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April 13, 2012

VIA HAND DELIVERY

Hon. Tani Cantil-Sakauye, Chief Justice,
Associate Justices of the Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: Request for Depublication: *Berkeley Hillside Preservation et al. v. City of Berkeley*, California Supreme Court Case No. S201116

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Pursuant to California Rules of Court, Rule 8.1125, and on behalf of the California League of Cities (the "League") and the California State Association of Counties ("CSAC"), we respectfully request that this court depublish the First District Court of Appeal's opinion in *Berkeley Hillside Preservation v. City of Berkeley*, filed on February 15, 2012 and modified on March 7, 2012 (the "Opinion"). This letter sets forth the League's and CSAC's interests in depublication and the reasons the Opinion should be depublished.

The Opinion overturns the approval of a 10,000 square-foot single-family home with a 10-car garage (the "Project") under the California Environmental Quality Act (Pub. Res. Code § 21000 *et seq.*) ("CEQA") and the Guidelines for CEQA (14 Cal. Code Regs. §§ 15000-15387) ("CEQA Guidelines"). The City of Berkeley (the "City") determined that the Project was categorically exempt from CEQA pursuant to the "in-fill exemption" (14 Cal. Code Regs. § 15332) and the exemption for single-family residences (14 Cal. Code Regs. § 15303(a)). The categorical exemption determination was unanimously approved by the City's zoning board and then upheld by the Honorable Frank Roesch in Alameda County Superior Court.

In reversing the trial court, the Opinion vastly broadens the "unusual circumstance" exception to the point that all categorical exemptions under CEQA become nearly meaningless. Using sweeping language, the Opinion imports the less deferential "fair argument" standard to all exceptions, making categorical exemptions as vulnerable to challenge as negative declarations. The Opinion rejects more than 30 years of precedent and undermines legislative intent aimed at streamlining CEQA. The Opinion impacts a wide range of projects, including many small projects conducted by cities and counties. In an era of extremely constrained public resources,

the Opinion prevents cities and counties from availing themselves of the Legislature's and Natural Resources Agency's intent to create a limited environmental review process for small projects. This unnecessary and unwise precedential effect can be avoided by depublishing the Opinion.

I. Interests in Depublication of the Opinion.

Both the League and CSAC represent cities and counties that commonly act as lead agencies. Since the Opinion involves a challenge to the City's use of the in-fill and small structures exemptions, the Opinion implicates not only in-fill development and single-family homes, but also modifications to existing structures, accessory structures, public works improvements, public buildings (such as libraries and administrative buildings), as well as small development projects such as commercial structures of less than 10,000 square feet -- just to name a few categories of projects. Indeed, the Opinion's broad ruling implicates all 33 categorical exemptions under CEQA since Petitioner's challenge was based on an exception that applies to all categorical exemptions. The Opinion burdens resource-strapped cities and counties, that routinely rely on categorical exemptions for their own projects, but may no longer be able to do so given the interpretation of the exceptions in the Opinion.

A. The League's Interests in Depublication.

The League is an association of 469 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's mission is to "expand and protect local control for cities through education and advocacy to enhance the quality of life for all Californians."

One of the League's 2012 strategic goals is to "Promote Local Control for Strong Cities" by supporting or opposing new law "based on whether they advance maximum local control by city governments over city revenues, land use, redevelopment and other private activities to advance the public health, safety and welfare of city residents." Another strategic goal is to "Build Strong Partnerships for a Stronger Golden State" by collaborating with "other public and private groups and leaders to reform the structure and governance, and promote transparency, fiscal integrity and responsiveness of our state government and intergovernmental system."

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 being of such significance.

B. CSAC's Interests in Depublication.

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 is committed to assisting California counties in providing a vital and efficient system of public services for the general health, welfare and public safety of every resident. County governments spend in excess of $30 billion a year and comprise a work force of more than 280,000 professionals. 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 adequately meet the demand for vital public programs and services.

One of CSAC's 2011-2012 platforms is that "[t]he CEQA process and requirements should be simplified wherever possible." Its 2012 legislative priorities state: "[w]ith tight budgets and increasing pressure to meet housing needs, the CSAC Board of Directors directed staff to sponsor legislation to provide counties with greater tools to proceed with affordable housing infill projects . . . . CSAC is participating in a working group to pursue potential CEQA reform related to this and other aspects of that law."

As evidenced by both the League and CSAC's mission statements and 2012 priorities, the Opinion is directly relevant to the League and CSAC's members. These members, as both lead agencies for land use approvals and project proponents themselves, are affected by the interpretation and application of CEQA. As local public agencies, and thus as a coordinating branch of government, the League and CSAC's members have a strong interest in ensuring that CEQA is applied fairly, uniformly, and predictably statewide. In light of the economic downturn in 2008 and recent and impending additional state-wide budget cuts, the League and CSAC's members have limited resources and decreased tolerance for unpredictability in the CEQA process. The Opinion invites inefficiency and unpredictability by severely limiting the use and defensibility of categorical exemptions.

II. The Opinion Dilutes the Efficacy of Categorical Exemptions.

A. The Opinion Eliminates the Well-Established Two-Step Unusual Circumstances Exception Inquiry, Clearing a Path For Petitioners to Defeat Legitimately Exempt Projects.

1. Decades of Case Law Interpret the Plain Language of the Unusual Circumstances Exception as a Two-Part Test.

Pursuant to CEQA, petitioners can challenge a lead agency's reliance on an exemption from environmental review by claiming that an exception applies, precluding the use of a categorical exemption. One of the most commonly-used exceptions, the so-called "unusual circumstances" exception, provides that a categorical exemption cannot be used "where there is a

reasonable possibility that the activity will have a significam effect on the environment due to unusual circumstances." 14 Cal. Code Regs. § 15300.2(c). For decades, courts have uniformly used a two-step approach to analyze this exception.[1] First, the court inquires whether the project presents unusual circumstances. Next, it inquires whether there is a reasonable possibility of a significant effect on the environment due to the unusual circumstances. *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 278 ("*Banker's Hill*"). A negative answer to either question means the exception does not apply. *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 800 ("*Santa Monica*"). Unusual circumstances exist "where the circumstances of a particular project (i) differ from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects." *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1350 citing *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1207 ("*Azusa*"). Said differently, case law establishes that "in the absence of any evidence of unusual circumstances nullifying the grant of a categorical exemption, there can be no basis for a claim of exception under Guidelines section 15300.2(c)." *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1260-1261.

2. The Opinion Effectively Eliminates One Part of the Two-Part Test.

The Opinion runs afoul of the CEQA Guidelines and decades of case law by eliminating the two-step test. The Opinion effectively reads the phrase "due to unusual circumstances" out of the exception by finding that a categorical exemption does not apply where there is any reasonable possibility that proposed activity may have a significant effect on the environment. Slip Opinion at p. 15. The Opinion found that the fact that the "proposed activity may have an effect on the environment is *itself* an unusual circumstance, because such action would not fall 'within a class of activities that does not normally threaten the environment,' and thus should be subject to further environmental review." Slip Opinion at p. 13 (emphasis in original.) This key holding does not even use the phrase "significant effect;" it simply says "effect." The Opinion concludes that "once it is determined that a proposed activity may have a significant effect on the

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[1] *See. e.g., Myers v. Santa Clara County* (1976) 58 Cal.App.3d 413, 426-427; *Lewis v. Seventeenth Dist. Agricultural Ass'n* (1985) 165 Cal.App.3d 823, 828-830; *Ass'n for Protection of Environmental Values in Ukiah v. City of Ukiah* (1991) 2 Cal.App.4th 734-735; *City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810, 826-827; *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1315; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115-118; *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1197-1198 [first case to explicitly establish the 2-prong test]; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1259-1261; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 129-130; *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 799-803; *San Lorenzo Community Advocates for Responsible Education v. San Lorenzo School District* (2006) 139 Cal. App.4th 1356, 1389-1395; *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 278; *Turlock Irrigation Dist. v. Zancker* (2006) 40 Cal.App.4th 1047, 1066-1067; *Committee to Save Hollywoodland v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1186-1187; *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1350.

environment, a reviewing agency is precluded from applying a categorical exemption to the activity." Slip Opinion at p. 15. Only in the second sentence is the word "significant" added to the phrase.

However, after collapsing the two-part inquiry into one prong, the Opinion still analyzes whether the Project presents "unusual circumstances" two headings later. *Compare* Slip Opinion at p. 15 *and* pp. 16-18. In considering what is unusual, the Opinion states that it is "whether a circumstance 'is judged relative to the typical circumstances related to an otherwise typically exempt project,' as opposed to the typical circumstances in one particular neighborhood." Slip Opinion at p. 17 (citation omitted). This would mean, however, that what is considered an "unusual circumstance" in the northern California seaside town of Dillon Beach (population 319) would also be true in urban Los Angeles, California (population 3,792,621). This is simply not factually accurate nor is it an appropriate legal standard. Moreover, in a similarly contradictory fashion, the Opinion compares the size of the Project to other single-family homes in the City. The Opinion finds that less than half a percent of the total dwellings in the City are more than 6,000 square feet, and therefore concludes that the Project "is 'unusual' within the meaning of the applicable exception." Slip Opinion at p. 17. Thus, the Opinion ultimately does analyze the "unusual circumstances" prong compared to other projects in the same jurisdiction, despite its earlier contradictory statements. Slip Opinion at pp. 17-18.

3. The Opinion's Elimination of the Two-Part Unusual Circumstances Test Creates Confusion and Contradicts Legislative Intent.

First, the contradictory nature of the Opinion creates uncertainty as to how this precedent should be applied. Second, by eliminating the two-step inquiry, the Opinion renders all categorical exemptions nearly meaningless. The standard becomes whether the project will have "an effect on the environment," without regard to whether that effect is significant or if that effect is due to an "unusual circumstance" in the context of the surroundings as set forth in the Guidelines and established case law. Slip Opinion at p. 13. Third, the Legislature created categorical exemptions to streamline environmental review. Pub. Res. Code § 21084(a); 14 Cal. Code Regs. § 15300. The Opinion undermines this very intent by making it nearly impossible for a lead agency to rely on categorical exemptions. Pursuant to the Opinion, if there are any potential environmental impacts, petitioners will claim that full environmental review is required for run-of-the-mill single-family homes, accessory structures, in-fill development, utility projects, as well as insignificant projects such as minor modifications to existing structures -- all projects that the Legislature clearly intended as exempt from CEQA. Projects proposed by public agencies such as public works improvements, utility projects, ordinances, park improvements, and school improvements would also be affected. Therefore, the Opinion will have a chilling effect on the use of exemptions and will require additional environmental review for countless projects that were intended to be exempt from CEQA.

B. The Opinion's Application of the "Fair Argument" Standard of Review Defeats the Legislative Intent of Categorical Exemptions.

The standard of review for categorical exemptions is a nuanced issue that many courts have declined to address. *See, e.g., 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. It is well-settled that the substantial evidence standard of review governs the court's review of a lead agency's determination that a project falls within a categorical exemption. While practically there should only be one standard for an agency's exemption determination, there is a split of authority on the appropriate standard of judicial review for the lead agency's determination that no exception to a categorical exemption is applicable. Courts have applied different standards of review to each of the two prongs of the unusual circumstances exception. *See, e.g., Banker's Hill, supra,* 139 Cal.App.4th 249 at p. 262.

The Opinion, claiming its approach is consistent with *Banker's Hill*, applied the fair argument standard of review to the entirety of its collapsed one-step inquiry into the unusual circumstances exception. Slip Opinion at p. 14. *Banker's Hill's* analysis, however, is nuanced and lengthy, and does not ultimately apply the fair argument standard to both prongs of the unusual circumstances inquiry. *Banker's Hill, supra,* 139 Cal.App.4th at p. 262, fn. 11. It also did not eliminate the second prong of the unusual circumstances test, but rather inquired whether "there is a reasonable possibility of a significant effect on the environment due to any . . . . . unusual circumstances." *Id.* at p. 278. Furthermore, at least one other court has limited *Banker's Hill's* reach by stating that it should not be read to suggest that the fair argument standard should apply under the guise of a "blanket exception" created under the unusual circumstances exception. *See Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1073.

Adding further confusion to the issue, the Opinion, like *Banker's Hill* and just a handful of other cases adjudicating the standard of review for categorical exemption determinations, mentions "*de novo* review," but does not specify to which inquiry "*de novo* review" applies nor does it relate it to the fair argument standard. Slip Opinion at pp. 15, 17; *see, e.g., Azusa, supra,* 52 Cal.App.4th at p. 1207; *Santa Monica, supra,* 101 Cal.App.4th at p. 792. The Opinion's cursory analysis of the proper standard of review is vague, and taken at its broadest construction, applies the fair argument standard to all exceptions to the exemptions, upending years of case law.

The Opinion applies the fair argument standard even to the City's determination of what constitutes an "unusual circumstance" in its jurisdiction. Stated differently, the Opinion holds that a court does not defer to a city or county's assessment of what is considered "unusual" in its jurisdiction for purposes of a categorical exemption. Slip Opinion at pp. 16-17. The Opinion completely disregards the fact that what is an "unusual circumstance" in one jurisdiction is not necessarily unusual in another. That is, a determination of what is "unusual" is based on the context. The Opinion implies that a judge that could be seated in a small town (such as Needles,

California (population 4,844)) would decide what is an "unusual circumstance" for a project located many miles away in an urban center (such as in Ontario, California (population 163,924)) with which she may have no familiarity. The appropriate course of action is to defer to the agency's determination of what is unusual, as the agency is best-suited to make that determination.

Furthermore, the Opinion undermines the very purpose of categorical exemptions - to streamline environmental review. 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). Section 21084 was added to CEQA in 1972 as part of A.B. 889. Recommending A.B. 889 for signature, the Department of Finance noted that "exempting certain classes of projects" creates "[a] reduction in administrative cost . . . at the state and local level." Enrolled Bill Report, Dept. of Finance, at p. 1 (Dec. 11, 1972). Thus, 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. These so-called 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. The Opinion puts categorical exemptions on the same legal footing as negative declarations and affords no deference to the lead agency's determination.

The Opinion frustrates this purpose by reviewing categorically exempt project classes under the same standard as non-exempt classes. In doing so, the Opinion purports to rely on *Wildlife Alive v. Chickering* (1976) 17 Cal.3d 190 ("*Wildlife Alive*"). However, *Wildlife Alive* states that the exceptions to the exemptions set forth in Guidelines § 15300.2(b) and (c) are necessary to the extent that "[t]he secretary is empowered to exempt only those activities which do not have a significant effect on the environment." *Id.* at p. 206. But "[t]his admonition from [*Wildlife Alive*] cannot be read so broadly as to defeat the very idea underlying CEQA section 21084 of *classes* or *categories* of projects that do not have a significant environmental effect." *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 127 (emphasis in original). Evaluating categorically exempt projects under the fair argument standard would do exactly that by placing them on equal footing as non-exempt projects.

C. The Opinion Bucks Current Legislative Trends to Streamline CEQA Review and Encourage In-fill Development.

The Opinion, in detracting from the benefits of using a categorical exemption, also discourages in-fill development and adds undue complexity to CEQA review. In doing so, the Opinion flies in the face of recent legislation that not only encourages urban in-fill development, but also provides incentives for such development through CEQA streamlining provisions. For example, S.B. 226 (Simitian and Vargas, 2011) creates a statutory exemption for solar panels and

establishes new CEQA streamlining methods for in-fill projects. Similarly, A.B. 900 (Buchannan, 2011) provides "streamlining benefits under the California Environmental Quality Act" for in-fill and transit-oriented projects. The Opinion, on the other hand, increases the risk in relying on a categorical exemption and thereby fosters or requires unwarranted additional environmental review.

* * *

The Opinion lowers the bar for petitioners to challenge a categorical exemption and invites the court to second-guess: (i) the Legislature's determination of exempt categories of projects; and (ii) a city or county's determination that a project qualifies for an exemption. The Opinion contradicts the Legislature's and Natural Resources Agency's intended effect in creating categorical exemptions and recent legislative trends to streamline CEQA review by creating unnecessary and expensive environmental review. We accordingly request that this Court depublish the Opinion.

Very truly yours,

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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 April 13, 2012, the following document(s) were served:

APRIL 13, 2012 LETTER TO HON. TANI CANTIL-SAKAUYE RE REQUEST FOR DEPUBLICATION: BERKELEY HILLSIDE PRESERVATION ET AL. V. CITY OF BERKELEY, CALIFORNIA SUPREME COURT CASE NO. S201116

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

SEE ATTACHED SERVICE LIST

☒ **(BY MAIL)** I caused a true copy of each document(s) to be placed in a sealed envelope with first-class postage affixed and placed the envelope for collection. Mail is collected daily at my office and placed in a United States Postal Service collection box for pickup and delivery that same day.

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

Executed on April 13, 2012 at San Francisco, California.

Lauren M. Williams

Lauren Williams-Santiago

SERVICE LIST

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

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