No. S201116

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BERKELEY HILLSIDE PRESERVATION, ET AL.,
Petitioners and Appellants,

v.

CITY OF BERKELEY, ET AL.,
Respondents,

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

After A Published Decision By The Court Of Appeal
First Appellate District, Division Four, Case No. A131254

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

APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; BRIEF *AMICUS CURIAE*; AND COPY OF MATERIAL NOT READILY AVAILABLE FOR LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENTS CITY OF BERKELEY AND CITY COUNCIL OF THE CITY OF BERKELEY AND REAL PARTIES IN INTEREST MITCHELL D. KAPOR AND FREADA KAPOR-KLEIN

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

The League of California Cities (the "League") and the California State Association of Counties ("CSAC") (collectively, "Proposed *Amici*") jointly seek leave to file the accompanying amicus curiae brief in support of Respondents City of Berkeley and the City Council of the City of Berkeley and Real Parties in Interest Mitchell D. Kapor and Freada Kapor-Klein. The League and CSAC believe that their joint submittal will assist this Court in deciding the issues regarding the interpretation and applicable judicial standard of review of categorical exemptions to the California Environmental Quality Act (Pub. Res. Code §21000 *et seq*.) ("CEQA") and the Guidelines for CEQA (14 Cal. Code Regs. §§15000-15387) (the "Guidelines") presented in this case. The League and CSAC provide the unique perspective of local agencies that rely on these exemptions to ensure proper and efficient environmental review of projects in their jurisdictions throughout California.

I. CSAC's Interest In Submitting An *Amicus* Brief

CSAC is an association of California's 58 counties that represents county government before the California Legislature, U.S. Congress, and state and federal agencies in policy development and implementation. CSAC's mission includes facilitating intergovernmental problem-solving, and its long-term objective is to significantly improve the fiscal health of all California counties so they can meet the demand for vital public services. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county

counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case involves issues affecting all counties.

II. The League's Interest In Submitting An *Amicus* Brief

The League is an association of 467 California cities, dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that are of statewide significance. The Committee has identified this case as having such significance.

The issue of fundamental importance to both the League and CSAC is the amount of deference afforded to local agencies in applying categorical exemptions to CEQA. Having joined in the request that this Court review the Court of Appeal's decision, the League and CSAC contend that the application of categorical exemptions and the corresponding judicial standard of review should be clearly articulated in California law. It should be clear to which standards all parties engaged in local agency decision-making are held.

The Court of Appeal's opinion reads language out of an exception and is inconsistent with decades of case law. It lowers the threshold for a petitioner to challenge the use of a categorical exemption, rendering categorical exemptions difficult to uphold if there is opposition, no matter if the agency has legitimate reasons to dismiss that opposition, and furthers a split in authority of cases addressing the proper judicial standard of review applied to a city or county's determination of whether certain exceptions apply.

The League and CSAC represent cities and counties that routinely act as lead agencies and also as project sponsors. When acting in both roles, local agencies must have certainty and be afforded deference in applying CEQA to projects within their jurisdiction. Inconsistency in the interpretation of the Guidelines prevents local agencies and courts from applying CEQA equitably. Uncertainty burdens resource-strapped cities and counties, and the League and CSAC's members have limited resources and decreased tolerance for unpredictability in the CEQA process. The Court of Appeal's precedent invites inefficiency and unpredictability by limiting the defensibility, and therefore appropriate use, of categorical exemptions.

The League and CSAC believe their perspective on this matter is worthy of the Court's consideration and will assist the Court in deciding this matter. The League and CSAC's counsel have examined the briefs on file in this case and are familiar with the issues involved and the scope of their presentation and do not seek to duplicate that briefing. Proposed *Amici* confirm, pursuant to California Rule of Court 8.520(f)(4), that no one and no party other than Proposed *Amici*, and their counsel of record, made any contribution of any kind to assist in preparation of this brief or made any monetary contribution to fund the preparation of the brief.

Accordingly, the League and CSAC respectfully request that the Court accept the accompanying *Amicus Curiae* brief for filing in this matter.

Respectfully submitted,

Dated: January 16, 2013

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LEAGUE OF CALIFORNIA CITIES
CALIFORNIA STATE ASSOCIATION OF COUNTIES

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INTRODUCTION

Amici Curiae California State Association of Counties ("CSAC") and the League of California Cities (the "League") (collectively, "*Amici*") support the arguments advanced by Respondents City of Berkeley and the City Council of the City of Berkeley (collectively, the "City") and Real Parties in Interest Mitchell D. Kapor and Freada Kapor-Klein ("Real Parties"). We urge this Court to uphold the Legislature's intent for categorical exemptions and clarify the applicable standard of review. We write to emphasize the importance of deferring to cities and counties (herein "local agencies") in their determinations regarding proposed projects which are categorically exempt from the California Environmental Quality Act (Pub. Res. Code § 21000 *et seq.*) ("CEQA") and the Guidelines for CEQA (14 Cal. Code Regs. §§ 15000-15387) (the "Guidelines"). Furthermore, we write to emphasize the importance and value of CEQA's categorical exemptions to local agencies and the wide-reaching effect this case will have on a myriad of projects that the Legislature properly exempted from environmental review.

SUMMARY OF ARGUMENT

Appellants challenged the City's determination that the construction of the Real Parties' single-family home was categorically exempt from CEQA pursuant to the exemption for single-family residences (14 Cal. Code Regs. § 15303(a)) and the "in-fill exemption" (14 Cal. Code Regs. § 15332). They assert it is "practical" for the City to review a single family home through an EIR. Appellants' Answer Brief on the Merits at page 2 ("Answer 2").

Appellants advance two primary arguments. First, they interpret an oft-used exception to challenge categorical exemptions in a manner that renders meaningless almost 20 percent of the text of the Guidelines and

undoes the utility of categorical exemptions. Answer 30. They contend that categorical exemptions cannot be used "where there is a reasonable possibility that the activity will have a significant effect on the environment," simply ignoring the "due to unusual circumstances" phrase. Answer 6. Asking this Court to discount statutory and regulatory language when it does not suit a party's purposes creates a dangerous precedent. Local agencies and the public alike need to have faith that a court will uphold plain language in statutes and regulations.

Next, Appellants claim that the fair argument standard, which affords local agencies less deference, applies to the judicial review of an agency's determinations regarding exceptions. Answer 31. Appellants contend that categorically exempt project classes should be reviewed under the same standard as non-exempt classes, rendering the Legislature's creation of categorical exemptions meaningless. Appellants inconsistently agree that agencies should be afforded deference under the substantial evidence standard when determining whether a project falls within the class of categorically exempt projects, but should not be afforded deference when determining if the exceptions to the exemptions apply - specifically the unusual circumstance exception, which applies to all exemptions. Answer 38-39. The lead agency is best-suited to determine what is an "unusual circumstance" because it is most familiar with the surrounding facts and circumstances and should be afforded just as much deference as when determining whether a project "fits" within the exemption.

Upending the plain language of the exceptions and reviewing exemptions under the fair argument rather than the substantial evidence standard would negate the purpose of the Legislature and Natural Resources Agency establishing categorical exemptions. It would also have a chilling effect on the use of exemptions by local agencies. While the

single-family home and in-fill exemptions are at issue in this case, all of the categorical exemptions are necessarily implicated because the "unusual circumstances" exception applies to all exemptions. Thus, this ruling will affect run-of-the-mill projects such as accessory structures, minor additions to schools, utility projects, minor modifications to existing structures, actions for the protection of natural resources, enforcement actions (such as brownfield remediation), and acquisition of housing for housing assistance projects. Local agency projects such as public works improvements, utility projects, ordinances, and park and school improvements would also be vulnerable. If this Court were to adopt Appellants' arguments, the result would thwart the use of exemptions for projects that the Legislature intended to be exempt from CEQA. The consequence is that resource-strapped local agencies would waste precious resources on projects that do not warrant detailed environmental review.

Appellants disregard these concerns as "puerile," since Appellants benefit from a less deferential standard. They claim that their position will "*simplify* agency and applicant CEQA responsibilities," ostensibly by forcing local agencies to conduct full environmental review whenever there is opposition to a proposed project, or at least opposition wealthy enough to hire an expert. Answer 106 (emphasis in original). It is easy for Appellants to characterize the City and *Amici's* position as a "sky is falling" argument, since there is no chance that the sky might fall on Appellants. *Id.* at 7. *Amici* will bear the brunt of conducting abundant and unnecessary environmental review for otherwise categorically exempt projects if a potential petitioner voices a purported "fair argument" of significant environmental impact, regardless of whether there are "unusual circumstances," and regardless of whether the evidence even analyzes the

proposed project. Such a low bar violates public policy and legislative intent and creates an intolerable amount of uncertainty for local agencies.

ARGUMENT

I. THE LEGISLATURE CREATED CATEGORICAL EXEMPTIONS TO STREAMLINE ENVIRONMENTAL REVIEW FOR CERTAIN CLASSES OF PROJECTS

A. The California Constitution Authorizes Local Agencies To Control Land Use In Their Jurisdictions

The California Constitution confers broad latitude to local agencies to govern land use in their jurisdictions. Through the police power, the Constitution gives cities the power to "make and enforce within [their] limits all local police, sanitary and other ordinances and regulations not in conflict with general laws." Cal. Const. art. XI, § 7. A local agency's power "to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state." *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782. This Court recognizes this broad grant of power and has found that "[u]nder the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. [Citation omitted]. Apart from this limitation, the 'police power [of local agencies] . . . . is as broad as the police power exercisable by the Legislature itself." Thus, while limited by state laws like CEQA, local agencies have broad authority in making land use determinations and should respectfully be afforded deference by this Court.

B. The Legislature Directed The Natural Resources Agency To Create Categorical Exemptions To Streamline Environmental Review

The Legislature created categorical exemptions to streamline environmental review. Pub. Res. Code §21084(a); 14 Cal. Code Regs. §15300. In recommending that the Legislature adopt the bill directing the Secretary of the Natural Resources Agency to create the categorical exemptions to CEQA, the Department of Finance noted that "exempting certain classes of projects" creates "[a] reduction in administrative cost . . . at the state and local level." Respondents' and Real Parties in Interest's Request for Judicial Notice ("City's RJN"), Exh. A.12, Legislative History Report and Analysis, p. PE-10. The Secretary of the Natural Resources Agency considered the potential impacts of the exempt project classes set forth in Guidelines sections 15300 through 15333 and found them "not to have a significant effect on the environment." 14 Cal. Code Regs. §15300.

The Legislature balanced environmental review with streamlined efficiency for lead agencies. Categorical exemptions were added to CEQA to save cities, counties, and other lead agencies the burden and expense of unnecessary environmental review for classes of projects that ordinarily do not have a significant effect on the environment.[1]

[1] The Legislature has continued to streamline CEQA review. For example, S.B. 226 (Simitian and Vargas, 2011) created a statutory exemption for solar panels and established new CEQA streamlining methods for in-fill projects. Similarly, A.B. 900 (Buchannan and Gordon, 2011) provides "streamlining benefits" under CEQA for in-fill and transit-oriented projects.

II. APPELLANTS' READING OF THE "UNUSUAL CIRCUMSTANCES" EXCEPTION CREATES UNNECESSARY CONFUSION BY ELIMINATING ONE PRONG OF A TWO-PRONGED INQUIRY

CEQA directs the Secretary of the Natural Resources Agency to "include a list of classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt from [CEQA]." Pub. Res. Code §21084(a). CEQA Guidelines section 15300.2 establishes "exceptions" that preclude an agency or applicant's use of a categorical exemption if an exception can be established. One exception is that a categorical exemption cannot be used "where there is a reasonable possibility that the activity will have a significant effect on the environment *due to unusual circumstances*." 14 Cal. Code Regs. §15300.2(c) (emphasis added). Appellants seek to weaken the Guidelines by eliminating the phrase "due to unusual circumstances." This interpretation is contrary to the canons of construction and CEQA, and contradicts existing case law. Appellants' reading greatly handicaps the ability of local agencies to rely on categorical exemptions with any certainty.

A. Appellants' Urged Interpretation Of The Unusual Circumstances Exception Does Not Comply With Established Canons of Statutory Construction

Recognizing the fallacy of their argument, Appellants claim that they "do not suggest that the words 'due to unusual circumstances' should be deleted from or 'read out' of section 15300.2 subdivision (c)," but this is exactly the result they advocate. Answer 47. Appellants ask this Court to find that the phrase "due to unusual circumstances" has no meaning by nonsensically stating that "the words are an integrated part of the section rather than an independent requirement." *Ibid.* Appellants' suggested approach is the functional equivalent of disregarding almost 20 percent of a 21-word regulation, impermissibly rendering the language surplusage. This

view is supported neither by legislative history nor any canons of statutory and regulatory construction. This Court should look at the plain meaning of the regulation and avoid rendering words or phrases surplusage.

Appellants claim the rule-making file of Guideline section 15300.2(c) somehow supports their re-interpretation of the statute, despite decades of copious case law to the contrary. Answer 50-54. As discussed at length in the Opening Brief, the legislative history does not subvert the plain language of the statute and does not advance a meaning contrary to the plain language in the Guidelines. Respondents' and Real Parties in Interest's Opening Brief on the Merits at pages 21 through 48 ("Opening Brief 21-48").

This Court recently held that if the plain language of a statute is clear and unambiguous, judicial inquiry ends, and this Court need not embark on judicial construction. *Stephens v. County of Tulare* (2006) 38 Cal.4th 793, 802 ("*Stephens*"); *see also Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 898 (finding the same rules of statutory construction govern interpretation of regulations by administrative agencies). If statutory or regulatory language contains no ambiguity, the Legislature or agency is presumed to have meant what it said, and the plain meaning governs. *Stephens, supra,* 38 Cal.4th at 802. Furthermore, when interpreting a statute, the Supreme Court "has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed [citation omitted]." *Id.* at 801-802.

Here, the Guidelines clearly state that certain exemptions cannot be utilized where there is "a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." 14 Cal. Code Regs. §15300.2(c). This exception thus clearly establishes that if: (i) there is a reasonable possibility that the activity will have a

significant effect on the environment (ii) due to unusual circumstances, a proposed project cannot be categorically exempt from CEQA. The language of this exception is clear on its face, and as the City and Real Parties have shown, the plain language interpretation is easily harmonized with the rest of CEQA's statutory scheme. *See, e.g.*, Opening 13-48; Respondents' and Real Parties in Interest's Reply Brief on the Merits at pages 7 through 21 ("Reply 7-21"). Thus, there is no need for judicial interpretation.

Appellants' urged interpretation of the Guidelines violates another "settled axiom of statutory construction:" that "significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided [citation omitted]." *Moss v. Kroner* (2011) 197 Cal.App.4th 860, 879. They contend that "unusual circumstances" are "inherent in any project that fits into a categorical exemption class but nonetheless has potentially significant environmental impacts." Answer 53. This inventive reading does not save Appellants' interpretation, as it still renders the phrase "due to unusual circumstances" surplusage. Had the drafters of the exception actually believed that "unusual circumstances" were an inherent requirement, there would have been no need to specifically state "due to unusual circumstances." Courts cannot presume that the Legislature's creation of categorical exemptions "was a meaningless and idle gesture." *Viking Pools, Inc. v. Maloney* (1989) 48 Cal.3d 602, 609. Thus, neither legislative history nor canons of statutory and regulatory interpretation support Appellants' novel reading of the unusual circumstances exception.

B. Appellants' Reading Of The Unusual Circumstances Exception Creates Confusion In An Otherwise Well-Settled Area Of Law

As the City and Real Parties point out, and Appellants themselves concede, numerous courts have construed the "unusual circumstances" as an "independent requirement," giving meaning to each word of the Guidelines. Answer 44. These previous decisions interpreting the unusual circumstances exception as a two-step inquiry are persuasive because "[t]he construction placed on a statute by judicial decisions becomes a part of it. Unless plainly shown to be wrong, that construction will be strictly adhered to in subsequent cases, especially where it is supported by a line of uniform decisions. . . ." *People v. Clark* (1966) 241 Cal.App.2d 775, 780; *see also*, *Cheesman v. Hanby* (1922) 188 Cal. 709, 713.

In addition to the vast body of case law cited by the City and Real Parties in support of a two-pronged inquiry, in *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 261, fn. 11 ("*Banker's Hill*"), the court notably stated that its shorthand reference to its inquiry "of whether there is a reasonable possibility of a 'significant effect' . . . . *is in no way intended to negate the 'due to unusual circumstances' portion of the exception*." (Emphasis added). Furthermore, the Third District Court of Appeal recently issued a published decision after the First District's decision in this case also concluding that the relevant inquiry involves two steps. *Voices for Rural Living v. El Dorado Irrigation Dist.* (2012) 209 Cal.App.4th 1096, 1108 ("*Voices for Rural Living*"). The court found that the "first question" was "whether the project for which a categorical exemption is being claimed involves unusual circumstances" and the "second question" is whether "there is a reasonable possibility of a significant effect on the environment due to the unusual circumstances." *Ibid.* Thus, the two-step test for the

unusual circumstances exception is clear on the face of the Guidelines and has been correctly interpreted since its adoption by courts and agencies alike. It is only Appellants' recent novel and unsupported interpretation that has created confusion.

Were this Court to accept Appellants' urged reading of the unusual circumstances exception, local agencies would have little or no comfort in their reading of other provisions in CEQA or any statute for that matter. The City's interpretation is supported by the plain meaning of the statute as well as copious case law. Upending the well-established meaning of the unusual circumstances exception by reading language out of the Guidelines would create an intolerable level of uncertainty for local agencies that routinely interpret statutes based on their plain language and established precedent.

III. THE DEFERENTIAL SUBSTANTIAL EVIDENCE STANDARD OF REVIEW SHOULD APPLY TO THE ENTIRE CATEGORICAL EXEMPTION INQUIRY

A. The Substantial Evidence Standard Of Review, Which Accords Local Agencies Greater Deference, Should Apply To The Entirety Of The Categorical Exemption Inquiry

The existing case law on the standard of review for exemptions is confusing and unwieldy. It fails to provide local agencies with certainty as to how their exemptions determinations will be reviewed by a court. This uncertainty stems from the fact that almost each step of analysis is subject to a different standard of review. This Court should establish a uniform judicial standard of review for the entirety of an agency's exemption determination.

1. Substantial evidence clearly applies to the determination that a project fits within the exemption.

Even Appellants concede that the substantial evidence standard applies to an agency's determination that a project fits within a categorical exemption. Answer 38-39. This deference is warranted because the Legislature established classes of exemptions, and local agencies should are best-suited to determine whether a project fits into an exemption class.

2. The substantial evidence standard should also apply to a local agency's determination of whether any exceptions preclude the use of an exemption.

In contrast to the exemption determination, case law regarding the standard of review for exceptions is a morass of confusion. There is nothing in CEQA, the Guidelines, nor Legislative history, however, to indicate that the same substantial evidence standard should not apply to an agency's determination of the exceptions to the exemptions. There is nothing that distinguishes an agency's experience with exceptions from the exemptions themselves. *Amici* urge this Court to clarify that the substantial evidence standard should apply to the entirety of the agency's determination that a project is exempt.

Appellants inconsistently claim there is no split in authority, but acknowledge that "recent cases often note that split." *Compare* Answer 31 to 41. Indeed, there is a long-standing split in authority and courts have recently acknowledged that the standard of review for categorical exemptions is inconsistent and have declined to address it, avoiding the quagmire by ruling that petitioners would lose or win under either standard. *See, e.g., Robinson v. City and County of San Francisco* (2012) 208 Cal.App.4th 950, 957-958; *Hines v. Coastal Commission* (2010) 186 Cal.App.4th 830, 855; *Committee to Save Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1187

("*Hollywoodland*"); *but see Voices For Rural Living, supra,* 209 Cal.App.4th 1096, 1108.

Banker's Hill is the oft-cited case that attempted to address the standard of review in detail, but the opinion is both unclear and internally inconsistent. *Banker's Hill* applied different standards of review to each step of the unusual circumstances exception: 1) whether unusual circumstances exist is reviewed either "*de novo*" or under the substantial evidence standard; and 2) whether any unusual circumstances result in a significant environmental impact is reviewed under fair argument. *Banker's Hill, supra,* 139 Cal.App.4th at 278. *Banker's Hill* applied the substantial evidence standard to other exceptions under the in-fill exemption and other courts have similarly applied substantial evidence to other exceptions. *Id.* at 268-269; *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1071-1074 ("*Valley Advocates*"). *Amici* urge this Court to determine that the substantial evidence standard applies to the entire unusual circumstances exception and all other exceptions as well.

(a) Whether a circumstance is "unusual" should be a question of fact, not law, subject to the substantial evidence standard.

Where a question of fact is involved, courts review the agency's decision to determine whether it is supported by substantial evidence in the administrative record. *Laurel Heights Improvement Association. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 393. Courts review questions of law *de novo*. *See, e.g., Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251.

Banker's Hill confuses the "unusual circumstances" inquiry and standard of review by parsing it into two inquires. *Banker's Hill, supra,* 139 Cal.App.4th at 261, fn. 11. The case to which *Banker's Hill* cites for

support does not clarify this issue. *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1207 ("*Azusa*") states that "the question [of] whether a particular circumstance exists would normally be a factual issue, whereas 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*." *Azusa* does not cite any authority to support this statement. Subsequent courts have applied the *de novo* standard, citing to *Banker's Hill*, but no other analysis of this issue exists. *See, e.g., Voices For Rural Living, supra,* 209 Cal.App.4th at 1108.

The statement in *Azusa*, reiterated by *Banker's Hill*, tries to separate the adjective "unusual" from the noun it modifies "circumstances." However, the adjective and noun together are only one inquiry: whether there are any unusual circumstances surrounding the project. The definition of "circumstance" is "an *accompanying or accessory fact*, condition, or event." Black's Law Dict. (9th ed. 2009), p. 277, col. 1. Thus, the agency is not simply determining actual, empirical facts, like the project's dimensions, but the "accompanying and accessory facts" which are inherently what comprise whether there is something unusual about the project. For example, the height of a project is meaningless in isolation; only in context can a local agency determine whether a 14-story building is unusual. The surrounding facts are what determine if a project is unusual. Thus, to parse the phrase "unusual circumstances" into a question of fact as to "circumstances" and law as to "unusual," and apply two different standards, simply does not make logical sense - both are questions of fact.

Other examples of questions of fact and question of law are illustrative that "unusual circumstances" is a question of fact. It is well-settled that issues such as interpretation of the Guidelines, interpretation of

exemptions, and substantiality of evidence supporting an agency's exemption determination are all questions of law subject to *de novo* review. *See, e.g., Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 693, 697-700; *San Lorenzo Valley Community Advocates For Responsible Education v. San Lorenzo Valley Unified School* (2006) 139 Cal.App.4th 1356, 1387-1389.

In contrast, what is unusual for a particular project in a particular jurisdiction is a question of fact, which local agencies are best-suited to determine. By its very nature, the determination of what is unusual relates to the facts on the ground, and is therefore a factual inquiry that local agencies should be afforded deference in determining. Questions of fact reviewed under the substantial evidence standard include whether an impact will be significant, whether adverse effects have been mitigated, or whether relevant information has been omitted from the analysis. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435; *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 898-888; *California Native Plant Soc'y v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 986-987. These examples illustrate how the question of unusual circumstance is clearly about actual facts and circumstances and issues that agencies should be afforded deference.

The factual nature of determining unusual circumstances is further supported by *Azusa*. While the Guidelines do not define "unusual circumstances," the *Azusa* court opined that the requirement was "presumably adopted to enable agencies to determine which specific activities - within a class of activities that does not normally threaten the environment - should be given further environmental evaluation . . . ." *Azusa, supra,* 52 Cal.App.4th 1206.

(b) *Substantial evidence should apply to the determination of whether unusual circumstances results in a significant impact.*

To date, courts have inconsistently applied varying standards or review to different portions of the exemption determination as well as the exceptions. Indeed, courts have even applied different standards of review to different exceptions under Guidelines section 15300.2.

Under the two-step analysis for the unusual circumstances exception, *Banker's Hill* separately considered at great length what standard of review applied to an agency's determination of whether unusual circumstances result in significant impacts. *Banker's Hill, supra,* 139 Cal.App.4th at 261-267. The court noted the then-existing split in case law, with more than twice as many cases applying substantial evidence. *Id.* at 262, fn. 12. The Court based its determination on an analogy to a discussion in *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83 ("*No Oil*") of the word "may" in Section 21151. *Banker's Hill, supra,* 139 Cal.App.4th at 265 (citing *No Oil*, *supra*, 13 Cal.3d at 83). *Banker's Hill* summarized *No Oil*, but the full quote provided in Reply 23 actually shows that this Court was explaining a range of meaning for "may" ("extending from the most unlikely possibility … [to] a hair short of certainty"). *No Oil, supra, 13 Cal.3d* at 83, fn. 16. Respectfully, it does not appear that this Court in *No Oil* intended to opine that the use of "reasonable possibility" and "may" were synonymous such that the phrase is dispositive of the applicable standard at issue here. Moreover, as discussed in Reply 21-23 (without reference to the discussion in *Banker's Hill*), Section 21084 uses the phrases "has been determined not to have a significant effect" and "do not have a significant effect," and Guidelines Section 15300.2(c) uses the verb "will," not "may," after the phrase "reasonable possibility." Thus,

consistent with the discussion in the Reply Brief, *Banker's Hill's* reliance on analogy to the phrase "may" is misplaced.

While *Amici* recognize the *Banker's Hill* court tried to piece together a rationale for the standard, the rationale is inconsistent a few pages later when the court concludes that the substantial evidence standard, not the fair argument standard, applies in the context of findings regarding whether an in-fill project would result in traffic, air, noise and water impacts. *Banker's Hill, supra,* 139 Cal.App.4th at 268-269. The court finds that the phrase "would not result" requires the agency to make a definitive finding, and therefore the substantial evidence standard of review should apply. The result is simply inconsistent. It is not logical to find that an agency should get less deference in determining if there is a "reasonable possibility that a project will result in significant impact due to unusual circumstances" but provide the same agency reviewing the same project more deference in determining that it "would not result in a significant effect to traffic, noise, air quality, or water quality." As *Banker's Hill* itself concludes, substantial evidence applies to the restrictions on the use of the in-fill exemption. *Ibid.* However, in *Valley Advocates*, the court applied substantial evidence to whether the historic resources exception of Section 15300.2(f) applied. *Valley Advocates, supra,* 160 Cal.App.4th at 1071-1074. There is no reason to apply a lesser standard to an agency's consideration of usual circumstances.

Between *Banker's Hill* and other cases, numerous standards of review have been applied to the requirements of categorical exemptions as well different standards of review for the exceptions. This Court has not previously addressed this issue, and should provide guidance to the lower courts and local agencies by establishing that the substantial evidence standard applies to all of the exemption and exception inquiry.

B. A Local Agency Is Best-Suited To Determine Whether A Project Is Exempt

As discussed above, whether a project is exempt must be judged in the context of the project's location. A local agency is best suited to make determinations about the project's context and therefore whether any exception is triggered, specifically whether any unusual circumstances exist. Case law establishes that agencies should examine "the context of the site" when deciding if a project is exempt. *City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810, 826. For instance, in *Association for Protection of Environmental Values in Ukiah v. City of Ukiah* (1991) 2 Cal.App.4th 720, 734, the court compared the size, height, and location of the house to others in the vicinity, finding it was not unusual. Indeed, even Appellants compare the proposed project to other single-family homes within the City although, tellingly, they do not compare the proposed project to other in-fill development projects within the City. Answer 99-102.

More broadly, courts have held that the context of impacts clearly matter. In *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, which concerned aesthetic objections to the construction of a building in an urban area, the court explained that "[t]he significance of an environmental impact is in any event measured in light of the context where it occurs." *Id.* at 589. In another example, a court determined that the "City Council is uniquely situated to determine the existence or nonexistence of an allegedly significant local historical resource." *Citizens' Committee To Save Our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157, 1171. In this case, the City is best-suited to determine whether any particular single-family home is "unusual" in its jurisdiction.

C. Because Of The Legislature And Natural Resources Agency's Findings, Local Agencies Should Be Afforded More Deference In Determinations Of Categorical Exemptions Than Negative Declarations

Appellants argue that "[i]t would make no sense for a categorical exemption to be subject to the deferential substantial evidence standard and thus be more difficult to overturn than a negative declaration." Answer 41. Appellants are exactly wrong. Exemption determinations should be more difficult to overturn.

As opposed to categorical exemptions which only apply to discrete classes of projects and contain an inherent explanation as to why a project is exempt from environmental review, a negative declaration is a written statement by a local agency determining that there is no substantial evidence that the project may have a significant effect on the environment. Pub. Res. Code §§21064, 21080(c); 14 Cal. Code Regs. §§15070(a), 15371. Because the local agency is reviewing the proposed project in the first instance without any guidance from the Legislature or the Natural Resources Agency, and because the local agency opts not to do an EIR, the less deferential fair argument standard applies to judicial review of negative declarations. This non-deferential standard sets a "low threshold" for preparation of an EIR and creates a presumption in favor of preparation of an EIR instead of a negative declaration. *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 282; 1 Kostka and Zischke, Practice Under The California Environmental Quality Act (Cont.Ed.Bar March 2012) § 6.37, pp. 340.

In contrast, the Secretary of the Natural Resources Agency has already determined limited categories of projects do not have a significant impact on the environment. Pub. Res. Code §21084(a); 14 Cal. Code Regs. §15300. The Guidelines set out stringent criteria for proposed projects to

qualify for a categorical exemption. 14 Cal. Code Regs. §§15300-15333. As just one example, to apply the in-fill categorical exemption, a local agency must find that a proposed project satisfies numerous limitations relating to plan and zoning consistency; size, location, and adjacent uses of the site; habitat value for endangered, rare, or threatened species; significant impacts relating to traffic, noise, air, and water quality; and adequate service by required utilities and public services. 14 Cal. Code Regs. §15332(a-e). Additionally, it must find no exceptions apply, including potential impacts related to cumulative impacts, unusual circumstances, scenic highways, hazardous waste sites, and historical resources. 14 Cal. Code Regs. § 15300.2(b-f). Other categorical exemptions are subject to an exception based on location as well. 14 Cal. Code Regs. §15300.2(a).[2]

Because the Legislature and Natural Resources Agency have already determined these classes do not have an environmental impact and have required a local agency to satisfy numerous criteria to apply a categorical exemption, its decision should be reviewed under the more deferential substantial evidence standard. Applying the fair argument standard to categorical exemptions puts them on the same legal footing as negative declarations. It offers local agencies no deference despite the fact that the Legislature and Natural Resources Agency set up detailed criteria for local agencies to follow that do not exist for negative declarations.

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[2] There are also other limitations that preclude the use of categorical exemptions for projects that may result in damage to scenic highway; projects for which applications were not completed before 1992 located on a Government Code section 65962.5 hazardous waste site; and projects that may cause a substantial adverse change in the significance of a historical resource as specified by Public Resources Code section 21084.1. *See, e.g.,* Pub. Resources Code §21084(b-e).

Appellants' position undermines legislative intent by taking away the streamlining benefits of categorical exemptions. To "reduce the cost of environmental impact statement activities" and "substantially reduce the cost . . . . to state and local government," the Legislature created categorical exemptions. City's RJN, Exh. A.12, p. PE-10. Applying the fair argument standard to categorical exemptions thwarts reliance on categorical exemptions. Appellant itself states that "the fair argument standard is deferential to the public-interest petitioners." Answer 39. Appellants advocate that categorically exempt project classes should be reviewed under the same standard as non-exempt classes, greatly hindering the intent of the Legislature creating categorical exemptions.

D. Applying Substantial Evidence Still Affords Appellants With Legitimate Claims A Meaningful Opportunity To Challenge Categorical Exemptions

The substantial evidence standard is not so deferential that it deprives petitioners of a meaningful opportunity to overturn a local agency's decision and does not mean that a proposed project is not subject to "any scrutiny." Answer 7. As discussed above, even under the substantial evidence standard, local agencies must base their decisions on "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts" and "relevant information" giving courts substantial authority to overturn local agency determinations. Pub. Res. Code §21082.2(c); 14 Cal. Code Regs. §15384(a); *see, e.g., California Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.* (2009) 178 Cal.App.4th 1225, 1246-1247 (overturning an agency's categorical exemption determination under the substantial evidence standard due to insufficient evidence in the record).

Empirical evidence demonstrates that petitioners routinely succeed in challenging lead agencies even under the substantial evidence standard.

Even when the supposedly "highly deferential substantial evidence standard of review" (*Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559, 571) applies to an agency's factual determinations, plaintiffs still successfully challenged the substantive merit of EIRs in 49% of published cases between January 1997 and February 2011.[3] While this number is less than the 58% rate at which plaintiffs successfully challenged the merits of a negative declaration under the fair argument standard,[4] both of these are remarkably high plaintiff success rates well-above the administrative law norm.[5]

The substantial evidence standard will not prevent project opponents from challenging local agencies' categorical exemption determinations. However, applying the substantial evidence standard of review as opposed to the fair argument standard of review will allow the courts to accord discretion to the local jurisdictions on the issues they are best-suited to determine, as the Legislature and Natural Resources Agency intended. Agencies are in the best position to determine whether an exemption

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[3] Thomas Law Group, "CEQA Litigation History" (2012), at 3, *available*: http://thomaslaw.com/wp-content/uploads/2012/03/CEQA-Lit-History.pdf

[4] *Id.* at 10.

[5] In federal appellate courts, plaintiffs succeed about 30% of the time in challenging agency fact-finding, legal interpretation, or policy-making. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 170-171 (2010). In lawsuits under the National Environmental Policy Act ("NEPA"), no plaintiff has succeeded in a NEPA challenge before the United States Supreme Court in the 44 years since NEPA was enacted. Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1510 (2012). Under the New York State Environmental Quality Review Act, plaintiffs won just under 16% of the cases that challenged the adequacy of New York's equivalent of an EIR over a 16-year period. Michael B. Gerrard, *Survey of SEQRA Cases From 2007*, 239 N.Y. L.J. 60 (Mar. 28, 2008). Thus, CEQA is rare example of not affording great deference to agencies. *Amici* hope that this Court will address this problem in this and subsequent cases.

applies and whether any exception is triggered, specifically whether any unusual circumstances exist for a project located in their jurisdiction. For example, in this case, the City is best-suited to determine whether a certain single-family home is "unusual" or whether an expert has analyzed the project approvals it issued. This approach still provides ample opportunity for judicial review of agency decision-making without overstepping local government expertise or unduly burdening courts to act as a local agency.

IV. LOCAL AGENCIES HAVE DISCRETION TO DETERMINE WHETHER EXPERT TESTIMONY IS RELEVANT

A. Not Just Any Evidence Constitutes "Substantial Evidence."

To prevail even under the "fair argument" standard of review, Appellants must produce *substantial* evidence, not just proffer inapplicable opinions based on erroneous information. Local agencies retain discretion to determine whether evidence is substantial, even under the fair argument standard, and can disregard evidence that is unsubstantiated, clearly erroneous or irrelevant. Pub. Res. Code §§21080(e)(2), 21082.2(c); 14 Cal. Code Regs. §15384(a). Concerns unrelated to an approved project are not substantial evidence. *See Lucas Valley Homewners Ass'n, Inc. v. County of Marin* (1991) 233 Cal.App.3d 130, 163-64. Here, Appellants maintain that their expert's letters and testimony, which are premised on the erroneous factual foundation that the project includes "side-hill fill," establish that the project will have significant environmental impacts. Answer 69-70. The City properly disregarded this information as irrelevant because "side-hill fill" was not part of the approved project. The basis of Appellants' expert opinion was therefore erroneous, so his opinion was not "relevant information" and therefore not "substantial evidence." The City's thorough

consideration and rejection of the claimed substantial evidence warrants deference.

Allowing Appellants to prevail based on analysis of their hypothetical unapproved activities would have severe consequences for local agencies. Setting this precedent would allow project opponents to force local governments to undertake unnecessary, costly, and time-consuming environmental review to prove that actions not even proposed lack significant environmental impacts. The result is that limited local agency resources would be misallocated in analyzing projects that do not need detailed environmental review, detracting limited resources away from the projects that do need detailed review. *Amici* respectfully request that this Court clarify that, under either the fair argument or substantial evidence standard of review, local agencies have discretion to determine what constitutes "substantial evidence" where the so-called "evidence" consists of erroneous information not grounded in relevant facts, even if offered by an expert.

B. Local Agencies Have Discretion To Disregard Expert Opinion If It Is Irrelevant To The Proposed Project

1. Local agencies have discretion to determine what constitutes "substantial evidence."

The lead agency determines in the first instance whether there is substantial evidence supporting a fair argument of a significant environmental effect. Pub. Res. Code §§21080(c)(1), 21082.2(a). In making this determination, the lead agency necessarily "has some discretion to determine whether particular evidence is substantial." *Gentry v. City of Murrietta* (1995) 36 Cal.App.4th 1359, 1400 ("*Gentry*"). This discretion includes determining whether information is relevant to the proposed project. For example, in *Gentry,* since project opponents failed to establish

that their groundwater impact conclusions related specifically to the approved project, those concerns "did not constitute substantial evidence." *Gentry, supra*, 36 Cal.App.4th at 1423. Likewise in *Newberry Springs Water Ass'n v. County of San Bernardino* (1984) 150 Cal.App.3d 740, 748-750, the court found that while opponents argued that nitrate loading associated with a dairy farm would have a significant impact on groundwater, this concern "was not shown to be relevant to the project in question, because there was no evidence that one dairy would cause excessive nitrate loading." *Id.* at 748-750. In *Lucas Valley Homeowners Association v. County of Marin* (1991) 233 Cal.App.3d 130, 163-164, the court focused narrowly on the impact of the "use, as approved [by the County], and not the feared or anticipated abuse" of the entitlements rather than what was actually approved. *See also Ass'n for Protection of Environmental Values in Ukiah v. City of Ukiah* (1991) 2 Cal.App.4th 720, 735-736 (dismissing neighbors' concerns because they did not relate to the project undergoing CEQA review)[6]; *City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810, 828-30, 834 (rejecting concerns because there was no causal connection between to the proposed project).

2. Local agencies retain discretion even when considering expert testimony.

Local agencies retain discretion to determine the weight of evidence even when considering expert testimony. *Citizens' Committee, supra,* 37 Cal.App.4th at 1171. *Citizens' Committee* stated, "[t]he opinions expressed by [an expert] rise only to the level of reliability and credibility as the evidence constituting the foundation for those opinions" and "[t]he operative words in the so-called fair argument standard are 'substantial

[6] While the *Ukiah* court applied the fair argument standard because the parties agreed to it, it noted that "[a] reasonable case can be made" that substantial evidence is in fact the proper standard. *Id.* at 728, fn.7.

evidence.'" *Citizens' Committee*, *supra*, 37 Cal.App.4th at 1170-1171. Similarly in *Gentry*, concededly expert testimony about groundwater impacts was insufficient to establish a fair argument of significant environmental impact because the expert's "opinions were not clearly based on an adequate foundation of factual information about the Project." *Gentry, supra,* 36 Cal.App.4th at 1422-23; *see also Ukiah*, *supra*, 2 Cal.App.4th at 734-35. *Amici* ask this Court to affirm this authority.

3. The City properly disregarded Appellants' expert opinion regarding unauthorized side-hill fill.

Appellants claim that their purported expert's letters, which contend that a project with "side-hill fill" would have significant environmental effects are substantial evidence. Answer 69-70. The project approvals, however, granted by the City do not authorize "side-hill fill." Opening 65-68, 72-74. It is well recognized that local agencies are best-suited to interpret the permits they have issued. *See*, *e.g, North Gualala Water Company v. State Water Resources Control Bd.* (2006) 139 Cal.App.4th 1577, 1607; *Bello v. ABA Energy* (2004) 121 Cal.App.4th 301, 318 ("*Bello*"). Thus, courts "extend considerable deference" to a local agency's interpretation of its own language and such interpretation is entitled to "great weight unless it is unauthorized, unreasonable, or clearly erroneous." *Bello, supra,* 121 Cal.App.4th at 318. Likewise, "[u]nder well-established law, an agency's view of the meaning and scope of its own ordinance is entitled to great weight unless it is clearly erroneous or unauthorized." *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015; *see also City of Los Angeles v. Rancho Homes, Inc.* (1953) 40 Cal.2d 764, 770-771.

Because the factual basis of the Appellant's opinion is based upon an unapproved hypothetical project, it is thus "clearly erroneous" and does not

constitute substantial evidence because it is not "relevant information." Pub. Res. Code §§21080(e)(2), 21082.2(c); 14 Cal. Code Regs. §15384(a). Appellants attempt to cast their refusal to recognize the scope of the approved permits as a "dispute among experts" which requires the court to err on the side of further environmental review under the fair argument standard. Answer 23. However, even in a dispute among experts, agencies must still be allowed to weigh whether the expert offered erroneous and irrelevant evidence.

Curiously, Appellants do not even attempt to demonstrate why an opinion about "side-hill fill" is relevant to the consideration of a project without "side-hill fill." Answer 18, 25. In lieu of bridging this gap, Appellants repeatedly reiterate the strength of the claimed expert's credentials, and the sincerity and confidence with which he contends that side-hill fill will have a significant impact. Answer 18-25. Had the City authorized Real Parties to construct side-hill fill, or a carte blanche to construct Real Parties' home, an expert opinion about the necessity of side-hill fill might be relevant. Here, however, the City only authorized certain construction activity in its project approval, and those activities do not include "side-hill fill." Opening 65-68, 72-74. Thus, Petitioners did not meet the fair argument standard.

C. Allowing Appellants To Redefine The Scope Of A Local Agency's Approvals Would Create Substantial Uncertainty For Local Governments And Unnecessarily Expand The Scope Of CEQA.

Permitting project opponents to redefine the scope of a local agency's project approvals would significantly expand the reach of the "fair argument" standard and contravene well-established precedent and principles. Appellants refuse to recognize the consequences of their position and dismiss the City and *Amici's* concerns as "puerile." Answer 7.

Amici do not have the luxury of refusing to consider the real-world consequences of the positions Appellants advance since *Amici*, not Appellants, will bear the burden of the unnecessarily expanded CEQA review Appellants desire.

Local agencies shoulder a significant portion of CEQA's environmental review mandate. *Amici* develop public infrastructure projects and make other routine improvements that are subject to CEQA. *Amici* also serve as lead agencies, responsible for approving most development proposed within their jurisdictions, much of it the kind of in-fill growth that is necessary to accommodate the state's growing population in an environmentally sustainable manner.

To focus environmental review, the Legislature created categorical exemptions. Without exemptions, these actions would require unnecessary full environmental review, delaying project approvals, and, especially for public projects, requiring significant public expense every time a resource-rich opponent hires an expert to argue that an unapproved activity associated with an otherwise categorically exempt project has a significant environmental impact. As the Legislature has made plain, "[t]he existence of public controversy over the environmental effects of a project shall not require preparation of an environmental impact report." Pub. Res. Code §21082.2(b). There is no "'public controversy' exception to the categorical exemptions." *Apartment Association of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1176, fn. 39.

The legal precedent Appellants urge this Court to adopt would also create an unworkable level of uncertainty for local agencies in meeting their obligations to conduct responsible environmental review. If the permits the local agency issues becomes subject to "fair argument" reinterpretation, lead agencies have no way of knowing which activities, authorized or

hypothetical, they might have to analyze in their environmental review. Even once a local agency has clarified any possible misunderstanding of its permits' scope, Appellants argue that project opponents still should be able to force an EIR by insisting that they know better than the local agency what the local agency actually approved. Cities and counties must be able to rely on a single, stable interpretation of their own actions in order to conduct rational environmental review.

Local agencies should have discretion to ensure that experts are constrained to offering arguments about the impacts of activities the agency has actually approved. The dramatic expansion of CEQA contemplated by Appellants is well beyond anything the Legislature intended.

V. CEQA GIVES THE CITY DISCRETION TO DETERMINE THE FORM ENVIRONMENTAL REVIEW TAKES

Appellants' position also compromises discretion the Legislature afforded to local agencies under CEQA by directing the City to prepare an EIR for the Project. CEQA states clearly "[n]othing in [CEQA] authorizes a court to direct any public agency to exercise its discretion in any particular way, "echoing the requirements of the Code of Civil Procedure that a writ of mandamus "shall not limit or control in any way the discretion legally vested in the [public agency]." Pub. Res. Code §21168.9(c); Code Civ. Proc. §1094.5(f). CEQA authorizes courts to issue "only those mandates which are *necessary* to achieve compliance with [CEQA]," without restricting the legal discretion of the public agency to achieve compliance. Pub. Res. Code §21168.9(b)(emphasis added). As the City and Real Parties note, the Third District Court of Appeal recently found that where a court determined that a project was not exempt from CEQA, it should have ordered the local agency to comply with CEQA rather than

requiring an EIR. *Voices for Rural Living, supra,* 209 Cal.App.4th at 1113. The court stated that the manner in which an agency complies with CEQA is "a matter left first to the agency's discretion," and courts may not order how that discretion is exercised. Reply 49; *see also Voices for Rural Living, supra,* 209 Cal.App.4th at 1113; *Hollywoodland, supra,* 161 Cal.App.4th at 1187. Appellants ineffectively discount this holding to state that the only possible way to comply with CEQA is to prepare an EIR.[7]

Contrary to Appellants' arguments, CEQA grants local agencies broad discretion in determining how best to comply with CEQA. Indeed, CEQA requires local agencies to exercise this discretion in evaluating projects before deciding how to comply with CEQA. 14 Cal. Code Regs. §§15060, 15061, 15063, 15070(b). For instance, in analyzing a project a local agency first determines whether or not a project is exempt. 14 Cal. Code Regs. §15061(a). For non-exempt projects, the lead agency prepares an initial study to assess the scope of potentially significant effects and whether these effects have already been analyzed and/or mitigated. 14 Cal. Code Regs §15063. More critically, local agencies and project proponents may also identify modifications to the project to mitigate impacts of the project "before an EIR is prepared" based on the results of the initial study. 14 Cal. Code §§15063(c)(2), 15070(b). Once these evaluations have been made to "eliminate unnecessary EIRs" (14 Cal. Code Regs. §15063(c)(6)),

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[7] Appellants also rely on *Galante Vineyards v Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1127 for the proposition that an EIR should be ordered when a categorical exemption does not apply. Answer at 103. *Galante* in no way addresses this question. The issue in that case was whether a supplemental EIR, addendum, or subsequent EIR was the appropriate document to prepare to remedy the inadequacies of an overturned EIR. *Id.* at 1124-1125. Since that choice is governed by strict statutory standards limiting agency discretion for EIRs, *Galante* is inapposite to the question of how courts should enforce compliance after overturning the use of a categorical exemption. Answer 103.

the local agency determines whether an EIR is actually required. 14 Cal. Code Regs. §§15063, 15065.

Any court order to proceed directly to producing an EIR would circumvent all agency discretion to determine how to comply with CEQA by commanding the agency to reach a preordained conclusion. In this instance, this result likely would also be futile, as the City could merely reconfirm that the project approvals do not allow side-hill fill.

CONCLUSION

Amici respectfully request that this Court determine that its analysis of the "unusual circumstances" exception is necessarily a two-step inquiry and that the more deferential substantial evidence standard of review applies to categorical exemptions.

Respectfully submitted,

Dated: January 16, 2013

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CERTIFICATE OF WORD COUNT

Pursuant to Rules 8.204(c)(1) and (4) and 8.520(c) of the California Rules of Court, I certify that the text of this brief consists of 8,285 words as counted by the Microsoft Word version 2007 word processing program used to generate this brief.

Respectfully submitted,

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CERTIFICATE OF INTERESTED PARTIES OR PERSONS

In compliance with California Rule of Court 8.208(d) and (e), *Amici* know of no persons or entities that must be listed in this certificate under subdivisions (e)(1) and (e)(2) of California Rules of Court, Rule 8.208.

Respectfully submitted,

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No. S201116

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BERKELEY HILLSIDE PRESERVATION, ET AL.,
Petitioners and Appellants,

v.

CITY OF BERKELEY, ET AL.,
Respondents,

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

After A Published Decision By The Court Of Appeal
First Appellate District, Division Four, Case No. A131254

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

COPY OF MATERIAL NOT READILY AVAILABLE PURSUANT TO CAL. RULES OF COURT 8.520(B)(1) AND 8.204(D) IN SUPPORT OF BRIEF *AMICUS CURIAE* FOR LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES

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Pursuant to California Rules of Court 8.520(b)(1) and 8.204(d), please find a true and correct copy of "CEQA Litigation History" by the Thomas Law Group, dated February 2012, attached as Exhibit A. This document is not a "readily available authority" as described in Rule 8.204(d), but it can be accessed online at: http://thomaslaw.com/wp-content/uploads/2012/03/CEQA-Lit-History.pdf

Respectfully submitted,

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EXHIBIT A

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CEQA LITIGATION HISTORY

INTRODUCTION

A review of all California Court of Appeal and Supreme Court decisions reviewing the adequacy of Negative Declarations and Environmental Impact Reports prepared pursuant to the California Environmental Quality Act (Public Resources Code section 21000 et seq.) ("CEQA") published in the last approximately fifteen (15) years was undertaken by the Thomas Law Group. This data was collected to determine the success rate of State, Regional, and Local Agencies under the Fair Argument and Substantial Evidence standards of review established by CEQA.

Our firm employed the following methodology:

Environmental Impact Reports: First, a database of all CEQA decisions addressing the adequacy of an Environmental Impact Report published from 1997 to present [February 17, 2012] was prepared. For the purposes of preparing this database, all published CEQA decisions concerning any type of Environmental Impact Report (e.g. Project-Specific, Master, Program, Subsequent, and Supplemental Environmental Impact Reports) was included. Decisions involving certified regulatory programs were not included. From this database, challenges resolved on grounds other than the substantive merit of the environmental document were eliminated (e.g. decisions resolved solely on procedural grounds were excluded; however, decisions addressing the substantive content of an EIR and resolved based on a failure to proceed in accordance with law were not excluded). Cases decided based on an agency's alleged failure to proceed in accordance with law are reviewed de novo. All other cases included in the database were decided based on the "substantial evidence" test. As defined by the CEQA Guidelines, the "substantial evidence" test is highly deferential and requires the court to uphold the agency's decision if it is supported by "enough relevant information and

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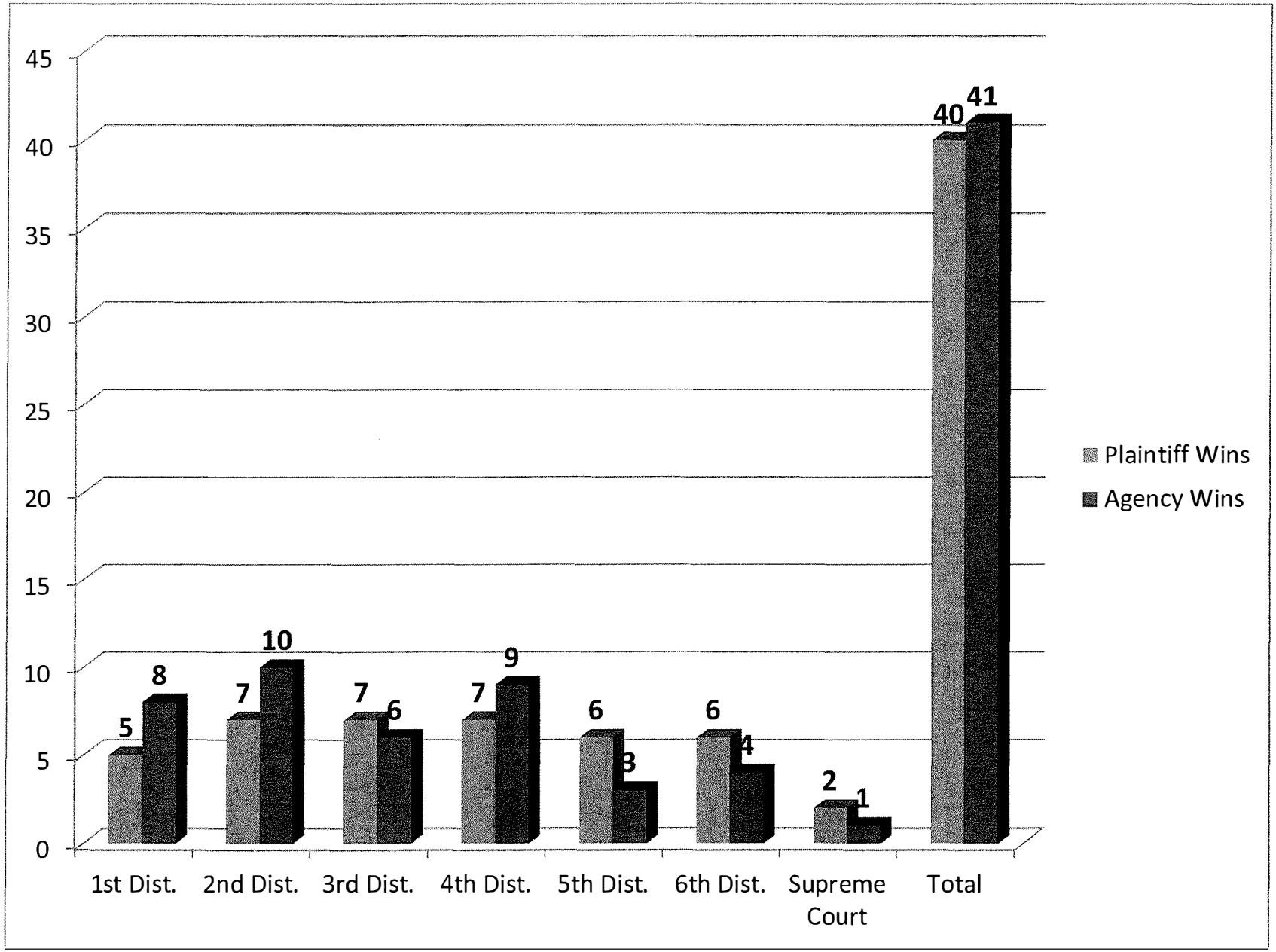
reasonable inference from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.... Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (CEQA Guidelines, § 15384.) For the purposes of the attached Environmental Impact Report chart, an agency prevailed when the Environmental Impact Report was upheld by the court based on substantial evidence in the record. And, where the court determined that one or more conclusions contained in the Environmental Impact Report were not supported by substantial evidence or that the agency failed to proceed in a manner required by law, the party challenging the Environmental Impact Report prevailed.

Negative Declarations: First, a database of all CEQA decisions addressing the adequacy of a Negative Declaration or Mitigated Negative Declaration published from 1997 to present [February 17, 2012] was prepared. From this database, challenges resolved exclusively on a basis other than the "fair argument" test were eliminated from the database (e.g. decisions resolved solely on procedural ground were excluded). The "fair argument" test requires a court to consider whether a fair argument can be made that a project may result in one or more significant impacts on the environment. If a "fair argument" can be made, then an Environmental Impact Report is required. For the purposes of the attached Negative Declaration chart, an agency prevailed when the Negative Declaration or Mitigated Negative Declaration was upheld by the court. And, where the court determined that a "fair argument" required an Environmental Impact Report to be prepared, the party challenging the Negative Declaration or Mitigated Negative Declaration prevailed.



Published CEQA Cases Decided on Substantive Merits of an EIR since 1997

Published CEQA Cases Decided on Substantive Merits of an EIR (1997-Today)

Case Name	Citation	Date	Court	**Plaintiff** Procedural Cases	**Plaintiff** Cases Decided on Substantive Merits of the EIR	**Agency** Procedural Cases	**Agency** Cases Decided on Substantive Merits of the EIR
Citizens for East Shore Parks v. California State Lands Com.	202 Cal.App.4th 549	Dec-11	Cal.App. 1 Dist.				X
Oakland Heritage Alliance v. City of Oakland	195 Cal.App.4th 884	May-11	Cal.App. 1 Dist.				X
California Oak Foundation v. Regents of University of California	188 Cal.App.4th 227	Sep-10	Cal.App. 1 Dist.				X
Communities for a Better Environment v. City of Richmond	184 Cal.App.4th 70	Apr-10	Cal.App. 1 Dist.		X		
Jones v. Regents of University of California	183 Cal.App.4th 818	Mar-10	Cal.App. 1 Dist.				X
St. Vincent's School for Boys, Catholic charities CYO v. City of San Rafael	161 Cal.App.4th 989	Mar-08	Cal.App. 1 Dist.				X
Uphold Our Heritage v. Town of Woodside	147 Cal.App.4th 587	Jan-07	Cal.App. 1 Dist.		X		
Eureka Citizens for Responsible Government v. City of Eureka	147 Cal.App.4th 357	Jan-07	Cal.App. 1 Dist.				X
Nacimiento Regional Water Management Advisory Committee v. Monterey County Water Resources Agency	122 Cal.App.4th 961	Sep-04	Cal.App. 1 Dist.			X	
Sierra Club v. County of Napa	121 Cal.App.4th 1490	Aug-04	Cal.App. 1 Dist.				X
Friends of the Eel River v. Sonoma County Water Agency	108 Cal.App.4th 859	May-03	Cal.App. 1 Dist.		X		
San Franciscans Upholding the Downtown Plan v. City & County of San Francisco	102 Cal.App.4th 656	Sep-02	Cal.App. 1 Dist.				X
Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs	91 Cal.App.4th 1344	Aug-01	Cal.App. 1 Dist.		X		
Napa Citizens for Honest Government v. Napa County Bd. of Supervisors	91 Cal.App.4th 342	Aug-01	Cal.App. 1 Dist.		X		
Ballona Wetlands Land Trust v. City of Los Angeles	201 Cal.App.4th 455	Nov-11	Cal.App. 2 Dist.				X

Published CEQA Cases Decided on Substantive Merits of an EIR (1997-Today)

Case Name	Citation	Date	Court	Plaintiff Procedural Cases	Plaintiff Cases Decided on Substantive Merits of the EIR	Agency Procedural Cases	Agency Cases Decided on Substantive Merits of the EIR
Santa Clarita Organization for Planning the Environment v. City of Santa Clarita	197 Cal.App.4th 1042	Jun-11	Cal.App. 2 Dist.				X
Santa Monica Baykeeper v. City of Malibu	193 Cal.App.4th 1538	Apr-11	Cal.App. 2 Dist.				X
Planning and Conservation League v. Castaic Lake Water Agency	180 Cal.App.4th 210	Dec-09	Cal.App. 2 Dist.				X
City of Long Beach v. Los Angeles Unified School Dist.	176 Cal.App.4th 889	Jul-09	Cal.App. 2 Dist.				X
Santa Clarita Organization for Planning the Environment v. County of Los Angeles	157 Cal.App.4th 149	Nov-07	Cal.App. 2 Dist.				X
Mani Brothers Real Estate Group v. City of Los Angeles	153 Cal.App.4th 1385	Aug-07	Cal.App. 2 Dist.		X		
Western States Petroleum Ass'n v. South Coast Air Quality Management Dist.	136 Cal.App.4th 1	Feb-06	Cal.App. 2 Dist.		X		
California Oak Foundation v. City of Santa Clarita	133 Cal.App.4th 1219	Nov-05	Cal.App. 2 Dist.		X		
Lincoln Place Tenants Ass'n v. City of Los Angeles	130 Cal.App.4th 1491	Jul-05	Cal.App. 2 Dist.				X
Federation of Hillside and Canyon Associations v. City of Los Angeles	126 Cal.App.4th 1180	Nov-04	Cal.App. 2 Dist.				X
Santa Clarita Organization for Planning the Environment v. County of Los Angeles	106 Cal.App.4th 715	Feb-03	Cal.App. 2 Dist.		X		
Natural Resources Defense Council, Inc. v. City of Los Angeles	103 Cal.App.4th 268	Oct-02	Cal.App. 2 Dist.	X			
Friends of Santa Clara River v. Castaic Lake Water Agency	95 Cal.App.4th 1373	Jan-02	Cal.App. 2 Dist.		X		
Federation of Hillside and Canyon Associations v. City of Los Angeles	83 Cal.App.4th 1252	Sep-00	Cal.App. 2 Dist.		X		
Fairview Neighbors v. County of Ventura	70 Cal.App.4th 238	Jan-99	Cal.App. 2 Dist.				X
City of Vernon v. Board of Harbor Com'rs of City of Long Beach	63 Cal.App.4th 677	Apr-98	Cal.App. 2 Dist.				X

Published CEQA Cases Decided on Substantive Merits of an EIR (1997-Today)

Case Name	Citation	Date	Court	Plaintiff Procedural Cases	Plaintiff Cases Decided on Substantive Merits of the EIR	Agency Procedural Cases	Agency Cases Decided on Substantive Merits of the EIR
Los Angeles Unified School Dist. v. City of Los Angeles	58 Cal.App.4th 1019	Oct-97	Cal.App. 2 Dist.		X		
Clover Valley Foundation v. City of Rocklin	197 Cal.App.4th 200	Jul-11	Cal.App. 3 Dist.				X
Friends of Shingle Springs Interchange, Inc. v. County of El Dorado	200 Cal.App.4th 1470	Nov-11	Cal. App. 3 Dist.			X	
County of Sacramento v. Superior Court	180 Cal.App.4th 943	Dec-09	Cal. App. 3 Dist.			X	
Tracy First v. City of Tracy	177 Cal.App.4th 912	Aug-09	Cal.App. 3 Dist.				X
California Native Plant Soc. v. City of Rancho Cordova	172 Cal.App.4th 603	Mar-09	Cal.App. 3 Dist.			X	
State Water Resources Control Bd. Cases	136 Cal.App.4th 674	Feb-06	Cal. App. 3 Dist.				X
Western Placer Citizens for an Agr. and Rural Environment v. County of Placer	144 Cal.App.4th 890	Nov-06	Cal.App. 3 Dist.				X
Citizens for Open Government v. City of Lodi	144 Cal.App.4th 865	Oct-06	Cal.App. 3 Dist.			X	
Environmental Council of Sacramento v. City of Sacramento	142 Cal.App.4th 1018	Aug-06	Cal.App. 3 Dist.				X
Anderson First Coalition v. City of Anderson	130 Cal.App.4th 1173	Jun-05	Cal.App. 3 Dist.		X		
Central Delta Water Agency v. State Water Resources Control Bd.	124 Cal.App.4th 245	Nov-04	Cal.App. 3 Dist.		X		
Protect The Historic Amador Waterways v. Amador Water Agency	116 Cal.App.4th 1099	Mar-04	Cal.App. 3 Dist.		X		
Neighbors of Cavitt Ranch v. County of Placer	106 Cal.App.4th 1092	Mar-03	Cal. App. 3 Dist.			X	
Placer Ranch Partners v. County of Placer	91 Cal.App.4th 1336	Jul-01	Cal. App. 3 Dist.				X
Planning and Conservation League v. Department of Water Resources	83 Cal.App.4th 892	Sep-00	Cal.App. 3 Dist.		X		
Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency	82 Cal.App.4th 511	Jul-00	Cal.App. 3 Dist.		X		

Published CEQA Cases Decided on Substantive Merits of an EIR (1997-Today)

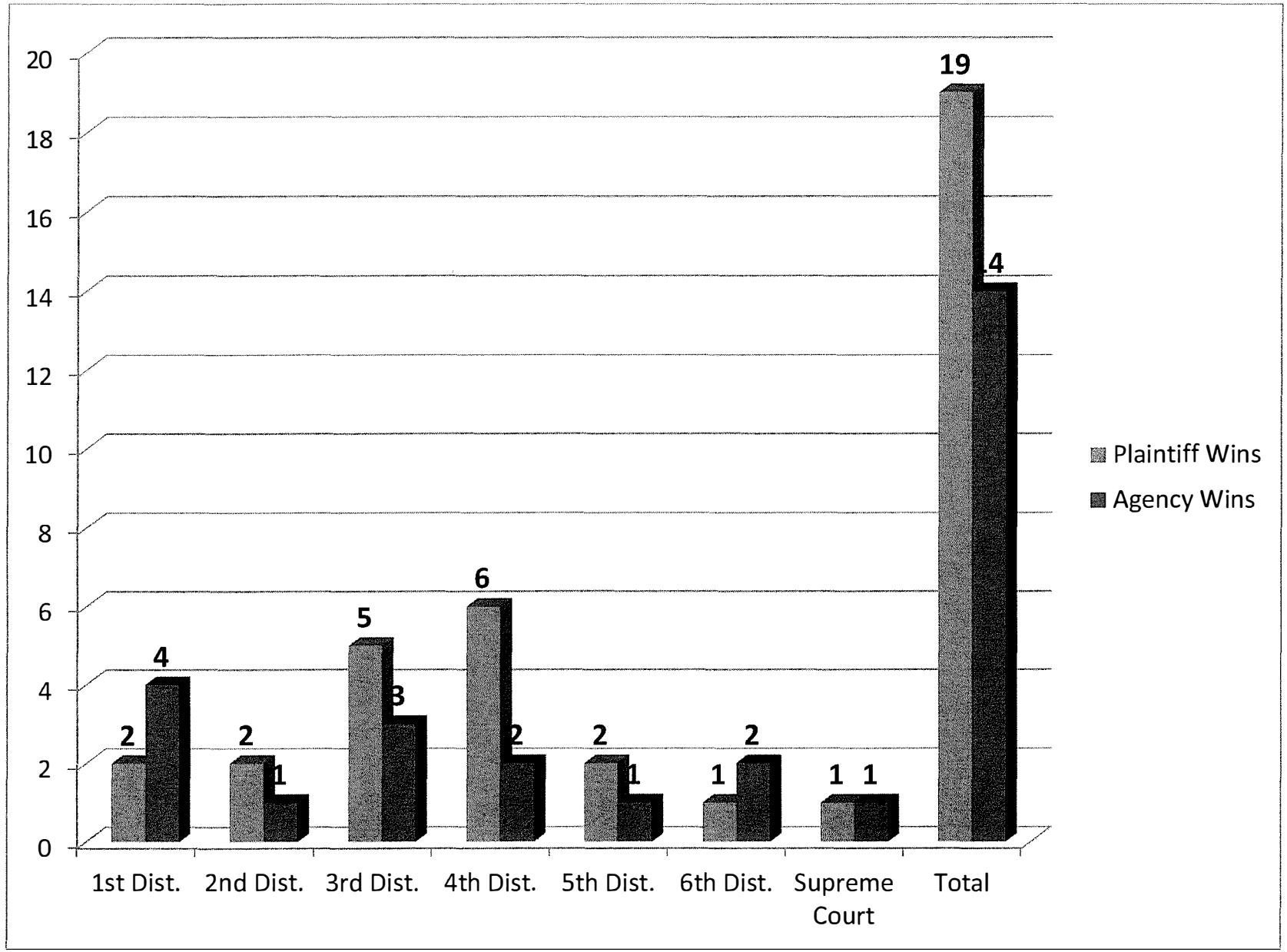
Case Name	Citation	Date	Court	Plaintiff Procedural Cases	Plaintiff Cases Decided on Substantive Merits of the EIR	Agency Procedural Cases	Agency Cases Decided on Substantive Merits of the EIR
County of Amador v. El Dorado County Water Agency	76 Cal.App.4th 931	Nov-99	Cal.App. 3 Dist.		X		
Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Sup'rs	62 Cal.App.4th 1332	Mar-98	Cal.App. 3 Dist.		X		
City of San Diego v. Board of Trustees of Cal. State University	201 Cal.App.4th 1134	Dec-11	Cal.App. 4 Dist.		X		
Silverado Modjeska Recreation and Parks Dist. v. County of Orange	197 Cal.App.4th 282	Jul-11	Cal.App. 4 Dist.				X
Citizens for Responsible Equitable Environmental Development v. City of San Diego	196 Cal.App.4th 515	May-11	Cal.App. 4 Dist.			X	
Banning Ranch Conservancy v. Superior Court	193 Cal.App.4th 903	Mar-11	Cal.App. 4 Dist.			X	
Cherry Valley Pass Acres and Neighbors v. City of Beaumont	190 Cal.App.4th 316	Nov-10	Cal.App. 4 Dist.				X
Torrey Hills Community Coalition v. City of San Diego	186 Cal.App.4th 429	Jul-10	Cal.App. 4 Dist.			X	
San Diego Navy Broadway Complex Coalition v. City of San Diego	185 Cal.App.4th 924	Jun-10	Cal.App. 4 Dist.			X	
Center for Biological Diversity v. County of San Bernardino	185 Cal.App.4th 866	May-10	Cal.App. 4 Dist.		X		
Sierra Club v. City of Orange	163 Cal.App.4th 523	Apr-08	Cal.App. 4 Dist.				X
Save Round Valley Alliance v. County of Inyo	157 Cal.App.4th 1437	Dec-07	Cal.App. 4 Dist.		X		
County of San Diego v. Grossmont-Cuyamaca Community College Dist.	141 Cal.App.4th 86	Jul-06	Cal.App. 4 Dist.		X		
Citizens For Responsible Equitable Environmental Development v. City of San Diego Citizens For Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency	134 Cal.App.4th 598	Nov-05	Cal.App. 4 Dist.				X
Endangered Habitats League, Inc. v. County of Orange	131 Cal.App.4th 777	Jun-05	Cal.App. 4 Dist.		X		

Published CEQA Cases Decided on Substantive Merits of an EIR (1997-Today)

Case Name	Citation	Date	Court	Plaintiff Procedural Cases	Plaintiff Cases Decided on Substantive Merits of the EIR	Agency Procedural Cases	Agency Cases Decided on Substantive Merits of the EIR
El Morro Community Ass'n v. California Dept. of Parks and Recreation	122 Cal.App.4th 1341	Oct-04	Cal.App. 4 Dist.				X
Defend the Bay v. City of Irvine	119 Cal.App.4th 1261	Jun-04	Cal.App. 4 Dist.				X
Maintain Our Desert Environment v. Town of Apple Valley	124 Cal.App.4th 430	Jun-04	Cal.App. 4 Dist.				X
Mira Mar Mobile Community v. City of Oceanside	119 Cal.App.4th 477	May-04	Cal.App. 4 Dist.				X
Vedanta Soc. of Southern California v. California Quartet, Ltd.	84 Cal.App.4th 517	Oct-00	Cal.App. 4 Dist.	X			
Cadiz Land Co., Inc. v. Rail Cycle, L.P.	83 Cal.App.4th 74	Aug-00	Cal.App. 4 Dist.		X		
Riverwatch v. County of San Diego	76 Cal.App.4th 1428	Dec-99	Cal.App. 4 Dist.		X		
National Parks and Conservation Ass'n v. County of Riverside	71 Cal.App.4th 1341	May-99	Cal.App. 4 Dist.				X
Madera Oversight Coalition, Inc. v. County of Madera	199 Cal.App.4th 48	Sep-11	Cal.App. 5 Dist.		X		
LandValue 77, LLC v. Board of Trustees of California State University	193 Cal.App.4th 675	Feb-11	Cal.App. 5 Dist.		X		
Melom v. City of Madera	183 Cal.App.4th 41	Mar-10	Cal.App. 5 Dist.				X
Gray v. County of Madera	167 Cal.App.4th 1099	Oct-08	Cal.App. 5 Dist.		X		
Woodward Park Homeowners Ass'n, Inc. v. City of Fresno	150 Cal.App.4th 683	Apr-07	Cal.App. 5 Dist.		X		
San Joaquin Raptor Rescue Center v. County of Merced	149 Cal.App.4th 645	Apr-07	Cal.App. 5 Dist.		X		
Bakersfield Citizens for Local Control v. City of Bakersfield	124 Cal.App.4th 1184	Dec-04	Cal.App. 5 Dist.		X		
Protect Our Water v. County of Merced	110 Cal.App.4th 362	Jul-03	Cal.App. 5 Dist.	X			
Association of Irritated Residents v. County of Madera	107 Cal.App.4th 1383	Apr-03	Cal.App. 5 Dist.				X
Dry Creek Citizens Coalition v. County of Tulare	70 Cal.App.4th 20	Feb-99	Cal.App. 5 Dist.				X
Flanders Foundation v. City of Carmel-by-the-Sea	202 Cal.App.4th 603	Jan-12	Cal.App. 6 Dist.		X		

Published CEQA Cases Decided on Substantive Merits of an EIR (1997-Today)

Case Name	Citation	Date	Court	**Plaintiff** Procedural Cases	**Plaintiff** Cases Decided on Substantive Merits of the EIR	**Agency** Procedural Cases	**Agency** Cases Decided on Substantive Merits of the EIR
Pfeiffer v. City of Sunnyvale City Council	200 Cal.App.4th 1552	Oct-11	Cal.App. 6 Dist.				X
Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council	190 Cal.App.4th 1351	Dec-10	Cal. App. 6 Dist.		X		
Watsonville Pilots Ass'n v. City of Watsonville	183 Cal.App.4th 1059	Mar-10	Cal.App. 6 Dist.		X		
California Native Plant Soc. v. City of Santa Cruz	177 Cal.App.4th 957	Aug-09	Cal.App. 6 Dist.				X
Preservation Action Council v. City of San Jose	141 Cal.App.4th 1336	Aug-06	Cal.App. 6 Dist.		X		
Gilroy Citizens for Responsible Planning v. City of Gilroy	140 Cal.App.4th 911	Jun-06	Cal.App. 6 Dist.				X
Santa Teresa Citizen Action Group v. City of San Jose	114 Cal.App.4th 689	Dec-03	Cal.App. 6 Dist.				X
Save our Peninsula Committee v. Monterey County Board of Supervisors	87 Cal.App.4th 99	Feb-01	Cal.App. 6 Dist.		X		
Galante Vineyards v. Monterey Peninsula Water Management Dist.	60 Cal.App.4th 1109	Aug-97	Cal.App. 6 Dist.		X		
Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection	44 Cal.4th 459	Jul-08	Cal. Supreme Court	X			
In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings	43 Cal.4th 1143	Jun-08	Cal. Supreme Court				X
Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova	40 Cal.4th 412	Feb-07	Cal. Supreme Court		X		
City of Marina v. Board of Trustees of the California State University	39 Cal.4th 341	Jul-06	Cal. Supreme Court		X		
			TOTALS:	4	40	10	41



Published "Fair Argument" Negative Declaration Cases Since January 1, 1997

Published "Fair Argument" Negative Declaration Cases Since January 1, 1997

Case Name	Citation	Date	Court	**Plaintiff** Procedural & Non-Fair Argument Cases	**Plaintiff** Procedural & Non-Fair Argument Cases	**Agency** Procedural & Non-Fair Argument Cases	**Agency** No Fair Argument (i.e. EIR not required)
Schenck v. County of Sonoma	198 Cal.App.4th 949	Aug-11	Cal.App. 1st Dist.				X
Wollmer v. City of Berkeley	179 Cal.App.4th 933	Oct-09	Cal.App. 1st Dist.				X
California Sportfishing Protection Alliance v. State Water Resources Control Bd.	160 Cal.App.4th 1625	Mar-08	Cal.App. 1st Dist.			X	
Citizens For A Megaplex-Free Alameda v. City of Alameda	149 Cal.App.4th 91	Mar-07	Cal.App. 1st Dist.			X	
Sierra Club v. California Dept. of Forestry and Fire Protection	150 Cal.App.4th 370	Mar-07	Cal.App. 1st Dist.		X		
American Canyon Community United for Responsible Growth v. City of American Canyon	145 Cal.App.4th 1062	Nov-06	Cal.App. 1st Dist.	X			
Bowman v. City of Berkeley	122 Cal.App.4th 572	Sep-04	Cal.App. 1st Dist.				X
Friends of East Willits Valley v. County of Mendocino	101 Cal.App.4th 191	Aug-02	Cal.App. 1st Dist.			X	
Kaczorowski v. Mendocino County Board of Supervisors	88 Cal.App.4th 564	Apr-01	Cal.App. 1st Dist.			X	
Snarled Traffic Obstructs Progress v. City & County of San Francisco	74 Cal.App.4th 793	Aug-99	Cal.App. 1st Dist.			X	
Silveira v. Las Gallinas Valley Sanitary Dist.	54 Cal.App.4th 980	Apr-97	Cal.App. 1st Dist.				X
League for Protection of Oakland's etc. Historic Resources v. City of Oakland	52 Cal.App.4th 896	Feb-97	Cal.App. 1st Dist.		X		
Ross v. California Coastal Com.	199 Cal.App.4th 900	Sep-11	Cal.App. 2nd Dist.			X	
Friends of Glendora v. City of Glendora	182 Cal.App.4th 573	Mar-10	Cal.App. 2nd Dist.			X	
Mejia v. City of Los Angeles	130 Cal.App.4th 322	May-05	Cal.App. 2nd Dist.		X		
Nasha L.L.C. v. City of Los Angeles	125 Cal.App.4th 470	Dec-04	Cal.App. 2nd Dist.	X			
Ocean View Estates Homeowners Ass'n, Inc. v. Montecito Water Dist.	116 Cal.App.4th 396	Mar-04	Cal.App. 2nd Dist.		X		
Arviv Enterprises, Inc. v. South Valley Area Planning Com.	101 Cal.App.4th 1333	Sep-02	Cal.App. 2nd Dist.			X	
Ventura County Flood Control Dist. v. Campbell	71 Cal.App.4th 211	Apr-99	Cal.App. 2nd Dist.			X	
Baldwin v. City of Los Angeles	70 Cal.App.4th 819	Mar-99	Cal.App. 2nd Dist.				X
Center for Sierra Nevada Conservation v. County of El Dorado	2012 WL 169954	Jan-12	Cal.App. 3rd Dist.		X		

Published "Fair Argument" Negative Declaration Cases Since January 1, 1997

Case Name	Citation	Date	Court	Plaintiff Procedural & Non-Fair Argument Cases	Plaintiff Procedural & Non-Fair Argument Cases	Agency Procedural & Non-Fair Argument Cases	Agency No Fair Argument (i.e. EIR not required)
California Native Plant Society v. County of El Dorado	170 Cal.App.4th 1026	Jan-09	Cal.App. 3rd Dist		X		
Save Our Neighborhood v. Lishman	140 Cal.App.4th 1288	Jun-06	Cal.App. 3rd Dist.	X			
Sierra Club v. West Side Irr. Dist.	128 Cal.App.4th 690	Mar-05	Cal.App. 3rd Dist.				X
Pocket Protectors v. City Of Sacramento	124 Cal.App.4th 903	Dec-04	Cal.App. 3rd Dist.		X		
Association For Sensible Development At Northstar, Inc. v. Placer County	122 Cal.App.4th 1289	Oct-04	Cal.App. 3rd Dist.		X		
El Dorado County Taxpayers for Quality Growth v. County of El Dorado	122 Cal.App.4th 1591	Sep-04	Cal.App. 3rd Dist.				X
People ex rel. Department of Conservation v. El Dorado County	133 Cal.Rptr.2d 780	May-03	Cal.App. 3rd Dist.			X	
Fat v. County of Sacramento	97 Cal.App.4th 1270	Apr-02	Cal.App. 3rd Dist.				X
Friends of Davis v. City of Davis	83 Cal.App.4th 1004	Aug-00	Cal.App. 3rd Dist.			X	
Tahoe Vista Concerned Citizens v. County of Placer	81 Cal.App.4th 577	Jun-00	Cal.App. 3rd Dist.			X	
Fall River Wild Trout Foundation v. County of Shasta	70 Cal.App.4th 482	Feb-99	Cal.App. 3rd Dist.		X		
Endangered Habitats League, Inc. v. State Water Resources Control Bd.	63 Cal.App.4th 227	Dec-97	Cal.App. 3rd Dist.	X			
South Orange County Wastewater Authority v. City of Dana Point	196 Cal.App.4th 1604	Jun-11	Cal.App. 4th Dist.				X
Citizens for Responsible Equitable Environmental Development v. City of Chula Vista	197 Cal.App.4th 327	Jun-11	Cal.App. 4th Dist.		X		
Inyo Citizens for Better Planning v. Board of Supervisors	180 Cal.App.4th 1	Nov-09	Cal.App. 4th Dist.		X		
Citizens for Responsible and Open Government v. City of Grand Terrace	160 Cal.App.4th 1323	Feb-08	Cal.App. 4th Dist.		X		
City of Arcadia v. State Water Resources Control Bd.	135 Cal.App.4th 1392	Jan-06	Cal.App. 4th Dist.		X		
Royalty Carpet Mills, Inc. v. City of Irvine	125 Cal.App.4th 1110	Jan-05	Cal.App. 4th Dist.			X	
Burrtec Waste Industries, Inc. v. City of Colton	97 Cal.App.4th 1133	Apr-02	Cal.App. 4th Dist.	X			

Published "Fair Argument" Negative Declaration Cases Since January 1, 1997

Case Name	Citation	Date	Court	Plaintiff Procedural & Non-Fair Argument Cases	Plaintiff Procedural & Non-Fair Argument Cases	Agency Procedural & Non-Fair Argument Cases	Agency No Fair Argument (i.e. EIR not required)
City of Redlands v. County of San Bernardino	96 Cal.App.4th 398	Jan-02	Cal.App. 4th Dist.		X		
San Bernardino Valley Audubon Soc. v. Metropolitan Water Dist. of Southern California	89 Cal.App.4th 1097	Jun-01	Cal.App. 4th Dist.	X			
Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga	82 Cal.App.4th 473	Jul-00	Cal.App. 4th Dist.			X	
San Bernardino Valley Audubon Soc. v. Metropolitan Water Dist.	71 Cal.App.4th 382	Apr-99	Cal.App. 4th Dist.		X		
Pala Band of Mission Indians v. County of San Diego	68 Cal.App.4th 556	Nov-98	Cal.App. 4th Dist.				X
Nelson v. County of Kern	190 Cal.App.4th 252	Nov-10	Cal.App. 5th Dist.		X		
Neighbors in Support of Appropriate Land Use v. County of Tuolumne	157 Cal.App.4th 997	Dec-07	Cal.App. 5th Dist.	X			
Porterville Citizens for Responsible Hillside Development v. City of Porterville	157 Cal.App.4th 885	Nov-07	Cal.App. 5th Dist.				X
Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora	155 Cal.App.4th 1214	Oct-07	Cal.App. 5th Dist.	X			
County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern	127 Cal.App.4th 1544	Apr-05	Cal.App. 5th Dist.		X		
Woodward Park Homeowners Ass'n v. Garreks, Inc.	77 Cal.App.4th 880	Jan-00	Cal.App. 5th Dist.	X			
McAllister v. County of Monterey	147 Cal.App.4th 253	Jan-07	Cal.App. 6th Dist.			X	
Landwatch Monterey County v. County of Monterey	55 Cal.Rptr.3d 34	Jan-07	Cal.App. 6th Dist.				X
Lighthouse Field Beach Rescue v. City of Santa Cruz	131 Cal.App.4th 1170	Aug-05	Cal.App. 6th Dist.				X
Architectural Heritage Ass'n v. County of Monterey	122 Cal.App.4th 1095	Aug-04	Cal.App. 6th Dist.		X		
Santa Teresa Citizen Action Group v. City of San Jose	114 Cal.App.4th 689	Dec-03	Cal.App. 6th Dist.			X	
Save the Plastic Bag Coalition v. City of Manhattan Beach	52 Cal.4th 155	Jul-11	Cal.Supreme Court				X
Communities For A Better Environment v. South Coast Air Quality Management Dist.	48 Cal.4th 310	Mar-10	Cal.Supreme Court		X		

Published "Fair Argument" Negative Declaration Cases Since January 1, 1997

Case Name	Citation	Date	Court	**Plaintiff** Procedural & Non-Fair Argument Cases	**Plaintiff** Procedural & Non-Fair Argument Cases	**Agency** Procedural & Non-Fair Argument Cases	**Agency** No Fair Argument (i.e. EIR not required)
People ex rel. Department of Conservation v. El Dorado County	36 Cal.4th 971	Aug-05	Cal.Supreme Court	X			
			TOTAL:	10	19	16	14

PROOF OF SERVICE

Berkeley Hillside Preservation et al. v. City of Berkeley
California Supreme Court Case No. S201116

I, the undersigned, hereby declare that I am over the age of 18 years and not a party to the above-captioned action; that my business address is c/o Holland & Knight LLP, 50 California Street, Suite 2800, San Francisco, CA 94111-4624.

On January 16, 2013, the following document(s) were served:

APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; BRIEF *AMICUS CURIAE*; AND COPY OF MATERIAL NOT READILY AVAILABLE FOR LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF RESPONDENTS CITY OF BERKELEY AND CITY COUNCIL OF THE CITY OF BERKELEY AND REAL PARTIES IN INTEREST MITCHELL D. KAPOR AND FREADA KAPOR-KLEIN

on the parties to this action at the following address(es):

SEE ATTACHED SERVICE LIST

☒ **BY FEDERAL EXPRESS (OVERNIGHT DELIVERY)** I caused a true and correct copy of each document to be placed in a sealed envelope, and picked up by Federal Express, with whom this firm has an ongoing account and placed the envelope for collection. Federal Express is collected daily at my office.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on January 16, 2013, at San Francisco, California.

Lauren Williams-Santiago

SERVICE LIST

BERKELEY HILLSIDE PRESERVATION v. CITY OF BERKELEY (LOGAN)
Case Number S201116

Party	Attorney
Berkeley Hillside Preservation; Susan Nunes Fadley, Plaintiffs and Appellants	Susan Brandt-Hawley Brandt-Hawley Law Group P. O. Box 1659 Glen Ellen, CA 95442-1659
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California Building Industry Association, Publication/Depublication Requestor	Andrew B. Sabey Cox, Castle & Nicholson LLP 555 California Street, 10th Floor San Francisco, CA 94104
California Infill Builders Association, Publication/Depublication Requestor	Meea Kang, President 2012 "K" Street Sacramento, CA 95811
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