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Editor's Note...

by Scott B. Birkey

This issue of *Environmental Law News* covers a broad spectrum of recent legislative and administrative developments in environmental law. As you've probably noticed, some of the recent legal and policy developments covered in this issue, such as the Clean Power Plan and the definition of "waters of the United States," have been picked up by major media outlets. I suppose that's a sign they've captured the public's attention, at least at some level. Digging quite a bit deeper, our authors have done a superb job of presenting their analyses, perspectives, and concerns as to the inner workings and implications of these recent developments.

First up in this issue is a reprise of the fireside chat with E. Clement (Clem) Shute, Jr. delivered at the October 2015 Yosemite Environmental Law Conference. Mr. Shute received the second annual Lifetime Achievement Award for Contribution to Environmental Law at the Conference, and these remarks were made at an informal question and answer session held during the Conference. Following up on Mr. Shute's fireside chat is an article on the "unusual circumstances exception" under the California Environmental Quality Act in the wake of the recent California Supreme Court decision in *Berkeley Hillside Preservation v. City of Berkeley*. After that we have an article on the Clean Power Plan and how this new overlay of federal regulation poses challenges for California's climate policy. Next up is an article on how to talk to reporters. This piece may be considered a bit nontraditional for the *News*, but I think you'll agree it's relevant to our practice, particularly given the media's attention to issues we deal with on a day-to-day basis. The next article gives some thought to what the recent Fixing America's Surface Transportation Act, or the "FAST Act", may mean for infrastructure project developers. After that is yet another piece concerning a topic that's garnered its fair share of media attention: the proposed new rule defining the term "waters of the United States." This issue closes with what's become an annual recap of the most recent California state legislative session. The title for this year's recap sums it up best – "Settling in and Taking a Breath."

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CEQA's "Unusual Circumstances Exception" In the Wake of *Berkeley Hillside*

by Nicole H. Gordon* and Lauren K. Chang**

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I. INTRODUCTION

In a highly anticipated decision, *Berkeley Hillside Preservation v. City of Berkeley* ("*Berkeley Hillside*"),[1] the California Supreme Court sought to resolve a long-standing question of what standard of review agencies and courts should apply when assessing whether "there is a reasonable possibility that [an] activity will have a significant effect on the environment due to unusual circumstances,"[2] thereby precluding use of otherwise-applicable categorical exemptions from the California Environmental Quality Act (CEQA).[3] Ultimately, the Supreme Court determined two separate standards apply: the deferential "substantial evidence" test applies to the question of whether unusual circumstances exist, and the "fair argument" test applies to the question of whether unusual circumstances give rise to a reasonable possibility of a significant effect.[4]

The majority opinion, authored by Justice Chin and joined by four other justices, claims that agencies and reviewing courts should have no trouble applying these tests.[5] Whether that is true remains to be seen. This article summarizes the *Berkeley Hillside* decision, discusses subsequent cases, and observes that to prevail under *Berkeley Hillside*, petitioners may be required to not only demonstrate that an agency's finding of no unusual circumstances is not supported by substantial evidence, but to "produce" evidence of unusual circumstances, and in some cases, to produce "more than substantial" evidence to "convincingly" demonstrate that a project will have a significant effect.

II. THE SUPREME COURT'S BERKELEY HILLSIDE DECISION

A. Summary of Facts and Procedural History

In May 2009, real parties in interest, Mitchell Kapor and Freada Kapor-Klein, applied for a conditional use permit to demolish an existing two-story house on a steep slope in a heavily wooded area in the Berkeley hills, and build a new house.[6] The new house would be 6,478 square feet with an attached 3,394-square-foot, 10-car garage and would cover approximately 16 percent of their 29,714 square-foot-lot.[7] In January 2010, the City of Berkeley's zoning adjustment board approved the use permit and found the project categorically exempt from CEQA under the CEQA Guidelines "Class 3" exemption[8] for small structures, including "[o]ne single-family residence, or a second dwelling unit in a residential zone" and the "Class 32" exemption[9] for in-fill development.

Several interested residents appealed the zoning adjustment board's decision to the City Council. They argued the categorical exemptions were not appropriate because the project's "unusual size, location, nature and scope will have significant environmental impact on its surroundings."[10] The residents also asserted that the proposed home would be "one of the largest houses in Berkeley, four times the average house size in its vicinity, and situated in a canyon where the existing houses are of much smaller scale."[11]

In support of the appeal, Lawrence Karp, an architect and geotechnical engineer, sent letters to the City and spoke at the City Council meeting. Based on his interpretation of the architectural plans and topographical survey completed for the proposed project, Karp concluded that the proposed project would have significant environmental impacts during construction and operation "due to the probability of seismic lurching of the oversteepened side-hill fills."[12] In response, Alan Kropp, the City's geotechnical engineer, refuted Karp's assessment, explaining that "the project site is in an area where an investigation is required to evaluate the potential for landslides, and that he had conducted the necessary investigation and found there is no landslide hazard" and that "in raising concerns about 'side-hill fill,' Karp had 'misread[]' the project plans."[13] The City Council dismissed the appeal and adopted the zoning adjustment board's decision. The project opponents filed a petition for writ of mandate challenging the City's approval.

The trial court denied the petition, concluding that "notwithstanding evidence of potentially significant environmental effects," the exception does not apply because "the proposed project does not present any unusual circumstances."[14]

Petitioner appealed the trial court decision, and the First District Court of Appeal reversed. In doing so, the Court of Appeal made "two distinct inquires": first whether the project presents unusual circumstances, and next, whether there is a reasonable possibility of a significant effect on the environment *due* to the unusual circumstances.[15] The Court of Appeal acknowledged an apparent "split in authority" over whether to apply the fair argument or substantial evidence standard of review to an agency's determination that there was no reasonable possibility of a significant effect on the environment, but determined that "the question of whether a circumstance is 'unusual' within the meaning of the significant effect exception would normally be an issue of law that this court would review de novo."[16] It also found that the fair argument standard is the correct standard of review for an agency's determination under Guidelines section 15300.2(c) that there is no reasonable possibility of a significant effect on the environment due to unusual circumstances.[17]

Applying these standards, the Court of Appeal found the unusual circumstances exception precluded the City's use of the Class 3 and 32 exemptions. It determined, as a matter of law, the project was "unusual… because the circumstances of the project differ from the general circumstances of projects covered by the single-family residence exemption, and it is thus unusual when judged relative to the typical circumstances related to an otherwise typically exempt single-family residence."[18] In other words, "the fact that proposed activity may have an effect on the environment is *itself* an unusual circumstance, because such action would not fall 'within a class of activities that does not normally threaten the environment,' and thus should be subject to further environmental review."[19]

The City petitioned the California Supreme Court for review.

B. Supreme Court Decision

The key issue before the Court was whether evidence of a potentially significant impact is, by itself, enough to overcome the use of a categorical exemption. Ultimately, the court answered in the negative, finding "it is not alone enough that there is a reasonable possibility the project will have a significant environmental effect; instead, in the words of the Guideline, there must be 'a reasonable possibility that the activity will have a significant effect on the environment *due to unusual circumstances*.'"[20] The Court reasoned that rules of statutory interpretation prohibit a reading of the Guidelines section that would render the words "due to unusual circumstances" surplusage.[21]

Turning to the question of the standard of review, the Supreme Court concluded that "both prongs of [CEQA] section 21168.5's abuse of discretion standard apply on review of an agency's decision with respect to the unusual circumstances exception."[22] For the first step of the inquiry, whether unusual circumstances exist, a lead agency's determination will be reviewed under the deferential substantial evidence standard.[23] The second step of the inquiry, which looks at the agency's decision of whether the unusual circumstances result in the reasonable possibility that the project will have a significant environmental impact, however, will be reviewed under the fair argument standard.[24] Applying this test to the lower court proceeding, the Supreme Court determined that the trial court and Court of Appeal had applied the standard incorrectly and reversed and remanded.[25]

The Supreme Court also articulated two alternative ways project opponents could establish evidence to support the Guidelines section 15300.2(c) exception. Under the first method, "[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."[26] Alternatively, "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.'"[27] The requisite burden of proof under these two approaches is discussed further below.

C. Justice Liu's Concurring Opinion

Justice Liu concurred with the outcome of the majority's decision, but not with what he characterized as "the court's novel and unnecessarily complicated approach to the standard of review."[28] Instead, "[w]hen there is a reasonable possibility that a project otherwise covered by a categorical exemption will have a significant environmental effect, it necessarily follows that the project presents unusual circumstances. In other words, the reasonable possibility of a significant environmental effect means that some circumstance of the project is not usual in comparison to the typical project in the exempt category."[29]

The concurrence predicted that "[e]ven under the cumbersome rules set forth today, it is hard to imagine that any court, upon finding a reasonable possibility of significant effects under the fair argument standard, will ever be compelled to find no unusual circumstances and thereby uphold the applicability of a categorical exemption. Rather, courts may continue to affirm in practice what we have stated as a simple principle: 'where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper.'"[30]

III. COURTS OF APPEAL CASES INTERPRETING *BERKELEY HILLSIDE*

Within nine months of the Supreme Court's decision, five published decisions considered its holding. Two of these accepted, but did not grapple with, its application and are not discussed further here.[31] The other three are discussed below.

A. *Paulek v. Western Riverside County Regional Conservation Authority*

Now depublished, *Paulek v. Western Riverside County Regional Conservation Authority* ("*Paulek*")[32] was the first appellate decision addressing *Berkeley Hillside*, which was issued just prior to oral argument in *Paulek*.[33] The Fourth District Court of Appeal considered whether an agency abused its discretion by determining that removal of a conservation overlay from certain property within a Multiple Species Habitat Conservation Plan (MSHCP) was categorically exempt from CEQA under Guidelines sections 15307 (exempting actions by regulatory agencies for protection of natural resources) and 15308 (exempting actions by regulatory agencies for protection of the environment).[34] The court ultimately determined that these categorical exemptions were inapplicable because evidence in the record supported a "fair argument" that the project will have a significant effect on the environment.[35] The court did not seem to fully appreciate the *Berkeley Hillside* opinion and did not address key legal issues addressed by the Supreme Court. For example, the opinion confuses the question of whether the project properly fit within the categorical exemptions with the question of whether an exception to those exemptions applies, and it overlooks the "unusual circumstances" prong of the section 15300.2(c) exception entirely.[36] While the opinion was subsequently ordered not to be officially published and is not citable as persuasive authority in California, it suggests that courts may have difficulty applying the *Berkeley Hillside* dual standard of review.

B. *Berkeley Hillside* On Remand *("Berkeley Hillside II")*

On remand, the First District Court of Appeal applied the high court's two-part test and found that substantial evidence supported the City's conclusion that the size and circumstances of the Kapor's home were not "unusual."[37] Having concluded there were no unusual circumstances, the court found it "need not consider appellants' contention … that there is a fair argument of a reasonable possibility of a significant effect on the environment due to unusual circumstances."[38]

While the court stuck strictly to the Supreme Court's procedural analysis and predictably found in favor of the City, the opinion repeatedly points to arguments the project's opponents could have made, but chose not to, which might have persuaded the court. Specifically, the opinion highlights appellants' prior concession that the project fell within the Class 3 and Class 32 exemptions in the first place, including the criterion that "approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality."[39] The court found this put "the proposed project within a class that presumptively does not have an effect on the environment" and amounted to a concession "that there is no feature distinguishing it from the exempt class."[40]

The court also noted that appellants had chosen not to provide evidence that the project *will* have a significant effect on the environment despite the fact it would otherwise be included in a class of projects that generally *do not* have an effect on the environment.[41] The court observed that "[t]here are certainly scenarios where a project falls into a class that is generally exempt but where evidence shows it will have a significant environmental effect, such as a residence proposed to be built on an environmentally sensitive area that could be environmentally impacted by the construction of a single home."[42]

C. *Citizens for Environmental Responsibility v. State of California ex rel. 14th District Agricultural Association*

Citizens for Environmental Responsibility is the most recent case to interpret *Berkeley Hillside*.[43] This case addressed the 14th District Agricultural Association's use of a Class 23 categorical exemption for "normal operations of existing facilities for public gatherings" for approval of a rodeo event at an existing fairground. Appellants contended that Guidelines section 15300.2(c) prohibited use of this exemption because there would be significant effects on the environment due to unusual circumstances, specifically, the fairgrounds' proximity to a contaminated creek, its proximity to residential and agricultural land, and the public safety risk of bull riding.[44]

In evaluating appellants' claim, the court first discussed the nature of the Class 23 exemption itself, and found that "normal operations" of the fairgrounds included livestock and equestrian events similar to the proposed rodeo.[45] The court observed that the rodeo would not increase the level of use or require modifications to the fairgrounds.[46]

Turning to the 15300.2(c) exception, the court articulated the two-step process for reviewing the agency's determination that the project did not trigger the exception for unusual circumstances: inquire first whether the project presents unusual circumstances, and then whether there is a reasonable possibility of a significant effect on the environment due to unusual circumstances.[47]

The court then considered the two alternative ways the Supreme Court had identified for proving the exception and found that appellants' arguments failed under either approach. Under the first alternative approach, "a party can show an unusual circumstance by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location."[48] If it makes that showing, then it "need only show a reasonable possibility of a significant effect due to that unusual circumstance" to invoke the exception.[49] Consistent with *Berkeley Hillside*, the court applied the substantial evidence test to the question of whether the rodeo project presents unusual circumstances. Appellants had urged the court to compare the rodeo project to all activities held at other public gathering facilities that would be exempt under the Class 23 exemption, such as stadiums, planetariums, and swimming pools.[50] The court chose instead to compare the rodeo to other projects held at the fairgrounds, particularly those involving horses and cattle, to determine whether the circumstances of the rodeo differ from such projects.[51] Ultimately, the court determined appellants failed to "produce substantial evidence supporting a finding of unusual circumstances based on features related to the rodeo project."[52]

Under the second alternative approach, "a party may establish an unusual circumstance with evidence that the project *will* have a significant environmental effect."[53] As articulated by the Court of Appeal, "[t]he reason for this alternative method is that 'evidence that the project *will* have a significant effect *does* tend to prove that some circumstance of the project is unusual.' [citation] This method of proving unusual circumstances requires that the project challenger provide more than 'substantial evidence' of 'a fair argument that the project will have significant environmental effects.'"[54] The court found that under this test, "appellants failed to establish unusual circumstances based on substantial evidence that the project *will have* a significant effect."[55]

IV. DISCUSSION

It remains to be seen whether *Berkeley Hillside*'s two-part standard of review will prove unnecessarily "complicated" and "cumbersome" as Justice Liu's concurring opinion predicted. Other than *Paulek*, which seems to have simply overlooked the "unusual circumstances" prong of the exception, the appellate decisions discussed above do not appear on their face to have been encumbered by this standard.

One trend to note in these decisions is the courts' focus on the particular exemption at issue. In the aftermath of the *Berkeley Hillside*, it will behoove lead agencies to ensure that their records clearly demonstrate that a proposed project fits squarely within the exempt class of projects.

More strikingly, *Berkeley Hillside II* and *Citizens for Environmental Responsibility* highlight a feature of the Supreme Court's decision that the majority did not expressly address, and that seems to cut against Justice Liu's prediction that courts would continue to find unusual circumstances wherever there is a reasonable possibility of a significant impact.[56] In following the letter of the two alternative approaches the Supreme Court identified in *Berkeley Hillside*, the two cases place a decidedly heavier burden of proof on parties invoking the unusual circumstances exception than the traditional requirement to show that an agency's decision is not supported by substantial evidence.

Specifically, as discussed above, under the first alternative approach, "a party can show an unusual circumstance by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location."[57] Both *Berkeley Hillside II* and *Citizens for Environmental Responsibility* interpret this to mean that petitioners have the burden "to *produce* evidence supporting an exception to the exemption."[58] Requiring petitioners to "produce" evidence is arguably consistent with the principle that the party challenging an agency's use of an exemption bears the burden of proving that an exception applies.[59] It goes beyond, however, typical application of the substantial evidence standard in CEQA litigation whereby a party challenging an agency's decision must demonstrate that no substantial evidence in the record supports the agency's determination, but is not generally required to "produce" contradictory evidence.[60]

It is unclear whether future courts, in applying *Berkeley Hillside*, will require petitioners to point to specific evidence in the record demonstrating "unusual circumstances," or alternatively, require them to demonstrate that the agency's record does not contain substantial evidence to support the agency's determination that the unusual circumstance exception does not apply. If

the former, this is a tall order particularly in the context of exemptions, which do not usually include an opportunity for public comment. If the latter, agencies relying on a categorical exemption would do well to ensure their files contain substantial evidence that the project in question fits within the exemption *and* that it does not have any unusual features that distinguishes it from others in the exempt class.

Citizens for Environmental Responsibility also seems to have increased the burden of proof under the second alternative approach whereby "a party may establish an unusual circumstance with evidence that the project *will* have a significant environmental effect."[61] Referring to the Supreme Court's direction that "convincing evidence" of a significant impact would prove unusual circumstances, the *Citizens for Environmental Responsibility* court found "[t]his method of proving unusual circumstances requires that the project challenger provide *more than* 'substantial evidence' of 'a fair argument that the project will have significant environmental effects.'"[62] Nowhere else in CEQA is there a requirement to demonstrate "more than" substantial evidence, and how such evidence could be established and deemed "convincing" is uncertain.[63]

In sum, while *Berkeley Hillside* may have resolved the question of the correct standard of review, how the two-step standard is applied in practice is likely to be an ongoing topic of discussion and litigation.

ENDNOTES

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1. *Berkeley Hillside Pres. v. City of Berkeley*, 60 Cal.4th 1086 (Cal. 2015).
2. 14 Cal. Code Regs. § 15300.2(c).
3. Public Resources Code § 21000 *et seq.*
4. *Berkeley Hillside*, 60 Cal.4th at 1097-1099.
5. *Id.* at 1116 (Lui, J., concurring).
6. *Id.* at 1093 (majority opinion).
7. *Id.*
8. 14 Cal. Code Regs. § 15303, subdivision (a), exempts the "construction and location of limited numbers of new, small facilities or structures," including "[o]ne single-family residence, or a second dwelling unit in a residential zone."
9. 14 Cal. Code Regs. § 15332 exempts in-fill developments that meet the following criteria, "(a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations; (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses; (c) The project site has no value as habitat for endangered, rare or threatened species; (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality; and (e) The site can be adequately served by all required utilities and public services."
10. *Berkeley Hillside*, 60 Cal. 4th at 1093.
11. *Id.*
12. *Id.* at 1094.
13. *Id.* at 1095.
14. *Id.* at 1096.
15. *Berkeley Hillside Pres. v. City of Berkeley* (2012) 137 Cal. Rptr. 3d 500, 513, *rev'd*, 60 Cal. 4th 1068 (2015), citing *Banker's Hill, Hillcrest, Park West Cmty. Pres. v. City of San Diego*, 139 Cal. App. 4th 249, 278.
16. *Id.* and at 513 n.10.
17. *Id.* at 513.
18. *Id.* at 514.
19. *Id.* at 512, *quoting Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal.Ap.4th 1165, 1206 (Cal. Ct. App. 1997).
20. *Berkeley Hillside*, 60 Cal. 4th at 1098 [emphasis in original].
21. *Id.* at 1097-1098.
22. *Id.* at 1114.
23. *Id.*
24. *Id.*
25. *Id.* at 1117-1122.
26. *Id.* at 1105.
27. *Id.*
28. *Id.* at 1123 (Lui, J., concurring).
29. *Id.*
30. *Id.* at 1134, citing *Wildlife Alive v. Chickering*, 18 Cal.3d 190, 206 (Cal. 1976).
31. *Save our Schools v. Barstow Unified School Dist. Bd.*, 240 Cal. App. 4th 128, 146-147; *Save our Big Trees v. City of Santa Cruz*, 241 Cal. App. 4th 694, 711 (Cal. Ct. App. 2015).
32. *Paulek v. W. Riverside County Reg'l Conservation Auth.*, 238 Cal.App.4th 583 (Cal. Ct. App. 2015) (depublished).
33. *Id.* at 614 n.4.
34. *Id.* at 605.

35. *Id.* at 607.

36. *Id.* at 605-608.

37. *Berkeley Hillside Preservation v. City of Berkeley*, 241 Cal. App. 4th 943, 956-957 (Cal. Ct. App. 2015).

38. *Id.*

39. *Id.* at 954, *citing* 14 Cal. Code Regs. § 15332.

40. *Id.* at 954-955.

41. *Id.* at 955 n.3, *citing Berkeley Hillside*, 60 Cal.4th at 1105.

42. *Id.*

43. *Citizens for Envtl. Responsibility v. St. of Cal. ex rel. 14th Dist. Agric. Ass'n,* 242 Cal. App. 4th 555 (Cal. Ct. App. 2015).

44. *Id.* at 566.

45. *Id.* at 573.

46. *Id.*

47. *Id.* at 574.

48. *Id.* at 576, *citing Berkeley Hillside*, 60 Cal.4th at 1105.

49. *Id.* at 574, *citing Berkeley Hillside*, 60 Cal.4th at 1105.

50. *Id.* at 577.

51. *Id.* at 577, 580.

52. 54 *Id.* at 588.

53. *Id.* at 589, *quoting Berkeley Hillside*, 60 Cal.4th at 1105, emphasis in original.

54. *Id.*, *quoting Berkeley Hillside*, 60 Cal.4th at 1105-1106, emphasis in original.

55. *Id.* at 593.

56. *Berkeley Hillside*, 60 Cal.4th at 1134.

57. *Id.* at 1105.

58. *Berkeley Hillside II*, 241 Cal. App. 4th 955-956; *Citizens for Envtl. Responsibility,* 242 Cal. App. 4th at 588, emphasis added.

59. See, e.g., *San Francisco Beautiful v. City and County of San Francisco*, 226 Cal.App.4th 1012, 1022-1023 (Cal. Ct. App. 2014) ["An agency's determination that a project falls within a categorical exemption includes an implied finding that none of the exceptions identified in the Guidelines is applicable. The burden then shifts to the challenging party to produce evidence showing that one of the exceptions applies to take the project out of the exempt category."].

60. See, e.g., *Santa Clarita Organization for Planning the Environment v. County of Los Angeles,* 157 Cal.App.4th 149, 158 (Cal. Ct. App. 2007) ["A party may challenge an EIR by showing the agency has abused its discretion … by reaching factual conclusions unsupported by substantial evidence."].

61. *Citizens for Envtl. Responsibility*, 242 Cal. App. 4th at 589, *quoting Berkeley Hillside*, 60 Cal.4th at 1105-1106, emphasis in original.

62. *Id*, emphasis added.

63. "Substantial evidence" is defined in CEQA Guidelines section 15384, subdivision, (a) as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions may be reached." There is no corresponding definition of "convincing evidence."