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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BERKELEY HILLSIDE PRESERVATION et al., Plaintiffs and Appellants, v. CITY OF BERKELEY et al., Defendants and Respondents; DONN LOGAN et al., Real Parties in Interest and Respondents.	A131254 (Alameda County Super. Ct. No. RG10517314)

Appellants Berkeley Hillside Preservation and Susan Nunes Fadley challenge the denial of their petition for a writ of mandate to set aside the approval of use permits to construct a large residence in the Berkeley hills. They claim that the proposed construction was not categorically exempt under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.),[1] and that environmental concerns should be reviewed in an environmental impact report (EIR). We agree and reverse.

I.
FACTUAL AND PROCEDURAL BACKGROUND

Real parties in interest and respondents Mitchell Kapor and Freada Kapor-Klein own a 29,714 square-foot lot on Rose Street in Berkeley. The lot is on a steep slope (approximately 50 percent grade) in a heavily wooded area. On May 19, 2009, Donn

[1] All statutory references are to the Public Resources Code unless otherwise specified.

Logan of Wong-Logan Architects filed an application for a use permit to demolish the existing two-story, single-family dwelling on the lot, and to construct a 6,478 square-foot home with an attached 3,394 square-foot, 10-car garage designed to address lack of street parking in the area (the proposed construction). The residence would be built on two floors, plus an open-air lower level, and would cover about 16 percent of the lot (less than the 40 percent lot coverage permitted by respondent City of Berkeley (City) rules, according to an architect involved with the proposed construction). The application stated that the immediate neighbors of the affected lot supported the proposed construction, and the record reveals that those neighbors, as well as other Berkeley residents (including those who live in the surrounding neighborhood), supported the proposed construction throughout proceedings below. The application stated that the proposed construction would provide a turnaround for vehicles at the end of the dead-end street where the lot was located, an addition that was welcomed by the neighbors. A revised application was submitted on October 13, 2009.

After providing notice, Berkeley's Zoning Adjustment Board (Board) held a public hearing on January 28, 2010, received comment about the proposed construction, and approved the use permit for the proposed construction by a vote of seven to zero, with one Board member absent and one abstaining. The Board found, consistent with a Board staff report, that the proposed construction was categorically exempt from the provisions of CEQA pursuant to Guidelines sections 15332[2] ("In-Fill Development Projects") and 15303, subdivision (a) ("New Construction or Conversion of Small Structures," single-family residence). The Board also determined that the proposed construction did not trigger any of the exceptions to exemptions, as set forth in Guidelines, section 15300.2. In particular, the Board concluded that the proposed construction would not have any significant effects on the environment due to unusual

[2] "Guidelines" refers to the Guidelines for Implementation of CEQA, which are found in California Code of Regulations, title 14, section 15000 et sequitur. All subsequent regulatory citations to the Guidelines are to title 14 of the Code of Regulations.

circumstances.[3] (Guidelines, § 15300.2, subd. (c).) The Board approved (1) a use permit to demolish the existing dwelling on the lot, (2) a use permit to construct the proposed unit, (3) an administrative use permit to allow a 35-foot average height limit for the main building (with 28 feet being the maximum), and (4) an administrative use permit to reduce the setback of the front yard to 16 feet (with 20 feet usually required). The Board imposed various "standard conditions" on the proposed construction, including requiring the permit applicant to secure a construction traffic management plan, comply with storm water regulations for small construction activities, and take steps to minimize erosion and landslides when construction takes place during the wet season.

Appellant Susan Nunes Fadley, a Berkeley resident, filed an appeal to the City Council on February 19, 2010. Thirty-three other Berkeley residents also signed the appeal. Appellants stressed that the proposed dwelling and attached 10-car garage would result in a single structure of 9,872 square feet, which would make it "one of the largest houses in Berkeley, four times the average house size in its vicinity, and situated in a canyon where the existing houses are of a much smaller scale." They submitted evidence that, of more than 17,000 single-family residences in Berkeley, only 17 are larger than 6,000 square feet, only 10 exceed 6,400 square feet, and only one other residence exceeds 9,000 square feet. In a response to the appeal, the City's director of planning and development stated that 68 Berkeley "dwellings" are larger than 6,000 square feet, nine are larger than 9,000 square feet, and five are larger than 10,000 square feet, and that 16 parcels within 300 feet of the proposed construction had a greater floor-area-to-lot-area ratio than the proposed dwelling.

An addendum to the appeal dated April 18, 2010, first challenged the Board's declaration that the proposed construction was categorically exempt from CEQA, arguing

[3] The Board also found that the proposed construction would not have any cumulatively significant impacts (Guidelines, § 15300.2, subd. (b)), and that it would not adversely impact any designated historical resources (Guidelines, § 15300.2, subd. (f)), findings that were later affirmed by respondent Berkeley City Council (City Council) and the trial court. Because appellants do not challenge these findings, we do not address them further.

that "the project's unusual size, location, nature and scope may have significant impact on its surroundings." The addendum stated that the proposed construction exceeded the maximum allowable height under Berkeley's municipal code, and was inconsistent with the policies of the City's general plan, and that an EIR was appropriate to evaluate the proposed construction's potential impact on noise, air quality, and neighborhood safety.

The City Council received numerous letters and e-mails both supporting and opposing the appeal. Among the submissions in support of the appeal were letters from Lawrence Karp, a geotechnical engineer specializing in foundation engineering and construction, who had more than 50 years of experience with design and construction in Berkeley, and who had previously prepared feasibility studies and provided engineering services during construction of "unusual projects." Karp first submitted a one-page letter to the City Council dated April 16, 2010, stating that he was familiar with the site of the proposed construction, and had been involved with new residences in the area for 50 years. Based on a review of the architectural plans and topographical survey filed with the Board, as well as visits to the proposed construction site, Karp stated that portions of the "major fill for the project are shown to be placed on an existing slope inclined at about 42º (~1.1h:1v) to create a new slope more than 50º (~0.8h:1v)." He opined that "[t]hese slopes cannot be constructed by earthwork and all fill must be benched and keyed into the slope which is not shown in the sections or accounted for in the earthwork quantities. To accomplish elevations shown on the architectural plans, shoring and major retaining walls not shown will have to be constructed resulting in much larger earthwork quantities than now expected." Karp further opined that the "massive grading" necessary would involve "extensive trucking operations," and that such work "has never before been accomplished in the greater area of the project outside of reservoirs or construction on the University of California campus and Tilden Park." He also emphasized that the project site was "located alongside the major trace of the Hayward fault and it is mapped within a state designated earthquake-induced landslide hazard zone." It was Karp's opinion that "the project as proposed is likely to have very significant environmental

impacts not only during construction but in service due to the probability of seismic lurching of the oversteepened side-hill fills."

Karp submitted another one-page letter dated April 18, 2010, stating that after he wrote his April 16 letter, he had the opportunity to review a geotechnical investigation done by geotechnical engineer Alan Kropp, dated July 31, 2009. Karp stated that no "fill slopes" were shown in Kropp's plan, and that "the recommendations for retaining walls do not include lateral earth pressures for slopes with inclinations of more than 2h:1v (~27º) or for wall heights more than 12 feet." Karp also noted that the architectural plans he reviewed "include cross-sections and elevations that are inconsistent with the Site Plan and limitations in the 7/31/09 report (there have been significant changes)." He stated that "all vegetation will have to be removed for grading, and retaining walls totaling 27 feet in height will be necessary to achieve grades. Vertical cuts for grading and retaining walls will total about 43 feet (17 feet for bench cutting and 26 feet for wall cutting). [¶] A drawing in the report depicts site drainage to be collected and discharged into an energy dissipater dug into the slope, which is inconsistent with the intended very steep fill slopes." Karp reiterated that it was his opinion that "the project as proposed is likely to have very significant environmental impacts not only during construction, but in service due to the probability of seismic lurching of the oversteepened side-hill fills."

Geotechnical engineer Kropp, who had conducted the 2009 geotechnical investigation, submitted a response to Karp's environmental concerns. According to Kropp, opponents had misread the project plans, because the proposed construction would not involve "side-hill fill," and the current ground surface, along with the vegetation, would be maintained on the downhill portion of the lot. According to Kropp, "the only fill placed by the downhill portion of the home will be backfill for backyard retaining walls and there will be no side-hill fill placed for the project. The current ground surface, along with the vegetation, will be maintained on the downhill portion of the lot." Because there would be no steep, side-hill fill constructed as Karp claimed, none of the concerns Karp raised in his letter applied to the proposed construction, according to Kropp.

As for claims that the project site fell within the boundaries of an area that requires investigation for possible earthquake-induced landslides, Kropp stated that although the site was in an area where an *investigation* was required to evaluate whether there was a potential for a landslide, Kropp's investigation revealed that no such landslide hazard was in fact present at the site. Another engineer (Jim Toby) also submitted a letter in support of the proposed construction, and opined that no fills would be placed directly on steep slopes, as Karp claimed.

The director of the City's planning and development department filed a supplemental report to the City Council, in part to respond to Karp's letters. According to the director, "A geotechnical report was prepared and signed by a licensed Geotechnical Engineer and a Certified Engineering Geologist. This report concluded that the site was suitable for the proposed dwelling from a geotechnical standpoint and that no landslide risk was present at the site. Should this project proceed, the design of the dwelling will require site-specific engineering to obtain a building permit."[4]

The City Council considered the appeal on April 27, 2010, and allowed each side 10 minutes to speak.[5] Geotechnical engineers Karp and Kropp made statements consistent with their written submissions. The City Council adopted the findings made by the Board, affirmed the decision to approve the use permit, adopted the conditions enumerated by the Board, and dismissed the appeal by a vote of six to two, with one councilmember absent. The City Planning Department thereafter filed a notice of

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4 At the hearing on appellants' writ petition in the trial court, counsel for respondent City represented that if inspections during construction revealed the geotechnical concerns that Karp raised, the City would issue a stop-work notice and investigate those issues. Appellants' counsel objected that the assertion was outside the scope of the record, and the trial court apparently agreed that it was impossible to know what the City would do under such circumstances.

5 Appellants repeatedly emphasize that, although certain people were allowed to address the City Council for 10 minutes, the council did not hold a public hearing on the appeal. However, no public hearing is required before an agency decides a project is categorically exempt under CEQA. (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1385.)

exemption, stating that the proposed construction was categorically exempt from the provisions of CEQA (Guidelines §§ 15332, 15303, subd. (a)), and that the proposed construction did not trigger any of the exceptions to the exemptions (Guidelines, § 15300.2).

Appellants Fadley and Berkeley Hillside Preservation[6] sought judicial review of the decision by filing a petition for a writ of mandate in the trial court on May 27, 2010. Following a hearing, the trial court denied the petition by written order dated December 30, 2010. The trial court first concluded that there was substantial evidence in the administrative record to support the City's determination that the in-fill and new construction categorical exemptions applied to the proposed construction (Guidelines, §§ 15332, 15303, subd. (a)). (*Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251.) As for whether appellants had established any exceptions to the exemptions, the trial court concluded that there was substantial evidence of a fair argument that the proposed construction would cause significant environmental impacts. The court nonetheless concluded that the proposed construction did not trigger the exception to the exemptions set forth in Guidelines section 15300.2, subdivision (c), because the possible significant impacts were not due to "unusual circumstances."

Appellants timely appealed from the subsequent judgment. They filed a motion for a temporary stay and a petition for a writ of supersedeas in this court, seeking to prevent the demolition of the existing structure and the commencement of construction of the new home during the pendency of the appeal. This court denied both the request for a temporary stay and petition for writ of supersedeas by orders dated March 28 and

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6 According to the petition, "Berkeley Hillside Preservation is an unincorporated association formed in the public interest in May 2010," after the City approved the proposed construction on Rose Street. The association includes "City residents and concerned citizens who enjoy and appreciate the Berkeley hills and their environs and desire to protect the City's historic, cultural, architectural, and natural resources." Association members filed the petition "on behalf of all others similarly situated that are too numerous to be named and brought before" the court. Appellant Fadley is a "founding member" of the association, whose members include Berkeley resident Lesley Emmington Jones (the only other association member to be named in the petition).

April 26, 2011. Appellants represent that the existing cottage on the relevant site has been demolished, and they seek no further relief relating to the demolition.[7] Respondents Kapor, Kapor-Klein, City, and City Council have filed a single respondents' brief.

II.
DISCUSSION

Appellants ask this court to order the trial court to issue a writ of mandate directing City to set aside its determination that the proposed construction is exempt from CEQA. "In considering a petition for a writ of mandate in a CEQA case, '[o]ur task on appeal is "the same as the trial court's." [Citation.] Thus, we conduct our review independent of the trial court's findings.' [Citation.] Accordingly, we examine the City's decision, not the trial court's." (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 257 (*Banker's Hill*).)

A. Overview of CEQA Process and Consideration of "Unusual Circumstances."

1. Purpose of CEQA

"The Supreme Court has repeatedly observed that the Legislature intended CEQA to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. [Citation.] Central to CEQA is the EIR, which has as its purpose informing the public and government officials of the environmental consequences of decisions before they are made. [Citation.]" (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1315.) "An EIR must be prepared on any 'project' a local agency intends to approve or carry out which 'may have a

[7] Although the denial of the request for a temporary stay and a petition for a writ of supersedeas enabled respondent owners to demolish the existing structure and to proceed with construction at their own risk, they later voluntarily agreed to suspend any construction activity when they requested a continuance of oral argument from December 6, 2011, to January 10, 2012. By order dated January 5, 2012, this court on its own motion ordered that any and all construction be stayed pending further order of the court, or until the filing of the remittitur in this case.

significant effect on the environment.' (§§ 21100, 21151; Guidelines, § 15002, subd. (f)(1).) The term 'project' is broadly defined and includes any activities which have a potential for resulting in physical changes in the environment, directly or ultimately. (§ 21065; Guidelines, § 15002, subd. (d), 15378, subd. (a); [citation].)" (*Ibid.*, fn. omitted.) A " 'significant effect on the environment' " is defined as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." (Guidelines, § 15382.)

2. Categorical exemptions

Not all proposed activity is subject to environmental review, however. "CEQA authorizes the resources agency to adopt guidelines that list classes of exempt projects, namely projects 'which have been determined not to have a significant effect on the environment and which shall be exempt from this division.' (Pub. Resources Code, § 21084, subd. (a).) These classes of projects are called 'categorical exemptions' and are detailed in Guidelines section 15300 et seq. Guidelines section 15300.2 in turn specifies *exceptions and qualifications* to the categorical exemptions." (*Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1347 (*Wollmer*), original italics.) Where a public agency decides that proposed activity is exempt and that no exceptions apply, a notice of exemption is filed, and no further environmental review is necessary. (Guidelines, § 15062, subd. (a); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74; *Apartment Assn. of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1171.)

Here, the Board found, and the City agreed, that the proposed construction was subject to two categorical exemptions. They found that the proposed construction satisfied the elements of the urban in-fill development exemption (Guidelines, § 15332), because (1) it was consistent with the applicable general plan designation and applicable general plan policies, as well as with the applicable zoning designation and regulations, (2) the proposed construction was within City limits on a project site of no more than five acres, surrounded by urban uses, (3) the site had no value as a habitat for endangered,

rare, or threatened species, (4) the proposed construction would not result in any significant effects relating to traffic, noise, air quality, or water quality, and (5) the site was already served by required utilities and public services, which also would serve the proposed construction. The Board and City also found that the proposed construction was exempt because it involved the construction of one single-family residence (Guidelines, § 15303, subd. (a)). Acknowledging that the relatively deferential substantial evidence standard of review applies to the City's conclusion that the proposed construction was categorically exempt (e.g., *Fairbank v. City of Mill Valley*, *supra*, 75 Cal.App.4th at p. 1251), appellants concede, for purposes of this appeal, that the proposed construction is subject to the two CEQA categorical exemptions.

3. Exceptions to exemptions

Appellants claim that the "unusual circumstances" *exception* to the CEQA exemptions applies here. (Guidelines § 15300.2, subd. (c).[8]) " 'In categorical exemption cases, where the agency establishes that the project is within an exempt class, the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions listed in Guidelines section 15300.2. The most commonly raised exception is subdivision (c) of section 15300.2, which provides that an activity which would otherwise be categorically exempt is not exempt if there are "unusual circumstances" which create a "reasonable possibility" that the activity will have a significant effect on the environment. A challenger must therefore produce substantial evidence showing a reasonable possibility of adverse environmental impact sufficient to remove the project from the categorically exempt class. [Citations.]' [Citations.]" (*Fairbank v. City of Mill Valley*, *supra*, 75 Cal.App.4th at p. 1259.)

Where, as here, a proposed activity meets "the comprehensive environmentally protective criteria of [Guidelines] section 15332," the project "normally would not have other significant environmental effects." (*Communities for a Better Environment v.*

[8] The Guidelines provide in full: "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."

California Resources Agency (2002) 103 Cal.App.4th 98, 129.) The requirement that unusual circumstances be present in order to satisfy the exception to the exemption "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 and hence excepted from the exemption." (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1206 (*Azusa*).) The concept apparently was first mentioned in *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, where our Supreme Court observed that "common sense tells us that the majority of private projects for which a government permit or similar entitlement is necessary are minor in scope—e.g., relating only to the construction, improvement, or operation of an individual dwelling or small business—and hence, in the absence of unusual circumstances, have little or no effect on the public environment." (*Id.* at p. 272, disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888; see also *Azusa*, *supra*, at pp. 1206-1207.)

The Supreme Court expanded on the concept of exceptions to categorical exemptions in *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190 (*Wildlife Alive*), which held that CEQA applies to the Fish and Game Commission's setting of hunting and fishing seasons. (*Wildlife Alive* at pp. 194-195, 204.) The court rejected the argument that the commission's activity was included within one of CEQA's categorical exemptions. (*Wildlife Alive* at p. 204.) Even if a regulation was intended to exempt the activity at issue in *Wildlife Alive*, however, such a regulation would be invalid, because "[t]he Secretary [of the California Resources Agency] is empowered to exempt *only* those activities which do not have a significant effect on the environment. [Citation.] It follows that where there is *any reasonable possibility* that a project or activity may have a significant effect on the environment, an exemption would be improper." (*Id.* at pp. 205-206, italics added.) In other words, a categorical exemption does not apply where there is any reasonable possibility that proposed activity may have a significant effect on the environment.

Relying on *Wildlife Alive, supra,* 18 Cal.3d 190 as authority, the secretary for the Resources Agency adopted the unusual circumstances exception that is now set forth in Guidelines, section 15300.2, subdivision (c).[9] (See Note and Authority cited, foll. Guidelines, § 15300.2.) Courts have interpreted that section of the Guidelines as applying "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." (*Azusa, supra,* 52 Cal.App.4th at p. 1207; see also *Wollmer, supra,* 193 Cal.App.4th at p. 1350.) Effects on aesthetics, cultural resources, water supply, health, and safety are among the effects that fall within the concept of " 'unusual circumstances.' " (*Communities for a Better Environment v. California Resources Agency, supra,* 103 Cal.App.4th at p. 129.) "[W]hether a circumstance is '*unusual*' is judged relative to the *typical* circumstances related to an otherwise typically exempt project." (*Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 801, original italics.)

In *Banker's Hill,* the court held that the application of Guidelines, section 15300.2, subdivision (c), involves "two distinct inquiries. First, we inquire whether the Project presents unusual circumstances. Second, we inquire whether there is a reasonable possibility of a significant effect on the environment *due to* the unusual circumstances. [Citation.] 'A negative answer to either question means the exception does not apply.' [Citation.]" (*Banker's Hill, supra,* 139 Cal.App.4th at p. 278, original italics.) Here, the

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9 We hereby grant appellants' unopposed request for judicial notice of materials surrounding the implementation of Guidelines, section 15300.2, subdivision (c). However, "[e]ven though we will grant motions for judicial notice of legislative history materials without a showing of statutory ambiguity, we do so with the understanding that the panel ultimately adjudicating the case may determine that the subject statute is unambiguous, so that resort to legislative history is inappropriate." (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 30.) Our understanding of the relevant section of the Guidelines is based primarily on the unambiguous language of the Guidelines and judicial interpretation of CEQA. Accordingly, we need not resort to documents underlying its implementation in reaching our conclusion that it applies to the proposed construction.

trial court found that there was substantial evidence of a fair argument that the proposed construction could have a significant environmental impact. Because there was a " 'negative answer' " to the question of whether the project presented unusual circumstances (*ibid.*), however, the trial court concluded that the unusual circumstances exception did not apply here. Respondents argue that this conclusion was appropriate under the two-step approach of *Banker's Hill*.

We disagree with the trial court's approach. Where there is substantial evidence that proposed activity may have an effect on the environment, an agency is *precluded* from applying a categorical exemption. (*Wildlife Alive*, *supra*, 18 Cal.3d at pp. 205-206.) The trial court concluded that the relevant exception did not apply because it found no "unusual circumstances" present; however, the fact that proposed activity may have an effect on the environment is *itself* an unusual circumstance, because such action would not fall "within a class of activities that does not normally threaten the environment," and thus should be subject to further environmental review. (*Azusa*, *supra*, 52 Cal.App.4th at p. 1206.)

Although the trial court's conclusion arguably is consistent with the two-step approach set forth in *Banker's Hill*, we note that the *Banker's Hill* court did not actually employ such a two-step procedure. Instead, it "streamlined" its approach by "proceed[ing] directly to the question of whether, applying the fair argument standard, there is a *reasonable possibility of a significant effect on the environment* due to any . . . purported unusual circumstances." (*Banker's Hill*, *supra*, 139 Cal.App.4th at p. 278, italics added.) Indeed, much of the court's opinion focused on all the reasons an agency must apply the fair argument approach in determining whether there is no reasonable possibility of a significant effect on the environment due to unusual circumstances (Guidelines, § 15300.2, subd. (c)). (*Banker's Hill*, *supra*, 139 Cal.App.4th at pp. 264-265.) Relying on *Wildlife Alive*, *supra*, 18 Cal.3d at pages 205-206, the *Banker's Hill* court emphasized that an agency is precluded under the Guidelines from "relying on a categorical exemption when there is a fair argument that a project will have a significant effect on the environment." (*Banker's Hill*, *supra*, at p. 266.) In other words, the court

acknowledged " 'that where there is *any reasonable possibility* that a project or activity may have a significant effect on the environment, an exemption would be improper.' " (*Ibid.*, italics added by *Banker's Hill*.) Our conclusion that the unusual circumstances exception does not apply whenever there is substantial evidence of a fair argument of a significant environmental impact is thus not inconsistent with *Banker's Hill*.

Other courts likewise have addressed the Supreme Court's statement in *Wildlife Alive*, *supra*, 18 Cal.3d at pages 205-206, that projects may not be categorically exempt where there is any reasonable possibility that the project may have a significant environmental effect. For example, in upholding a challenge to the categorical exemption for in-fill development projects (Guidelines, § 15332), the court in *Communities for a Better Environment v. California Resources Agency*, *supra*, 103 Cal.App.4th 98, summarized the relevant history of the unusual circumstances exception to the exemption: "This admonition from *Chickering* 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. So subsequent case law has stated that '[t]o implement th[is] rule laid out in *Chickering*, Guidelines section 15300.2, subdivision (c), was adopted . . . .' [¶] Thus, a categorical exemption authorized by CEQA section 21084 is an exemption from CEQA for a *class* of projects that the Resources Agency determines will *generally* not have a significant effect on the environment." (*Id.* at p. 127, original italics, fns. omitted.)

Respondents apparently would have this court read the forgoing excerpt from *Communities* as cautioning against applying the unusual circumstances exception too " 'broadly.' " In fact, the quoted passage simply sets forth the relevant history of the unusual circumstances exception. The *Communities* court went on to emphasize that effects on aesthetics, cultural resources, water supply, health, and safety "would constitute 'unusual circumstances' under this exception for a project that otherwise meets the Guidelines 15332 [in-fill development] criteria. This is because a project that does meet the comprehensive environmentally protective criteria of section 15332 normally would not have other significant environmental effects; if there was a reasonable

possibility that the project would have such effects, *those effects would be 'unusual circumstances' covered by the section 15300.2, subdivision* (*c*) *exception*." (*Communities for a Better Environment v. California Resources Agency*, *supra*, 103 Cal.App.4th at p. 129, italics added.) We recognize that the proposed construction here fell within two categorical exemptions, meaning that it belonged to classes of projects that generally do not have a significant effect on the environment. (*Id.* at p. 127.) However, once it is determined that there is a reasonable possibility that a specific activity may have significant effects on aesthetics, cultural resources, or other areas not covered by the in-fill exemption (such as geotechnical impacts), application of a categorical exemption no longer is appropriate, because such a project is different from activity that generally does not have environmental effects. (*Ibid.*)

In sum, the trial court erred insofar as it concluded that appellants had provided substantial evidence of a fair argument of a significant environmental impact, yet declined to apply the unusual circumstances exception. We acknowledge that it may be helpful to analyze the applicability of the unusual circumstances exception as part of a two-step inquiry (as we do below), separately inquiring as to whether unusual circumstances exist, and whether there is a risk of significant environmental impact due to those unusual circumstances. (*Banker's Hill*, *supra*, 139 Cal.App.4th at p. 278.) This approach assists with the determination of whether the circumstances surrounding a proposed activity "differ from the general circumstances of the projects covered by a particular categorical exemption." (*Azusa*, *supra*, 52 Cal.App.4th at p. 1207.) However, once it is determined that a proposed activity may have a significant effect on the environment, a reviewing agency is precluded from applying a categorical exemption to the activity.

4. Standard of review

"[A]ny factual determination relating to the existence of a certain circumstance is reviewed as a question of fact under the substantial evidence standard, but 'the question whether that circumstance is "unusual" within the meaning of the significant effect exception would normally be an issue of law that this court would review de novo.'

[Citations.]" (*Banker's Hill, supra,* 139 Cal.App.4th at p. 261-262, fn. 11; see also *Azusa, supra,* 52 Cal.App.4th at p. 1207.) "[A]n agency must apply a fair argument approach in determining whether, under Guidelines section 15300.2(c), there is no reasonable possibility of a significant effect on the environment due to unusual circumstances. Accordingly, as a reviewing court we independently review the agency's determination under Guidelines section 15300.2(c) to determine whether the record contains evidence of a fair argument of a significant effect on the environment."[10] (*Banker's Hill* at p. 264; see also *Wollmer, supra,* 193 Cal.App.4th at p. 1350.)

With these general principles in mind, we analyze whether the unusual circumstances exception applies to the facts of this case.

B. Appellants Established Fair Argument of Significant Effect on Environment Due to Unusual Circumstances.

1. Proposed construction presents "unusual circumstances"

As set forth above, the proposed construction is concededly subject to two categorical exemptions (the single-family residence exemption and the in-fill exemption, Guidelines, §§ 15303, subd. (a), 15332). As for the single-family residence exemption, the Guidelines provide that this categorical exemption applies to the "construction and location of limited numbers of new, small facilities or structures; . . . . The numbers of structures described in this section are the maximum allowable on any legal parcel. Examples of this exemption include but are not limited to: [¶] (a) One single-family residence, or a second dwelling unit in a residential zone. In urbanized areas, up to three single-family residences may be constructed or converted under this exemption." (Guidelines, § 15303, subd. (a).)

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10 Respondents contend that there is a "split in authority" over whether we apply the fair argument or substantial evidence standard of review to an agency's finding that there was no reasonable possibility of a significant effect on the environment, but that appellants have not shown error under either standard. Our reliance on the fair argument standard is consistent with our recent decision in *Wollmer, supra,* 193 Cal.App.4th at page 1350, citing *Banker's Hill, supra,* 139 Cal.App.4th at page 261.

Appellants presented substantial, and virtually uncontradicted, evidence that the proposed single-family residence to be constructed was unusual, based on its size. (*Banker's Hill*, *supra*, 139 Cal.App.4th at p. 261, fn. 11 [determination relating to existence of certain circumstance reviewed as question of fact under substantial evidence standard].) Of more than 17,000 single-family residences in Berkeley, only 17—or a tenth of a percent—are larger than 6,000 square feet, whereas the proposed construction will result in a residence that is more than 9,800 square feet. On appeal, respondents highlight evidence that 68 City "dwellings" are larger than 6,000 square feet. First, it is unclear whether all 68 "dwellings" are single-family residences. Second, even assuming arguendo that they are, that still means that less than a half percent (or 0.4 percent) of all Berkeley residences are more than 6,000 square feet, an indication that the approximately 9,800 square-foot proposed residence " 'differ[s] from the general circumstances of the projects covered by a particular categorical exemption.' " (*Wollmer, supra*, 193 Cal.App.4th at p. 1350.)

The trial court found that there were no unusual circumstances present here, because the proposed construction was "not so unusual for a single family residence, *particularly in this vicinity*, as to constitute . . . unusual circumstances . . . ." (Italics added.) Respondents likewise highlight evidence that 20 houses in the area, including five "immediately surrounding the property," range in size from 4,000 to 6,000 square feet. Again, however, whether a circumstance is unusual "is judged relative to the *typical* circumstances related to an otherwise *typically exempt project*," as opposed to the typical circumstances in one particular neighborhood. (*Santa Monica Chamber of Commerce v. City of Santa Monica*, *supra*, 101 Cal.App.4th at p. 801, second italics added; but see *Association for Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 736 (*Ukiah*) [size and height of house not unusual "in the vicinity"].) Reviewing de novo the question of whether the circumstance is " ' "unusual" ' " within the meaning of the significant effect exception (*Banker's Hill*, *supra*, 139 Cal.App.4th at p. 261, fn. 11), we conclude as a matter of law that the proposed construction, which would result in a 6,478 square-foot home with an attached 3,394 square-foot, 10-car garage, is "unusual" within

the meaning of the applicable exception, because the circumstances of the project differ from the general circumstances of projects covered by the single-family residence exemption, and it is thus unusual when judged relative to the typical circumstances related to an otherwise typically exempt single-family residence. (*Wollmer, supra,* 193 Cal.App.4th at p. 1350; *Santa Monica Chamber of Commerce v. City of Santa Monica, supra,* 101 Cal.App.4th at p. 801.)

2. Fair argument of significant effect on the environment

We next inquire whether there is a reasonable possibility that the proposed construction will have a significant effect on the environment due to the unusual circumstance of its size. (*Banker's Hill, supra,* 139 Cal.App.4th at p. 278.) We agree with the trial court that Karp's letters submitted to the City Counsel amounted to substantial evidence of a fair argument that the proposed construction would result in significant environmental impacts.

As set forth above, Karp opined that the proposed construction would (1) require the excavation of all vegetation and extensive trucking of earthwork in order to achieve grading, (2) result in steepening of the already existing steep slope, (3) necessitate 27-foot retaining walls, and (4) impact the environment because of the probability of "seismic lurching of the oversteepened side-hill fills" in a landslide hazard zone. These were certainly potential "direct physical change[s] in the environment," which justified Karp's opinion that the construction would result in a significant impact to the environment. (Guidelines, § 15378, subd. (a) [definition of "project"]; see also *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 277-278, fn. 16.) Stated differently, Karp's opinion provided substantial evidence upon which it could be fairly argued that the proposed construction may have significant environmental impact. (*Sierra Club v. County of Sonoma, supra,* 6 Cal.App.4th at p. 1316.)

Two engineers opined that Karp's conclusion that geotechnical issues were present at the site was based on a misreading of the relevant plans, and the director of the City's planning and development department likewise concluded that the site was suitable for the proposed dwelling from a geotechnical standpoint, and that no landslide risk was

present at the site. However, where there is substantial evidence of a significant environmental impact, "*contrary evidence is not adequate* to support a decision to dispense with an EIR. [Citations.] Section 21151 creates a low threshold requirement for initial preparation and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted. [Citations.] For example, *if there is a disagreement among experts* over the significance of an effect, *the agency is to treat the effect as significant and prepare an EIR*. [Citations.]" (*Sierra Club v. County of Sonoma*, *supra*, 6 Cal.App.4th at pp. 1316-1317, italics added; see also Guidelines, § 15064, subd. (g) [where there is disagreement in marginal case over significance of environmental effect, lead agency shall treat effect as significant and prepare EIR].)

Ukiah, *supra*, 2 Cal.App.4th 720, upon which respondents rely, is distinguishable. In *Ukiah*, an environmental association challenged the construction of a single residence on the last undeveloped lot in a single subdivision. (*Id.* at p. 724.) The court rejected appellant's argument that the unusual circumstances exception applied, concluding that "[n]either the size of the house (2,700 square feet), nor its height, nor its hillside site is so unusual in the vicinity as to constitute the type of unusual circumstance required to support application of this exception." (*Id.* at pp. 736.) The court emphasized that "[t]he potential environmental impacts which [appellant] posits seems to us to be *normal and common considerations in the construction of a single-family residence* and are in no way due to 'unusual circumstances.' " (*Ibid.*, italics added.) Here, by contrast, we do not consider the potential massive grading and seismic lurching associated with the proposed construction to be "normal and common considerations" associated with the construction of a new home.

Because there was substantial evidence in the record to support a fair argument that the proposed construction will have a significant effect on the environment (Guidelines, § 15300.2, subd. (c)), the application of a categorical exemption was

inappropriate here, and the trial court erred in denying appellants' petition for a writ of mandate.[11]

III.
DISPOSITION

Appellants' request for judicial notice is granted. The judgment is reversed, and the trial court is ordered to issue a writ of mandate directing the City to set aside the approval of use permits and its finding of a categorical exemption, and to order the preparation of an EIR. Appellants shall recover their costs on appeal.

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Sepulveda, J.

We concur:

_____
Ruvolo, P.J.

_____
Reardon, J.

[11] In light of our conclusion, we need not consider appellants' argument that the Board's adoption of a traffic management plan was a "mitigation measure[]" that precluded a finding of a categorical exemption. (*Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1108.)

Trial Court:	Alameda County Superior Court
Trial Judge:	Honorable Frank Roesch
Counsel for Appellants:	Susan Brandt-Hawley
Counsel for Respondents City of Berkeley and Real Parties in Interest City of Berkeley and City Council of City of Berkeley:	Zach Cowan, City Attorney, Laura McKinney, Deputy City Attorney
Counsel for Respondents and Real Parties in Interest Mitchell Kapor, Freada Kapor-Klein, and Donn Logan:	Myers, Nave, Riback, Silver & Wilson, Amrit S. Kulkarni, Julia L. Bond