Joshua B. Kardon + Co

Structural Engineers
2634 Grant Street
Berkeley, CA 94703
Phone 510 548-1892
Fax 510 548-1895
www.jbkse.com

June 17, 2015

Berkeley Architectural Heritage Association
2318 Durant Avenue
Berkeley, CA 94704

Attention: Leila H. Moncharsh, Esq.

Subject: Berkeley Hills Preservation Case
Supreme Court Opinion re: Engineering

Dear Ms. Moncharsh:

I was dismayed upon learning that the Supreme Court had denied Berkeley Hills Preservation's request for a re-hearing, which request had included engineering issues with which I have familiarity. I had read and agreed with your *amicus curiae* letter filed on April 21, 2015 (**Reference A**) as well as the rehearing request itself which included reports.[1] Having been a civil and structural engineer practicing in the Berkeley Hills for 40 years, I have designed numerous residential buildings and retaining wall projects along the Hayward fault. Always interested in Berkeley houses, particularly those in the unique Maybeck and Greenwood Common areas, when Dr. Karp took the assignment from Susan Nunes (Mrs. Chuck Fadley) of critiquing the Marcy Wong Donn Logan design for the 2707 Rose project, I discussed with him the drawings the City of Berkeley Planning Department had provided him on April 15, 2010 (AR 0449, ¶1). He had asked me what I knew about the La Loma Viaduct, so I was interested in viewing City records about the Viaduct. No documents concerning the construction of the Viaduct were in the 2707 Rose record, although they should have been, but they were in other City files.[2]

As Karp noted on April 18, 2010 (AR 0449, ¶3), the Planning Department provided him with copies of stamped and signed drawings for the project (stamping and signing drawings are statutory requirements of the Business & Professions Code for both architects and engineers) that they had in their file (which drawings were properly used in the letter-reports he wrote to the City of Berkeley) (**Reference C**).

On April 16, 2010 Karp wrote a letter-report to City Planning for the purpose of pointing out to the Planning Department, which has no engineers on its staff, that the 2707 Rose site was in a very difficult geotechnical engineering environment (AR 0448). He wrote that there should have been a geotechnical report for the project in the Planning file. That report would have informed the Zoning Adjustment Board (ZAB) about potential environmental impact. The hillsides along the Hayward fault are mapped by the State as seismic landslide hazard areas (**Reference D**), lurching of sidehill fills is a concern of the State, and reports are always required for projects in all seismic hazard areas mapped by the State. Despite the absence of a geotechnical report, the project had been approved on January 28, 2010 as being categorically exempt from environmental review under CEQA. Geotechnical input is required regardless of CEQA.

(continued)

Furthermore, the drawings in fact do show sidehill fills which are prohibited in seismic landslide hazard areas. Sidehill fills were shown in a general section on Sheet 14 which illustrates the situation best for lay viewers, and on the grading plan which included two specific sections shown on Sheet 16 which, with slope inclinations, illustrates the situation best for technical viewers such as Karp as cited in his letter-report of April 18, 2010 (AR 0449, ¶3). Both Sheet 14 and Sheet 16 appear many times in the administrative record. From the text of Karp's initial April 16, 2010 letter-report, I conclude the purpose of his writing was not to defeat the project, but was to point out that a geotechnical report was needed. On April 18, 2010 Karp wrote his second letter-report after being provided with a geotechnical report that was generated by the office of Alan Kropp & Associates, authored by Jim Lott (AR 0653-0691)[3], but withheld until that time by the architects who had commissioned the report. The geotechnical report was provided after the April 16, 2010 letter-report. It was not in the Planning Department's file and therefore not part of the project documents or discussion before the ZAB on January 28, 2010, a very important fact that was mostly overlooked. The report pointed out seismic landslide hazards at the site were mapped by the State and the report, filing delayed with the City until after project approval, contained stringent grading recommendations that were not incorporated into the plans.

Ms. Nunes (Mrs. Chuck Fadley) appealed ZAB approval of the project to the City Council and the appeal was opposed by the owner who presented a April 21, 2010 letter prepared by Jim Toby that objected to Karp and his reports by denigrating Karp and discounting Karp's engineering judgment.[4] After the April 27, 2010 hearing and losing the appeal, Berkeley Hills Preservation sued the owner and the City. Eventually there was an appellate court decision that an Environmental Impact Report was required for the project.

The objective of the Berkeley Hills Preservation case was to have the owner prepare an EIR to inform the neighborhood of environmental concerns. An EIR would address all environmental issues including the stability of the more than 50 year old La Loma Viaduct. The owner and the City then appealed the decision to the Supreme Court. Because the issue of environmental impact hinged on engineering opinion that there were geotechnical and structural issues that had not been addressed in the City's project approval process but should and would be addressed in an EIR, in their pleadings the respondents/parties in interest attacked the Karp letter-reports principally based on, with quotes, the negligent and incompetent statements contained in the April 21, 2010 letter by Jim Toby (which the lawyers had commissioned)[5]. By their reckoning, Sheet 14, which conveniently had not been retroactively labeled "approved" after the appeal hearing, was not approved and no other drawing (called "Plan" in the pleadings) showed any grading as quoted from the Jim Toby letter.[6] As noted previously, the project's Sheet 16 was attached and described in detail in the April 18, 2010 Karp letter-report (AR 0450, ¶3) which Jim Toby denied showed sidehill fills (although it does).

(continued)

In the administrative record prepared by the City, Sheet 14 only appeared in about half of the sets of drawings in the record and in the first set of drawings in the record Sheet 14 had been labeled "approved" but Sheet 16 had not been labeled, obviously after the night hearing of January 28, 2010. All sets in the administrative record, complete or incomplete, were prefaced with a list that included Sheets 14 and 16. From a study of the administrative record it appears that in some sets Sheet 14's were selectively removed from the record after the April 27, 2010 appeal hearing, and in one set (that the City Council used in the appeal of ZAB approval) Sheet 16 had been removed before the hearing. None of the drawings that were used in the hearing were labeled "approved" meaning the labels were added to the drawings (without Sheet 14 but with Sheet 16) after the hearing.[7]

Berkeley Hills Preservation's briefs did not argue against the attacks on Karp and his engineering, and there was no opportunity (until a request for rehearing) to answer the last minute contention[8] that Sheet 14 had "not been approved". Unfortunately, the Supreme Court copied the respondents/parties in interest's arguments into their opinion[9] without recognizing (I) the administrative record provided by the project conditions of approval and City of Berkeley ordinance that all documents submitted were approved by the City and (II) that Sheet 14 (general) and/or Sheet 16 (specific) attached to the Karp letter-reports illustrate the project included sidehill fills. At time of approval (January 28, 2010) ZAB had no geotechnical information e.g. the site is located on the State's seismic landslide hazard map which precludes sidehill fills due to potential seismic lurching as noted in the Karp letter-reports (and the Kropp report) all only made available to the City after project approval.

The opinion also did not include references to the Conditions of Approval for the project based on City of Berkeley Ordinance §23B.56.030 (AR 0008 & 0767) which provides that project approval means approval of everything (all parts to the project in the record) for that project were approved unless specifically excluded at the ZAB hearing (References A & F). The ordinance was enacted for the specific purpose of defeating the removal of documents from the record by a party or lobby in order to avoid compliance with submittals and conditions of approvals. The ordinance contains no requirements for retroactively labeling drawings "approved" or any exceptions to the ordinance due to a lack of labels affixed after-the-fact on documents.

The Karp letter-reports, although not prepared for that purpose (they were prepared to inform City Planning about the lack of a geotechnical information about a steep and difficult site in the Hayward fault zone) were the evidence Berkeley Hills Preservation had of potential environmental impact due to geotechnical issues concerning the building of fill slopes along the Hayward fault. Therefore, as quoted in the Supreme Court opinion, Karp's credibility as to reading the architectural drawings and opining about geotechnical engineering rested on the "expert" the lawyers for the owner had hired. Jim Toby, hired and directed by the lawyers, wrote the Mayor of Berkeley to denigrate Karp and discount Karp's engineering judgment (AR 1064-1067). When I read Jim Toby's letter of April 21, 2010, I found, as an engineer practicing in Berkeley, with review of the Karp letter-reports and knowledge of the technical issues, that most of Jim Toby's statements were untrue or were demonstrative of incompetent engineering both for the purpose of defeating Berkeley Hills Preservation's case for an EIR and simultaneously injuring their engineer.

(continued)

In my 40 years as a practicing engineer in Berkeley and after reviewing Jim Toby's letter I can state: (1) Until this matter, I had never heard of Jim Toby; (2) I can find no information that Jim Toby has ever worked on Berkeley projects as he claims; (3) Jim Toby gave opinions as to issues under the purview of architects and geotechnical engineers without being licensed as either where Karp is licensed in California as both; (4) Jim Toby's statements that he reviewed a full set of drawings and did not find any evidence of sidehill fills are not supported by the documents because (A) Sheet 14 shows a sidehill fill in one general (not located on a plan) architectural-type transverse section; and (B) Sheet 16 shows sidehill fills on the engineering-type grading plan and sidehill fills at specific locations (located on a plan) in two engineering-type sections[10]; (5) Jim Toby's letter gave the lawyers who hired him the basis for contending that Karp had been working on another project than that intended for 2707 Rose in the Supreme Court case up to and including the last filing with the Supreme Court[11]; and (6) Jim Toby gave no information in his letter about the La Loma Viaduct above the intended building site (a very important environmental issue that would be addressed in an EIR) or the oversteepened slopes down to the existing retaining wall on Shasta Road, nor did he demonstrate any knowledge of the seismic design requirements for retaining walls and garage walls along the Hayward fault.[12]

On Friday June 5, 2015, commencing at about 7:30 am, I was in a meeting with Alan Kropp at his office in Berkeley. I have known Al Kropp for more than 30 years and have worked on projects with him, all with satisfactory results. Upon looking at the Grading Plan and Sections 1 and 3 on Sheet 16 of the 2707 Rose Street plans, Kropp said when asked: "I believe those are sidehill fills." He indicated he had never seen Sheet 16 before. When asked about Jim Toby, Kropp said he had never heard of Jim Toby. When asked if his office had worked with Jim Toby, Kropp said no, and again he said he had never heard of Jim Toby. These facts, added to the engineering statements in the Jim Toby letter of April 21, 2010, suggest that Jim Toby was manipulated by lawyers to improperly denigrate Karp and misrepresent engineering issues. Jim Toby's actions were deliberately vehement; he even underlined some of his inaccurate statements. Furthermore, Jim Toby allowed his acts to eventually lead to a Supreme Court opinion that included engineering based on his incompetent letter, instead of the actual facts concerning the project, as they existed when he wrote his letter.

Very truly yours,

Joshua B. Kardon PhD, F.ASCE

(continued)

REFERENCES

A. BAHA *amicus curiae* letter filed with the Supreme Court, April 21, 2015.

B. "La Loma Improvement - Bridge Sections", City of Berkeley, drawn September 30, 1960.

C. Letter-reports of April 16, 2010 and April 18, 2010 by Karp with project Sheets 14-15-16.

D. State of California February 14, 2003 "Seismic Hazard Zones [Zones of Areas of Potential Liquefaction and Earthquake Induced Landslides", map of Richmond Quadrangle.

E. Excerpts from Respondents and Real Parties in Interest opening brief, July 19, 2012.

F. Milford Wayne Donaldson FAIA *amicus curiae* letter to the Supreme Court, April 15, 2015.

G. Jim Toby letter re: Kapor-Klein Residence to Mayor of Berkeley, April 21, 2010.

H. Excerpts from Respondents and Real Parties in Interest reply brief, December 13, 2012.

I. Excerpts from the Supreme Court opinion, S201118, March 2, 2015.

J. Sheet 16 annotated to describe in words the graphics shown in plan and sections.

K. Letter to the Supreme Court opposing petition for rehearing, filed by Julia Bond April 30, 2015.

END NOTES

1. The undersigned, awaiting an appropriate forum, intended to write an amicus letter to the court to practically and technically support the content of the Karp letter-reports and verify the City ordinance that project approval means approval of all submittals unless specifically excluded, seismicity, and pointing out the hazard from the La Loma Viaduct, however Chuck Fadley called me and expressed his concerns about Ms. Fadley being billed for professional engineering services. Business & Professions Code §6749 prohibits a professional engineer from charging for services without a written contract. Furthermore, although I have been familiar with the 2707 Rose project for more than 5 years, I have never provided anyone with a proposed contract by me for professional engineering services for any part of the project.

2. The La Loma Viaduct was constructed in the early 1960s to elevate La Loma Avenue over the former intersection of Rose Street and La Loma Avenue (Rose Street still runs under the overpass along the upper property line of 2707 Rose. Before failing in the 1950s, the roadway intersection had been supported by stone retaining walls, parts of which can still be seen under the overpass where Rose Street now dead-ends. Review of drawings for the viaduct show that the foundations for the columns south of the intended 2707 Rose project are, considering the very steep slope between La Loma and Shasta Road, relatively shallow; Sheet 3470/501-148, Sheet 10 of 17, September 30, 1960 (**Reference B**) shows the column foundations are only about 8 feet deep where rock slope is shown as steep as 45° (100% grade). The concrete design codes under which the viaduct was built have been obsolete since ACI 318-63 became effective, more than 50 years ago. The influence of the planned excavation into the slope of 2707 Rose upon the stability of the viaduct, which is in the Hayward fault zone, was not included in any environmental review and it has not been investigated. In his April 16, 2010 letter-report to the City of Berkeley (AR 0448) Karp noted "Rose Steps and the concrete of the elevated part of La Loma are cracked from fault creep and other ground movement."

3. The Kropp office also generated a defensive supplemental letter addressed to the architects on April 21, 2010 (AR 1061-1062) however Alan Kropp himself was absent; the signature was by rubber stamp and the letter contained quotations from the Karp letter-reports that were not in the Karp letter-reports, not something that Kropp would do, and the notations about Sheets 14 and 16 were not actually taken from the drawings rather those criticisms of the Karp letter-reports were apparently given to the typist because they are technically incorrect which also is not something Kropp would do. Apparently, as the 7/31/09 Kropp report and the April 16, 2010 Karp letter-report both noted that the State maps show the area is located in a seismic landslide hazard area, the lawyers for the owner noted there was no disagreement between experts (about "lurching") which was true, however the lawyers then stated "Thus, because the Project did not call for side-hill fill, none of the concerns raised by Mr. Karp applied to the project proposed for approval." (**Reference E**, page 65 ¶2) which was patently false but that argument has been used by the authors ever since (e.g. Reference K, objections to re-hearing) and the argument was actually adopted by the Supreme Court (Reference I). As Karp stated in his April 18, 2010 letter-report, which Jim Toby denied without basis a few days later, ***"As noted in my letter-report of 4/16/10, the plans (11/12/09) approved by the ZAB (1/28/10) depict portions of the major fill for the project (Sheet 16 attached) to be placed on an existing slope inclined at about 42° (~1.1h:1v) to create a new fill slope more than 50° (~0.8h:1v)."*** (AR 0449, ¶3).

4. Jim Toby (not a licensed architect or geotechnical engineer) implied that Karp (a licensed architect and geotechnical engineer) did not know how to read architectural drawings. A well known independent architect lodged a letter with the supreme court that verified that Sheet 16 showed sidehill fills (**Reference F**). Additionally, as noted covered on the last paragraph of this correspondence, Alan Kropp told me personally in a discussion about Sheet 16 that it showed sidehill fills. Mr. Kropp stated that he had not seen the drawing before nor had he ever heard of Jim Toby let alone ever worked with Jim Toby on any of the many projects that Jim Toby had stated they had worked on together in his letter to the Mayor. My own review of the referenced sheets convince me that there is indeed sidehill fill depicted, and that Karp is correct in his conclusion that keying, benching, and drainage is required in the construction of that fill.

5. Jim Toby's letter (AR 1064-1067) of April 21, 2010, (**Reference G**), contains false statements (Toby writes, "Their plans do not show grading beyond the footprint of the new improvements"), and negligent and incompetent engineering (Toby writes, "He is concerned that the report does not address fills on slopes greater than 2:1. In fact no new slopes greater than 2:1 are proposed." That is not the point: Fills placed on slopes without keying and benching – which are the conditions depicted on the drawings – is very different from new fill slopes that are keyed and benched.

6. Respondents and Real Parties briefs (Reference E, pages 66-67 & Reference H, pages 33-35).

7. For the appeal, on April 19, 2010 the architects provided the City Council with 16 sets of drawings that included Sheet 14 but not Sheet 16 (AR 0407-0424). Jim Toby's letter of April 21, 2010 generally refers to all drawings but specifically points to Sheets 14 and 16 meaning that Sheet 14 was removed from the administrative record after the January 28, 2010 ZAB hearing and approval of all submittals.

8. Excerpts from Brief "Respondents and Real Parties in Interest - Reply Brief on the Merits" prepared for the Supreme Court of California by Meyers, Nave, Riback, Silver & Wilson with the attorneys for the City of Berkeley, December 13, 2012 (**Reference H**).

9. Excerpts from Opinion for S201116. filed March 2, 2015 (**Reference I**).

10. As the Karp letter-report of April 18, 2010 (i.e. AR 0450, ¶3) was not understood by the Supreme Court, having been obfuscated by the repeating of Jim Toby's vehement statements that no sidehill fills were shown on the architectural drawings (to the contrary, as opined to the Supreme Court by a well known architect (Reference F), Sheet 16 has also been annotated by others on a reproduction of Sheet 16 to describe with notes the engineering information shown graphically on the drawing (**Reference J**).

11. "Joint Letter in Opposition to Amicus Curiae Letters in Support of Petition for Rehearing", from Julia L. Bond counsel for Respondents and Real Parties in Interest, filed April 30, 2015 (**Reference K**).

12. Structural Engineers Association of California (SEAOC), October 2013; "Seismically Induced Lateral Earth Pressures on Retaining Structures and Basement Walls" SEAOC Blue Book Article 09.10.010, 24 pages.

Reference A

LAW OFFICES
VENERUSO & MONCHARSH
5707 REDWOOD RD., STE 10
OAKLAND, CALIFORNIA 94619
TELEPHONE (510) 482-0390
FACSIMILE (510) 482-0391

DONNA M. VENERUSO (d.'09)
LEILA H. MONCHARSH

April 21, 2015

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

Re: Petition for Rehearing
Berkeley Hillside Preservation v. City of Berkeley, S201116

Dear Honorable Justices:

Amicus curiae Berkeley Architectural Heritage Association (BAHA) supports rehearing. BAHA is Berkeley's nonprofit preservation organization, incorporated in 1974. Its purpose is to encourage preservation of Berkeley's rich architectural heritage — of which the unique historic environs of Rose Street are an important part. As pointed out in BAHA's amicus brief filed in this Court in 2013, "the immediate neighborhood is an architectural treasure trove ..." (AR 323, BAHA Amicus Brief, pp. 10-11.)

BAHA's amicus brief was prompted by concerns about the 10,000 square-foot Kapor project proposed on a steep hillside in the Hayward fault zone. Claiming categorical exemption from CEQA, the city neither studied nor mitigated the environmental impacts of construction of a 10-car underground garage downslope of the La Loma overpass. The concrete overpass is over fifty years old, weakened from fault creep and other ground movement. The Kapor project requires large-scale excavation that may undermine the overpass and also threatens historic neighboring properties due to seismic lurching. (BAHA Amicus Brief, *passim*.) Those issues warrant CEQA analysis and mitigation, as do the project's aesthetic impacts and inconsistencies with the Berkeley General Plan. The trial court acknowledged evidence of significant geotechnical impacts as well as failure to comply with the city's mandate that projects in the architecturally significant, historic neighborhood be compatible in "design and scale."

BAHA supports rehearing to adopt the reasoning of the Concurring Opinion and the Petition for Rehearing: the significant effects exception to categorical exemptions should be one-step. BAHA also agrees with appellants that as a matter of law the record supports a fair argument of significant environmental impacts, and asks that the Court so find.

BAHA writes, in particular, to address the substantial geotechnical evidence in the administrative record. The Court's ruling that the evidence did not address the "approved project" is unsupported by the record and is also inconsistent with architectural practices familiar to BAHA members.

The Kapor project is a 10,000 square-foot structure proposed on Rose Street next to and lower than the La Loma overpass. The scope of environmental impacts of the hillside excavation required to build it are disputed, as is compliance with CEQA. As to project conditions of approval relevant to the dispute, Section 23B.56.030 of the Berkeley Municipal Code entitled "***Plans and Representations Become Conditions***" provides that:

> **Unless otherwise specified or required by the Zoning Officer, Board or Council, the site plan, floor plans, building elevations and/or any additional information or representations, whether oral or written, indicating the proposed structure or manner of operation submitted with an application or submitted during the approval process shall be deemed conditions of approval.**

This language is repeated in the Kapor project's "findings and conditions":

> **5. Plans and Representations Become Conditions (Section 23B.56.030)** Except as expressly specified herein, the site plan, floor plans, building elevations and any additional information or representations submitted by the applicant during the Staff review and public hearing process leading to the approval of this Permit, whether oral or written, which indicated the proposed structure or manner of operation are deemed conditions of approval.

(AR 8, attached; *see also* Petition for Rehearing, pp. 22-23.)

BAHA understands that the city's briefs in this Court have focused on Sheet 14 of the sequentially-numbered project plans. Sheet 14, which generally shows the "transverse section" of the house (shown more specifically on Sheet 16), is inexplicably missing from *some* copies of stamped architectural plans in the record, although all sheets are intact in other copies. (*E.g.*, AR 423, 450, 640, 727, 1082.) BAHA notes also that Sheet 14 is listed as part of the complete plan sets on each and every set's index page, including all plan sets from which Sheet 14 is missing:

DRAWING INDEX

1 VICINITY MAP / NEIGHBOR CONTRAST
2 SITE PLAN
3 LANDSCAPE PLAN
4 UPPER FLOOR PLAN
5 LOWER FLOOR PLAN
6 LANDSCAPE WEST ELEVATION
7 LANDSCAPE NORTH ELEVATION
8 LANDSCAPE EAST ELEVATION
9 LANDSCAPE SOUTH ELEVATION
10 WEST ELEVATION
11 NORTH ELEVATION
12 EAST ELEVATION
13 SOUTH ELEVATION
14 TRANSVERSE SECTION
15 TOPOGRAPHIC SURVEY
16 CONCEPTUAL GRADING PLAN
17 SHADOW STUDY - SUMMER SOLTICE - 2 HOURS AFTER SUNRISE
18 SHADOW STUDY - SUMMER SOLTICE - NOON
19 SHADOW STUDY - SUMMER SOLTICE - 2 HOUR BEFORE SUNSET
20 SHADOW STUDY - EQUINOX - 2 HOURS AFTER SUNRISE
21 SHADOW STUDY - EQUINOX - NOON
22 SHADOW STUDY - EQUINOX - 2 HOURS BEFORE SUNSET
23 SHADOW STUDY - WINTER SOLTICE - 2 HOURS AFTER SUNRISE
24 SHADOW STUDY - WINTER SOLTICE - NOON
25 SHADOW STUDY - WINTER SOLTICE - 2 HOUR BEFORE SUNSET
26 PREAPPLICATION PICTURES

(AR 14, 49, 170, 627, 714, and 1069 [attached].)

BAHA is unaware of any evidence that the city disapproved Sheet 14. It thus *is* part of the project conditions of approval. As noted above, the City Code requires a 'specification or requirement' by a city official in

order to amend project plans; the record contains none. There is also no evidence that the Kapors or their architects intentionally removed Sheet 14 from the sequential project plans. There is not a whisper anywhere that Sheet 14 is not part of the plan set. This is a fiction introduced in this Court.

The city's Answer to appellants' Petition for Rehearing concedes that it indeed raised the issue of the sometimes-missing Sheet 14 in this Court for the very first time. The city claims that it did so "in response to the Court of Appeal's erroneous holding that a disagreement over whether the project could be built as approved could constitute [evidence] of a significant environmental effect." (Answer to Petition for Rehearing, p. 8.) But this appears to be another fiction. The city's Petition for Review makes no mention of a missing Sheet 14. (*Ibid.*)[1] Contending that geotechnical engineer and architect Lawrence Karp misread the plans as to side-hill fills, the Petition simply disagrees with the Court of Appeal for ruling to the contrary that there is credible expert evidence of significant impacts:

> "...[L]etters submitted by Lawrence Karp 'amounted to substantial evidence of a fair argument that the proposed construction would result in significant environmental impacts.' (Opinion, p.18.) The Opinion held that where there is a disagreement among experts over the significance of an effect of the project, the agency is to treat the effect as significant. (Opinion, p. 19.)"

(City's Petition for Review, pp. 26-27.) The Court of Appeal never said that the Kapor project could not be built as approved; it noted credible expert evidence that the project if built would result in significant adverse impacts.

There is no dispute that Karp's opinions were based on site visits and review of all of the architectural plans (including but not limited to Sheets 14 and 16), culminating in his own section drawing over the project

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[1] While the Petition for Rehearing states that the city belatedly raised the "missing Sheet 14 issue" for the first time in its Petition for Review, it appears to BAHA that the city first raised the issue even later: in its Opening Brief in this Court.

architects' Sheet 10. Karp's section drawing and conclusions were further informed by his fifty years as a geotechnical engineer working in the Berkeley Hills.

The Majority Opinion confirms Karp's undisputed credentials and references his preparation of detailed reports based on his independent evaluation of the site and project. (Maj. Opn, pp. 5-7.) The Court also notes the city planning director's concession that "site-specific engineering" has not yet been done and will be required before building permits issue. (*Id.*, p. 6.) Yet this Court found Karp's opinion "insufficient as a matter of law insofar as it is based on the potential effect of *unapproved activities* Karp believes will be necessary because the project cannot be built as approved." (*Id.*, p. 43, italics added.) The Court's opinion *is not based on the facts*:

> "Karp relied largely, if not entirely, on a page of those plans entitled 'TRANSVERSE SECTION LOOKING EAST.' [SHEET 14.] In April 2010, during the appeal to the city council, Karp stated that this page 'indicates [that] fills [will be] placed directly on very steep existing slopes,' 'creat[ing] a new slope more than 50°.' However, the plans the Board had already approved three months earlier (along with the use permit) did not include this page. Nor, as appellants concede, do the project plans the city council ultimately approved include this page. [fn. omitted.] *Insofar as Karp thus based his opinion regarding the project's potential effects on side-hill fill that has not been approved*, his opinion is legally insufficient."

(Maj. Opn, p. 44, italics added.)

The fact that Sheet 14 is missing from *some* copied plan sets cannot make it go away, as there is no explanation in the record. Among the complete sets of project plans submitted to the city [with Sheet 14 included] was the 'Zoning Submittal' reprinted by the Kapor architects for the City Council appeal hearing. (AR 1068-1084; *see* attached AR 1068-69, 1082, 1084.) BAHA agrees with the Petition for Rehearing that the *un*disputed

Sheet 16 in the plan set also shows side hill fills, with a grading plan and in more detail than Sheet 14.

BAHA surmises that the city and the Kapors realized that Karp's investigation and professional opinions documented a classic 'dispute among experts' and amply supported a fair argument of significant environmental impacts, well-settled under decades of case law and the Guidelines. They belatedly constructed an argument that since Sheet 14 is not in every plan set, the 'approved project' does not include the problematic side-hill fills generally shown on that sheet. Unsurprisingly, appellants did not treat this untimely argument as relevant or compelling.

In a nutshell, this Court was misled by the Sheet 14 arguments. Karp did not address an "unapproved project." He analyzed the impacts of the *actual* 10,000 square foot project: a home and 10-car underground garage on a particular constrained site on Rose Street. In finding Karp's reports insufficient to raise a low-threshold fair argument of significant geotechnical impacts, the Court not only accepted the city's untimely and baseless arguments regarding Sheet 14 but ignored other ample expert evidence easily supporting a fair argument of significant environmental impact. The Court's discarding of such a level of substantial evidence is truly unprecedented in CEQA cases and if not corrected will lead to great uncertainty in the implementation of California environmental law.

BAHA requests that the Petition for Rehearing be granted, and that the Court find as a matter of law that the record well meets the fair argument standard as to geotechnical impacts as well as general plan inconsistencies and aesthetics. The judgment should be affirmed in full.

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Thank you for your consideration of rehearing.

Respectfully submitted,

Leila H. Moncharsh, State Bar No. 74800
Attorney for *Amicus Curiae*
Berkeley Architectural Heritage Association

LHM:lm

Attachment

BERKELEY MUNICIPAL CODE

A Codification of the General Ordinances of the City of Berkeley, California

CODE PUBLISHING COMPANY | Seattle, Washington

BMC General Information

Ordinances Pending Codification

The Berkeley Municipal Code is current through Ordinance 7397-NS, passed March 10, 2015.
Disclaimer: The City Clerk's Office has the official version of the Berkeley Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

City Website: http://www.cityofberkeley.info/Home.aspx (http://www.cityofberkeley.info/Home.aspx)
Telephone number: (510) 981-6900
Code Publishing Company (http://www.codepublishing.com/)

Chapter 23B.56

CONDITIONS APPLICABLE TO ALL PERMITS

Sections:

Section 23B.56.010 Uses Approved Deemed to Exclude Other Uses

A. Any approval permits only those uses and activities actually proposed in the application and excludes other uses and activities.

B. Unless otherwise specified therein, any approval terminates all other uses at the location subject to the approval. (Ord. 6478-NS § 4 (part), 1999)

Section 23B.56.020 Modification of Permits

A. No change in the use or structure for which a Permit has been issued is permitted unless the Permit is modified by the Zoning Officer or Board. Changes which require modification include, but are not limited to, the following:

1. Expanding the floor or land area devoted to the approved use or uses;

2. Expanding a customer service area and/or increase in the number of customer seats;

3. Changing a building's occupant load rating under the City's Building Code so that it is classified in a different category with a higher occupancy rating;

4. Increasing the number of employees, beds, rooms or entrances;

5. Establishing a new product line, service, function or activity so as to substantially change the character of the use;

6. Increasing the volume of production, storage or capacity of any business manufacturing process or activity;

7. Changing the type of alcohol sales and/or service; and

8. Any other change that expands, intensifies or otherwise substantially changes the use or building.

B. AUPs may be modified by the Zoning Officer but all other Permits may be modified only by the Board.

C. The Board may modify Permits which have not been exercised without a public hearing or may set the matter for a public hearing, in which case the procedures for Use Permits will apply.

D. Permits for construction of a building may not be modified after construction is complete. (Ord. 6478-NS § 4 (part), 1999)

Section 23B.56.030 Plans and Representations Become Conditions

Unless otherwise specified or required by the Zoning Officer, Board or Council, the site plan, floor plans, building elevations and/or any additional information or representations, whether oral or written, indicating the proposed structure or manner of operation submitted with an application or submitted during the approval process shall be deemed conditions of approval. (Ord. 6478-NS § 4 (part), 1999)

Section 23B.56.040 Subject to All City and Other Regulations

The approved use and/or construction is subject to, and shall comply with, all applicable City Ordinances and laws and regulations of other governmental agencies. (Ord. 6478-NS § 4 (part), 1999)

Section 23B.56.050 Required Guarantees

Any approval may be subject to requirements that the permittee guarantees, warranties or insures that the Permit's plans and/or conditions shall in all respects be complied with. (Ord. 6478-NS § 4 (part), 1999)

Section 23B.56.060 Periodic Review and Reporting

All approvals may be subject to periodic review to determine compliance with the requirements thereof and conditions attached thereto. If a condition specifies that activities or uses allowed under the Use Permit are subject to periodic reporting, monitoring or assessments, it shall be the responsibility of the permittee, the property owner or successor property owners to comply with such conditions. (Ord. 6478-NS § 4 (part), 1999)

Section 23B.56.070 Limited Duration of Time

Any approval may be subject to time limits. (Ord. 6478-NS § 4 (part), 1999)

Section 23B.56.080 Exercised Permit for Use Survives Vacancy of Property

Once a Permit for a use is exercised and the use is established, that use is legally recognized, even if the property becomes vacant. (Ord. 6478-NS § 4 (part), 1999)

Section 23B.56.090 Resubmittal of Same Use Permit Application

No application for any approval which has been denied may be resubmitted by the applicant for a period of one (1) year from such denial except on the grounds of new evidence or substantially changed conditions, or if the application was denied without prejudice. (Ord. 6478-NS § 4 (part), 1999)

C. If there are explicit conditions (#A) or implied conditions (#B) affected by the proposed modification, the project shall be brought back to the Board as a Use Permit Modification.

D. If there are no explicit conditions that would be affected by the proposed modification, and if Staff is not otherwise aware of implied conditions, and the project would otherwise meet the requirements of the Zoning Ordinance, Staff will approve the Building Permit without Board or public review.

5. **Plans and Representations Become Conditions** (Section 23B.56.030)
Except as expressly specified herein, the site plan, floor plans, building elevations and any additional information or representations submitted by the applicant during the Staff review and public hearing process leading to the approval of this Permit, whether oral or written, which indicated the proposed structure or manner of operation are deemed conditions of approval.

6. **Subject to all City and Other Regulations** (Section 23B.56.040)
The approved use and/or construction are subject to, and shall comply with, all applicable City Ordinances and laws and regulations of other governmental agencies.

7. **Exercised Permit for Use Survives Vacancy of Property** (Section 23B.56.080)
Once a Permit for a use is exercised and the use is established, that use is legally recognized, even if the property becomes vacant, except as set forth in Standard Condition #8 below.

8. **Exercise and Lapse of Permits** (Section 23B.56.100)

A. A permit for the use of a building or a property is exercised when, if required, a valid City business license has been issued, and the permitted use has commenced on the property.

B. A permit for the construction of a building or structure is deemed exercised when a valid City building permit, if required, is issued, and construction has lawfully commenced.

C. A permit may be declared lapsed and of no further force and effect if it is not exercised within one year of its issuance, except that permits for construction or alteration of structures or buildings may not be declared lapsed if the permittee has (1) applied for a building permit or (2) made substantial good faith efforts to obtain a building permit and begin construction, even if a building permit has not been issued and/or construction has not begun.

9. **Indemnification Agreement**
The applicant shall hold the City of Berkeley and its officers harmless in the event of any legal action related to the granting of this Permit, shall cooperate with the City in defense of such action, and shall indemnify the City for any award of damages or attorneys fees that may result.

ZONING SUBMITTAL
2707 ROSE STREET, BERKELEY, CA

Eye Level View from Shasta Rd

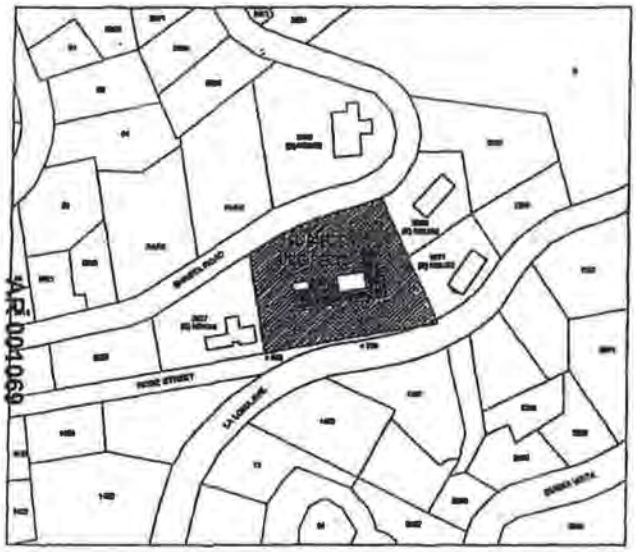
Bird's Eye View from Shasta Rd

MARCY WONG DONN LOGAN ARCHITECTS

MARCH 16, 2010

KAPOR KLEIN HOUSE
2707 ROSE STREET, BERKELEY, CA

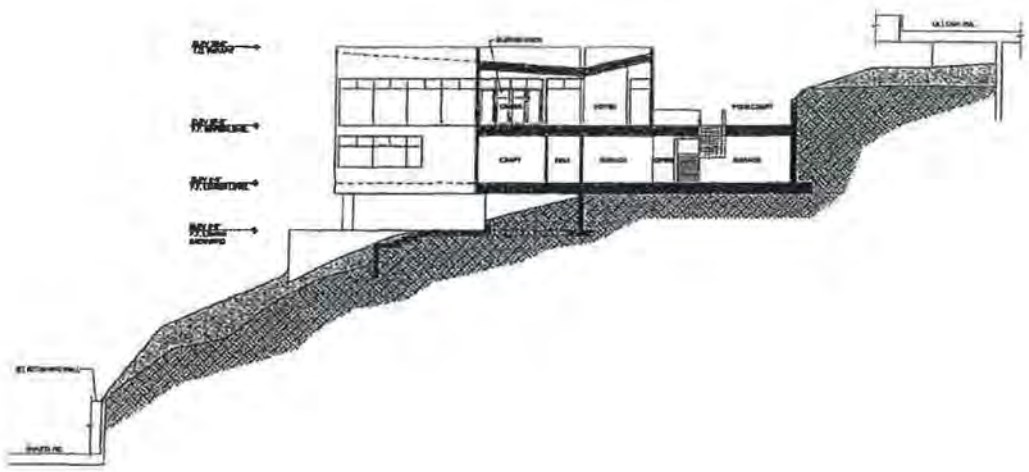
DRAWING INDEX



VICINITY MAP

DATA

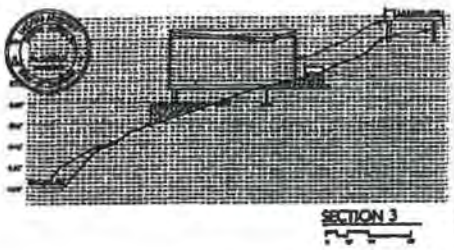
MARCY WONG DONN LOGAN ARCHITECTS



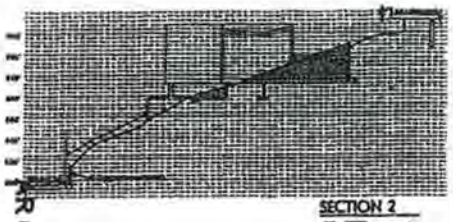
TRANVERSE SECTION LOOKING EAST

KAPOR KLEIN HOUSE

MARCY WONG DONN LOGAN ARCHITECTS



SECTION 3



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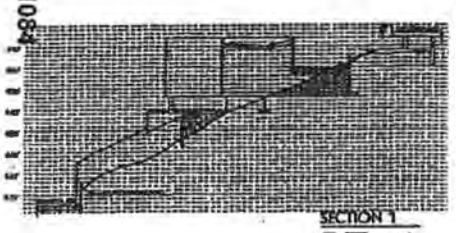

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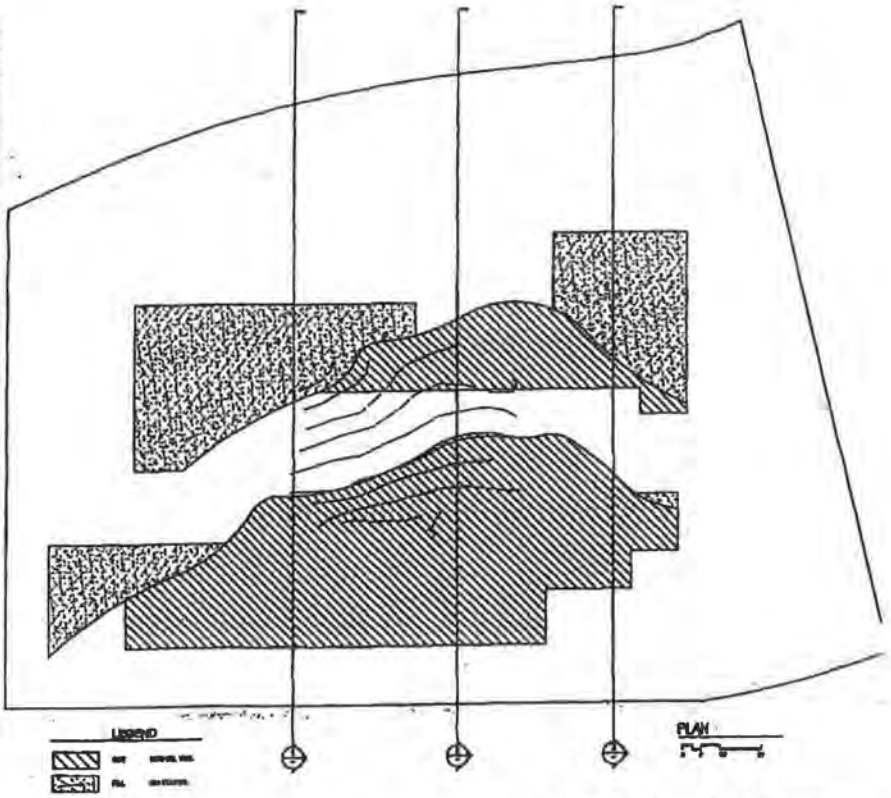


CONCEPTUAL GRADING PLAN

KAPOR KLEIN HOUSE

MARCY WONG DONN LOGAN ARCHITECTS

16

PROOF OF SERVICE

I am over the age of eighteen years and not a party to this action. I am employed in the county where this service initiated. My business address is VENERUSO & MONCHARSH, 5707 Redwood Rd., STE 10, Oakland, CA 94619

On the date specified below, I served the attached:

LETTER IN SUPPORT OF PETITION FOR REHEARING

[XX] (BY MAIL) placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail in Oakland, California addressed as follows:

[ ] (BY FEDERAL EXPRESS) placing a true copy thereof enclosed in a sealed envelope, prepaid, deposited with the Federal Express carrier/box in Oakland, California addressed as follows:

[ ] (BY MESSENGER) placing true and correct copies in envelopes with delivery charges fully paid for delivery by Silver Bullet Messenger Service this same day.

[ ] (BY FACSIMILE) placing a true copy thereof into a facsimile machine addressed to the person and address shown below.

Zach Cowan, City Attorney
Laura McKinney, Deputy City Attorney
2180 Milvia Street, Fourth Floor
Berkeley CA 94704
Attorney for Respondents

Amrit Kulkarni
Julia Bond
Meyers Nave
555 12th Street, Suite 1500
Oakland CA 94607
Attorneys for Respondents and Real Parties in Interest

Alameda County Superior Court
Attention: Clerk of the Court
1225 Fallon Street
Oakland CA 94612

California Court of Appeal
First Appellate District, Division 4
Attention: Clerk of the Court
350 McAllister Street
San Francisco CA 94102

Kamala D. Harris
Attorney General of California
Sally Magnani
Senior Assistant Attorney General
Janill Richards
Supervising Deputy Attorney General
Catherine M. Wieman
Deputy Attorney General
300 South Spring Street
Suite 1702
Los Angeles CA 90013
Attorneys for Amicus Curiae
Attorney General Kamala D. Harris

Susan Brandt-Hawley
Brandt-Hawley Law Group
PO Box 1659
Glen Ellen CA 95442
Attorney for Plaintiffs and Appellants

Amanda Monchamp
Melanie Sengupta
Holland & Knight LLP
50 California Street, 28th Floor
San Francisco CA 94111
Attorneys for Amici Curiae
League of California Cities;
California State Association of Counties

Michael H. Zischke
Andrew B. Sabey
Cox, Castle & Nicholson LLP
555 California Street, 10th Floor
San Francisco CA 94104
Attorneys for Amici Curiae
California Building Industry Association;
California Business Properties Association;
Building Industry Legal Defense Foundation

Christian L. Marsh
Andrea P. Clark
Graham St. Michael
Downey Brand LLP
333 Bush Street
Suite 1400
San Francisco CA 94104
Attorneys for Amicus Curiae
Association of California Water Agencies

Stephen L. Kostka
Barbara J. Schussman
Perkins Coie LLP
Four Embarcadero Center, Suite 2400
San Francisco CA 94111
Attorneys for Amicus Curiae
Building Industry Association of the Bay Area

Harold M. Freiman
Kelly M. Rem
Lozano Smith
2001 N. Main Street, Suite 650
Walnut Creek CA 945596
Attorneys for Amicus Curiae
California School Boards Association of Education Legal Alliance

M. Reed Hopper
Pacific Legal Foundation
930 G Street
Sacramento CA 95814
Attorneys for Amicus Curiae
Pacific Legal Foundation

Michael W. Graf
Law Offices of Michael W. Graf
227 Behrens Street
El Cerrito CA 94530
Attorneys for Amicus Curiae
Center for Biological Diversity;
High Sierra Rural Alliance

Kelly L. Drumm
Charles Robinson
1111 Franklin Street, 8th Floor
Oakland, CA 94607
Attorneys for Amicus Curiae
Regents of the University
of California

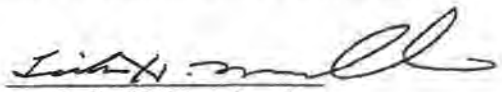
Christine Helwick
Andrea M. Gunn
California State University
Office of the General Counsel
401 Golden Shore, 4th Floor
Long Beach CA 90802
Attorneys for Amicus Curiae
The Board of Trustees of the California
State University

Jan Chatten-Brown
Douglas P. Carstens
Chatten-Brown & Carstens LLP
2200 Pacific Coast Hwy, #318
Hermosa Beach CA 90254

and
Michael W. Stamp
Molly Erickson
Law Offices of Michael W. Stamp
479 Pacific Street, #1
Monterey CA 93940
Attorneys for Amicus Curiae
Planning and Conservation League;
Endangered Habitat League;
California Preservation Foundation;
Save Our Heritage Foundation;
Save Our Carmel River; The Open
Monterey Project

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

Dated: April 21, 2015



Leila H. Moncharsh

Reference B

IMPROVEMENT OF LA LOMA AVENUE

BUENA VISTA WAY to EL PORTAL COURT

vicinity map

site location map

schedule of drawings

NUMBER	TITLE OF DRAWING	NUMBER	TITLE OF DRAWING	NUMBER	TITLE OF DRAWING
1	TITLE SHEET	7	EXISTING PLAN, PROFILE & LOGS OF SOIL BORINGS	13	BRIDGE SECTIONS
2	NEW ALIGNMENT PLAN & PROFILE	8	BRIDGE FRAMING PLAN & PROFILE	14	RETAINING WALL ELEVATIONS
3	NEW ALIGNMENT PLAN & PROFILE	9	BRIDGE SECTIONS	15	RETAINING WALL DETAILS
4	NEW ALIGNMENT PLAN & PROFILE	10	BRIDGE SECTIONS	16	MISCELLANEOUS DETAILS
5	EXISTING PLAN, PROFILE & LOGS OF SOIL BORINGS	11	BRIDGE SECTIONS	17	MISCELLANEOUS DETAILS
6	EXISTING PLAN, PROFILE & LOGS OF SOIL BORINGS	12	BRIDGE SECTIONS		

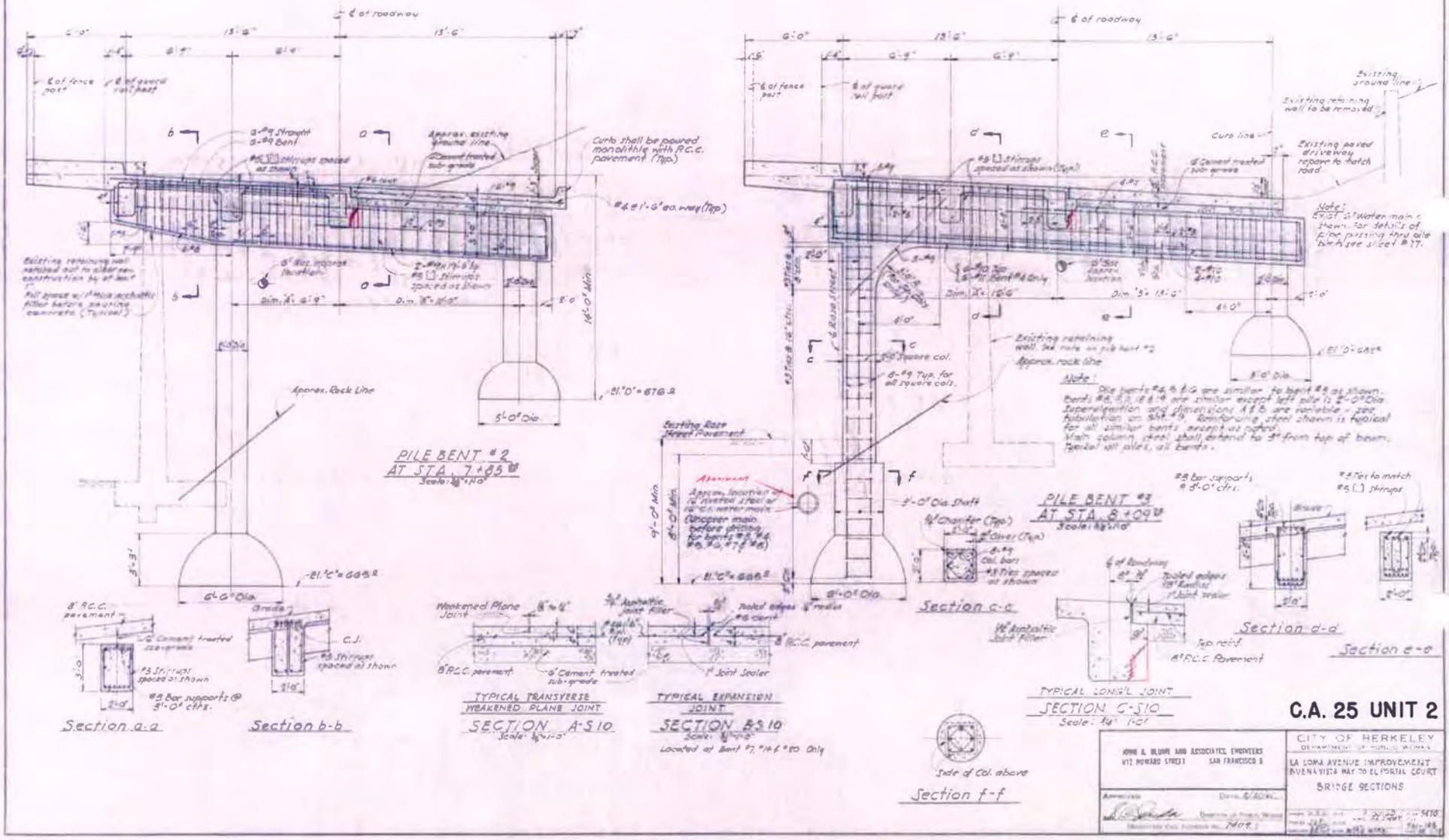
C.A. 25 UNIT 2

JOHN A. BLUME AND ASSOCIATES, ENGINEERS
510 HOWARD STREET SAN FRANCISCO 5

Approved: Date: 2-20-62
Director of Public Works

CITY OF BERKELEY
DEPARTMENT OF PUBLIC WORKS

LA LOMA AVENUE IMPROVEMENT
BUENA VISTA WAY TO EL PORTAL COURT
TITLE SHEET


℄ of roadway
℄ of fence post
℄ of guard rail post
#9 Straight
#9 Bent
#5 ☐ stirrups spaced as shown
Approx. existing ground line
Cement treated sub-grade
Curb shall be poured monolithic with P.C.C. pavement (Typ.)
#4 @ 1'-6" ctrs. way (Typ)
Existing retaining wall removed out to allow for construction by others
Fill space with rock asphaltic filler before pouring concrete (Typical)
6" Slot, expose reinforcing
2-#9 Vert. & 1-#8 ☐ Stirrups spaced as shown
Dim. 'A' = 2'-6"
Dim. 'B' = 2'-0"
8'-0" Min
Approx. Rock Line
-81.1°C = 668.2
6'-0" Dia.
PILE BENT #2
AT STA. 7+85.18
Scale: 1/4"=1'-0"
Existing Base Street Pavement
Abutment
Approx. location of 12" riveted steel or 12" C.I. water main
Concreter main before pouring for bents #3, #4, #5, #6, #7, & #8)
-81.1°C = 668.2
4'-0" Min
3'-0" Dia. Shaft
Section c-c
Existing retaining wall to be removed
Existing ground line
Curb line
Existing paved driveway repave to match road
Note: Exist. 12" water main shown for details of line passing thru pile bents see sheet #17.
#9 @ 3'-0" ctrs. Typ. for all square cols.
Approx. rock line
Note: Pile bents #4, 5, & 6 are similar to bent #3 as shown. Bents #2, 7, & 8 are similar except left pile is 2'-0" Dia. Superstructure and dimensions A & B are variable - see tabulation on sht. 9. Reinforcing steel shown is typical for all similar bents except as noted. Main column steel shall extend to 3" from top of beam. Typical all piles, all bents.
PILE BENT #3
AT STA. 8+09.18
Scale: 1/4"=1'-0"
#9 bar supports @ 3'-0" ctrs.
#8 Tie to match #5 ☐ Stirrups
Section d-d
Section e-e
Section f-f
Side of Col. above
8" P.C.C. pavement
Cement treated sub-grade
#3 Stirrups spaced as shown
#9 Bar supports @ 3'-0" ctrs.
Section a-a
Arch
C.J.
Section b-b
Weakened Plane Joint
1/2" Asphaltic Joint Filler
Tooled edges 1/4" Radius
#6 Dowel
1" Joint Sealer
TYPICAL TRANSVERSE WEAKENED PLANE JOINT
SECTION A-S.10
Scale: 1/4"=1'-0"
TYPICAL EXPANSION JOINT
SECTION B-S.10
Scale: 1/4"=1'-0"
Located at Bent #7, #16 & #20 Only
1/2" Asphaltic Joint Filler
Top reinf.
TYPICAL LONG'L JOINT
SECTION C-S.10
Scale: 1/4" = 1'-0"
C.A. 25 UNIT 2
JOHN A. BLUME AND ASSOCIATES, ENGINEERS
912 HOWARD STREET SAN FRANCISCO 3
CITY OF BERKELEY
DEPARTMENT OF PUBLIC WORKS
LA LOMA AVENUE IMPROVEMENT
BUENA VISTA WAY TO EL MORTAL COURT
BRIDGE SECTIONS

Reference C

LAWRENCE B. KARP
CONSULTING GEOTECHNICAL ENGINEER

FOUNDATIONS, WALLS, PILES
UNDERPINNING, TIEBACKS
DEEP RETAINED EXCAVATIONS
SHORING & BULKHEADS
CEQA, EARTHWORK & SLOPES
CAISSONS, COFFERDAMS
COASTAL & MARINE STRUCTURES

SOIL MECHANICS, GEOLOGY
GROUNDWATER HYDROLOGY
CONCRETE TECHNOLOGY

Appendix 2

April 16, 2010

Mayor & City Council
City of Berkeley
2180 Milvia Street
Berkeley, CA 94704

Subject: 2707 Rose Street (Use Permit)

Dear Mayor & City Council:

I have reviewed the architectural plans and topographic survey filed with the Zoning Administrator for the proposed project and I have visited the subject site on several occasions. I am familiar with the area having been involved since 1960 with new residences on Buena Vista and La Loma, and with remedial foundation design and construction on Euclid, Le Roy, Shasta, Tamalpais, and Maybeck Twin Drive.

The file, and the Administrative Record last updated on 3/1/10, do not show a geotechnical report being part of the record and it appears that the plans were not prepared pursuant to site specific geotechnical engineering recommendations for earthwork (excavations, subdrainage, placement of engineered fill). The architectural Conceptual Grading Plan (Sheet 16) gives cut and fill quantities but the Transverse Section Looking East (Sheet 14) indicates fills are placed directly on very steep existing slopes.

The project site is located alongside the major trace of the Hayward fault and it is mapped within a state designated earthquake-induced landslide hazard zone. Although the site as now configured appears stable, Rose Steps and the concrete of the elevated part of La Loma are cracked from fault creep and other ground movement. An alternative project should be considered to avoid grading with massive excavations and fills as well as the shoring and retaining walls necessary to achieve grades shown on the drawings.

Portions of the major fill for the project are shown to be placed on an existing slope inclined at about 42° (~1.1h:1v) to create a new slope more than 50° (~0.8h:1v). These 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. The massive grading necessary to achieve grades for the proposed project will involve extensive trucking operations, as a nearby site to stockpile and stage the earthwork is not available. Such work has never before been accomplished in the greater area of the project outside of reservoirs or construction on the University of California campus and Tilden Park. In my professional opinion, 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.

Yours truly,

Lawrence B. Karp

REGISTERED PROFESSIONAL ENGINEER
LAWRENCE B. KARP
No. 452
Ren 12/31/11
GEOTECHNICAL
STATE OF CALIFORNIA

100 TRES MESAS, ORINDA CA 94563 (925) 254-1222 fax: (925) 253-0101 e-mail: lbk@lbkarp.com

LAWRENCE B. KARP
CONSULTING GEOTECHNICAL ENGINEER

FOUNDATIONS, WALLS, PILES
UNDERPINNING, TIEBACKS
DEEP RETAINED EXCAVATIONS
SHORING & BULKHEADS
CEQA, EARTHWORK & SLOPES
CAISSONS, COFFERDAMS
COASTAL & MARINE STRUCTURES

SOIL MECHANICS, GEOLOGY
GROUNDWATER HYDROLOGY
CONCRETE TECHNOLOGY

Appendix 2

April 18, 2010

Mayor & City Council
City of Berkeley
2180 Milvia Street
Berkeley, CA 94704

Subject: 2707 Rose Street (Use Permit)
Supplemental Information

Dear Mayor & City Council:

After my letter-report of 4/16/10, which was based on my review of the file as was provided to me by City Planning on 4/15/10, a report "Geotechnical Investigation - Kapur Klein Residence" prepared for Marcy Wong was filed with the City. The report by Alan Kropp & Assoc. is dated 7/31/09. Architectural plans are not referenced, but the text refers to preliminaries and the Site Plan shows locations of exploratory borings. No fill slopes are shown in plan or section and the recommendations for retaining walls do not include lateral earth pressures for slopes with inclinations of more than 2h:1v (~27°) or for wall heights more than 12 feet. A footnote reads "Slopes steeper than 2:1 are not anticipated at the site.", consistent with 2007 CBC §J106.1.

The architectural plans I reviewed for the 4/16/10 letter-report are dated 11/12/09 and they 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). The Site Plan is the topo survey (attached) overlain with a building footprint of 3,870 sq. ft. (includes carport). Decks indicated on fill total 1,670 sq. ft. without including the off-street parking area The 7/31/09 report indicates the project will be a 6,000 sq. ft. single family residence with a detached carport. The building that was approved is 9,868 sq. ft. which includes a 10 car garage.

As noted in my letter-report of 4/16/10, the plans (11/12/09)approved by the ZAB (1/28/10) depict portions of the major fill for the project (Sht. 16 attached) to be placed on an existing slope inclined at about 42° (~1.1h:1v) to create a new fill slope more than 50° (~0.8h:1v). The main site section (Sht. 14 attached) has the building's roof at Elev. 694, lower yard at Elev. 659, and Shasta is at Elev. 616. There will be 78 feet vertical between Shasta and the roof and 43 feet between Shasta and the lower yard level which means, for a 2h:1v maximum slope between Shasta and the building, 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 dissipator dug into the slope, which is inconsistent with the intended very steep fill slopes. To reiterate, in my professional opinion, 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.

Yours truly,

Lawrence B. Karp

REGISTERED PROFESSIONAL ENGINEER
LAWRENCE B. KARP
No. 452
Ren 12/31/11
GEOTECHNICAL
STATE OF CALIFORNIA

100 TRES MESAS, ORINDA CA 94563 (925) 254-1222 fax: (925) 253-0101 e-mail: lbkarp@lbkarp.com

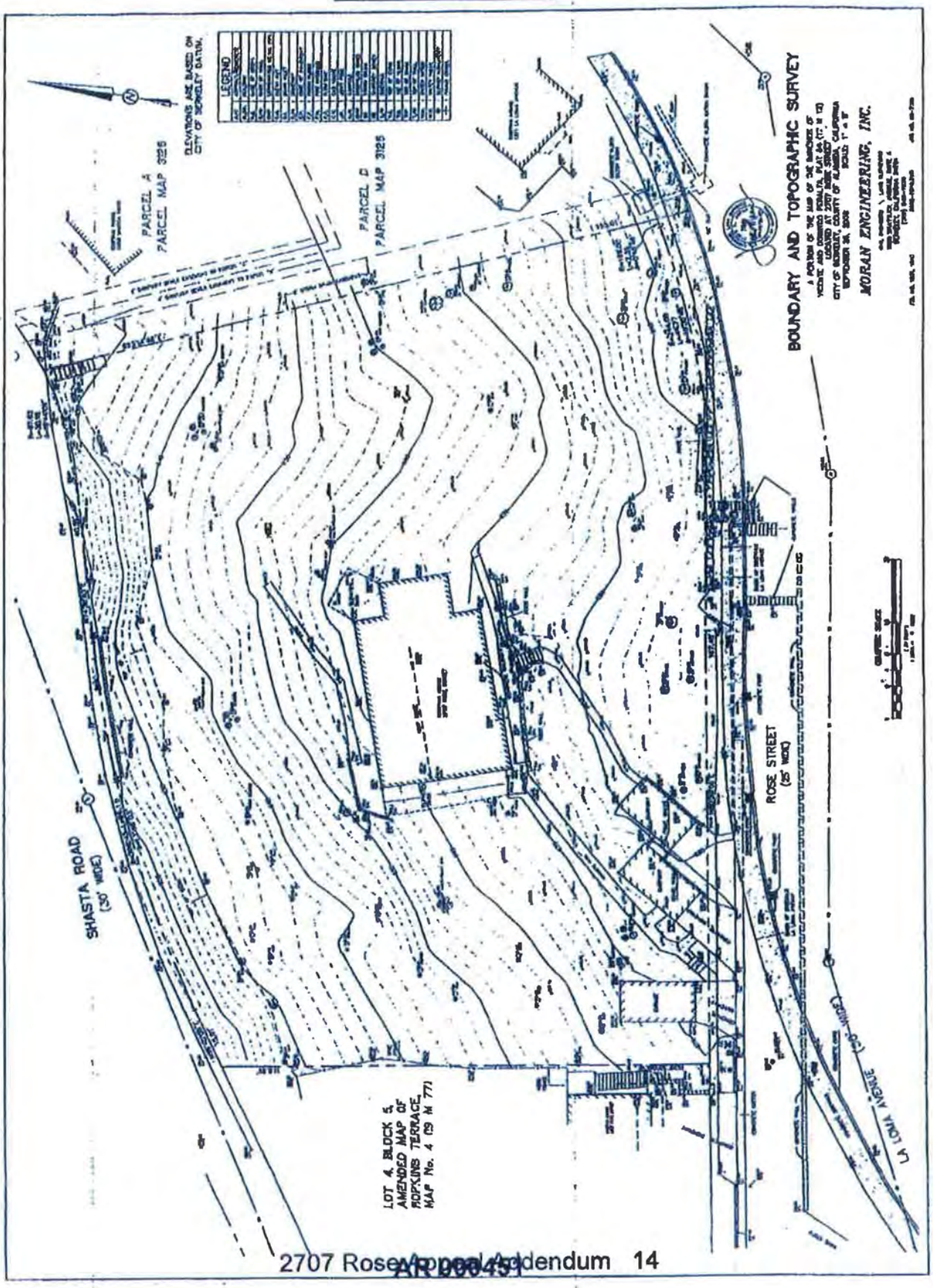
Appendix 2

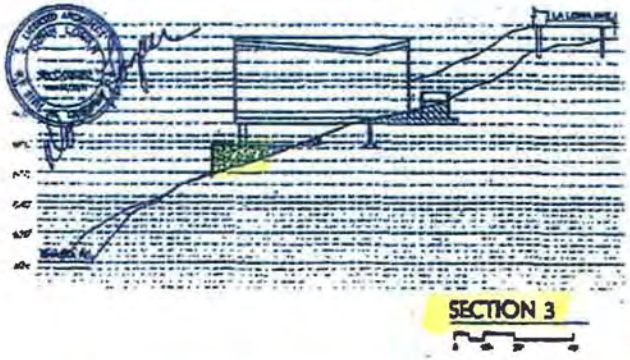
MARCY WONG DONN LOGAN ARCHITECTS

KAPOR KLEIN HOUSE

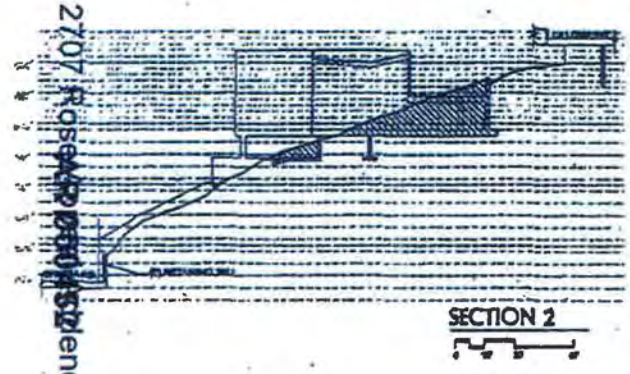
TRANSVERSE SECTION LOOKING EAST

Appendix 2

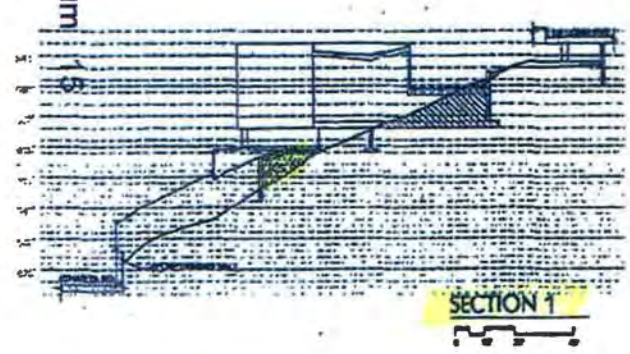

BOUNDARY AND TOPOGRAPHIC SURVEY
MORAN ENGINEERING, INC.
LEGEND
ELEVATIONS ARE BASED ON CITY OF BERKELEY DATUM.
PARCEL A
PARCEL MAP 3125
PARCEL D
PARCEL MAP 3125
SHASTA ROAD
(30' WIDE)
ROSE STREET
(25' WIDE)
LA LOMA AVENUE (30' WIDE)
LOT 4, BLOCK 5,
AMENDED MAP OF
ROPKINS TERRACE
MAP No. 4 159 M 77



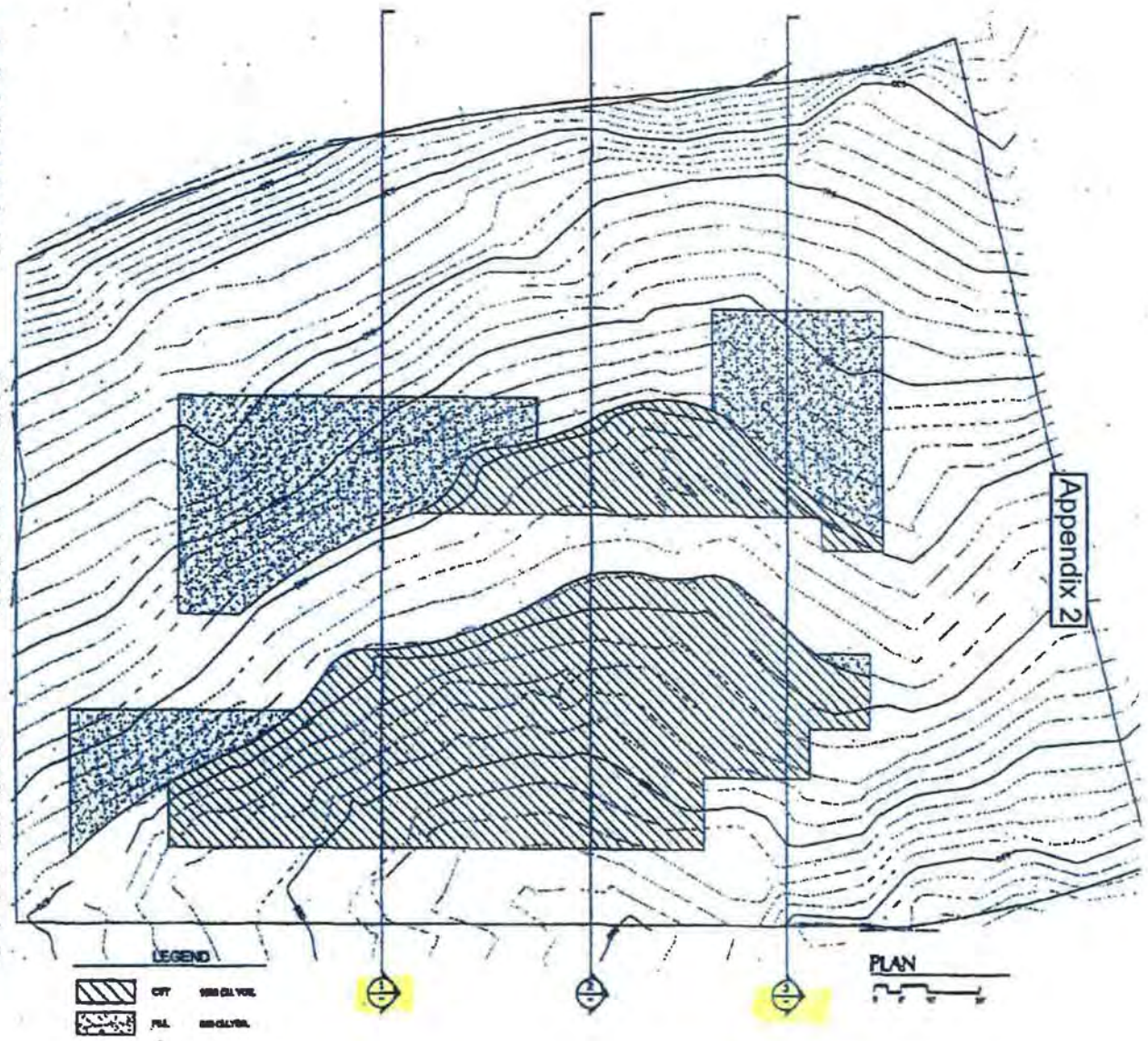
SECTION 3



SECTION 2



SECTION 1



2707 Rose Street

Addendum 15

Appendix 2

CONCEPTUAL GRADING PLAN

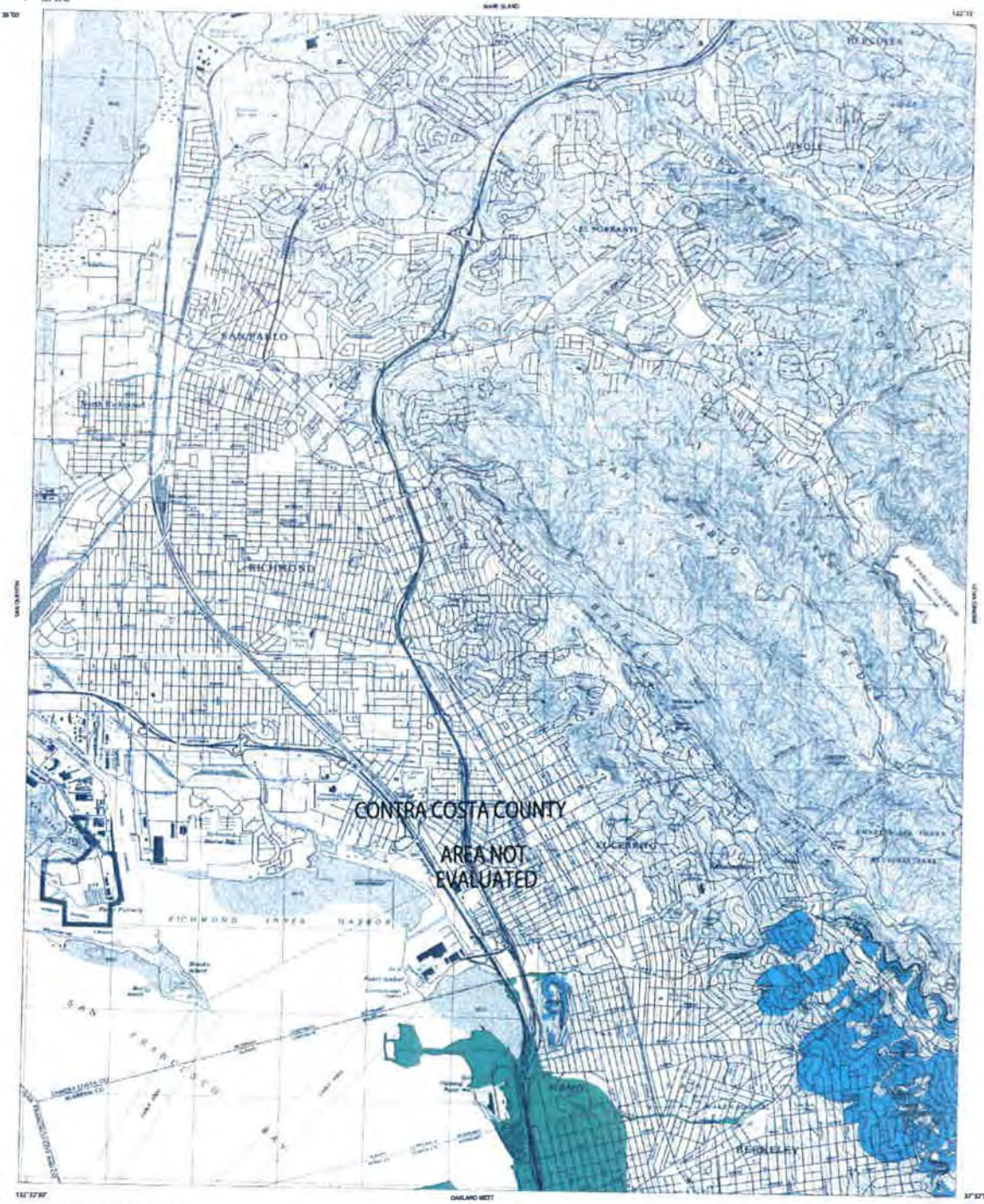
KAPOR KLEIN HOUSE

MARCY WONG DONN LOGAN ARCHITECTS

Reference D

CALIFORNIA GEOLOGICAL SURVEY
JAMES F. DAVIS, STATE GEOLOGIST

STATE OF CALIFORNIA-GRAY DAVIS, GOVERNOR
THE RESOURCES AGENCY-MARY D. NICHOLS, SECRETARY
DEPARTMENT OF CONSERVATION-DARRYL W. YOUNG, DIRECTOR



Base Map prepared by U.S. Geological Survey, 1993.
Zones of required investigation boundaries may reflect updated digital topographic data that can differ significantly from contours shown on the base map.

PURPOSE OF MAP

This map will assist cities and counties in fulfilling their responsibilities for protecting the public from the effects of earthquake-triggered ground failure as required by the Seismic Hazards Mapping Act (Public Resources Code Sections 2690-2699.6).

For information regarding the general approach and recommended methods for preparing this map, see CMG Special Publication 118, *Recommended Criteria for Delineating Seismic Hazard Zones in California.*

For information regarding the scope and recommended methods to be used in conducting the required site investigations, see CMG Special Publication 117, *Guidelines for Evaluating and Mitigating Seismic Hazards in California.*

For a general description of the Seismic Hazard Mapping Program, the Seismic Hazards Mapping Act and regulations, and related information, please refer to this website at www.conservation.ca.gov/cgs/

IMPORTANT - PLEASE NOTE

1) This map may not show all areas that have the potential for liquefaction, landsliding, strong earthquake ground shaking or other earthquake and geologic hazards. Also, a single earthquake capable of causing liquefaction or triggering landslide failure will not uniformly affect the entire area zoned.

2) Liquefaction zones may also contain areas susceptible to the effects of earthquake-induced landslides. This situation typically exists at or near the toe of existing landslides, downslope from landslide or seismic flow source areas, or adjacent to steep stream banks.

3) This map does not show Alquist-Priolo earthquake fault zones, if any, that may exist in this area. Please refer to the latest official maps of earthquake fault zones for disclosure and other actions that are required by the Alquist-Priolo Earthquake Fault Zoning Act. For more information on this subject and an index to available maps, see CMG Special Publication 42.

4) Landslide zones on this map were determined, in part, by adapting methods originally developed by the U.S. Geological Survey (USGS). Landslide hazard maps prepared by the USGS typically use experimental approaches to assess earthquake-induced and other types of landslide hazards. Although aspects of these new methodologies may be incorporated in future California Geological Survey (CGS) seismic hazard zone maps, USGS maps should not be used as substitutes for these Official SEISMIC HAZARD ZONES maps.

5) U.S. Geological Survey base map standards provide that 90 percent of culture features be located within 40 feet (horizontal accuracy) of the scale of the map. The identification and location of liquefaction and earthquake-induced landslide zones are based on available data. However, the quality of data used is varied. The zone boundaries depicted here have been drawn as accurately as possible at this scale.

6) Information on this map is not sufficient to serve as a substitute for the geologic and geotechnical site investigations required under Chapters 7.5 and 7.8 of Division 2 of the Public Resources Code.

7) DISCLAIMER: The State of California and the Department of Conservation make no representations or warranties regarding the accuracy of the data from which these maps were derived. Neither the State nor the Department shall be liable under any circumstances for any direct, indirect, special, incidental or consequential damages with respect to any claim by any user or any third party on account of or arising from the use of this map.

MAP EXPLANATION

Zones of Required Investigation:

Liquefaction

Areas where historical occurrence of liquefaction, or local geologic, geotechnical and ground-water conditions indicate a potential for permanent ground displacement such that mitigation as defined in Public Resources Code Section 2693(c) would be required.

Earthquake-Induced Landslides

Areas where previous occurrence of landslide movement, or local topographic, geologic, geotechnical and subsurface water conditions indicate a potential for permanent ground displacements such that mitigation as defined in Public Resources Code Section 2693(c) would be required.

NOTE: Seismic Hazard Zones identified on this map may include developed land where earthquake hazards have already been mitigated to city or county standards. Check with your local building/planning department for information regarding the location of such mitigated areas.

STATE OF CALIFORNIA

SEISMIC HAZARD ZONES

Delineated in compliance with
Chapter 7.8, Division 2 of the California Public Resources Code
Seismic Hazards Mapping Act

RICHMOND QUADRANGLE

OFFICIAL MAP

Released: February 14, 2003

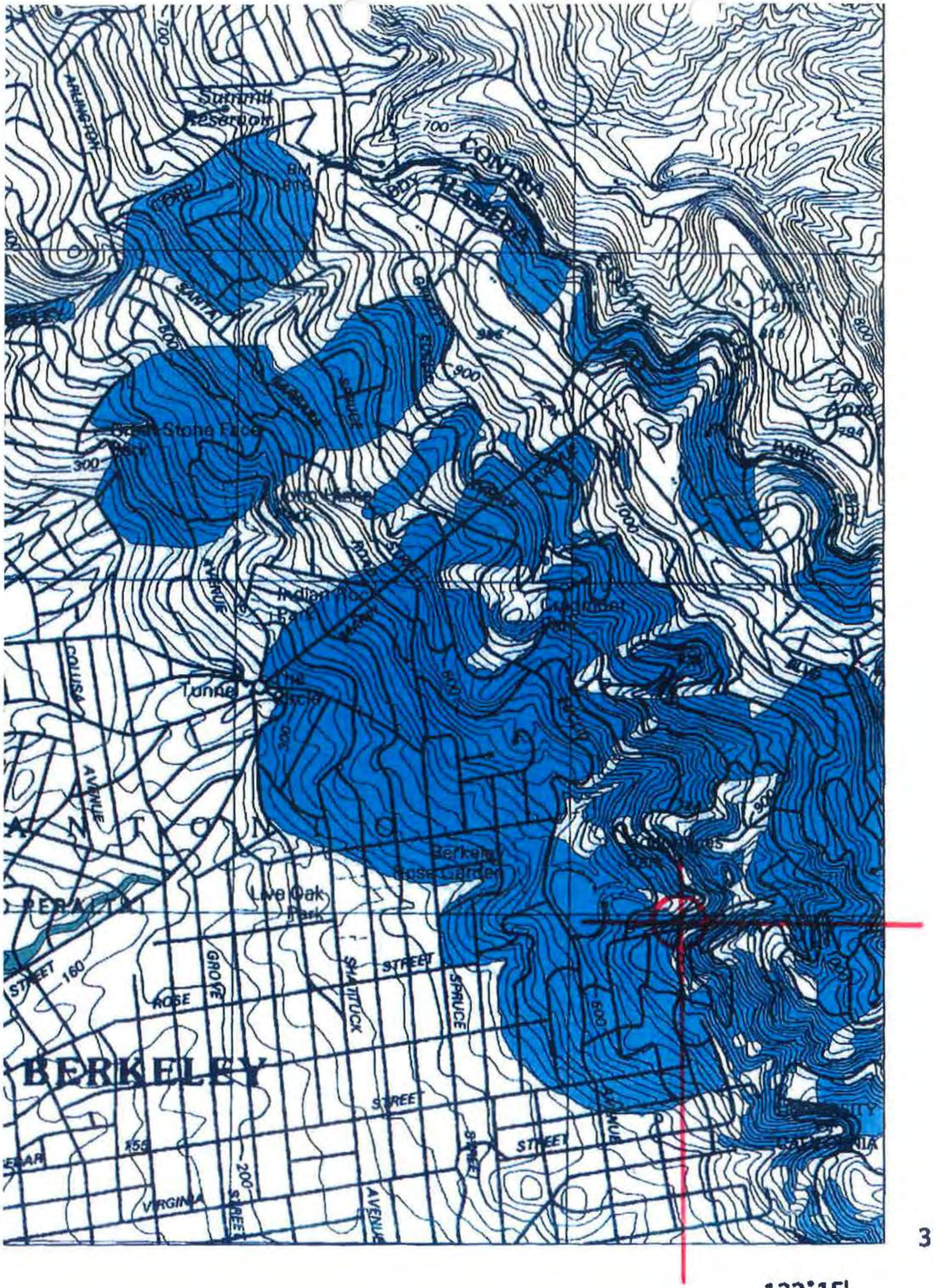
STATE GEOLOGIST

DATA AND METHODOLOGY USED TO DEVELOP THIS MAP ARE PRESENTED IN THE FOLLOWING:

Seismic Hazard Zone Report of the Richmond 7.5-Minute Quadrangle, Alameda County, California: California Geological Survey, Seismic Hazards Zone Report 016.

For additional information on seismic hazards in this map area, the rationale used for zoning, and additional references consulted, refer to CGS's World Wide Web site

www.conservation.ca.gov/cgs/



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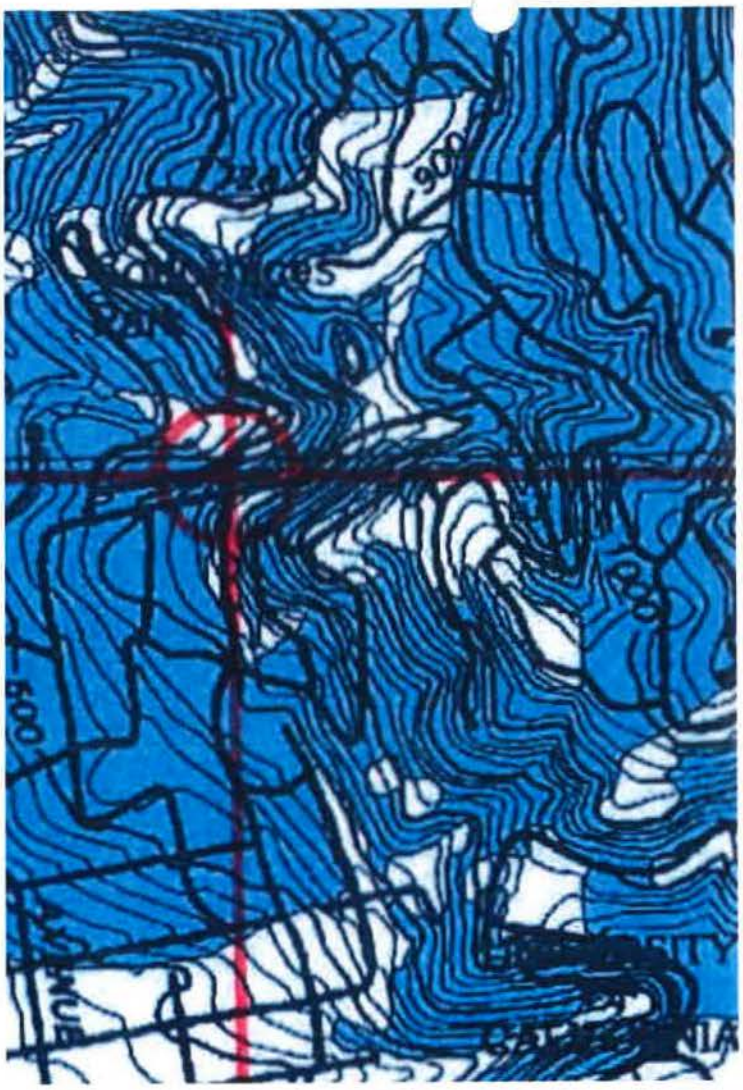
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Reference E

S201116

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

BERKELEY HILLSIDE PRESERVATION, ET AL.
Petitioners and Appellants,

v.

CITY OF BERKELEY, ET AL.
Respondents.

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

After a Published Decision by The Court of Appeal
First Appellate District, Division Four
Civil Case No. A131254

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

RESPONDENTS AND REAL PARTIES IN INTEREST'S OPENING BRIEF ON THE MERITS

MEYERS, NAVE, RIBACK, SILVER & WILSON
Amrit S. Kulkarni (SBN: 202786)
Julia L. Bond (SBN: 166587)
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Attorneys for Respondents and Real Parties in Interest Mitchell Kapor and Freada Kapor-Klein

Zach Cowan, City Attorney (SBN: 96372)
Laura McKinney, Deputy City Attorney (SBN:176082)
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704
Telephone: (510) 981-6998
Facsimile: (510) 981-6960

Attorneys for Respondents City of Berkeley and City Council of the City of Berkeley

City, but would instead require additional construction activities, including the placement of "side-hill fills." (Opinion, 4-5.) Mr. Karp further opined that the allegedly required side-hill fills would be subject to "seismic lurching" impacts.

Mr. Karp's opinion was contradicted by the applicant's geotechnical engineer, Mr. Kropp. (Opinion, 5.) However, Mr. Kropp did not differ with Mr. Karp as to whether the "side-hill fill" would be subject to this "seismic lurching"—there is no "disagreement among experts" on this issue. Rather, he explained that Mr. Karp had misread the project plans, and that in fact, *no "side-hill fill" was proposed.* As a consequence, none would be constructed, so there would be nothing to "seismically lurch". Thus, because the Project did not call for side-hill fill, none of the concerns raised by Mr. Karp applied to the Project proposed for approval. (*Ibid.*) The seismic impacts to the allegedly required side-hill fills were the only potentially significant impacts which the Appellate Court identified as triggering the unusual circumstances exception. (Opinion, 18.)

If the Court applies the substantial evidence standard, it should uphold the City's determination because there is substantial evidence in the record supporting the City's conclusion that the Project would not have any geotechnical impacts. Even if the Court applies the fair argument test, however, it should uphold the City's determination because Appellants did not meet their burden of presenting substantial evidence of a fair argument that the Project may have significant geotechnical effects on the environment. Moreover, the Court of Appeal made several incorrect holdings as a matter of law on this issue.

1. There Is No Substantial Evidence Raising a Fair Argument of Any Significant Geotechnical Impacts

In the CEQA context, substantial evidence is "fact, a reasonable assumption predicated upon fact, or expert opinion *supported by fact.*" (§

21080(e)(1), emphasis added; 21082.2(c).) Substantial evidence does not include "argument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous . . ." (§ 21080(e)(2); 21082.2(c).) "Mere argument, speculation, and unsubstantiated opinion, even expert opinion, is not substantial evidence for a fair argument." (*Pocket Protectors v. City Of Sacramento* (2004) 124 Cal.App.4th 903, 928-929. See also § 21082.2(c); Guidelines § 15384(a); *Santa Monica, supra,* 101 Cal.App.4th at 797; *California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026, 1059.)

In this case, Appellants provided the City with an opinion by an expert regarding alleged geological impacts of the Project resulting from allegedly massive excavation and topographical changes to the property. Specifically, Lawrence Karp submitted an opinion that the Project would have a significant environmental impact because of fill, landslide, truck traffic and slope issues. (2 AR 448, 449.) However, Mr. Karp's entire opinion was based on the premise that the Project would not be built as proposed, but, rather, would require additional construction activities, including the placement of "side-hill fills." (*Ibid.*)

In response, the applicant submitted two expert opinions stating that the project could be constructed as proposed and that the massive excavation feared by Mr. Karp may have been a result of his misreading of the plans. (4 AR 961, 963-966, 1064-1067.) There is a detailed summary of the evidence in the record explaining how, contrary to Mr. Karp's contention, the Project would not require "side-hill fills":

> Contrary to Mr. Karp's Opinion, there will be no "Side Hill" Fill
>
> What Mr. Karp calls a large, side-hill fill is in fact "the current ground surface where the east wing of the new building will be located." (Kropp letter, April 21, 2010, [4 AR 1061]) There is "no evidence ...in the plans" of what

> Karp calls "fills are placed directly on very steep existing slopes". (Letter Jim Toby, [4 AR 1065]) An accurate reading [of] the submitted plans shows that the 'the only fill placed by the downhill portion of the home will be backfill for backyard retaining walls***The current ground surface, along with the vegetation, will be maintained on the downhill portion of the lot." [4 AR 1061]
>
> Most of Mr. Karp's letter relates to unsubstantiated concerns related to the non-existent fact of 'a large side-hill fill':
>
> - Removal of vegetation on the lower slopes,
> - Massive grading on a steep slope, including deep keyways and benches into the hill,
> - Construction of a new, very steep fill slope,'
> - Extensive trucking to stockpile excavated materials to re-use in the fill slope,
> - Future seismic lurching on the steep side-hill fill.
>
> "[Since] there will be no steep, side-hill fill constructed, none of these assumptions, concerns or 'facts' relied on for those opinions apply to the proposed project." [4 AR 1061-1062]

(4 AR 934-935, emphasis original, citing 4 AR 1061-1062, 1064-1067. See also 2 AR 537-538.)

Thus the fundamental question posed by Appellants' geotechnical argument is: does the project approved by the City involve "side-hill fill"?

2. The City's Determination Regarding the Scope of the Proposed Project Per the Approved Plans is Not Subject to Expert Dispute

The fundamental purpose of the land use permit process is to enable a public agency to determine what may and what may not be built, and how. It follows that the City is entitled to determine for itself the scope of a project that it approves. In this case, the application proposed and the City

approved[9] a project that it determined would involve excavation of approximately 1,500 cubic yards of soil, of which approximately 800 cubic yards would be retained on site, on a slope of approximately 50%. (1 AR 34, 63.) The geotechnical impact of *that* proposal is potentially subject to dispute among experts. What is *not* subject to dispute is the proposal itself.

Appellants argue that a purported disagreement among experts as to the geotechnical effects of the project constitutes substantial evidence supporting a fair argument that the project has the potential for a significant adverse impact on the environment. But they ignore the fact that the project *as approved* will, by all accounts, *not* have the impacts they allege. To the contrary, the impacts their expert foresees could result only from a differently designed project. But that differently designed project is not what the City approved.

When Appellants argued to the City Council that staff did "not mention the impact of the massive excavation and topographical changes to the property", City planning staff stated unequivocally that "[t]his appeal point is factually incorrect" and reiterated that *as approved*, the excavation would involve approximately 1500 cubic yards, of which approximately 800 cubic yards would be retained on site. (1 AR 149.)

In reviewing a City's interpretation of its own laws, contemporaneous construction given a statute by the officials charged with administering and following it, including their construction of the authority vested in them by it, is entitled to great weight.[10] One reason for this rule is

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[9] Representations in the application defined the proposal before the City and became conditions of project approval. (1 AR 8.)

[10] *Harrott v. County of Kings* (2001) 25 Cal. 4th 1138, 1154-55; *Reno v. Baird* (1998) 18 Cal.4th 640, 660; *Highland Ranch v. Agricultural Labor*

that agencies will often have "a comparative interpretive advantage over the courts." (*Yamaha, supra,* 19 Cal.4th at 12, quoting Cal. Law Revision Com., Tent. Recommendation, Judicial Review of Agency Action (Aug. 1995) p. 11 (Tentative Recommendation).) In considering the deference to be accorded an agency interpretation, courts are "more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another." (*Ibid.*) Courts will also consider "indications of careful consideration by senior agency officials." (*Id.* at 13.)

The same rule applies to agencies' interpretations of their own permits, and for the same reasons. "Deference is particularly appropriate where, as here, the agency is interpreting its own language, drafted to suit a particular circumstance, rather than language drafted by the legislature." (*Bello v. ABA Energy* (2004) 121 Cal.App.4th 301, 318 [county interpretation of its own encroachment permit entitled to deference].)

For example, in *Stone v. Board of Supervisors* (1988) 205 Cal.App.3d 927, the Tuolumne County Board of Supervisors considered whether a mining company was in compliance with a use permit condition that required it to have a $25 million liability insurance policy. The company had only a $12.5 million policy, plus a $3 million pollution liability policy, and had agreed to fund an environmental monitor to prevent pollution. Despite the contrary opinion of county counsel, the Board

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Relations Bd. (1981) 29 Cal.3d 848, 859; *Whitcomb Hotel, Inc., supra,* 24 Cal.2d 753, 756-757; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 142; *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1021.

determined that the company was in compliance. In doing so, it relied on the facts that: (1) an environmental monitor could substitute for insurance coverage by preventing pollution from occurring; (2) the parties were likely aware when the permit originally issued that environmental liability would probably be excluded from any insurance policy; (3) the cost of the additional $12.5 million in coverage was very high; and (4) $12.5 million in coverage was generally regarded as adequate in the industry. (*Id.* at 933-937.) The court upheld this decision, using a "reasonableness" standard of review, under which the plaintiff had the burden of proving the nonexistence of the facts on which the decision was based. (*Id.* at 933-934.)

Similarly, in *North Gualala Water Company v. State Water Resources Control Board* (2006) 139 Cal.App.4th 1577, the court gave "considerable deference" and "great weight" to the Board's interpretation of the term "bypass" in a permit condition, noting that the condition was "awkwardly worded" and could no longer be interpreted literally due to changed circumstances. (*Id.* at 1607 & 1581, fn. 3.)

So, to answer the question posed by Appellants' geotechnical argument, no, the project approved by the City does *not* involve "side-hill fill".

3. CEQA's Requirement to Prepare an EIR Cannot Be Triggered by Alleged Impacts of Project Elements Which Are Neither Proposed Nor Approved

Under CEQA, a "project" refers "to the activity which is being approved . . ." (Guidelines § 15378(c).) A "project" means the whole of an action and, in this case, is "[a]n activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (Guidelines § 15378(a)(3); § 21065(c).)

Courts have held that evidence of potentially significant impacts which does not relate to the project proposed or approved is not capable of supporting a "fair argument" that an EIR must be prepared. In *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, the court upheld the county's approval of a negative declaration and conditional use permit to convert a single-family home into a synagogue. The court rejected claims by project opponents that the synagogue would be larger than what was approved, holding that such claims "ignored the reality of the permit as approved and accepted." (*Id.* at 162.) The court held that "the focus must be on the use, as approved, and not the feared or anticipated abuse." (*Id.* at 164; see also *Citizens for Responsible Development in West Hollywood v. City of West Hollywood* (1995) 39 Cal.App.4th 490, 501 [evidence of historical significance of two buildings not included in the proposed project to demolish and restore structures was not substantial evidence to support a fair argument of a potentially significant impact].)

The Court of Appeal departed from this established precedent. The Opinion found that letters submitted by Lawrence Karp "amounted to substantial evidence of a fair argument that the proposed construction would result in significant environmental impacts." (Opinion, 18.) The Opinion held that where there is a disagreement among experts over the significance of an effect of the project, the agency is to treat the effect as significant. (Opinion, 19.) This glossed over the threshold question noted above of whether the effect in question was actually an effect of the project or was in contrast the effect of a consultant's mistaken reading of the plans. In fact, there was no disagreement over the significance of an effect *of the project* or the proposed construction of the project: Mr. Karp never said that the project as described by the application and as approved—i.e., without the "side-hill fill"—would have a significant impact on the

environment. Rather, his letters were limited to presenting his misconception as to *what the project was* in the first instance.

Under the Appellate Court's holding, agencies must accept as conclusive evidence from project opponents purporting to show that the project will not be constructed in the manner proposed for approval, but rather will be constructed in a manner contrary to their entitlements and that raises the specter of potentially significant impacts. According to the Opinion, evidence that is not related to any element of the Project as proposed and approved, but rather to elements which Project opponents "fear or anticipate" may occur, may trigger the requirement to prepare an EIR.

Here, the Project does not include a "side-hill fill." The Kapors may only construct the Project as shown on the plans approved by the City. The City approved the Project by adopting Resolution No. 64,860-N.S. (1 AR 3-29.) Resolution No. 64,860-N.S. affirmatively adopted the project plans attached as Exhibit B to the Resolution and made construction in compliance with those plans a condition of approval. (1 AR 3.) The approved Project plans attached as Exhibit B to the Resolution do not include the "side-hill fill" that Mr. Karp opined was part of the project. Rather, the approved project plans contained in Exhibit B to Resolution No. 64,860-N.S. contain the *only* approved grading plan for the Project. (1 AR 13-29.) And that approved grading plan only allows 1500 cubic yards of cut and 800 cubic yards of fill. (1 AR 28.) The approved grading plan is the *only* approved document that allows cut and fill for the Project. As stated above, Condition Number 5 of the approved Use Permit provides that all approved plans and representations submitted by the applicant are deemed conditions of approval of the Use Permit. (1 AR 8.)

It is neither Appellants' nor a court's role to decide whether or not the approval should be different than what is specified on the approved

plans. The purpose of CEQA is to review the environmental impacts *of the project*, which is defined as the activity that is approved by the public agency. If the Opinion is allowed to stand, no project subject to the fair argument standard could ever withstand judicial review. Such a result would impose significant delay and expense on what was intended to be exempt projects and is, thus, in contravention of CEQA.

Here, Appellants' expert asserted that the "project grading ... will ... be much more extensive *than represented to the City*." (Emphasis added) (2 AR 532.) Thus, he *acknowledged* that the City-approved plans *did not represent* the "extensive grading" he feared would actually occur. As a result, Appellants' expert *admits* that the "extensive grading" could only actually take place pursuant to *a modified permit* (which would be subject to further review under CEQA). Consequently, there is absolutely no disagreement among experts regarding what the plans depict, what the City authorized and, thus, the impacts of the Project. Rather, Appellants' expert only offered testimony regarding what he feared might happen *in contravention* of the City's approval. This cannot, and does not, form the basis of a significant environmental impact under CEQA.

As a result, the evidence submitted by Appellants is not substantial evidence because it is not based on facts, is clearly erroneous, and is misleading. Even an expert cannot manufacture a significant impact by ignoring the reality of the project.[11] "Unsubstantiated opinions, concerns, and suspicions about a project, though sincere and deeply felt, do not rise to the level of substantial evidence." (*Leonoff v. Monterey County Bd. of*

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[11] The fact that a Ph.D. in mathematics may testify that 2+2=5 is not substantial evidence for that proposition.

Supervisors (1990) 222 Cal.App.3d 1337, 1352 [erroneous information that is corrected by other evidence in record may be disregarded].)

4. Even Assuming a Reasonable Possibility of Significant Geotechnical Impacts, Appellants Failed to Show that Such Impacts Were Due to Unusual Circumstances

Another problem with the Court of Appeal's decision is that, under the unusual circumstances exception, it is not enough for Appellants to show a reasonable possibility of a significant impact. Rather, Appellants must show that such an impact is "due to unusual circumstances." (Guidelines § 15300.2.) No such showing was made in this case, and the Court of Appeal failed to address this issue.

The only purportedly unusual circumstance here was the size of the proposed home. However, there is no evidence that the alleged geotechnical impacts discussed above are due to the size of the home in a way that differs from the typical new construction or in-fill project. Accordingly, the Court of Appeal decision is wrong on this ground as well.

5. The Court of Appeal Erred By Holding that the Unusual Circumstances Exception Was Triggered By Allegations of an Impact of the Environment on the Project

The Court of Appeal further erred when it held that the geotechnical comments of Mr. Karp required the City to apply the unusual circumstances exception. The Court held that Mr. Karp's assertion that "seismic lurching of oversteepened side-hill fills" would occur was substantial evidence upon which it could be fairly argued that the Project "may have [a] significant environmental impact," and that therefore categorical exemptions were inapplicable. (Opinion, 18.) This conclusion is wrong, as a matter of law.

Any "seismic lurching" that might conceivably occur would be an effect of Berkeley's existing earthquake-prone environment on an alleged "side-hill fill" element of the Project. Case law makes clear that CEQA

does not require agencies to analyze the significance of impacts of the existing environment on a proposed project, and furthermore establishes that evidence of such impacts is not capable of raising even a "reasonable possibility" that the Project would have a "significant effect on the environment" that requires application of the unusual circumstances exception.

Under CEQA, a "significant effect on the environment" is a substantial, or potentially substantial, adverse change in the environment. (§ 21068.) Under the Guidelines, this means "an 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.)

Numerous cases have made clear, however, that potentially adverse effects of the existing environment *on a project* cannot constitute significant environmental effects that require CEQA review. In *Baird v. Court of Appeal* (1995) 32 Cal.App.4th 1464, 1468, the court held that evidence of existing soil contamination, at the site of proposed construction of a drug and alcohol treatment facility, could not support a fair argument of a potentially significant environmental impact. The court held that such evidence at most indicated that preexisting site conditions might have an adverse effect *on the proposed facility.* (*Ibid.*) Such effects, the court held, are "beyond the scope of CEQA, since "[t]he purpose of CEQA is to protect the environment from proposed projects, not to protect proposed projects from the environment." (*Ibid.*)

A similar result was reached in *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604 ("*SOCWA*"). In that case, the court held that evidence that a proposed residential development would experience odor impacts from a nearby sewage treatment plant was incapable of supporting a fair argument of a potentially

significant environmental impact. "SOCWA's objection," the court wrote, "essentially turns CEQA upside down. Instead of using the act to defend the existing environment from adverse changes caused by a proposed project, SOCWA wants to use the act to defend the proposed project . . . from a purportedly adverse existing environment . . . ." (*Id.* at 1615.)

And most recently, in *Ballona Wetlands*, the court held that CEQA did not require an EIR for construction of a mixed-use development to evaluate potential impacts of coastal inundation on the project site due to global warming. (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 473-474, citing *SOCWA* and *City of Long Beach v. Los Angeles Unified Sch. Dist.* (2009) 176 Cal.App.4th 889, 905 [EIR was not required to examine purported impacts of emissions from nearby freeway on staff and students of proposed school].)

These cases make clear that evidence suggesting that existing environmental hazards may adversely affect a project is legally incapable of supporting a fair argument of a potentially significant environmental impact of that project.

Consistent with these cases, at least one court has *specifically* held that allegations of the effect of existing seismic risks on a proposed project are not relevant when considering whether the unusual circumstances exception applies. That case concerned a challenge to an agency's determination that two school closures were exempt from CEQA. (*San Lorenzo Community Advocates for Responsible Education v. San Lorenzo Valley Unified Sch. Dist.* (2006) 139 Cal.App.4th 1356, 1389-1390.) Among the grounds for challenge was a claim that the agency should have found the unusual circumstances exception applied, since the closures would transfer students to another school that was alleged to be in a high seismic-risk zone. (*Id.* at 1389-1393.) The court held that, since the seismic risks already existed, evidence that the project would expose

students to that risk was not evidence of an "environmental impact" capable of serving as the basis for the unusual circumstances exception. (*Id.* at 1392.)

Therefore, the evidence upon which the Court of Appeal in this case relied to hold that there was a reasonable possibility that the Project may result in a significant impact, and therefore that a categorical exemption could not be used, is inadequate for that purpose as a matter of law. The Court noted that Mr. Karp opined that the Project could not be constructed as proposed and approved by the City, but would instead require additional construction activities, including the placement of "side-hill fills." (Opinion, 4-5, 18.) Mr. Karp further opined that the alleged side-hill fills would be subject to "seismic lurching" due to the location of the Project site "alongside the major trace of the Hayward Fault." (*Id.* at 4.)

Mr. Karp's evidence, therefore, supported at most an argument that the allegedly required "side-hill fill" component of the Project would be adversely affected by seismic events due to an existing fault line. The record contains no evidence that alleged "seismic lurching" would cause damage to the environment other than to the imagined "side-hill fill" element of the Project itself. This is exactly the sort of evidence of a potential adverse *effect of the environment on the Project* that courts have uniformly held to be legally incapable of establishing a potentially significant environmental impact that requires analysis under CEQA. Accordingly, the Appellate Court erred, as a matter of law, in finding that the unusual circumstances exception applied.

IV. THE COURT OF APPEAL ERRED IN ORDERING THE CITY TO PREPARE AN EIR

Finally, the Court of Appeal erred in ordering the City to prepare an EIR after setting aside the City's categorical exemption determination, rather than allowing the City to exercise its discretion as to whether

Reference F

ARCHITECT MILFORD WAYNE DONALDSON FAIA

April 14, 2015

Honorable Chief Justice Tani Cantil-Sakauye
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Amicus Curiae* Support for the Petition for Rehearing
Berkeley Hillside Preservation v. City of Berkeley
Supreme Court No. S201116

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

As a preservation architect whose firm, Architect Milford Wayne Donaldson FAIA, has just celebrated its 37th year, I have many years of experience with the application of the California Environmental Quality Act (CEQA) to development in California. I am a Fellow of the American Institute of Architects and served by appointment of two Governors as the California State Historic Preservation Officer from 2004 until 2012.

I currently serve as the Chairman of the Advisory Council on Historic Preservation, appointed by President Barack Obama in 2010 and reappointed for another four-year term in 2013.

I have followed this case with interest, and as a concerned citizen I support rehearing. As a licensed California architect I am very concerned with the court's reliance on the fact of a missing sheet from sequentially-numbered architectural plans as if evidence that said sheet is somehow not part of the approved project. That is not how architectural plans and practice work in California, and if the case is not modified it will in my opinion result in confusion and abuse in CEQA review processes, to the detriment of the environment.

The architects in this case submitted a sequentially-numbered set of stamped plans. I reviewed relevant Sheets 10, 14, and 16, each of which is indexed on the 1st page of each of the plan sets in the administrative record.

When a sheet is missing from a plan set, it does not mean that it is not part of the approved plans. Industry practice is to interpret a missing sheet as one may interpret a missing page from a novel: that for unknown reason a page is missing

from a copy, not that it is no longer an intended part of the book. Architectural plan sheets are not redundant. When a sheet is missing, the plan set becomes incomplete. Absent explanation for the missing sheet, shown by notation in the plan set, one must reasonably conclude that there was a copying error, and not that the missing sheet is not encompassed in the approved plans.

The City of Berkeley has an ordinance that specifically directs that each sheet from a plan set submitted at any point in an approval process is part of an approved project. Section 23B.56.030 of the Berkeley Municipal Code is referenced in the administrative record at page AR 8 where it was made a 'Standard Condition' of the project before the court:

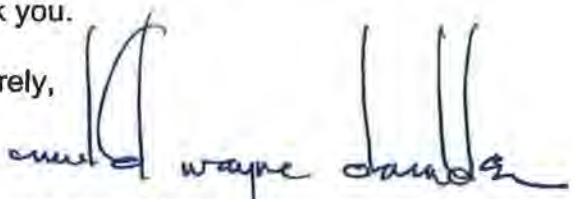
> **5. Plans and Representations Become Conditions**
> (Section 23B.56.030)
> Except as expressly specified herein, the site plan, floor plans, building elevations and any additional information or representations submitted by the applicant during the Staff review and public hearing process leading to the approval of this Permit, whether oral or written, which indicated the proposed structure or manner of operation are deemed conditions of approval.

I appreciate that the Supreme Court may have been told that a missing page of architectural plans, without explanation, signifies a change in those plans and in the scope of the approved project. But that is not the case. Amending the ruling, in a manner that does not misconstrue the import of a sheet missing from a sequentially-numbered set of architectural plans, will avoid significant problems in the ongoing implementation of CEQA by California's public agencies.

Finally, in this particular plan set, an assumption that Sheet 14 is the only sheet depicting side-hill fills would be incorrect. The small side drawings on Sheet 16, Sections 1 and 3, unequivocally depict side-hill fills for this large project.

Thank you.

Sincerely,



Architect Milford Wayne Donaldson FAIA

7745 GREENRIDGE WAY, FAIR OAKS, MWDONALDSON13@YAHOO.COM CA 95628 916 532 8004

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

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to the within entitled action; my address is 1014 Phillips Avenue, Petaluma, California 94952.

On April 14, 2015, I served one true copy of:

Letter to Court

by placing a true copy enclosed in a sealed envelope with prepaid postage in the United States mail in Petaluma, California, to addresses listed below.

See attached Service List

I declare under penalty of perjury that the foregoing is true and correct and is executed on April 14, 2015, at Petaluma, California.

Jacqueline Bailey

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

Service List

Zach Cowan, City Attorney
Laura McKinney, Deputy City Attorney
2180 Milvia Street, Fourth Floor
Berkeley CA 94704
Attorney for Respondents

Amrit Kulkarni
Julia Bond
Meyers Nave
555 12th Street, Suite 1500
Oakland CA 94607
Attorneys for Respondents and Real Parties in Interest

Kamala D. Harris
Attorney General of California
Sally Magnani
Senior Assistant Attorney General
Janill Richards
Supervising Deputy Attorney General
Catherine M. Wieman
Deputy Attorney General
300 South Spring Street
Suite 1702
Los Angeles CA 90013
Attorneys for Amicus Curiae Attorney General Kamala D. Harris

Michael H. Zischke
Andrew B. Sabey
Cox, Castle & Nicholson LLP
555 California Street, 10th Floor
San Francisco CA 94104
Attorneys for Amici Curiae California Building Industry Association; California Business Properties Association; Building Industry Legal Defense Foundation

Susan Brandt-Hawley
Brandt-Hawley Law Group
PO Box 1659
Glen Ellen CA 95442
Attorney for Plaintiffs and Appellants

Alameda County Superior Court
Attention: Clerk of the Court
1225 Fallon Street
Oakland CA 94612

California Court of Appeal
First Appellate District, Division 4
Attention: Clerk of the Court
350 McAllister Street
San Francisco CA 94102

Amanda Monchamp
Melanie Sengupta
Holland & Knight LLP
50 California Street, 28th Floor
San Francisco CA 94111
Attorneys for Amici Curiae League of California Cities; California State Association of Counties

Christian L. Marsh
Andrea P. Clark
Graham St. Michael
Downey Brand LLP
333 Bush Street
Suite 1400
San Francisco CA 94104
Attorneys for Amicus Curiae Association of California Water Agencies

Service List, continued

Stephen L. Kostka
Barbara J. Schussman
Perkins Coie LLP
Four Embarcadero Center, Suite 2400
San Francisco CA 94111
Attorneys for Amicus Curiae
Building Industry Association of the Bay Area

M. Reed Hopper
Pacific Legal Foundation
930 G Street
Sacramento CA 95814
Attorneys for Amicus Curiae
Pacific Legal Foundation

Kelly L. Drumm
Charles Robinson
1111 Franklin Street, 8th Floor
Oakland, CA 94607
Attorneys for Amicus Curiae
Regents of the University of California

Leila H. Moncharsh
Veneruso & Moncharsh
5707 Redwood Road, Suite 10
Oakland CA 94612
Attorneys for Amicus Curiae
Berkeley Architectural Heritage Association

Christine Helwick
Andrea M. Gunn
California State University
Office of the General Counsel
401 Golden Shore, 4th Floor
Long Beach CA 90802
Attorneys for Amicus Curiae
The Board of Trustees of the California State University

Harold M. Freiman
Kelly M. Rem
Lozano Smith
2001 N. Main Street, Suite 650
Walnut Creek CA 945596
Attorneys for Amicus Curiae
California School Boards Association of Education Legal Alliance

Michael W. Graf
Law Offices of Michael W. Graf
227 Behrens Street
El Cerrito CA 94530
Attorneys for Amicus Curiae
Center for Biological Diversity; High Sierra Rural Alliance

Jan Chatten-Brown
Douglas P. Carstens
Chatten-Brown & Carstens LLP
2200 Pacific Coast Hwy, #318
Hermosa Beach CA 90254
----&
Michael W. Stamp
Molly Erickson
Law Offices of Michael W. Stamp
479 Pacific Street, #1
Monterey CA 93940
Attorneys for Amicus Curiae
Planning and Conservation League; Endangered Habitat League; California Preservation Foundation; Save Our Heritage Foundation; Save Our Carmel River; The Open Monterey Project

Reference G

LEA & BRAZE ENGINEERING, INC.
CIVIL ENGINEERS I LAND SURVEYORS

Mayor Tom Bates
Berkeley Council Members
2180 Milvia Street
Berkeley, CA 94704

April 21, 2010

Subject: Kapor Klein Residence
2707 Rose St., Berkeley, CA

Dear Mayor Bates and Berkeley City Council members:

I have reviewed the relevant documents submitted to the City of Berkeley including application documents, architectural drawings and the letters sent from Brandt-Hawley Law Group, Lawrence B. Karp, consulting engineer. The purpose of this letter is to give you my professional opinion on the statements and conclusions of those letters. I have a Master of Science in Civil Engineering with an emphasis in Urban Planning and Construction Management. I hold California licenses as a Professional Engineer and as a Professional Land Surveyor. I am a principal with Lea & Braze Engineering, Inc with over 14 years experience in civil engineering with particular expertise in hillside custom residential homes. I have personally designed grading and drainage for hundreds of custom homes on moderate to steep hillsides. My opinion is based on my education, experience and review of the above mentioned documents.

Overview.

Upon review of the plans prepared by Marcy Wong Donn Logan Architects, it is clear that the site was given significant consideration in terms of placement of the house and its impact on the site. Very few trees are proposed to be removed, none of which are either heritage trees or oak trees. The grading consists of cutting into the hillside for the main residence and associated driveways and retaining walls. Their plans do not show grading beyond the footprint of the new improvements. In my opinion, setting the house into the hillside is a smart building practice. By benching into the hillside, the house will have more of solid foundation to rest on and does not need extensive grading on the site to create a flat pad.

Review of Letter by Brandt-Hawley and Lawrence Karp Opinions on Fill/Stability Based on Incorrect Facts:

The statement "that major retaining walls are not shown, which would result in larger earthworks than is currently proposed" is not supported by my review of the full set of documents. In my opinion, the retaining walls necessary to construct the residence and

Main Office:
2495 Industrial Pkwy. West
Ste. 300
Hayward, CA 94545
Ph: 510.887.4086
Fx: 510.887.3019

Sacramento Region:
3017 Douglas Blvd.,
Roseville, CA
95661
Ph: 916.966.1338
Fx: 916.797.7363

driveway are shown at the level of detail which is customary for zoning submittal level. In virtually every hillside construction, retaining walls are necessary if one wants to keep the house profile low. The planning level architectural documents show an accurate representation of what will be required for retaining walls and excavation and as such, I see no reason for additional large walls. The conceptual grading plan is clear on where walls are being placed.

Mr. Karp states "fills are placed directly on very steep existing slopes" I do not see any evidence of this on the plans. Page 14 of the plans submitted by Marcy Wong Donn Logan's office shows the existing slope of the hillside with a hatch below it and another line and different hatch pattern above this. This upper line is meant to depict the existing grade at another location on the site, not a fill line. No other sheet, including the conceptual grading indicates any intent of spreading any earthworks on the site. The Brandt-Hawley/Karp statements are based on erroneous reading of only Page 14, and not the full set of plans. Their failure to consider the entire document combined with their mis-reading of page 14 apparently led to their completely incorrect assumption that the cut material will be placed on the surface of the existing slope, when in fact the surface of the existing slope will remain intact.

Mr. Karp's April 18, 2010 Opinion is Apparently Based on the Same Incorrect Factual Assessment

In a follow-up letter by Mr. Karp dated April 18, 2010, he has had the opportunity to review the geotechnical report by Allan Kropp and Associates. In his letter he again misinterprets the plans to state that fill will be placed on the existing slope downhill of the residence. He is concerned that the report does not address fills on slopes greater than 2:1. In fact no new slopes greater than 2:1 are proposed. This concern too seems based on his original failure to correctly interpret the plans. He goes on to depict regrading the existing steep slope to a new 2:1 grade creating walls in excess of 43 feet. Again, nowhere do the plans depict regrading the slope outside of the footprint of the house and deck. Due to the nature of the pier and grade beam foundation, any fills will be supported with retaining walls that in themselves will contain the cut material. For the same reason that Mr. Karp's opinions are based on the incorrect assertion that excavated fill will be placed on the existing slope, there is no support for the Karp conclusions that 1) walls 27' in height will be required; and 2) all vegetation will have to be removed.

The Geotechnical Investigation Supports Site Suitability for This Construction

A geotechnical investigation has been performed by Alan Kropp and Associates, a well respected local geotechnical engineering firm with whom I have worked with on several projects. His findings indicate that the site is suitable for the construction of a new residence on the property. The site is underlain by shallow bedrock and in his opinion the site is "within

Main Office:
2495 Industrial Pkwy. West
Ste. 300
Hayward, CA 94545
Ph: 510.887.4086
Fx: 510.887.3019

Sacramento Region:
3017 Douglas Blvd.,
95661
Roseville, CA
Ph: 916.966.1338
Fx: 916.797.7363

normal risk tolerance levels for hillside residential construction". He goes on to recommend a pier and grade beam foundation, a construction method that has proven to be one of the best construction methods for hillside development in the Bay Area. I do not see anything in Alan Kropp and Associates' report that would indicate that this site should be subject to additional review other than normal building permit review procedures.

Truck Traffic and Construction.

Per the architect's and surveyor's calculations, approximately 780 cubic yards of earth will be removed. Soil in the ground is very dense. Once it is disturbed it will occupy a greater volume in terms of off-haul due to the disturbance of the earth. This is typically referred to as a "fluff factor". A conservative fluff factor of 20% is typically used to determine how many truck loads of off-haul may be required, or a total of 940 cubic yards. The letter addresses concern over truck hauling traffic for the 940 cubic yards of off-haul. While a specific construction operation plan has not been started, I anticipate the easiest method of disposal for the off-haul is to create a chute down the hillside to Shasta Ave below. Shasta Ave is a 20' wide residential street. Based on aerial photography of the area, it appears that 20 cubic yard (c.y.) dump trucks would easily be able to maneuver down this street. With 20 c.y. trucks, the off-haul would be removed with approximately 40 to 45 trips. This could be accomplished in as little as a week with up to 10 trips a day. This amount of trips is common for all new home construction and, in fact, is significantly less in comparison to smaller homes with basements, which produce much more off-haul. It is common practice to consult with Planning and Building to coordinate the hours and days of truck traffic.

Site drainage concerns raised by Mr. Karp are customarily addressed during the construction documents / building permit phase of a project.

Moreover, the site is approximately ¼ acre lot, and, per zoning code, based on its area at least four houses could be built. Such development would result in far more significant environmental impacts. This would include more tree destruction, more grading, more cuts into the hillside, additional truck traffic, noise and many other items of concern and a significantly longer period of construction. The impact of only one house on this site will be significantly less than if multiple houses were built as allowed by current zoning regulations.

Main Office:
2495 Industrial Pkwy. West
Ste. 300
Hayward, CA 94545
Ph: 510.887.4086
Fx: 510.887.3019

Sacramento Region:
3017 Douglas Blvd., Ste. 300
Roseville, CA 95661
Ph: 916.966.1338
Fx: 916.797.7363

While no project can completely eliminate an environmental impact, I feel that the construction of this house is not out of the norm in terms of its environment impact from an engineering point of view. The amount of excavation, fill, and temporary construction impacts will not, in my opinion, have a significant impact beyond that of a typical new home construction in the hills. In my professional opinion an assertion to the contrary is not consistent with the proposed plans and house design.

Please let me know if you have any questions or if I can help in any way.

Very truly yours,

Jim Toby, P.E., P.L.S.
Principal
Lea & Braze Engineering, Inc.

Main Office:
2495 Industrial Pkwy. West
Ste. 300
Hayward, CA 94545
Ph: 510.887.4086
Fx: 510.887.3019

Sacramento Region:
3017 Douglas Blvd.,
95661
Roseville, CA
Ph: 916.966.1338
Fx: 916.797.7363

Reference H

S201116

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

BERKELEY HILLSIDE PRESERVATION, ET AL.
Petitioners and Appellants,

v.

CITY OF BERKELEY, ET AL.
Respondents.

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

After a Published Decision by The Court of Appeal
First Appellate District, Division Four
Civil Case No. A131254

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

RESPONDENTS AND REAL PARTIES IN INTEREST'S REPLY BRIEF ON THE MERITS

MEYERS, NAVE, RIBACK, SILVER & WILSON
Amrit S. Kulkarni (SBN: 202786)
Julia L. Bond (SBN: 166587)
555 12th Street, Suite 1500
Oakland, California 94607
Telephone: (510) 808-2000
Facsimile: (510) 444-1108

Attorneys for Respondents and Real Parties in Interest Mitchell Kapor and Freada Kapor-Klein

Zach Cowan, City Attorney (SBN: 96372)
Laura McKinney, Deputy City Attorney (SBN: 176082)
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704
Telephone: (510) 981-6998
Facsimile: (510) 981-6960

Attorneys for Respondents City of Berkeley and City Council of the City of Berkeley

impacts *due to* unusual circumstances. Their argument fails for that reason alone. Instead, Appellants simply argue that the proposed home may have a significant impact on the environment, which is the wrong inquiry. Even if it was the correct inquiry, Appellants have also failed to show a reasonable possibility of a significant environmental impact.

1. There Is No Expert Dispute Over Geotechnical Impacts.

Appellants have still failed to show a reasonable possibility of a significant geotechnical impact. They argue that Respondents advocate rejecting Appellants' expert's opinion in favor of the Kapors' expert's opinion, which "is not how the CEQA standard of review works." (Answer Brief, p. 71.) Appellants miss the point. This is not a case of dueling expert opinions over the impacts of a project as proposed and approved. Rather, Appellants' expert has postulated a *different* project, and opined about the impacts of that different project. *That* is not how CEQA works.

Appellants mischaracterize Respondents' argument as Mr. Karp misread the project plans, respond that Mr. Karp insists that he did not misread the project plans and, therefore, claim that this a classic dispute among experts. However, this case is not about whether Mr. Karp reviewed all the plans, or whether the project changed, or whether he conducted his own investigation, or his credentials as an expert. Rather, the fundamental point is that there cannot be a dispute over what the approved project is. The City approves specific project plans. That is the project. Respondents cited extensive legal authority in the Opening Brief for the propositions that: (1) the City's determination regarding the scope of the proposed project per the approved plans is not subject to expert dispute (Opening Brief, pp. 67-70); and (2) CEQA's requirement to prepare an EIR is not triggered by alleged impacts of project elements which are neither

proposed nor approved (Opening Brief, pp. 70-74). Appellants failed to respond to these legal authorities.

Instead, Appellants' brief contains a baffling, jumbled explanation of the Project plans, evidently in hopes that the Court will be so confused that it will default to the "dispute among experts" conclusion. However, the project plans approved by the City are the Project. It is this Project that the City must review to determine whether CEQA review is required. The City has said over and over again that the Project it considered and approved does not contain the "side-hill fill" invented by Appellants. The legal presumptions and authorities in favor of the City and its official actions discussed in the Opening Brief are enough to establish the definition of the Project as a matter of law. However, in order to respond once and for all to Appellants' repeated and confusing mischaracterizations of the Project plans, the following explanation walks through those plans step by step.

The City adopted Resolution No. 64,860-N.S., which approved the Project and expressly adopted the project plans contained in Exhibit B. (1 AR 3.) The project plans contained in Exhibit B are located at 1 AR 13-28, and consist of 17 pages of "Approved Plans" dated November 12, 2009. Each sheet of the Approved Plans serves a distinct function, and the Index to the Approved Plans provides a detailed list of each sheet, as follows:

Plan 1 is the Vicinity Map/Neighbor Contact. (1 AR 14.)

Plan 2 is the Site Plan with Revised Driveway. (1 AR 15.)

Plan 3 is the Landscape Plan. (1 AR 16.)

Plan 4 is the Upper Floor Plan with Revised Driveway. (1 AR 17.)

Plan 5 is the Lower Floor Plan with Revised Driveway. (1 AR 18.)

Plan 6 is the Landscape West Elevation. (1 AR 19.)

Plan 7 is the Landscape North Elevation. (1 AR 20.)

Plan 8 is the Landscape East Elevation. (1 AR 21.)

Plan 9 is the Landscape South Elevation. (1 AR 22.)

Plan 10 is the West Elevation. (1 AR 23.)

Plan 11 is the North Elevation. (1 AR 24.)

Plan 12 is the East Elevation. (1 AR 25.)

Plan 13 is the South Elevation. (1 AR 26.)

Plan 14 is the Tranverse Section Looking East.

Plan 15 is the Boundary & Topographic Survey. (1 AR 27.)

Plan 16 is the Conceptual Grading Plan. (1 AR 28.)

Thus, Plans 2-14 are simply visual representations of the house from different directions, which is unambiguously denoted on the Plans. Plans 2-5 present a view of the house from above and each shows a different perspective about the view from above. Plans 6-13 provide a 360 degree perspective of the house with a focus on landscaping and depictions of the elevations. Plan 14 is a visual representation of the cross-section of the inside of the house. Plan 15 provides the boundaries and topography of the site. Plan 16 depicts the cut and fill that will be necessary to effectuate the construction of the house.

Mr. Karp relied on Plan 14 to form his opinion that the grading for the Project would actually be much larger than what the City approved and would require the "side-hill fill." (Answer Brief, pp. 22-23.) However, Plan 14 is the Tranverse Section Looking East, which is the cross-section showing the inside of the house. (4 AR 1082.) Plan 14 does not have anything to do with grading, or cut and fill information. It also does not show any elevations or topographical information. The City only approved one grading plan in the Approved Plans. That is Plan 16 at 1 AR 28. That approved grading plan only allows 1500 cubic yards of cut and 800 cubic yards of fill. (1 AR 28.)

The Kapors' expert explained how Plan 14 did not show any grading for the Project:

> Page 14 of the plans submitted by Marcy Wong Donn Logan's office shows the existing slope of the hillside with a hatch below it and another line and different hatch pattern above this. This upper line is meant to depict the existing grade at another location on the site, not a fill line. No other sheet, including the conceptual grading indicates any intent of spreading any earthworks on the site. The Brandt-Hawley/Karp statements are based on erroneous reading of only Page 14, and not the full set of plans. Their failure to consider the entire document combined with their mis-reading of page 14 apparently led to their completely incorrect assumption that the cut material will be placed on the surface of the existing slope, when in fact the surface of the existing slope will remain intact. (4 AR 1065, underlining original.)

Indeed, given the confusion caused by Appellants' expert over Plan 14, that plan was not included in the "Approved Plans" attached to City Resolution No. 64,860-N.S. and approved by the City. (1 AR 3.) Thus, the entire foundation of Mr. Karp's opinion is not part of the Approved Plans. As such, Mr. Karp's opinion does not constitute substantial evidence of a geotechnical impact *of the approved Project.* Nothing in CEQA or the fair argument standard supports Appellants' request that this Court simply disregard the City Council's approved grading plan for the Project.

To the contrary, Appellants fail to even acknowledge the citation in the Opening Brief to *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, which rejected claims by project opponents that the project would be larger than what was approved, holding that such claims "ignored the reality of the permit as approved and accepted." (*Id.* at 162.) The court held that "the focus must be on the use, as approved, and not the feared or anticipated abuse." (*Id.* at 164.) Here too, Appellants' expert ignored the reality of the permit as approved and accepted. As such, it does not show a potentially significant impact *of the project.*

Appellants also argue that because the "Conceptual Grading Plan" in Plan 16 includes the word "Conceptual" it is "by its very name

preliminary." (Answer Brief, p. 20.) However, Appellants disregard that the City Council expressly adopted Plan 16 in Resolution No. 64,860-N.S. (1 AR 3), which *does* make it the only approved document that allows cut and fill for the Project.

Appellants further contend that: Project approval conditions require a "project grading plan" to be approved "prior to issuance of any building permit" that must include "Drainage and Erosion Control Plans to minimize the impacts from erosion and sedimentation during grading." (Answer Brief, pp. 20-21, citing "1 AR 10, see 12.") However, these conditions require Drainage and Erosion Control plans associated with the Project grading—they do not authorize or contemplate any additional or different grading than what is already included in the Approved Plans. (1 AR 10, 12.)

Appellants misrepresent the record by claiming that the final design of the Project was never subject to review for geotechnical impacts. To the contrary, the record contains expert evidence that the geotechnical investigation supports the construction of the Project. (4 AR 1065-1066.)

Finally, Appellants argue that Mr. Karp's opinion that the Project cannot be built as proposed and approved is substantial evidence that the Project will have a significant impact on the environment. Just to state this argument is to demonstrate its absurdity. Appellants rely on Mr. Karp's preparation of his own plan for how the house should be built. (Answer Brief, p. 19, citing 4 AR 1085.) However, the City did not approve Mr. Karp's plan; it approved the Kapors' plan.

If the Project cannot be built as approved by the City, then there is no approved project. If the Kapors want to build a different project, they must return to the City for approval of a different project and the City could issue a stop-work notice to prevent unauthorized construction. Appellants reject this obvious reality as speculation and outside the record, and claim

the trial court agreed with them. However, the trial court did not agree with Appellants, but stated: "It's really just the operation of law in any event." (RT:67.) The trial court was correct. Courts presume that the City will comply with the law and perform its official duties (see Evid. Code § 664), which includes enforcing its own Approved Plans.

Thus, there is no dispute among experts as to the impacts of the Project as approved. Accordingly, Appellants have not shown that the unusual circumstances exception applies here.

2. Appellants Rely on Impacts of the Environment on the Project.

Appellants also dismiss the argument in the Opening Brief that a reasonable possibility of significant impact cannot be shown by alleged impacts of the environment on the project. (Opening Brief, pp. 74-77.) Appellants claim that this is not a situation of people choosing to move into an environmentally dangerous area. However, that is exactly the type of impact that Appellants allege—that the alternative project hypothesized by Mr. Karp will be subject to "seismic lurching."

In *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 473-474, the court questioned the validity of Guidelines section 15126.2(a), which provides that an EIR should evaluate "any potentially significant impacts of locating development in areas susceptible to hazardous conditions." The court further cast doubt on a particular question listed in Appendix G of the CEQA Guidelines—a checklist for use in evaluating a project's potentially significant impacts—namely: "Would the project . . . [e]xpose people or structures to . . . risk of loss, injury or death involving . . . [r]upture of a known earthquake fault." (*Id.* at 474.) The court held that this question, to the extent it might imply that an EIR should evaluate "the effects on users of the project and structures in the project of preexisting environmental hazards" was inconsistent with CEQA,

and therefore "cannot support an argument that the effects of the environment on the project must be analyzed in an EIR." (*Ibid.*) Similarly, here, evidence suggesting that existing environmental hazards may adversely affect a project is legally incapable of supporting a fair argument of a potentially significant environmental impact of that project.

3. Seismic Issues.

Appellants next address what they characterize as "seismic issues." (Answer Brief, p. 78.) Again, however, Appellants fail to show a reasonable possibility of a significant environmental impact due to "seismic issues," or to link any such impact to unusual circumstances.

Appellants rely on Mr. Karp's recommendation that the City approve an alternative project to avoid the massive grading and side-hill fill he has determined is required to construct the Project. Of course, since the approved Project does not include massive grading or side-hill fill, this is not substantial evidence of an impact of the Project.

Appellants' rely on Mr. Karp's reference to the "designated earthquake-induced landslide hazard zone" and claim it is buttressed by the Kapors' 2009 geotechnical report. However, as discussed above and clearly explained in the record, all this means is that the Project site, like the rest of the Berkeley and Oakland hills, is in an area that requires a site-specific investigation, which was done. (4 AR 1062.) Appellants do not cite any significant environmental impact due to the Project's location in the landslide hazard zone.

Appellants next argue that the La Loma overpass adjacent to the Project site will somehow contribute to significant environmental impacts. However, Appellants rely on the same recommendation of Mr. Karp that the City approve an alternative project to avoid the massive grading and the side-hill fill. Again, the approved Project does not include massive grading

or the side-hill fill, and therefore this opinion is not substantial evidence of a significant impact of the Project.

Appellants next claim that Mr. Karp stated that the drainage from the Project would be inconsistent with the "intended very deep fill slopes." (Answer Brief, p. 83.) Again, however, the approved Project does not contain these "intended very deep fill slopes," and therefore there is no substantial evidence of a significant environmental impact of the Project.

4. No Conflict With Berkeley General Plan/Zoning.

Appellants have also failed to show that there is a reasonable possibility of a significant impact due to unusual circumstances based on any alleged general plan inconsistencies.

First, "an inconsistency between a project and other land use controls does not in itself mandate a finding of significance. [Citations] It is merely a factor to be considered in determining whether a particular project may cause a significant environmental effect." (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1207.) Thus, even if Appellants had shown an inconsistency between the Project and the City's General Plan, they failed to show any significant impact on the environment due to the alleged General Plan consistency.

Second, Appellants cite *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, as applying the fair argument standard to a claim that the proposed project was inconsistent with a general plan. However, the well-established rule is that courts review the City's general plan consistency determination under the "arbitrary and capricious standard." (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782.) Under this standard, the City's conclusions of consistency carry "a strong presumption of regularity that can be overcome only by a showing of abuse of discretion." (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th

Reference I

Filed 3/2/15

IN THE SUPREME COURT OF CALIFORNIA

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.	S201116 Ct.App. 1/4 A131254 Alameda County Super. Ct. No. RG10517314

The California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.)[1] establishes a comprehensive scheme to provide long-term protection to the environment. It prescribes review procedures a public agency must follow before approving or carrying out certain projects. For policy reasons, the Legislature has expressly exempted several categories of projects from review under CEQA. (See § 21080, subd. (b)(1) – (15).) By statute, the Legislature has also directed the Secretary of the Natural Resources Agency (Secretary) to establish "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.

1 All further unlabeled statutory references are to the Public Resources Code.

have a significant effect *does* tend to prove that some circumstance of the project is unusual. An agency presented with such evidence must determine, based on the entire record before it — including contrary evidence regarding significant environmental effects — whether there is an unusual circumstance that justifies removing the project from the exempt class.

This reading of the guideline is not inconsistent with the phrase "reasonable possibility that the activity will have a significant effect on the environment." (Guidelines, § 15300.2, subd. (c).) A party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to that unusual circumstance. Alternatively, under our reading of the guideline, a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect. That evidence, if convincing, necessarily also establishes "a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (Guidelines, § 15300.2, subd. (c).)

As this discussion demonstrates, our approach is consistent with the concurring opinion's statement of its central proposition: "When it is *shown* that a project otherwise covered by a categorical exemption *will* have a significant environmental effect, it necessarily follows that the project presents unusual circumstances." (Conc. opn, *post*, at p. 2, italics added.) However, for reasons already set forth, we part company with the concurring opinion when it moves from this central proposition to the conclusion that a reviewing court must find the exception applicable, and overturn an agency's application of an exemption, if there is "substantial evidence" of "a fair argument that the project will have

significant environmental effects." (*Ibid.*) The Secretary, in complying with the Legislature's command to determine the "classes of projects" that "do not have a significant effect on the environment" (§ 21084, subd. (a)), necessarily resolved any number of "fair arguments" as to the *possible* environmental effects of projects in those classes. Allowing project opponents to negate those determinations based on nothing more than "a fair argument that the project will have significant environmental effects" (conc. opn., *post*, at p. 12) would be fundamentally inconsistent with the Legislature's intent in establishing the categorical exemptions.

Appellants assert that *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190 (*Chickering*) precludes us from construing the unusual circumstances exception to require a showing of something more than a potentially significant environmental effect. There, we held in relevant part that the setting of hunting and fishing seasons by the Fish and Game Commission (Commission) was not exempt from CEQA under Guidelines former section 15107. (*Chickering*, *supra*, at p. 205.) That former guideline established a categorical exemption for " 'actions taken by regulatory agencies . . . to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment' " (*id.* at p. 204), and it described as an example " 'the wildlife preservation activities of the State Department of Fish and Game.' " (*Id.* at p. 205.) We gave two reasons for finding this exemption inapplicable on its terms. First, the Commission "is not" the Department of Fish and Game. (*Ibid.*) Second, and "[m]ore significantly," several of the statutes that granted powers and duties to the Department of Fish and Game "contemplate projects specifically designed for the preservation of wildlife." (*Ibid.*) These are the "departmental functions" to which the former guideline referred in mentioning "[t]he 'wildlife preservation activities of the State Department of Fish and Game.' " (*Ibid.*) "The

Finally, and again contrary to respondents' assertion, our approach is fully consistent with — and is, indeed, affirmatively supported by — the decision in *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039. At issue there were the following CEQA provisions: (1) section 21084.1, which provides that "[a] project that may cause a substantial adverse change in the significance of an historical resource is a project that may have a significant effect on the environment"; (2) section 21084, subdivision (e), which provides that "[a] project that may cause a substantial adverse change in the significance of a historical resource, as specified in Section 21084.1, shall not be exempted from [CEQA] pursuant to subdivision (a)"; and (3) Guidelines section 15300.2, subdivision (f), which provides that "[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 court held that, in applying these provisions, "the fair argument standard does not govern" an agency's determination of whether a building qualifies as a "historical resource." (*Valley Advocates*, *supra*, at p. 1072.) However, the court continued, "once the resource has been determined to be an historical resource, then the fair argument standard applies to the question whether the proposed project 'may cause a substantial adverse change in the significance of an historical resource' [citation] and thereby have a significant effect on the environment." (*Ibid.*) This discussion supports the conclusion that, if "unusual circumstances" are established, an agency should apply the fair argument standard in determining whether there is "a reasonable possibility" that those circumstances will produce "a significant effect" within the meaning of CEQA. (Guidelines, § 15300.2, subd. (c).)

C. Lower Court Rulings.

In reviewing the City's determination that the unusual circumstances exception does not apply, the trial court identified and made "two separate

determinations": (1) whether "there is a reasonable possibility that the activity will have a significant effect on the environment"; and (2) "whether such reasonable possibility of a significant effect is due to unusual circumstances associated with the project." It answered the first question in the affirmative, explaining in part that, "[d]espite Respondents' criticisms of [Karp's] report and [his] methodology, and even when discounting the clearly erroneous and misleading portions, Dr. Karp's opinion" regarding the " 'probability of seismic lurching of oversteepened side-hill fills' " "provides substantial evidence of a fair argument of a significant environmental effect consequent to the Project." However, the court also found that the proposed project did not present "unusual circumstances," explaining: "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 that any of the circumstances surrounding the Project make it 'unusual.' . . . [T]hough 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."

In reversing the judgment, the Court of Appeal agreed with the trial court "that Karp's letters . . . amounted to substantial evidence of a fair argument that the proposed construction would result in significant environmental impacts." But it disagreed that the unusual circumstances exception applies only if the proposed project's potentially significant environmental effects are due to unusual circumstances. In the Court of Appeal's view, "the fact" that the proposed project "may" have a significant effect on the environment "is *itself* an unusual circumstance" that "preclude[s]" the City from applying a categorical exemption. The Court of Appeal went on to note that it may nevertheless "be helpful" to

determine "whether unusual circumstances exist" apart from the project's potentially significant environmental effect. Considering this question de novo, it found that, with respect to the Class 3 small structure exemption, the proposed project's size constitutes such a circumstance. In reaching this result, it reasoned that "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." As to the Class 32 in-fill development exemption, the court offered no additional analysis.

It is apparent that neither the trial court nor the Court of Appeal applied principles like those we have set out above. Remand for application of the standards we announce today is therefore both appropriate and necessary.[7]

The Court of Appeal erred in another respect by indicating, as noted above, that the unusual circumstances inquiry excludes consideration of "the typical circumstances in one particular neighborhood." In a number of decisions, our appellate courts have looked to conditions in the immediate vicinity of a proposed project to determine whether the unusual circumstances exception applied. (*Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1315-1316; *City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810, 826-827; *Ukiah*, *supra*, 2 Cal.App.4th at p. 736.) Indeed, in the only decision the Court of Appeal cited for its contrary view — *Santa Monica*, *supra*, 101 Cal.App.4th 786 — the court

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7 In reversing based on potential geotechnical effects, the Court of Appeal did not address other potential effects appellants allege, including aesthetic and view impacts, inconsistencies with land use plans and policies the City has adopted for environmental protection, construction-related traffic impacts, and permanent traffic impacts related to contemplated fundraising activities at the house. Nor did the Court of Appeal address appellants' argument that the City's adoption of a traffic management plan is a mitigation measure that precludes a finding that the proposed project is categorically exempt. Rather than address these issues here in the first instance, we leave their consideration to the Court of Appeal on remand.

quoted *Ukiah* on this point and declared it to be "instructive." (*Santa Monica*, at p. 802.) Insofar as these decisions indicate that local conditions are relevant, we agree. In determining whether the environmental effects of a proposed project are unusual or typical, local agencies have discretion to consider conditions in the vicinity of the proposed project.

Respondents separately attack the conclusion of both the trial court and the Court of Appeal that Karp's submissions constitute substantial evidence of a fair argument that the proposed project may have a significant environmental effect. As earlier noted, Karp opined that the proposed project "is likely to have very significant environmental impacts . . . due to the probability of seismic lurching of the oversteepened side-hill fills." Respondents contend that Karp's opinion does not constitute substantial evidence of a fair argument because it is based on a misreading of the plans the City approved. In their view, the evidence in the record, including the submissions of Kropp and Toby, conclusively establishes that "the project approved by the City does *not* involve 'side-hill fill' " and that Karp was mistaken in reading the plans otherwise. Because of Karp's erroneous belief there would be side-hill fill, his opinion, respondents assert, "is not substantial evidence." A finding of potential environmental impacts, respondents argue, must be based on the proposed project as actually approved, and may not be based on unapproved activities that opponents assert will be necessary because the project as approved cannot be built. If the proposed project "cannot be built as approved" and applicants want to build a different project, then "they must return to the City for approval of a different project and the City could issue a stop-work notice to prevent unauthorized construction."

We agree with respondents that a finding of environmental impacts must be based on the proposed project as actually approved and may not be based on unapproved activities that opponents assert will be necessary because the project,

as approved, cannot be built. In *Laurel Heights I, supra*, 47 Cal.3d at page 395, we considered whether there are circumstances under which an EIR must address "future action related to" a proposed project. There, the University of California, San Francisco (UCSF), had certified an EIR for moving its school of pharmacy to 100,000 square feet of a 354,000-square-foot building it had purchased. (*Id.* at p. 393.) Although UCSF admitted it intended to use the remainder of the building when existing tenants left, the EIR it prepared did not consider the potential environmental effect of that intended future use. (*Id.* at pp. 393, 397.) To justify this omission, UCSF argued that it had "not formally decided *precisely* how [it would] use the remainder of the building." (*Id.* at p. 396.) In rejecting this argument, we first held that an EIR for a proposed project must consider the potential environmental effects of future expansion if expansion (1) "is a reasonably foreseeable consequence of the initial project" and (2) "will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (*Ibid.*) This standard, we reasoned, properly balances the following considerations: (1) delayed review may produce "bureaucratic and financial momentum" that "provid[es] a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project" (*id.* at p. 395); (2) " 'environmental considerations do not become submerged by chopping a large project into many little ones — each with a minimal potential impact on the environment — which cumulatively may have disastrous consequences' [citation]"; and (3) "premature environmental analysis may be meaningless and financially wasteful" (*id.* at p. 396). We then concluded that UCSF's EIR had to address the potential effects of future use because there was "telling evidence" UCSF had, by the time it prepared the EIR, "either made decisions or formulated reasonably definite proposals as to future uses of the building." (*Id.* at p. 397.) We clarified, however, that an EIR need not discuss

"specific future action that is merely contemplated or a gleam in a planner's eye." (*Id.* at p. 398.)

We decline to extend *Laurel Heights I* to situations where project opponents claim, not that the proposed project will lead to additional future development, but that the proposed project cannot be carried out as approved and will require additional work that may or will have a significant environmental effect. The latter situation, unlike the former, presents little risk of either bureaucratic and financial impediments to proper environmental review or piecemeal review of a project with the potential for significant cumulative effects. As respondents argue, if a proposed project cannot be built as approved, then the project's proponents will have to seek approval of any additional activities and, at that time, will have to address the potential environmental effects of those additional activities. As respondents also argue, if a project opponent's opinion that *unapproved* activities may have a significant environmental effect constitutes fair argument, then it is doubtful that any project could survive challenge. Accordingly, Karp's opinion is insufficient as a matter of law insofar as it is based on the potential effect of unapproved activities Karp believes will be necessary because the project cannot be built as approved.

This conclusion has implications for respondents' claim that, because Karp misread the proposed project's plans, his opinion is legally insufficient. As part of the permit application, applicants submitted a set of architectural plans for the project. In opining that the proposed project would result in "oversteepened side-hill fills" with potentially significant environmental effects — including "seismic lurching" — Karp relied largely, if not entirely, on a page of those plans entitled "TRANSVERSE SECTION LOOKING EAST." In April 2010, during the appeal to the city council, Karp stated that this page "indicates [that] fills [will be] placed directly on very steep existing slopes," "creat[ing] a new slope more than 50°."

However, the plans the Board had already approved three months earlier (along with the use permit) did not include this page. Nor, as appellants concede, do the project plans the city council ultimately approved include this page.[8] Insofar as Karp thus based his opinion regarding the project's potential effects on side-hill fill that has not been approved, his opinion is legally insufficient.[9] On remand, the Court of Appeal should apply these principles to Karp's opinion should it reach that point in its analysis.[10]

Finally, because reversal and remand is appropriate for reasons explained above, we need not resolve respondents' claim that the remedy the Court of Appeal chose upon finding the proposed project not to be exempt under Class 3 or Class 32 — ordering preparation of an EIR — was improper. However, it is appropriate to discuss that issue because the question of remedy could arise again on remand.

Section 21168.9 specifically addresses the available remedies for CEQA violations. As here relevant, subdivision (a) provides that, upon finding that a

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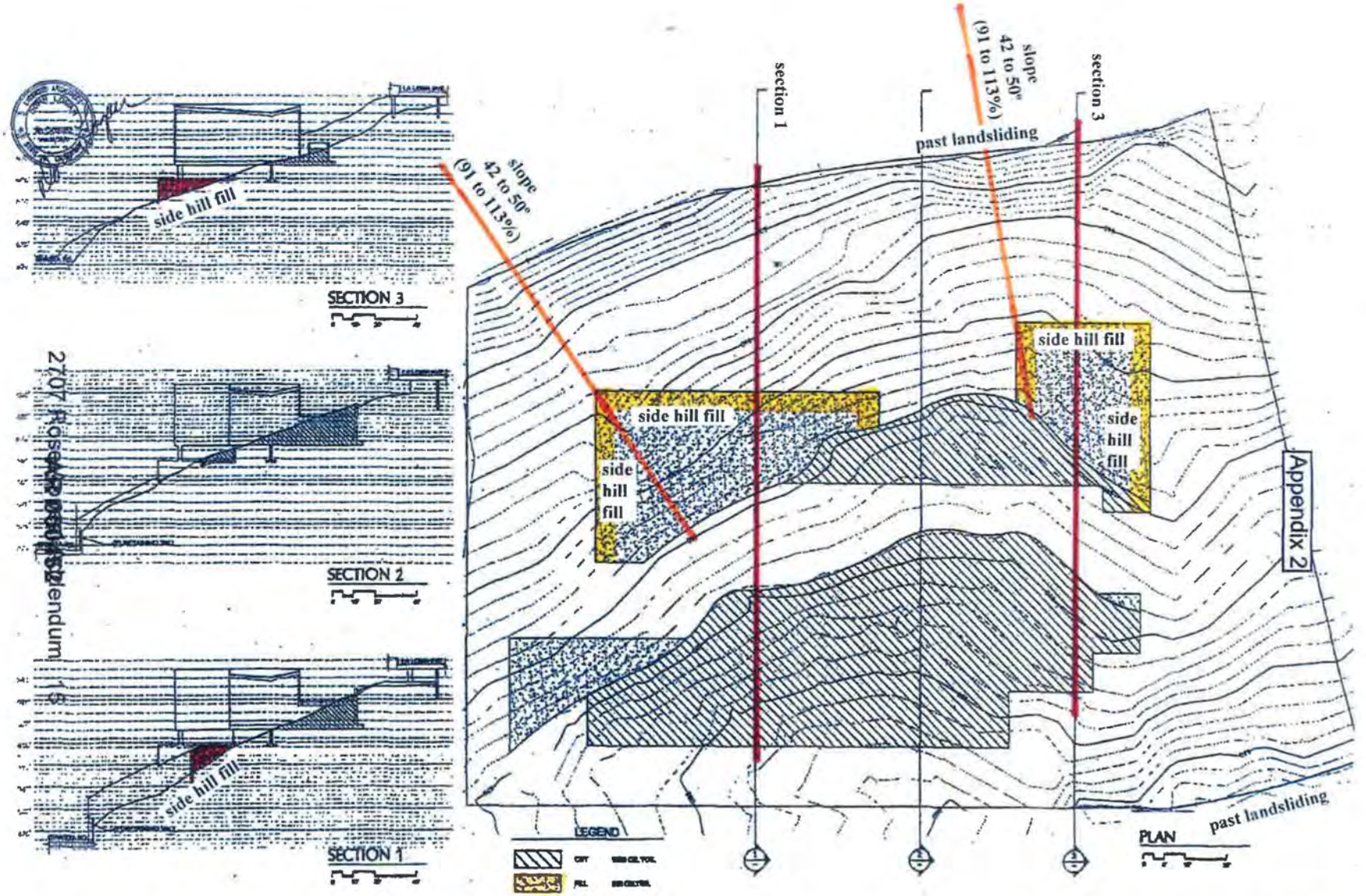
8 In its resolution affirming the Board's decision, the city council stated: "[T]he Council hereby adopts . . . the project plans on Exhibit B." The page on which Karp relied does not appear in that exhibit.

9 Based on other expert evidence before the city council — the letters from Kropp and Toby — respondents also assert that Karp misread the omitted page, and that what he identified on that page as side-hill fill is actually nothing more than the lot's current ground surface. In light of our conclusion, we need not address this argument.

10 Respondents also argue that the "the probability of seismic lurching" Karp identified is an effect, not of the project, but of Berkeley's "existing earthquake-prone environment," and that application of the unusual circumstances exception may not be based on evidence of the existing environment's impact on a proposed project. In *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (review granted Nov. 26, 2013, S213478), we granted review to decide whether CEQA requires an analysis of how existing environmental conditions will impact future residents or users of a proposed project. Given this fact, and the other errors that require reversal and remand, we do not address this claim.

Reference J



CONCEPTUAL GRADING PLAN

KAPOR KLEIN HOUSE

MARCY WONG DONN LOGAN ARCHITECTS

16

Appendix 2

AR 0452

Reference K

555 12th Street, Suite 1500
Oakland, California 94607
tel (510) 808-2000
fax (510) 444-1108
www.meyersnave.com

Amrit S. Kulkarni
Attorney at Law
akulkarni@meyersnave.com

meyers | nave

April 30, 2015

Honorable Chief Justice Tani Gorre Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Joint Letter in Opposition to Amicus Curiae Letters in Support of Petition for Rehearing in *Berkeley Hillside Preservation v. City of Berkeley*
Supreme Court Case No. S201116

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Respondents and Real Parties in Interest Mitch Kapor and Freada Kapor-Klein ("Kapors" or "Real Parties") and Respondents City of Berkeley and City Council of the City of Berkeley ("City" or "Respondents") hereby oppose the five Amicus Curiae Letters in support of Berkeley Hillside Preservation's Petition for Rehearing in this matter, filed by Center for Biological Diversity ("Center"), architect Milford Wayne Donaldson ("Donaldson"), Douglas P. Carstens on behalf of the Planning and Conservation League, the Endangered Habitats League, and Save Our Heritage Organization (collectively "Amici"), the National Resources Defense Council ("NRDC"), and the Berkeley Architectural Heritage Association ("BAHA"). None of these five letters raise any issues that warrant rehearing.

Standard for Rehearing

As set forth in Respondents' and Real Parties' Answer to the Petition for Rehearing, this Court grants rehearing to revisit a decision that threatens substantial mischief on an important question of law of general applicability or that works an appreciable injustice in the particular case. (See *In re Jessup* (1889) 81 Cal. 408, 471-72.) The Court does not grant rehearing merely to reconsider claims or arguments raised on review or to consider claims or arguments raised for the first time thereafter. (See *Reynolds v. Bement* (2005) 36 Cal.4th 1075, 1092; *250 L.L.C. v. Photopoint Corp. (USA)* (2005) 131 Cal.App.4th 703, 719 n.6.)

The Center Seeks to Reargue the Issues Already Decided By the Court

The Center's letter to the Court, submitted on March 31, 2015 ("Center Letter"), does nothing more than ask the Court to reexamine the arguments that this Court already decided in the Opinion. As such, it provides no basis for a rehearing.

The Center begins by alleging that the Opinion is based on an "incorrect" premise – that the Secretary of the Natural Resources Agency ("Secretary") subjected the categorical exemptions to prior review for potential environmental effects. (Center Letter, p. 2.) The Center further explains that "the Secretary has never subjected any 'lists of usual circumstances' to prior environmental review, but the Opinion assumes she has." (*Id.*, p. 4 (emphasis original).) This argument is directly addressed by the California Environmental Quality Act ("CEQA") and the CEQA Guidelines and was discussed at length in the Opinion. As set forth in section 21084 of CEQA, the categorical exemptions are, by definition a "list of classes of projects that have been determined not to have a significant effect on the environment" and for which the Secretary has already made "a finding that the listed classes of projects … do not have a significant effect on the environment." Thus, the "list of usual circumstances" is the list of categorical exemptions already in the CEQA Guidelines. The Secretary has already determined that these classes of projects will not have a significant impact on the environment and are therefore exempt from further CEQA review. The Opinion dealt with this issue of statutory interpretation at the outset, and then again within its main consideration of the arguments. (*Berkeley Hillside Pres. v. City of Berkeley* (2015) 60 Cal.4th 1086, 1091-92, 1100-1104.) As such, there is no need for the Court to rehear these arguments.

The Center also accuses the Opinion of reading the "unusual circumstances" exception out of the Guideline through its interpretation of the Guideline. (Center Letter, p. 3.) The Center believes that "the determination that a project meets the criteria of a categorical exemption in the first instance renders the subsequent application of the 'unusual circumstances' exception a foregone conclusion." (*Ibid.*) This argument plainly misreads the Opinion. As the Court stated, "an agency invoking a categorical exemption may not simply ignore the unusual circumstances exception; it must 'consider the issue of significant effects … in determining whether the project is exempt from CEQA where there is some information or evidence in the record that the project might have a significant environmental effect.'" (*Berkeley Hillside Pres.*, *supra*, 60 Cal.4th at 1103.) Thus, under the Opinion, once the lead agency has determined that a project fits within the definition of a categorical exemption, it must examine whether there is evidence that the project will, nevertheless, have a significant impact on the environment due to unusual circumstances.

For all of these reasons, the Center's Letter raises no issues or arguments that should be considered in a rehearing.

Mr. Donaldson Improperly Seeks to Introduce Extra-Record Evidence

On April 14, 2015, Mr. Milford Wayne Donaldson submitted a letter urging the Court to consider Mr. Donaldson's purported expertise in CEQA and architecture ("Donaldson Letter"). The Donaldson Letter, however, constitutes an improper attempt to introduce extra-record evidence into the Court's consideration of the Petition for Rehearing. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571-72; *Porterville Citizens for*

Responsible Hillside Dev. v. City of Porterville (2007) 157 Cal.App.4th 885, 896-98.) Mr. Donaldson's opinions on architectural practice were not before the City of Berkeley at the time the City approved the Project, nor have they previously been submitted to any court considering this matter. As such, the Court should disregard the Donaldson Letter in its entirety.

In any event, nothing in the Donaldson Letter is of such material nature to the case as to warrant a rehearing.

Amici Provide No Support for Rehearing

Amici's letter, submitted on April 14, 2015 ("Amici Letter"), offers three reasons for rehearing. None of these reasons should compel the Court to grant the Petition for Rehearing.

Amici's first argument is that they simply prefer the Concurring Opinion's "one-step" test regarding the application of the unusual circumstances exception. (Amici Letter, pp. 1–3.) Amici claim that that the Concurring Opinion should replace the majority's Opinion here because the Concurring Opinion "offers two reasons" why categorical exemptions still have utility even if they could be defeated by the presentation of any substantial evidence of a fair argument of a significant impact. (*Id.*, p. 2.) This argument was directly rejected in the Opinion. Whether the Concurring Opinion's one-step test is "workable" is no longer an issue – the Opinion has already interpreted CEQA and the CEQA Guidelines as requiring the two-step test for "unusual circumstances." Amici's preference for the Concurring Opinion's test is not grounds for rehearing.

Second, Amici argue that the one-step test is preferable because, in Amici's opinion, the Court's approved test will result in "comparative arguments" regarding whether a project is "locally 'typical'" or not. However, the Court already considered and rejected this argument. The Court reviewed a number of court of appeal decisions indicating that local conditions are relevant and expressly agreed with those cases, holding that: "In determining whether the environmental effects of a proposed project are unusual or typical, local agencies have discretion to consider conditions in the vicinity of the proposed project." (*Berkeley Hillside Pres.*, *supra*, 60 Cal.4th at 1119.) Thus, this argument is also not grounds for a rehearing.

Finally, Amici misread the Opinion's discussion of *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039. Contrary to Amici's arguments, the Opinion here does not identify a different standard of review for historical resources when addressing the question whether a project requires a negative declaration or an EIR. (See Amici Letter, pp. 4-5.) Rather, the Opinion simply notes that, under *Valley Advocates*, the substantial evidence test applies to the initial question whether a building qualifies as a historical resource and, once it is determined that the building is a historical resource, the fair argument standard applies to the question of whether an EIR is required due to the potential for significant impacts of the project to the historical resource. (*Berkeley Hillside Pres.*, 60 Cal.4th at 1117.) The Court then held that the

two-step analysis in *Valley Advocates* supports the two-step approach used here. (*Ibid.*) As such, there is no grounds for a rehearing on this issue either.

NRDC Offers No Reason for Rehearing

NRDC was not an amicus to this case, but offers its opinion regarding the need for rehearing anyway because its attorneys were co-authors of a study regarding the prevalence of CEQA litigation. (NRDC Letter, p. 3.) Without any justification NRDC posits that the first part of the two-step test articulated by this Court for determining whether a project may have significant impacts due to unusual circumstances "is both unsupported and unworkable." (*Id.*, p. 3.) The sole basis for this argument is NRDC's wholly unfounded claim that the two-step test articulated in the Opinion is likely to result in more litigation than NRDC's preferred one-step approach. (*Id.*) Even assuming for the sake of argument that NRDC is correct, an interpretation by the Court of the law that results in subsequent litigation is hardly unprecedented, and does not speak at all to the correctness of the Opinion's well thought-out analysis.

Furthermore, NRDC is not correct. As discussed in the extensive briefing in this case, many courts of appeal have applied the "unusual circumstances" step in the two-step test articulated by the Court. With the Court's guidance in the Opinion, the two-step test is clearly supported and workable. Therefore, NRDC's letter offers nothing in support of the Petition for Rehearing.

BAHA Inappropriately Seeks to Reargue the Case

BAHA's letter, submitted on April 21, 2015 ("BAHA Letter"), presents no grounds for a rehearing. BAHA raises two issues. First, BAHA states, without any argument, that the Court should adopt the Concurring Opinion's one-step test for the unusual circumstances exception. (BAHA Letter, p. 2.) As noted above, the Court has already directly addressed and disagreed with the one-step test. Thus, this statement is not grounds for rehearing.

BAHA spends the majority of its Letter rearguing the administrative record in an attempt to support BAHA's proposition that the administrative record "supports a fair argument of significant environmental impacts." (BAHA Letter, p. 2.) BAHA's arguments here are nothing more than a repeat of the arguments that this Court already rejected regarding "side-hill fill" and the approved architectural plans. This Court already found that Mr. Karp's opinion that a different project than the one that was approved was legally insufficient. BAHA's attempts to revive the argument that the Project would somehow have to be constructed in a way other than the way approved by the City are unavailing and provide no grounds for a rehearing.

Conclusion

As set forth above, none of the five letters submitted to the Court provide any grounds for granting the Petition for Rehearing. Respondents and Real parties respectfully request, therefore, that the Court deny the Petition for Rehearing.

Respectfully submitted,
MEYERS, NAVE, RIBACK SILVER & WILSON

Amrit S. Kulkarni
Julia L. Bond
Attorneys for Respondents and Real Parties in Interest
Mitch Kapor and Freada Kapor-Klein

Respectfully submitted,
ZACH COWAN, City Attorney
CITY OF BERKELEY

Laura McKinney
Attorneys for Respondents
City of Berkeley and City Council
of the City of Berkeley

ASK:cs
2430099.2
cc: Attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On April 30, 2015, I served true copies of the following document(s) described as **JOINT LETTER IN OPPOSITION TO AMICUS CURIAE LETTERS IN SUPPORT OF PETITION FOR REHEARING** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave, Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on April 30, 2015, at Oakland, California.

Cynthia Sauceda

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

Susan Brandt-Hawley Esq.
Brandt-Hawley Law Group
P.O. Box 1659
13760 Arnold Drive
Glen Ellen, CA 95442

Zach Cowan, City Attorney
Laura McKinney, Deputy City Attorney
City of Berkeley
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704

Alameda County Superior Court
1225 Fallon Street
Oakland, CA 94612

Court of Appeal
First District Court of Appeal
350 McAllister Street
San Francisco, CA 94102

Kamala D. Harris
Attorney General of California
Sally Magnani
Senior Assistant Attorney General
Janill Richards
Supervising Deputy Attorney General
Catherine M. Wieman
Catherine.Wieman@doj.ca.gov
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Attorneys for Amicus Curiae
Attorney General Kamala D. Harris

Amanda Monchamp
Melanie Sengupta
Holland & Knight LLP
50 California Street, 28th Floor
San Francisco, CA 94111

Attorneys for Amici Curiae
League of California Cities;
California State Association of Counties

Michael H. Zischke
Andrew B. Sabey
Cox, Castle & Nicholson LLP
555 California Street, 10th Floor
San Francisco, CA 94014

Attorneys for Amici Curiae
California Building Industry Association;
California Business Properties Association;
Building Industry Legal Defense Foundation

Christian L. Marsh
Downey Brand LLP
455 Market Street, Suite 1420
San Francisco, CA 94104

Attorneys for Amicus Curiae
Association of California Water Agencies

Stephen L. Kostka
Barbara J. Schussman
Perkins Coie LLP
Four Embarcadero Center, Suite 2400
San Francisco, CA 94111-4131

Attorneys for Amicus Curiae
Building Industry Association of the Bay Area

M. Reed Hopper
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814

Attorneys for Amicus Curiae
Pacific Legal Foundation

Michael W. Graf
Law Offices
227 Behrens Street
El Cerrito, CA 94530

Attorneys for Amici Curiae
Center for Biological Diversity;
High Sierra Rural Alliance

Harold M. Freiman
Kelly M. Rem
Lozano Smith
2001 N. Main Street, Suite 650
Walnut Creek, CA 94596

Attorneys for Amicus Curiae
California School Boards Association's Education Legal Alliance

Charles F. Robinson
Kelly L. Drumm
University of California
Office of General Counsel
1111 Franklin Street, 8th Floor
Oakland, CA 94607

Attorneys for Amicus Curiae
The Regents of The University of California

Jan Chatten-Brown
Douglas P. Carstens
Chatten-Brown & Carstens LLP
2200 Pacific Coast Hwy., #318
Hermosa Beach, CA 90254

Michael W. Stamp
Molly Erickson
Law Offices of Michael W. Stamp
479 Pacific Street, #1
Monterey, CA 93940

Attorneys for Amici Curiae
Planning and Conservation League; Endangered Habitat League; California Preservation Foundation; Save Our Heritage Organization; Save Our Carmel River; The Open Monterey Project

Leila H. Moncharsh
Veneruso & Moncharsh
5707 Redwood Rd., Ste. 10
Oakland, CA 94612

Attorneys for Amicus Curiae
Berkeley Architectural Heritage Association

Thomas N. Lippe
Law Offices of Thomas N. Lippe
201 Mission Street, 12th Floor
San Francisco, CA 94105

Attorneys for Amici Curiae
Center for Biological Diversity;

David Petit
Natural Resources Defense Council
1314 Second Street
Santa Monica, CA 90401

Christine Helwick
Andrea M. Gunn
California State University
Office of the General Counsel
401 Golden Shore, 4th Floor
Long Beach, CA 90802-4210

Attorneys for Amicus Curiae
The Board of Trustees of the California State University

Architect Milford Wayne Donaldson FAIA
7745 Greenridge Way
Fair Oaks, CA 95628