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ALAMEDA COUNTY
DEC 30 2010
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

BERKELEY HILLSIDE PRESERVATION and SUSAN NUNES FADLEY, Petitioners, vs. CITY OF BERKELEY and CITY COUNCIL OF THE CITY OF BERKELEY, Respondents. DONN LOGAN, MITCHELL KAPOR, and FREADA KAPOR-KLEIN Real Parties in Interest.	Case No. RG10-517314 ORDER DENYING PETITION FOR WRIT OF MANDATE

The merits hearing of the Petition for Writ of Mandate came regularly before the Court on December 2, 2010, Judge Frank Roesch presiding. Susan Brandt Hawley, Esq. appeared for Petitioners Berkeley Hillside Preservation and Susan Nunes Fadley. Laura McKinney, Esq. appeared for Respondents City of Berkeley and the City Council of the City

of Berkeley. Amrit Kulkarni, Esq. appeared for Real Parties in Interest Donn Logan, Mitchell Kapor, and Freada Kapor-Klein.

The matter was argued and the Court took the matter under submission.

After careful consideration of the papers and pleadings filed in support and in opposition to the Petition including the Administrative Record and after consideration of the argument of counsel, the Court orders that the Petition is DENIED; the Court's reasoning follows.

SUMMARY OF FACTS

The subject of this case is a construction project of a single family residence proposed by the Real Parties in Interest to be built at 2707 Rose Street, Berkeley, California ("the Project") and the application of CEQA to the proposed construction. The proposed residence is a large house; it has a gross square foot area of 6,478 square feet. (1 AR 3.) The Project also includes a 10-car garage which was designed to address the absence of street parking and to take advantage of the building site's steep topography. (1 AR 29.) The Project also includes an unenclosed terrace area on a level below the two-story house and garage. (1 AR 36.) The proposed construction site is quite steep at approximately 50% grade at some points (see 1 AR 62 and 1 AR 34), and quite large for an urban lot at 29,714 square feet (1 AR 35), almost six times as large as the typical 5,000 square foot urban lot.

The construction of the Project will require the demolition and removal of an existing single family residence. The existing structure is slightly less than 2,500 square feet in size (1 AR 35) and is in a "dilapidated condition" (see 1 AR 29 and 1 AR 83). The existing

structure is a Craftsman-style home built in 1917-1918, and designed by an architect named Abraham Appleton for an opera singer named Lucia Dunham. (2 AR 446.)

The CEQA lead agency, Respondent City of Berkeley, determined that the Project is exempt from CEQA as a Class 3 categorical exemption and exempt from CEQA as a class 32 categorical exemption, and made findings to support both exemptions (see 1 AR 2), including a determination that none of the exemption exceptions apply.

The Project was opposed at the agency hearings by the Petitioners who argued, *inter alia,* that the Project should not have been determined to be exempt from CEQA review.

Following the City's approval of the Project, Petitioners filed this Petition asserting that the City's determination of the applicability of the categorical exemptions is not supported by substantial evidence. Petitioners further argue that, assuming that the categorical exemptions do apply, the Project is excepted from each of the exemptions for a variety of reasons. Petitioners have raised exceptions due to: (1) cumulative impacts; (2) significant effects due to unusual circumstances; and (3) historical resources. (Guidelines 18300.2(b), (c) & (f).)

DISCUSSION

I. STANDARDS OF REVIEW

A. Exemptions

While Petitioners' counsel made clear that the core of the Petition is based on the exceptions to the exemptions, the City's determination of the applicability of the two asserted exemptions was put at issue by Petitioners as well. It is settled that the standard of review of an agency's determination of the applicability of the two exemptions is measured

by the substantial evidence test. "[T]he substantial evidence test governs our review of the City's factual determination that a project falls within a categorical exemption." (*Fairbank v City of Mill Valley*, 75 Cal. App. 4th 1243, 1251 [citing Public Resources Code §21168, Code of Civil Procedure §1094.5, *inter alia*].)

B. Exceptions

The standard of review of the exceptions to the categorical exemptions (found at Guidelines 15300 *et seq.*) is a different matter, with the level of judicial review depending upon the specific language of the exception under consideration and the cases interpreting that language.

1. *Cumulative Impact Exception*

The cumulative impact exception is found at Guidelines 15300.2(b); it states: "[a]ll exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant." No case has been cited and the Court is unaware of any authority directly on point determining whether a "substantial evidence" standard or a "fair argument" standard is applied in the review of the administrative record in the determination of the applicability of the exception.

As CEQA should be interpreted to "'afford the fullest possible protection to the environment within the reasonable scope of the statutory language'" (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84), and as the language of the exception is not specific, the Court will apply the fair argument standard of review. That is, the Court will determine that the cumulative impact exception applies if there is substantial evidence to support a fair argument that, over time, the cumulative effects of the Project and of successive projects of

the same type in the same place is significant. And, like all exceptions to exemptions, the burden is on the proponents of the exception to produce the evidence to support the exception.

2. *Significant Effects Exception*

The significant effects exception is found at Guidelines 15302(c); it states: "[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." In the Court's review, there are two separate determinations to which different standards of review are applied. The first issue is whether or not there is a reasonable possibility that the activity will have a significant effect on the environment and the second is whether such reasonable possibility of significant effect is due to unusual circumstances associated with the project.

The first issue is reviewed under the fair argument standard. The agency's task in its consideration of this exception is to inquire whether the record contains credible evidence to support an argument that there may be a significant effect. This standard of review is founded on the language of the exception, *i.e.*, "may have a significant effect." (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 265.)

On the second issue, any 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."

(*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1207; see also *Bankers Hill, supra,* 139 Cal.App.4th at 261 n.11.)

3. *Historical Resources Exception*

The historical resources exception is found at Guidelines 15300.2(f); it states: "[a] categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource." The standard of review applicable to a determination whether the historical resources exception applies requires, like the significant effects exception, a two-step analysis.

The first step of the analysis is to determine if substantial evidence in the administrative record exists to support the agency's determination of the historicity of the resource asserted by the proponents of the applicability of the exception. (*Valley Advocates v. City of Fresno* (2008) 160 Cal. App. 4th 1039, 1067-1073.) If the agency has determined, based upon substantial evidence, that the asserted historical resource is lacking in historicity, that is the end of the analysis and the Court must rule that the exception does not apply.[1]

If, on the other hand, the agency determines that the asserted historical resource has sufficient historicity or there is insufficient evidence to support the agency's determination of lack of historicity, the analysis turns to the question of whether the proposed project "may cause a substantial adverse change in the significance of an historical resource." (Pub. Res.

[1] The earlier cases of *League for the Protection of Oakland's Architectural and Historical Resources v. City of Oakland* (1997) 52 Cal. App. 4th 896 and *Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal. App. 4th 1095, were distinguished by *Valley Advocates v. City of Fresno* (2008) 160 Cal. App. 4th 1039, which determined the general rule by an analysis of the legislative history of the statute under which Guideline 15300.2(f) was promulgated. The Court therefore finds *Valley Advocates*' analysis the more persuasive. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal. 2d 450, 454.)

Code §21084.1.) The analysis of this question is then made by application of the fair argument test. That is: is there sufficient evidence in the record to raise a fair argument that the proposed project may cause such a substantial adverse change? (*Valley Advocates, supra,* 160 Cal.App.4th at 1072.) Again, like the substantial effects exception, the "may" in the statute requires the agency to evaluate whether the project *may* cause the environmental impact and not whether, after evaluating competing evidence, it does or it does not.

II. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE CITY'S DETERMINATION THAT THE INFILL AND NEW CONSTRUCTION EXEMPTIONS APPLY

The City determined that no further CEQA review was necessary by finding that the "in-fill exemption" (Class 32 exemption) applies to the Project. (1 AR 2.) Guidelines section 15332 defines the in-fill exemption. To apply the exemption, the City must determine that the project satisfies the five elements stated in the Guidelines. Here, the Court finds that there exists substantial evidence in the administrative record to support each of the required elements, and that the exemption is properly applied. (See 1 AR 30-39, 1 AR 147-152 and 2 AR 463-468.)

The City also determined that no further CEQA review was necessary based upon a determination that the "New Construction" exemption (Class 3 exemption) applies to this project, finding that the Project is for the construction of a single family residence ("SFR"). (1 AR 2.) Guidelines section 15303 creates the categorical exemption for "new construction," providing the limitation that the number of structures described in the exemption may not exceed the "maximum allowable on any legal parcel." The Guideline

gives examples of projects that fall into this exemption, and in its subpart (a) identifies "single family residences," up to three of them, as being a project to which the "new construction" exemption applies. The Court finds that there is substantial evidence in the record to support the finding that the Project is a single family residence and that the exemption is properly applied. (1 AR 22.)

III. EXCEPTIONS TO THE EXEMPTIONS

A. Cumulative Impacts

The cumulative impacts exception requires a showing that "successive projects of the same type in the same place, over time is significant." While Petitioners argue in passing that the cumulative impacts exception should have been applied to the Project (Petitioners' Opening Brief ["POB"] at 8:23 and 10:20), Petitioners make no further mention of it in their briefing. The only reference of a factual nature to cumulative impacts of any kind is found in Petitioners' "Traffic Impacts" section of their opening brief. There, Petitioners refer to cumulative traffic impacts associated with construction relating to the reconstruction of Berryman Reservoir. The citation refers the reader to two pages in the administrative record, 2 AR 440 and 2 AR 444, which are part of the Addendum to the Appeal to the Zoning Appeals Board ("ZAB") submitted by Petitioner and six others. At page 3 of the Addendum (2 AR 440), the appeal document asserts the Berryman Reservoir demolition and construction will occur "roughly 1000 feet distant" (presumably "as the crow flies") from the Project site, and that both constructions will use the same access streets (Cedar or Eunice) to arrive at their respective construction sites. At page 7 of the Addendum, the authors assert that the neighborhoods overlooking the Berryman Reservoir will be affected

by noise, dust and traffic problems; and that a large residential addition project on Tamalpais Road is in the planning process.

The Court finds that the factual basis asserted by Petitioners is not substantial evidence to support a fair argument of the existence of a significant cumulative impact of successive projects of the same type in the same place. First, the testimony regarding traffic impacts is submitted by interested parties who are not traffic experts. While statements of non-experts can be considered substantial evidence if they are based upon relevant personal observations or involve nontechnical issues, in these circumstances the commenters could not be describing relevant personal observations -- the Berryman Reservoir project is described to begin in June 2010, and the Addendum to the ZAB Appeal was dated April 2010. (See *Bowman v. City of Berkeley* (2004) 122 Cal. App. 4th 572, 583.)

Second, the testimony does not explain why the two projects should be considered successive projects of the same type in the same place. Some explanation needs be made to explain why impacts would be cumulative, particularly when the project at issue is a single family house, while the Berryman Reservoir is apparently an entirely different type of project, located downhill, on a steep downslope, 1,000 feet away.

Third, the conclusions asserted by the testimony in the Addendum to the Appeal are not supported by any facts that are actually identified. That is, the statement that "the neighborhoods overlooking the [Berryman] project will be affected by noise, dust and traffic problems" is nothing more than a conclusion that is not supported by any identified facts.

Fourth, the reference to a "large project . . .in the planning process" on Tamalpais Road neither identifies the cumulative impacts to which the authors are referring, nor does it

provide a factual basis to support that such a "large project" will be a successive project of the same type given the fact that it is in the "planning process" and it cannot be said with any certainty that it will be approved or built.

B. Historical Resources Exception

Petitioners next argue that the Project would require demolition of an historical resource and that such demolition excepts the Project from the asserted exemptions, and compels further CEQA review. The Court finds that the historical resources exception does not apply herein because the City properly determined, based upon substantial evidence, that the structure to be demolished is of insufficient historicity.

There is substantial evidence in the record to support the City's determination that the existing structure is not an historical resource. First, the existing structure of (now) almost 2,500 square feet was originally constructed in 1917-18 as a 1,556 square foot house, later fully remodeled in the years of 1966 to 1974, and presently in a state of severe disrepair. (1 AR 30; 3 AR 612-613.) As the historical architect Mark Hulbert stated in his first report on the subject, "[w]hatever features the house may once have possessed are seriously dilapidated or gone; moreover the house is so structurally disintegrated and as a result, dangerous, that during its sale, visitors were forbidden from setting foot on the decks and through most of the house." (3 AR 613.) He further reported that "[a]s a result of the 1970's remodel and of the subsequent severe physical deterioration, the extant house does not even represent a genre of its time." (*Id.*) The City also relied on the additional evidence in the April 20, 2010 report of historical architect Mark Hulbert. (4 AR 1046-1060.) The conclusion in that report is that neither the original architect nor any occupant of the home

was of sufficient historical significance to establish the historicity of the building as an historical resource. (*Id.*) With these facts and expert opinions, the City had substantial evidence to support its determination that the existing building is not an historical resource. Thus, there is no need to evaluate whether the Project might cause a substantial adverse change affecting an historical resource.

C. Significant Effects Exception

1. Are There Consequences of the Project that May Have Significant Effects on the Environment?

Guidelines section 15300.2, subsection (c) provides that "[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." As discussed above, on the first prong of the inquiry, the Court must apply the fair argument standard to determine whether there is evidence that the Project may have significant environmental effects. (*Banker's Hill, supra,* 139 Cal.App.4th 249, 265.)

However, the assessment of the existence of a fair argument of a significant effect due to unusual circumstances is limited in two important respects. First, to the extent the "significant effects" at issue are effects on an historical resource, an agency's determination concerning historicity, or lack thereof, is subject to a more deferential review. As established by the *Valley Advocates* case, an agency's determination of whether a resource has historical significance is reviewed only to ascertain whether the agency had substantial evidence for such determination. (*Valley Advocates v. City of Fresno* (2008) 160 Cal. App. 4th 1039, 1067-1073.) While *Valley Advocates* determined the propriety of this standard of

review in connection with the historical resources exception found at Guidelines 15300.2(f) and PRC §21084.1, no different standard could logically apply when the historical resources impact is being considered as a "significant effect" rather than on its own. To do otherwise would effectively eliminate and supplant the 15300.2(f) exception. (See *Kern County Water Agency v. Watershed Enforcers* (2010) 185 Cal.App.4th 969, 980 [citing *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 249].)

Second, and in connection with exceptions to the in-fill exemption only, the nature of the exemption precludes review of certain effects under a fair argument standard. Because that particular exemption requires an agency to determine that approval "would not result" in a significant effect on traffic, noise, air quality or water quality, or be inconsistent with the City's plans and policies, the fair argument standard does not apply to those factors. (See Guidelines §15332(d); *Banker's Hill, supra,* 139 Cal.App.4th at 268-69.) The fair argument standard would, however, apply to environmental effects outside of that inquiry, such as geological impacts.[2]

In support of their argument that the significant effects exception applies (to both of the City's asserted categorical exemptions), Petitioners claim the existence of a fair

[2] The Court applies the fair argument standard under the significant effects exception to other categorical exemptions, even if the significant effects at issue are identical to those determined (under the substantial evidence standard) with respect to the in-fill exemption. (See *Banker's Hill, supra*, 139 Cal.App.4th at 281 ["In reaching this conclusion, we consciously apply a different standard than we applied in determining whether the elements of the urban in-fill exemption were met. Here, we ask whether the record contains any substantial evidence supporting a fair argument that the Project will have a significant effect on traffic."].)

argument of the following significant effects or impacts: (1) aesthetic impacts; (2) historic resources impacts; (3) traffic impacts; (3) general plan/zoning inconsistencies; and (4) geotechnical impacts. As the Court has already determined above, the City had substantial evidence to support its finding that the in-fill exemption applied. Thus Petitioners' arguments concerning traffic impacts and inconsistency with the General Plan need not be further addressed with regard to the in-fill exemption, but must still be addressed with respect to the New Construction/SFR exemption. The Court addresses the asserted significant effects in turn.

a. Aesthetic impacts

The Court's review of the evidence asserted by Petitioners (POB at 12-15) leads to the determination that there is no substantial evidence to support a fair argument of significant aesthetic impact. The first piece of evidence to which the Court is directed (POB 12:3-8) expresses what Petitioners assert is an "expert opinion" on aesthetics. This opinion states that the project is a "huge monolith looming over the existing ridge line." (1 AR 72.) One might be able to grant more credence to the opinion if it were not absolutely clear that the Project will not be built on a ridgeline and that there does not appear to be a ridgeline anywhere near the Project. (See, e.g., 1 AR 173.) Further, a review of the complete testimony of the "expert" leads one to the inescapable conclusion that the expert owns property somewhere near the Project and is primarily concerned that his property values will diminish because of an impact on his private views.

The next piece of evidence from the record (cited at POB 12:10-13) does not identify any *public* view and is primarily directed at the concept that the Project is an SFR

that is out of scale with its neighbors. (1 AR 95.) The commenter also seems to not have made a careful inspection of the Project; she mistakenly understands that the driveway to the Project's garage will be from Shasta Road (1 AR 95) while the Project plans clearly show that such access is from Rose Street. The next cited evidence of aesthetic impact (POB 12:14-20) makes no mention of any public viewscape but simply asserts, like the prior commenter, that the Project is too big for the neighborhood.

The next testimony to which the Court is directed (POB 12:22-13:7) states that the project will impact *her* view, but provides no facts to support that conclusion, and gives no indication of what view she believes is "her view." This commenter then goes on to list several grounds for opposing the project, all of which relate to the architectural style of the Project and its size.

None of the other evidence identified by Petitioner's counsel identifies any public view that could possibly be impacted. Like the situation found in the case of *Bowman v. City of Berkeley* (2004) 122 Cal. App. 4th 572, there is no substantial evidence in the record to support a fair argument of an aesthetic impact.

b. Historic Resources Impacts

As discussed above, the City made a determination, supported by substantial evidence, that the existing structure at the project site is of no historical significance. This determination eliminates the applicability of the exception codified at Guidelines 15300.2(f) and PRC §21084.1. Likewise, this determination eliminates consideration of impact on historical resources as a part of the significant effects exception.

c. Traffic Impacts

Although the City determined, based upon substantial evidence, that the Project will not cause any significant traffic impact, that finding is applicable only to the in-fill exemption and not to the New Construction/SFR exemption.

An examination of the evidence to which the Court was directed in Petitioners' brief reveals the following :

The first citation to evidence in the record from Petitioners (POB 18:7-11) cites a portion of the record that contains numerous conclusions by a non-expert which are neither supported by any factual basis or by any claimed observations by the commenter. (1 AR 88.)

The second comment cited (POB 18:12-15) does not identify any traffic impacts; it merely asks the City to "make sure that all necessary arrangements are made regarding the delivery...of construction related materials..." (1 AR 90.)

The remainder of the evidence cited by Petitioners (POB 18:24-20:23) is a series of comments by persons who are not traffic experts, stating conclusions about traffic impacts without any stated factual underpinning or basis in personal observation. Such evidence is not sufficient to support a fair argument that the Project will cause significant traffic impacts. (See *Bankers Hill, supra,* 139 Cal.App.4th at 274.)

d. General Plan/Zoning Inconsistencies

The City must find, as an element of the in-fill exemption, that the Project is consistent with the applicable General Plan and with city zoning laws; and they did so here with the requisite substantial evidence. Nonetheless, the court needs review if a fair

argument is raised of such inconsistencies in its evaluation with regard to the new construction exemption.

It is an interesting commentary that the very generalities of Berkeley's zoning policies, which provide the flexibility to allow the City to exercise discretion in governing well and making good land use decisions, also make it a simple matter to satisfy the low threshold of a fair argument that any particular construction project is inconsistent with those policies. The record here does contain evidence sufficient to support a fair argument of inconsistency with Berkeley's zoning policies. For example, Petitioners point to the assertions in the appeal letter which states:

> Policy UD-16 Context
> This policy states that "[t]he design and scale of new or remodeled buildings should respect the built environment in the area, particularly where the character of the built environment is largely defined by an aggregation of historically and architecturally significant buildings (emphasis added). The proposed building does not acknowledge in the slightest way the nature of its context.

(1 AR 205.) Even though the author is an interested party and non-expert, that assertion taken in context with the factual underpinning stated in the appeal document raises a fair argument of the possibility that the Project is inconsistent with Berkeley's zoning policies.[3]

e. Geotechnical impacts

Petitioners point to the opinion of Dr. Lawrence B. Karp, submitted in written form to the City (2 AR 448, 449 and 4 AR1089) for the proposition that there will be significant

[3] This finding of substantial evidence to support a fair argument applies only to exceptions to the new construction/SFR exemption, not the in-fill exemption. The Court is limited to a review of whether the City had substantial evidence to support its finding of no inconsistency with the General Plan and local zoning with respect to the in-fill exemption. (*Banker's Hill, supra,* 139 Cal.App.4th at 268-69.)

environmental effects due to geotechnical and seismic issues. Dr. Karp is an architect and a geotechnical engineer. Dr. Karp provided an opinion that the Project is "likely to have ... environmental impacts... due to the probability of seismic lurching of the over-steepened side-hill fills." (2 AR 449.)

The Respondents acknowledge Dr. Karp's expertise but assert that his conclusion is "not based on fact, is clearly erroneous, and misleading." Despite Respondents' criticisms of the report and Dr. Karp's methodology, and even when discounting the clearly erroneous and misleading portions, Dr. Karp's opinion provides substantial evidence of fair argument of a significant environmental impact consequent to the Project.

2. *Are the Possible Significant Effects Due to Unusual Circumstances?*

Because there is a fair argument of the possibility of significant environmental impacts, the Court's analysis turns to the question of whether the possible significant impact is "due to unusual circumstances." (Guidelines § 15300.2(c).) The Court reviews the facts *de novo* to determine whether the Project presents "unusual circumstances." That is: Do the circumstances of this project "differ from the general circumstances of the projects covered by a particular categorical exemption" [here the in-fill exemption and the New Construction/SFR exemption] and then do those "circumstances create an environmental risk that does not exist for the general class of exempt projects[?]" (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1207.)

Here, the Court cannot find unusual circumstances. Though the Project involves a large house, built in the hills on a steep slope, there is nothing so out of the ordinary about such a project that it would take it out of the exemption. Moreover, there is no evidence to support a finding by the Court that any of the circumstances surrounding the Project make it "unusual." Rather, the facts in this case are strikingly similar to the facts found in *Association for Protection of Environmental Values in Ukiah v. City of Ukiah,* (1991) 2 Cal. App. 4th 720, where neighbors of a proposed SFR project opposed its construction for reasons very similar to those found here. In that case, the Court stated "[n]either the size of the house (2,700 square feet) [on an 8,840 square foot lot], nor its height, nor its hillside site is so unusual in the vicinity as to constitute the type of unusual circumstances required to support application of this exception." (*Association for Protection of Environmental Values in Ukiah* 2 Cal. App. 4th at 736.) The same is apparent here: though it is a large house proposed to be built on a large and steep hillside lot with grading and retaining walls, the Project is not so unusual for a single family residence, particularly in this vicinity, as to constitute the type of unusual circumstances required to support application of this exception.

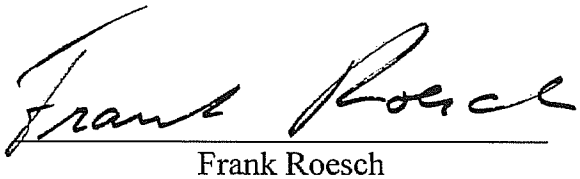
Petitioners also argue that the City established conditions for approval of the Project, including a construction noise manager, a construction management traffic plan, drainage and erosion control plans, soils report, arborist report, limited hours of work and of use of pneumatic tools and heavy machinery, watering active construction areas, shielding exterior lighting, and establishing drainage patterns. (1 AR 163-68.) However, the evidence indicates that these conditions are typical of conditions imposed by the City on approval of

projects in the Berkeley hills. (2 AR 465-466.) Nothing about these conditions indicates that there are unusual circumstances, or that the City is trying to use mitigations of environmental effects to avoid an exception to the chosen categorical exemptions.

CONCLUSION

For the foregoing reasons, the Petition is DENIED. Respondents and Real Parties in Interest shall present a form of judgment of dismissal to the Court for its review and execution.

Date: December 30, 2010



Frank Roesch
Judge of the Superior Court