IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S201116

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, Judge

APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS AND REAL PARTIES IN INTEREST

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APPLICATION TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f),[1] Pacific Legal Foundation requests leave to file the attached brief amicus curiae in support of Respondents, City of Berkeley, et al., and Real Parties in Interest, Mitchell Kapor and Freada Kapor-Klein, collectively (City). Amicus is familiar with the arguments and believes the attached brief will aid the Court in its consideration of the issues presented in this case.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is the oldest and largest donor-supported public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, balanced environmental regulation, individual freedom, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations nationwide. PLF is headquartered in Sacramento, California.

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[1] Pursuant to California Rule of Court 8.520, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

PLF attorneys were active participants in the development of the California Environmental Quality Act (CEQA)[2] Guidelines at issue in this case. PLF attorneys have also been regular amicus participants in landmark CEQA cases in this Court including: *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155 (2011); *Environmental Protection Information Center v. California Department of Forestry and Fire Protection*, 44 Cal. 4th 459 (2008); *Mountain Lion Foundation v. Fish and Game Commission*, 16 Cal. 4th 105 (1997); *Laurel Heights Improvement Association v. Regents of the University of California*, 6 Cal. 4th 1112 (1993); *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553 (1990); and *Wildlife Alive v. Chickering*, 18 Cal. 3d 190 (1976).

Amicus will argue that CEQA categorical exemptions should be interpreted as bright-line rules to effectuate the purpose and intent of the Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

CEQA mandates the designation of classes of activities that the Secretary of the Resources Agency has determined and certified, through formal rule making, as having no significant effect on the environment. The Act explicitly declares that projects that fit within these classes will not be subject to CEQA review. However, Petitioners, Berkeley Hillside

[2] Pub. Res. Code § 21000, *et seq.*,

Preservation, et al. (Berkeley Hillside), contest the City's argument that the CEQA categorical exemptions should be interpreted as "bright-line rules." Instead, Berkeley Hillside argues, in effect, that the exemptions should be challengeable on a project-by-project basis. *See* Berkeley Hillside Answering Brief at 50.

In this case, Berkeley Hillside challenges the exemption of a home construction that falls within two separate categorical exemptions for single family residences and urban in-fill projects. *See Berkeley Hillside Preservation v. City of Berkeley*, 203 Cal. App 4th 656 (2012). Berkeley Hillside's position that these exemptions do not apply, because of contested claims that the project will have significant environmental effects, is not supported by this Court's precedents, legislative intent and clear statutory language, and makes a nullity of the exemption process.

ARGUMENT

I

THIS COURT HAS NEVER AUTHORIZED A PROJECT-BY-PROJECT CHALLENGE TO CEQA CATEGORICAL EXEMPTIONS

This Court has never ruled that a *discrete* project, that fits within a valid categorical exemption, should be excluded from the exemption because a project opponent claimed the project may have a significant effect on the environment. Nor should it. The statute prohibits it. This Court has ruled,

however, that a *class* of projects is not exempt from CEQA when the class as a whole would have significant effects on the environment. But this Court need go no further.

In *Wildlife Alive*, *supra*, this Court determined that establishing hunting and fishing seasons by the Fish and Game Commission was not categorically exempt because that class of activities would have significant environmental effects: "We conclude that the setting of hunting and fishing seasons has the potential for a significant environmental impact, both favorable and unfavorable. There inheres in the fixing of hunting seasons and the issuance of hunting permits a serious risk of overkill and depletion of the affected species." *Wildlife Alive*, 18 Cal. 3d at 206. Two decades later, in *Mountain Lion Foundation*, *supra*, this Court ruled that the delisting of species under the California Endangered Species Act is not categorically exempt because that class of activities clearly resulted in a loss of protections for recovering species:

> "Because the removal of a species from the endangered or threatened list withdraws existing levels of protection, a delisting creates at least the potential for population reduction or habitat restriction. Thus, the Commission is obligated to find a delisting may have a significant environmental effect. Such a finding precludes invocation of a categorical exemption."

Mountain Lion Foundation, 16 Cal. 4th at 124.

In each case, this Court declared that the class must be excluded because categorically exempting these *types* of activities exceeded the scope of CEQA—an ultra vires act.

> Even if section 15107 was intended to cover the commission's hunting program, it is doubtful that such a categorical exemption is authorized under the statute. We have held that no regulation is valid if its issuance exceeds the scope of the enabling statute. (See Gov. Code, § 11374; *Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal. 2d 753, 757 [151 P.2d 133, 155 A.L.R. 405].) The secretary is empowered to exempt only those activities which do not have a significant effect on the environment. (Pub. Resources Code, § 21084.) It follows that where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper.

Wildlife Alive, 18 Cal. 3d at 205-206.

As in most cases, however, the context is everything. In *Wildlife Alive*, this Court set aside the categorical exemption for fixing hunting and fishing seasons generally, and not the specific black bear hunting season at issue in the case. In *Mountain Lion Foundation*, as in *Wildlife Alive*, this Court set aside the categorical exemption for delistings of protected species as a whole, and not the specific ground squirrel delisting at issue in that case. *See* 16 Cal. 4th at 124-126.

However, Berkeley Hillside has taken a selective portion of this Court's narrow holdings out of context, and seeks to have it applied wholesale to all project exemptions. Berkeley Hillside claims this Court's statement that the "secretary is empowered to exempt only those activities which do not have a

significant effect on the environment" authorizes a case-by-case challenge to any project with purported significant environmental effects. But this is not so.

That this Court did not intend to authorize anyone and everyone who opposes a project to second guess the Secretary for each discrete project that fits within a valid categorical exemption, is apparent in more recent statements this Court has made on CEQA exemptions.

In *Muzzy Ranch Co v. Solano County Airport Land Use Commission*, 41 Cal. 4th 372 (2007), this Court laid out the process for CEQA review, underscoring the special treatment of exempt projects:

> *If a public agency properly finds that a project is exempt from CEQA, no further environmental review is necessary*. (*No Oil, Inc. v. City of Los Angeles, supra*, 13 Cal.3d at p. 74.) The agency need only prepare and file a notice of exemption (see CEQA Guidelines, §§ 15061, subd. (d), 15062, subd. (a)), citing the relevant statute or section of the CEQA Guidelines and including a brief statement of reasons to support the finding of exemption (*id*., § 15062, subd. (a)(4)). If a project *does not* fall within an exemption, the agency must "conduct an initial study to determine if the project may have a significant effect on the environment." (*Id*., § 15063, subd. (a).) If there exists "no substantial evidence that the project or any of its aspects may cause a significant effect on the environment" (*id*., § 15063, subd. (b)(2)), the agency must prepare a "negative declaration" that briefly describes the reasons supporting its determination (see *id*., § 15070 et seq.).

Id. at 380-381 (emphasis added).

Contrary to this Court's ruling in *Muzzy*, Berkeley Hillside argues that any exemption may be overcome if an opponent claims the specific project

may have significant environmental effects. In effect, Berkeley Hillside is calling for an "initial study" even if the project *does* fall within a categorical exemption.

But this Court expressly rejected that approach in *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155 (2011). According to this Court, "If the agency's initial study of a project produces substantial evidence supporting a fair argument the project may have significant adverse effects, the agency must (*assuming the project is not exempt from CEQA*) prepare an EIR." *Id*. at 171 (emphasis added). This statement appears to be a recognition by this Court that Berkeley Hillside is wrong; a fair argument of potential environmental effects is not enough to exclude a project from its exempt status.

Perhaps this Court's most definitive statement on the process for reviewing discrete projects was set forth by this Court just last year in *Tomlinson v. County of Alameda*, 54 Cal. 4th 281 (2012). If the proposed activity is deemed a "project,"

> [t]he public agency must then decide whether it is exempt from compliance with CEQA under either a statutory exemption (§ 21080) or a categorical exemption set forth in the regulations (§ 21084, subd. (a); Cal. Code Regs., tit. 14, § 15300). *A categorically exempt project is not subject to CEQA, and no further environmental review is required*. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380 [60 Cal. Rptr. 3d 247, 160 P.3d 116]; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th

> 1356, 1373 [44 Cal. Rptr. 3d 128].) If the project is not exempt, the agency must determine whether the project may have a significant effect on the environment. If the agency decides the project will not have such an effect, it must "adopt a negative declaration to that effect." (§ 21080, subd. (c); see Cal. Code Regs., tit. 14, § 15070; *Muzzy Ranch Co. v. Solano County Airport Land Use Com., supra*, at pp. 380-381.) Otherwise, the agency must proceed to the third step, which entails preparation of an environmental impact report before approval of the project. (§§ 21100, subd. (a), 21151, subd. (a).)

Id. at 286 (emphasis added).

This Court's reading of the Act is unequivocal: "A categorically exempt project is not subject to CEQA, and no further environmental review is required."

Of course, if it could be said that the entire class of activities produced substantial evidence supporting a fair argument that the activities may have significant adverse effects, then under this Court's precedents (*i.e.*, *Wildlife Alive* and *Mountain Lion Foundation*), the whole class could be excluded from the exemption. Short of such an ultra vires challenge, the Legislature intended the exemption to be determinative.

II

THE LEGISLATURE INTENDED TO EXEMPT CERTAIN ACTIVITIES FROM PROJECT-BY-PROJECT REVIEW

CEQA itself is as unequivocal as this Court in setting forth the status of categorically exempt projects, like the single family residence and in-fill project in this case:

> The [CEQA] guidelines prepared and adopted pursuant to Section 21083 *shall* include a list of classes of projects that have been determined not to have a significant effect on the environment and that *shall* be exempt from this division. In adopting the guidelines, the Secretary of the Natural Resources Agency *shall* make a finding that the listed classes of projects referred to in this section do not have a significant effect on the environment.

Pub. Res. Code § 21084(a) (emphasis added).

This statutory language could not be any clearer. It uses the mandatory term "shall" not once, but three times: (1) The Secretary of the Resources Agency shall (will) create a list of classes of low impact projects; (2) those classes of projects shall (will) be exempt from CEQA review; and (3) the Secretary shall (will) certify that the classes do not have a significant effect on the environment.

As this Court has stated, "Our fundamental task in interpreting a statute is to determine the Legislature's intent so as to effectuate the law's purpose." *Coalition of Concerned Communities, Inc. v. City of Los Angeles*, 34 Cal. 4th 733, 737 (2004). To that end, "We first examine the statutory language, giving it a plain and commonsense meaning." *Id.* Moreover, "If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." *Id.*

Because the language here is clear, and applies the mandatory terms "shall," *not* giving the language its plain meaning would result in absurd

consequences the Legislature did not intend. Berkeley Hillside's argument that any project that falls within a valid categorical exemption can be defeated by anyone qualified to state the facts and offer an opinion about the project's environmental effects, cannot be reconciled with the Act. Converting the term "shall be exempt" to "may be exempt," as Berkeley Hillside suggests, makes a nullity of the cited provision. It is absurd to think that the Legislature would expressly mandate the certification of categorical exemptions and then make them of no account by subjecting each and every exempt project to a case-by-case challenge. This would defeat the very purpose of an exemption and cannot be the law.

III

INTERPRETING CATEGORICAL EXEMPTIONS AS BRIGHT-LINE RULES FURTHERS THE PURPOSES OF THE ACT

It is axiomatic that the purpose of CEQA is to protect the environment. But not at any cost. The Legislature understood that compliance with CEQA would be costly, time consuming, and subject to abuse. The mandatory exemptions provide the necessary balance between protecting the environment and guarding against unnecessary economic and social dislocation. As the Secretary of the Resources Agency has explained: "the exemptions are all necessary for avoiding the time and expense of going through the CEQA

process where it can be determined in advance that a class of projects will not have a significant effect on the environment." City's Opening Brief at 17.

This Court has expressed similar sentiments in interpreting CEQA: "rules regulating the protection of the environment must not be subverted into an instrument of the oppression and delay of social, economic, or recreational development and advancement." *Goleta*, 52 Cal. 3d at 576.

To ensure that the exemptions further the environmental purposes of CEQA, each class of exempt activities is subject to rigorous substantive and procedural rules including Administrative Procedure Act notice and comment, public hearings, and express technical determinations that the categorical exemption has been found to have no significant effect on the environment. *See* Pub. Res. Code § 21083(e). With respect to the 33 categorical exemptions now in use, the Secretary expressly "found that [these] classes of projects listed in this article do not have a significant effect on the environment, and they are declared to be categorically exempt from the requirement for the preparation of environmental documents." Cal. Code Regs., tit. 14, § 15300.

Moreover, the Legislature has declared that the courts shall not interpret CEQA or the guidelines "in a manner which imposes procedural or substantive requirements beyond those explicitly stated." Pub. Res. Code § 21083.1. CEQA explicitly states that CEQA review "shall" not apply to exempt projects. This interpretation is bolstered by this Court's observation that

"CEQA does not provide for a public comment period preceding an agency's exemption determination. (*See* § 21092 [providing for public comment only as to negative declarations and environmental impact reports].)" *Tomlinson*, 54 Cal. 4th at 289-290.

Finally, it should be observed that any other interpretation would result in a waste of resources. Under Berkeley Hillside's view, instead of relying on the exemption, lead agencies would have to evaluate the impacts of each project on a case-by-case basis, as if the exemption did not exist, to avoid a lawsuit. This would be a waste of agency resources in almost all cases for a whole class of activities that have already been determined to provide no significant risk to the environment. It would also be a waste of those resources already expended by the Secretary in making the initial finding that the classes of activities exempted do not have a significant effect on the environment. This cannot be what the Legislature intended.

CONCLUSION

In accordance with this Court's precedents, the intent of the Legislature to avoid unnecessary cost and delay of projects that have been determined to have no significant effect on the environment, and the clear statutory language, this Court should hold that individual projects that fit within a valid CEQA categorical exemption are not subject to case-by-case challenge.

For these reasons, the decision of the court below should be reversed.

DATED: January 15, 2013.

Respectfully submitted,

_____

M. REED HOPPER

Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS AND REAL PARTIES IN INTEREST is proportionately spaced, has a typeface of 13 points or more, and contains 2,809 words.

DATED: January 15, 2013.

_____

M. REED HOPPER

DECLARATION OF SERVICE BY MAIL

I, SUZANNE M. MACDONALD, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 930 G Street, Sacramento, California 95814.

On January 15, 2013, true copies of APPLICATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS AND REAL PARTIES IN INTEREST were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 15th day of January, 2013, at Sacramento, California.

_____
SUZANNE M. MACDONALD