

**CITIZENS FOR ENVTL. RESPONSIBILITY v. STATE ex rel. 14TH n DIST.  
AGRIC. ASS'N**

S218240  
Supreme Court of California  
May 2, 2014

**Reporter:** 2014 CA S. Ct. Briefs LEXIS 377

CITIZENS FOR ENVIRONMENTAL RESPONSIBILITY, ET AL., Petitioners and Appellants, v. STATE OF CALIFORNIA EX REL. 14TH n DISTRICT AGRICULTURAL ASSOCIATION, ET AL., Respondents and Appellees; STARS OF JUSTICE, INC., ET AL., Real Parties in Interest and Respondents.

**Type:** Petition for Appeal

**Prior History:** (3rd App. Dist. CIVIL No. C070836 Sacramento Sup.Ct. Case No. 34-2011-80000902, Related Case No. 34-2011-80000901).

After Decision by the Court of Appeal, Third Appellate District, Case No. C070836. Appeal from the Superior Court for Sacramento County, Case No. 34-2011-80000902 (Related Case No. 34-2011-80000901). Honorable Lloyd G. Connelly.

<b>Counsel</b>
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<b>Title</b>
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Petition For Review

<b>Text</b>
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**TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA**

Appellants Citizens For Environmental Responsibility, Stop The Rodeo, and Eric Zamost (collectively "Appellants") respectfully petition for review of the decision of the Court of Appeal (Certified for Publication), Third Appellate District, filed on March 26, 2014 ("Opinion"). Appellants did not seek rehearing in the Court of Appeal. A copy of the Opinion is attached hereto as Exhibit A.

. I

**ISSUE PRESENTED FOR REVIEW**

Does the "Significant Effects" exception, [14 CCR § 15300.2\(c\)](#), to the California Environmental Quality Act ("CEQA"), Public Resources Code ("PRC") § 21000, *et seq*, apply if there is a fair argument of substantial evidence that a project will have a significant effect on the environment?

. II

**INTRODUCTION**

CEQA authorizes the Secretary of the California Resources Agency to identify by regulation [\*2] certain classes of projects which are exempt from CEQA's provisions. These are called categorical exemptions. ([PRC § 21084\(a\)](#));

[14 CCR §§ 15300, 15354.](#)) Categorical exemptions are certain classes of activities that generally do not have a significant effect on the environment. (*Id.*) Erroneous reliance by an agency on a categorical exemption constitutes a prejudicial abuse of discretion and a violation of CEQA. ([Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster \(1997\) 52 Cal.App.4th 1165, 1201.](#))

CEQA contains several exceptions to categorical exemptions. If an exception applies, the exemption cannot be used, and the agency must instead prepare an initial study and CEQA document. ([McQueen v. Board of Directors of the Midpeninsula Open Space District \(1988\) 202 Cal.App.3d 1136, 1149; Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles \(2008\) 161 Cal.App.4th 1168, 1187.](#)) “[W]here 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 v. Chickering \(1976\) 18 Cal.3d 190, 206.](#)) [\*3]

CEQA Guidelines § 15300.2 implements these exceptions to the categorical exemptions. The significant effects exception provides that “[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” ([14 CCR § 15300.2\(c\).](#) n) <sup>1</sup>

In the present matter, the Third Appellate District affirmed the trial court’s holding that the issuance of a categorical exemption by Respondents 14th District Agricultural Association and its Board of Directors for the Stars of Justice Rodeo (“Rodeo Project” or “Project”) was not subject to the significant effects exception to CEQA. The ruling is based entirely on the court’s conclusion that the challenged Rodeo Project did not [\*4] involve unusual circumstances. In reaching its decision, however, the appellate court interpreted the significant effects exception so as to avoid addressing whether the Project may have a significant effect on the environment. As a result, the Court of Appeal did not address evidence that Appellants introduced concerning the question of the Rodeo Project’s potential significant effects on the environment.

The issue regarding the correct application of the significant effects exception, and specifically whether a project’s potential significant environmental impact triggers the exception, is presently before this Court in [Berkeley Hillside Preservation v. City of Berkeley \(2012\) 203 Cal.App.4th 656, review granted](#), (May 23, 2012) (No. S201116). <sup>2</sup> Given the identical nature of the issue here and in *Berkeley Hillside*, this Court should grant review and order briefing in this case deferred until this Court issues its decision in *Berkeley Hillside*. ([Cal. Rules of Court, Rule 8.512\(d\)\(2\).](#)) [\*5]

### . III

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Trial Court Denies Appellants’ Claim That the Project Violates CEQA.

The Santa Cruz County Fairgrounds (“Fairgrounds”) is a 110-acre facility located in Watsonville, California that consists of barns and stables, four event arenas and a smaller livestock arena, an automobile race track, a large parking lot and various buildings. (Administrative Record (“AR”):545; Original Court File (“OCF”):226; Opinion, p. 3.) Salsipuedes Creek flows through and adjacent to the Fairgrounds. (AR: 1429; 267; Opinion, p. 3; *see also* OCF:226.) Storm water flows freely over paddocks and arenas in the Fairgrounds’ livestock areas where animal waste is deposited. (AR: 1088-1093; AR: 1094 (Video No. 1); AR:298.) Rain water falling on the facility also erodes unpaved roads and other areas and carries sediment and other pollutants to the creek. (AR: 1094 (Video No. 1); AR: 1088-1093.)

<sup>1</sup> This exception is also referred to as the unusual circumstances exception. The terms “unusual circumstances exception” and “significant effects exception” are used interchangeably throughout this Petition for Review.

<sup>2</sup> The *Berkeley Hillside* opinion is not citable since it was superseded by a grant of review from the Supreme Court. [Cal. Rules of Court, Rule 8.1115](#). However, pursuant to [Cal. Rules of Court, Rule 8.504\(e\)\(3\)](#), Exhibit A to the petition for review and the answer filed in that case are hereby incorporated by reference and a copy of the opinion is attached hereto as Exhibit B pursuant to [Cal. Rules of Court, Rule 8.504\(e\)\(1\)\(b\)](#). Appellants do not discuss the *Berkeley Hillside* opinion in support of their arguments on the merits but only to demonstrate that the issue on review in that case is identical to the issue raised in this appeal.

The waters of Salsipuedes Creek regularly violate the applicable water quality objectives for fecal coliform established by the Regional Water Quality Control Board, Central Coast Region ("Regional Board"). (AR: 1428-29 (P 6); AR:265.) The Regional Board noted [\*6] the threat to children and people coming into contact with the Creek's water: "the beneficial use of water contact recreation is not being protected in . . . Salsipuedes Creek[] because fecal coliform concentrations exceed existing . . . numeric water quality objectives designed to protect this designated use." (AR: 1434; *see* AR:268-69.) The Regional Board identified "farm animal and livestock discharges" as a significant source of the creek's fecal coliform pollution. (AR:1435; *see also* Opinion, p. 4.) The Regional Board specifically identified the Fairgrounds as a pollution source, directly observing that no management measures were in place to prevent storm water contaminated with animal waste or sediment from reaching the creek. (AR:298.)

On February 28, 2011, Respondents entered into a rental agreement with Real Party in Interest Stars of Justice, Inc., to use the Fairgrounds for the Rodeo Project, which was to be held on October 1-2, 2011. (AR:643-668.) In May 2011, Respondents invoked the Class 23 Categorical Exemption adopted by the Secretary of Resources for CEQA, addressing the "Normal Operations of Facilities for Public Gatherings." (Opinion, p. 6.)

Appellants [\*7] Citizens For Environmental Responsibility, Stop The Rodeo, and Eric Zamost (collectively "Appellants") brought a writ of mandate challenging Respondents' approval of the Project in violation of CEQA by relying on the Class 23 exemption and failing to consider the Project's potential environmental impacts either in a mitigated negative declaration or an environmental impact report. On February 3, 2012, the superior court denied Appellants' writ request. (Opinion, p. 10.) Appellants subsequently appealed the decision, contending that, *inter alia*, "the unusual circumstances exception to [the] categorical exemptions applies because stormwater runoff flows over the fairground where cattle and horses defecate and into an already polluted creek." (Opinion, pp. 2-3.) Appellants also claimed that the exception applies because fecal coliform and sediment resulting from the Project may cause or contribute to violations of water quality standards in the creek, either individually or cumulatively.

#### **B. The Appellate Court Improperly Restricts the Scope of the Significant Effects Exception Applicable to Categorical CEQA Exemptions.**

The Third Appellate District considered the Class [\*8] 23 categorical exemption and "the applicability of the unusual circumstances exception that would disqualify the rodeo project from exemption." (Opinion, p. 17.) The Third District employed a two-part test to determine whether the unusual circumstances exception applied. Following its earlier ruling in [Voices for Rural Living v. El Dorado Irrigation Dist. \(2012\) 209 Cal.App.4th 1096, 1107](#), the court considered: 1) "whether the [p]roject presents unusual circumstances"; 2) "whether there is a reasonable possibility of a significant effect on the environment *due* to the unusual circumstances." (Opinion, pp. 18-19 (emphasis original).) The court then spent the remainder of its decision, save one paragraph, exploring the first prong of its two-part unusual circumstances test. (*Id.* at pp. 19-36.) It ultimately concluded that "there were no 'unusual circumstances taking this rodeo project out of the categorical exemption for 'normal operations' of the Fairground." (*Id.* at p. 36.)

Because it made this initial finding, the court held it need not engage in the second prong of the test, and consequently never addressed evidence that Appellants presented about the [\*9] Rodeo Project's significant environmental impacts: "Because a negative answer as to the question of whether there are unusual circumstances means the exception does not apply..., we need not address appellants' arguments about significant environmental effects." (*Id.* at p. 37.)

#### **C. The Supreme Court Has Granted a Petition for Review of Berkeley Hillside's Holding That When There is Substantial Evidence of a Fair Argument That a Project Might Have Significant Environmental Impacts, the Significant Effects Exception Applies.**

The Supreme Court has granted a petition to review a First Appellate District decision that directly contradicts the Third Appellate District's ruling. In [Berkeley Hillside Preservation, 203 Cal.App. 4th 656](#), the First Appellate District also considered the unusual circumstances exception to categorical exemptions under CEQA. The First District overturned the trial court's ruling that the unusual circumstances exemption did not apply only because the trial court found that no "unusual circumstances" were present. (*Id.* at 670.) It found that "the fact that proposed activity may have an effect on the environment [\*10] 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." (*Id.* (emphasis original)) The court concluded that "the unusual circumstances exception applies whenever there is substantial evidence of a fair argument of a significant environmental impact." (*Id.* at 671.)

On May 23, 2012, this Court granted a petition for review for *Berkeley Hillside*.

. IV

## WHY REVIEW SHOULD BE GRANTED

### A. The Supreme Court Should Grant This Petition for Review and Hold Any Briefing Pending the Court's Decision in *Berkeley Hillside*.

This Court granted review in *Berkeley Hillside* to determine the proper application of the significant effects exception to CEQA. The Court's website, as well as its Weekly Summary issued when the petition for review was granted, frames the issue:

This case presents the following issue: Did the City of Berkeley properly conclude that a proposed project was exempt from the California Environmental Quality Act ([Pub. Resources Code, § 21000](#) et seq.) under the categorical [\*11] exemptions set forth in [California Code of Regulations, title 14, sections 15303](#), subdivision (a), and [15332](#), and that the "Significant Effects Exception" set forth in section 15300.2, subdivision (c), of the regulations did not operate to remove the project from the scope of those categorical exemptions?

The issue presented here regarding the proper application of the "Significant Effects Exception" is identical to the issue on appeal in *Berkeley Hillside*. To the extent that this Court affirms the First District's holding in *Berkeley Hillside* that "the unusual circumstances exception applies whenever there is substantial evidence of a fair argument of a significant environmental impact," Appellants should have the benefit of applying the Supreme Court's clarification of the significant effects exception to Appellants' petition challenging the Rodeo Project. Indeed, the Third District determined that the court did not need to address Appellant's evidence of significant environmental impacts from the Rodeo Project - evidence that this Court could find is integral to a proper application of the significant effects exception. (*See* Opinion, p. 37.)

Given the identical [\*12] nature of the issue here and in *Berkeley Hillside*, this Court should grant review and order briefing in this case deferred until this Court issues its decision in *Berkeley Hillside*. ([Cal. Rules of Court, Rule 8.512\(d\)\(2\)](#).)

### B. Review is Necessary to Secure Uniformity of Decision and to Settle an Important Question.

One of the main functions of the Supreme Court is to resolve conflict in the courts of appeal. (*Warner v. Steamship Uncle Sam (1858) 9 Cal. 697, 718.*) As explained below, review should be granted to resolve the conflict in the courts of appeal regarding the application of the significant effects exception in CEQA, and thereby settle an important question of law. ([Cal. Rules of Court, Rule 8.500\(b\)\(1\)](#).) By agreeing to review the First Appellate District's *Berkeley Hillside* ruling, the Court appears to have acknowledged the presence of a conflict amongst the courts of appeal on the proper application of the significant effects exception.

In recent years, a showing of unusual circumstances has been treated as an independent requirement for finding an exception under the significant effects exception. (*E.g. Banker's Hill v. City of San Diego (2006) 139 Cal.App.4th 249, 278*; [\*13] *Azusa Land Reclamation Co., Inv., 52 Cal.App.4th at 1207* (the first appellate opinion to suggest a two-step test for the unusual circumstances exception).) The presence of unusual circumstances is always treated as a question of law for the Court, without deference to the agency. (*Banker's Hill, 139 Cal.App.4th at 262, n.11.*) Under this approach, if a Court finds that the record presents unusual circumstances, it next turns to the question of whether the project may have significant impacts due to those unusual circumstances, under the fair argument standard of review. (*Id. at 264* ["... [W]e conclude that an agency must apply a fair argument approach in determining whether, under Guidelines section 15300.2(c), there is no reasonable possibility of a significant effect on the environment due to unusual circumstances."].)

However, the two-part test for the unusual circumstances exception is not the only way that the courts apply the exception. ([Communities for a Better Environment v. California Resources Agency \(2002\) 103 Cal. App.4th 98](#) ("CBE"))

held that if a project that fits into a categorical exemption category [\*14] nonetheless presents a reasonable possibility of significant environmental effects, "those effects *would be* 'unusual circumstances' covered by the section 15300.2, subdivision (c) exception." (*Id. at 129* (emphasis added).) *CBE* unequivocally holds that a project demonstrating a reasonable possibility of significant environmental effects *despite* fitting into an exempt category demonstrates unusual circumstances by that very fact. (*Id.*)

Indeed, CEQA's statutory authority does not allow categorical exemptions for any project that *may have a significant impact on the environment*; that remains the overarching rule. (*Pub. Resources Code, §§ 21082.2, 21100, 21151.*) As this Court ruled in *Wildlife Alive v. Chickering*,

The secretary [of the Resources Agency] is empowered [by the Public Resources Code] to exempt only those activities which do not have a significant effect on the environment...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.

18 Cal.3d at 205-206.

The proper application of the significant [\*15] effects exception has important public policy implications critical to ensuring that CEQA's primary objectives are not diminished. If exemptions are allowed for projects that may have (or even will have) significant adverse environmental effects, CEQA's objective "to inform the public and its responsible officials of the environmental consequences of their decisions before they are made" will be completely eroded for large classes of projects. (See *Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal. 3d 553, 564*) (CEQA "protects not only the environment but also informed self-government"); CEQA Guidelines § 15002(a)(1).) Likewise, an application of the significant effects exception that ignores evidence of a project's potentially significant environmental impacts would undermine CEQA's goal of requiring public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures. (CEQA Guidelines § 15002(a)(2)-(3). See also *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmr. (2001) 91 Cal.App.4th 1344, 1354-55.*) "The 'foremost principle' under [\*16] CEQA is that the Legislature intended the act 'to be interpreted in such a manner so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal. 3d 376, 390.*) The Court's review of the "Significant Effects Exception" will decide whether projects that may have or will have significant adverse effects on the environment will be exempted from CEQA's environmental review and mitigation requirements simply by virtue of falling within a generally exempt category of projects that purportedly cannot have any adverse environmental effects, an undeniably important public policy determination. Therefore, given the way that courts have split over the proper application of CEQA's significant effects exception, this Court should grant review to secure uniformity of decision and settle an important question of law. (*Cal. Rules of Court, Rule 8.500(b)(1).*)

. V

## CONCLUSION

Based on the foregoing, Appellants request that the Court grant review and hold the case pending this Court's decision in *Berkeley Hillside*. Respectfully [\*17] submitted,

Dated: May 2, 2014

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Responsibility, Stop the Rodeo, and Eric Zamost

**Certificate of Word Count**

(Cal. Rules of Court Rule 8.504(d)(1))

The text of this brief consists of 2,776 words, as counted by the Microsoft Word 2007 word-processing program used to generate this brief.

Date: May 2, 2014

Respectfully submitted,

LOZEAU | DRURY LLP

/s/ Michael R. Lozeau

Michael R. Lozeau

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**PROOF OF SERVICE**

I, Toyer Gear, declare as follows:

I am a resident of the State of California, and employed in Oakland, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 410 12th Street, Suite 250, Oakland, CA 94607. On May 2, 2014, I served a copy of the foregoing document(s) entitled:

**PETITION FOR REVIEW**

**[X]BY ELECTRONIC MAIL AND US FIRST CLASS MAIL (PURSUANT TO CASE MANAGMENT ORDER AND [\*18] STIPULATION).** By sending the documents as an electronic mail attachment in PDF format to the e-mail addresses below, and by placing the document(s) listed above in a sealed postage pre-paid envelope, and causing the envelope to be delivered to a US Mail receptacle for collection

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I declare under penalty of perjury (under the laws of the State of California that the foregoing is true and correct,  
and that this declaration was executed May 2, 2014, in Oakland, California.

/s/ Toyer Gear  
Toyer Gear

[SEE EXHIBIT A IN ORIGINAL]

[SEE EXHIBIT B IN ORIGINAL]