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WILLIAM P. GALLAHER

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA

WILLIAM P. GALLAHER, an individual, Petitioner and Plaintiff, v. CITY OF SANTA ROSA, CITY COUNCIL OF THE CITY OF SANTA ROSA, and DOES 1 through 25, inclusive, Defendants and Respondents.	Case No. SCV-265711 <u>NOTICE OF APPEAL</u> ASSIGNED FOR ALL PURPOSES TO: JUDGE PATRICK BRODERICK COURTROOM 16 **<u>CEQA Action</u>** Action Filed: December 17, 2019

TO THE CLERK OF THE ABOVE-ENTITLED COURT AND TO ALL PARTIES IN THE ABOVE-ENTITLED ACTION AND TO THEIR ATTORNEYS OF RECORD HEREIN:

NOTICE IS HEREBY GIVEN that Petitioner and Plaintiff WILLIAM P. GALLAHER appeal to the Court of Appeal of the State of California, First Appellate District, from the Ruling on Petition for Writ of Mandate and Complaint For Declaratory and Injunctive Relief filed on April 22, 2021 attached hereto as <u>Exhibit "1"</u> as well as the subsequent Judgment

filed on May 10, 2021 attached hereto as Exhibit "2". Notice of Entry of Judgment was served on May 20, 2021.

Dated: June 21, 2021

MILLER STARR REGALIA

By:

MATTHEW C. HENDERSON
Attorneys for Petitioner and Plaintiff WILLIAM P. GALLAHER

EXHIBIT 1

HON. PATRICK M. BRODERICK
JUDGE OF THE SUPERIOR COURT
Courtroom 16
3035 Cleveland Avenue
Santa Rosa, CA 95403
(707) 521-6729

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SONOMA
APR 22 2021
BY [signature]
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

WILLIAM P. GALLAHER,

Petitioner and Plaintiff,

v.

CITY OF SANTA ROSA, et al.,

Respondents and Defendants.

Case No. SCV-265711

RULING ON PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief filed December 17, 2019, came on regularly for hearing on January 27, 2021, before the Honorable Patrick M. Broderick, Judge, presiding. Counsel Matthew C. Henderson was present on behalf of Petitioner and Plaintiff William P. Gallaher. Counsel Kevin D. Siegel was present on behalf of Respondents and Defendants City of Santa Rosa and City Council of the City of Santa Rosa. Also present observing on behalf of Respondents and Defendants were counsel Stephen E. Velyvis and Ashle T. Crocker.

Upon consideration by the Court of the papers and evidence filed in support of and in opposition to the Petition, and having heard and considered the oral argument of counsel, the Court renders the following decision:

Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief DENIED as explained herein.

Facts

Petitioner seeks a writ of mandate directing Respondents to set aside their approval of Ordinance No. ORD-2019-019 Entitled: Ordinance of the Council of the City of Santa Rosa Adopting by Reference, With Local Amendments, the 2019 California Energy Code Including All-Electric, Low-Rise Residential Reach Code ("the Reach Code" or "the Project") adopted November 19, 2019.

In his first cause of action, Petitioner contends that Respondents improperly adopted the Reach Code without conducting required review under the California Environmental Quality Act ("CEQA"). He asserts that Respondents improperly found the adoption of the Reach Code to fall within three exemptions from CEQA when in fact substantial evidence shows that the Reach Code may cause reasonably foreseeable, potentially significant physical changes in the environment so Respondents were required to prepare an environmental impact report ("EIR") under CEQA. He also argues that the unusual circumstances exception and the cumulative impacts exception to the exemptions apply.

In the second cause of action, Petitioner contends that the adoption of the Reach Code violated requirements for adopting reach codes because Respondents failed to prepare the requisite CEQA document and failed to do a required cost-effectiveness analysis.

Adoption of The Reach Code

Prior to the Respondent City of Santa Rosa ("the City") adopting the Reach Code, the State of California ("the State") updated its Building Standards Code with a 2019 Energy Code ("the Energy Code") which requires low-rise residential construction to include solar photovoltaic ("PV") and battery storage systems. 2 Administrative Record ("AR") 22, 28, 32, 34; 6 AR 61; 7 AR 72 23 AR 305; 56 AR 1148. The State published a Negative Declaration ("the State ND") for the Energy Code finding that it will not cause any significant impacts and that it will provide environmental benefits through reduction of energy consumption from providers. 2 AR 3 et seq.; 3 AR 49 et seq.;

particularly 2 AR 28-29, 32, 34, 49-59. It also commissioned a Cost-Effectiveness Study ("the Cost Study"). 24 AR 309 et seq.

Respondent City began exploring adoption of an all-electric Reach Code in early 2019 and on June 11, 2019 its Climate Action Subcommittee ("CAS") considered 3 options, directing staff to develop an all-electric Reach Code, partnering with several other local agencies regulating climate protection and energy uses. 7 AR 74-75.

The City made public-outreach efforts and received comments from the public, organizations, and industry groups. See, e.g., 14 AR 157, 18 AR 186 et seq., 32 AR 609 et seq., 43 AR 596.

Staff presented the proposed Reach Code requiring new low-rise residential construction to provide a permanent electricity supply for space heating, water heating, cooking and clothes drying, with no plumbing for natural gas. 1 AR 134, 138l 12 AR 139-141. Prior to the regularly scheduled City Council meeting of October 22, 2019, City staff prepared a memo regarding exemption from CEQA ("the City CEQA Memo") and finding the Reach Code to be exempt from CEQA, in part relying on the State ND and Cost Study for the amendments in the State's 2019 Energy Code. 56 AR 1148-1156. It explains that a minimum code-compliant PV system would generate electricity roughly equal to that typically purchased for mixed-fuel homes while a larger system would generate close to 100% of a home's typical energy needs. 24 AR 398; 56 AR 1151.

The City CEQA Memo concluded that adoption of the Reach Code would be exempt from CEQA pursuant to the "common-sense" exemption set forth in 14 CCR section 15061(b)(3) of the Guidelines for the Implementation of CEQA ("Guidelines"), as well as two "categorical" exemptions, Class 7 and Class 8, set forth in Guidelines 15307 and 15308, respectively. 56 AR 1148-1156. The City CEQA Memo explained that the Reach Code will "further reduce energy consumption" with specific findings that that the PV systems will reduce energy consumption by specific amounts compared to multi-fuel homes; they will reduce the need for additional transmission infrastructure; they will

reduce the impacts of power shut-offs; they will reduce consumption of natural gas or water for generating electricity; and the proposal will promote the policies of the City's Climate Action Plan ("CAP"). 56 AR 1150-1156. It also determined that there is no exception to the exemptions, stating that the "unusual circumstances" exception does not apply because there are no "unusual circumstances" and there is no evidence of cumulative impacts. 56 AR 1156.

Respondents ultimately found adoption of the Reach Code to be exempt from CEQA under the three exemptions as set forth in the City CEQA Memo. 6 AR 68-69. The City published a notice of exemption ("NOE") on December 12, 2020, setting forth all three exemptions. 1 AR 2.

Requests for Judicial Notice

Respondents request judicial notice of the California Energy Commission ("CEC") approval of the Reach Code, Petitioner's letter to the CEC, approved reach codes of several other municipalities, therm equivalence to kilowatt hours ("kWh"), specified details from the information published by the State of California ("the State") on solar photovoltaic systems, the State's Building Standards Codes, and Respondents' Climate Action Plan ("CAP").

Petitioner objects to the requests except for the last two items, the State Building Standards Codes and Respondents' CAP. He argues that the items are not relevant and were not part of the record or before Respondents when adopting the Reach Code.

The request is granted as to CEC approval, therm equivalence, the State's published information on photovoltaic systems, the States codes, and the CAP. Judicial notice of the CEC approval of the Reach Code, which took place after the underlying proceedings and affects Petitioner's challenge based on noncompliance with law governing reach codes, is appropriate. The therm and photovoltaic information are relevant for understanding the context of the information in the record and are judicially noticeable.

///

The request is denied as to Petitioner's letter, which does not appear judicially noticeable, and the reach codes of other municipalities, which, by their nature and purpose here, would only be appropriate to consider if they were information in the record. The information on other codes appears to be an improper attempt to include information outside of the record.

Petitioner also seeks judicial notice of information from Pacific Gas and Electric Company ("PG&E") regarding rotating outage status and a newspaper article on rolling blackout during a heatwave. These are again improper for judicial notice here since the information was not part of the record but its nature and intended purpose here are such that they would only be appropriate to consider had they been part of the record. The information appears to be an improper attempt to include information outside of the record. The Court accordingly denies Petitioner's requests.

The Court notes that no decision regarding any of the items which either party presents for judicial notice is dispositive to the outcome of this Petition. The Court's ultimate ruling would be the same regardless of whether it reversed its decision on any of these items.

Overview of Reach Codes

Title 24 of the California Code of Regulations sets minimum standards for building codes in California in the Building Standards Code, including, among others, the Plumbing Code and Energy Code.

Local agencies may modify these codes based on local conditions and based on required findings. Health and Safety Code sections 17958.7, 18941.5; see 7 AR 43. In addition, no modification or change is effective or operative until the finding and the modification or change have been filed with the California Building Standards Commission.

Local agencies may also adopt energy-efficiency modifications to the Energy Code if 1) they find the modifications to be cost-effective and 2) the California Energy Commission ("CEC") finds that the rules will reduce energy consumption. PRC section

25402.1(h)(2); see 24 AR 317. Again, these are not enforceable or effective until the agency submits required documentation to the CEC and obtains CEC approval. PRC section 25402.1; 24 CCR 10-106.

CEQA Overview

The ultimate mandate of CEQA is "to provide public agencies and the public in general with detailed information about the effect [of] a proposed project" and to minimize those effects and choose possible alternatives. Public Resources Code ("PRC") section 21061. After all, the public and public participation hold a "privileged position" in the CEQA process based on fundamental "notions of democratic decision-making." *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, 936. As stated in *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 392, "[t]he EIR process protects not only the environment but also informed self-government."

An EIR is required for a project which substantial evidence indicates *may* have a significant effect on the environment, unless the project is exempt from CEQA. Guidelines for the Implementation of CEQA (Guidelines), 14 CCR section 15063(b)[1]; PRC sections 21100, 21151; PRC section 21084 (governing exemptions); Guideline 15061 (governing exemptions). EIRs are, in the words of the California Supreme Court, "the heart of CEQA." *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 392 (*Laurel Heights I*). Thus, an environmental impact report ("EIR") is ordinarily required, and a lesser CEQA document such as a negative declaration ("ND") is insufficient, if substantial evidence in light of the record indicates that the project may have a significant impact. PRC 21080(c)(1); Guideline 15064(a)(1).

The Supreme Court in *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74, found that CEQA sets forth a three-stage process for determining if environmental review pursuant to CEQA is necessary and, if so, what level. This was further explained

[1] These are at 14 Cal Code Regs §§ 15000, et seq. Courts should at a minimum afford great weight to the Guidelines except when a section is clearly unauthorized or erroneous under CEQA. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (*Laurel Heights I*) (1988) 47 Cal.3d 376, 391, fn 2; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1315.

and clarified in *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, at 1371-1372, which stated that "CEQA lays out a three-stage process" by which 1) the agency must determine whether the particular activity is covered by CEQA, i.e., the activity is a "project" as defined in CEQA and is not exempt; 2) if the activity is a "project" and not exempt, the agency must conduct an initial study to determine if it "may have a significant effect on the environment"; and 3) it must then approve an EIR if the project *may* have such an effect, or if it finds that the project *will not* have such an impact, it may prepare a negative declaration. In the words of *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.* (App. 3 Dist. 2015) 242 Cal.App.4th 555, 568,

> "[T]he Guidelines establish a three-step process to assist a public agency in determining which document to prepare for a project subject to CEQA. (Guidelines, § 15002, subd. (k).) In the first step, the lead public agency preliminarily examines the project to determine whether the project is statutorily exempt from CEQA, falls within a Guidelines categorical exemption or if ' "it can be seen with certainty" that [the] project will not have a significant effect on the environment. [Citations.]' [Citation.] If so, no further agency evaluation under CEQA is required. The agency may prepare a notice of exemption. [Citation.] If, however, the project does not fall within an exemption and it cannot be seen with certainty that the project will not have a significant effect on the environment, the agency takes the second step and conducts an initial study to determine whether the project may have a significant effect on the environment. [Citations.] If the initial study shows there is no substantial evidence the project may have a significant effect on the environment or revisions to the project would avoid such an effect, the lead agency prepares a negative declaration. [Citations.] If the initial study shows 'there is substantial evidence ... that the project may have a significant effect on the environment,' the lead agency must take the third step and prepare an environmental impact report (EIR)." [Citation.]

Projects Subject to CEQA

Generally speaking, any activity a public agency has discretion to carry out or to approve which has the potential for resulting in a physical change in the environment is a "project." *Gentry, supra*, 1371. Under CEQA, a "Project" means the "activity which is being approved and which may be subject to several discretionary approvals" and it "does not mean each separate governmental approval." Guideline 15378.

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1 Respondents do not contend that the decision to adopt the Reach Code was not
2 within the definition of a "project" under CEQA.

3 **Projects Exempt from CEQA**

4 As noted above, the first step an agency must make in conducting review
5 pursuant to CEQA is determining whether an activity is a "project" and, if so, whether it
6 is "exempt" from CEQA.

7 PRC section 21084 is the statutory authority for exemptions from CEQA and
8 exceptions to those exemptions. If the project is exempt, then the agency need conduct
9 no further CEQA review. *Citizens for Environmental Responsibility, supra*, 242
10 Cal.App.4th 568. If an exception to the exemptions applies, the agency may not rely on
11 an exemption and must conduct further CEQA review.

12 Guideline 15061 governs "Review for Exemption" from CEQA and sets forth the
13 types of exemptions. These include, as relevant here, (2) pursuant to a categorical
14 exemption found in Guidelines 15300, et seq., and (3) the "common sense exemption"
15 for projects with a potential for causing a significant effect and which applies "[w]here it
16 can be seen with certainty that there is no possibility that the activity in question may
17 have a significant effect on the environment." Subdivision (b)(3) is the "common-sense"
18 exemption. See, *Apartment Association of Greater Los Angeles v. City of Los Angeles*
19 (2001) 90 Cal.App.4th 1162, 1171; *Davidon Homes v. City of San Jose* (1997) 54
20 Cal.App.4th 106, 116-117.

21 The Common-Sense Exemption

22 The common-sense exemption may be used "only in those situations where its
23 absolute and precise language clearly applies." *Myers v. Board of Supervisors* (1st
24 Dist. 1976) 58 Cal.App.3d 413, 425. Where one can raise a legitimate question of a
25 possible significant impact, the exemption does not apply and, because it requires a
26 finding that such impacts are *impossible*, it requires a factual evaluation based on
27 evidence which shows that it could have no possible significant impact. *Davidon*
28 *Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116-117. The agency thus

bears the burden of basing its decision on substantial evidence that shows no such possibility. *Ibid.*

Categorical Exemptions

In accordance with PRC section 21084, the CEQA Guidelines list a number of classes of projects which are considered generally not to result in a significant impact on the environment and are thus generally exempted from CEQA. PRC 21084; Guidelines 15300-15331; *Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165.

Guideline 15307 sets forth the Class 7 categorical exemption for actions taken to protect natural resources. It states, in full,

> Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption.

Guideline 15308 sets forth the Class 8 categorical exemptions for actions taken "for Protection of the Environment." It states, in full,

> Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.

Standard of Review

Any inquiry into whether an agency has failed to comply with CEQA "shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. PRC section 21168.5.

A threshold dispute which this case presents, and which may determine the outcome, is what specific standard of review to apply. There are several specific

standards which may apply under CEQA when determining if the agency has thus abused its discretion, with the determination as to which applies depending on the circumstances and, most specifically, the procedural stage of the environmental review. These include the fair argument test, which controls when an agency is determining if it should prepare an EIR or simply an ND. This is based on PRC 21080(c); see also, Guideline 15064(a)(1); *Laurel Heights Improvement Ass'n. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1135 (*Laurel Heights II*). The substantial-evidence test applies to decisions regarding significant impacts in approving an EIR and the court must uphold the decision if it is supported by substantial evidence in the record as a whole. *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1075; see, *River Valley Preservation Project v. Metropolitan Transit Dev. Bd.* (1995) 37 Cal.App.4th 154, 166; see, *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 703. On the other hand, failure to include required elements or information is a failure to proceed in the manner required by law and demands strict scrutiny involving de novo review. *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Vineyard Area Citizens for Responsible Growth, supra*, 40 Cal.4th 435. Where an agency has determined if a project is exempt from CEQA under a categorical exemption, the court also must uphold the agency's decision if supported by substantial evidence in light of the whole record. *Citizens for Environmental Responsibility, supra*, 242 Cal.App.4th 568; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251.

Demonstrating Prejudicial Error

Preliminarily, agency actions are presumed to comply with applicable law unless the petitioner presents proof to the contrary. Evidence Code section 664; *Foster v. Civil Service Commission of Los Angeles County* (1983) 142 Cal.App.3d 444, 453. Accordingly, the findings of an administrative agency are presumed to be supported by substantial evidence absent contrary evidence. *Taylor Bus. Service, Inc. v. San Diego Bd. of Education* (1987) 195 Cal.App.3d 1331.

1 Additionally, as noted above, any inquiry into whether an agency has failed to
2 comply with CEQA must determine if the error, or abuse of discretion, was prejudicial.
3 PRC section 21168.5; see also, *Save Cuyama Valley v. County of Santa Barbara*
4 (2013) 213 Cal.App.4th 1059, 1073.

5 **The Applicable Standard of Review for Exemptions**
6 **and Exceptions to Exemptions**

7 Petitioner incorrectly relies on the fair argument standard here in arguing that the
8 Project does not fall within the exemptions on which Respondents rely. As
9 Respondents note, that test does not apply to a determination that a project is exempt
10 from CEQA, and specifically within a categorical exemption.

11 Petitioner relies on the "fair argument" standard of review to argue that the court
12 must order an agency to prepare an EIR if the record contains substantial evidence
13 supporting a fair argument that the project may have a significant impact, despite finding
14 that the Project falls within a categorical exemption. Petitioner's Opening Brief ("OB")
15 14, et seq. Although Petitioner sets forth a correct description of the fair argument test,
16 Petitioner is incorrect in asserting that it applies here, as explained below.

17 Petitioner is also generally correct when initially discussing the standard of
18 review regarding exemptions from CEQA and exceptions to the exemptions at OB 9-13,
19 at which point the standard which Petitioner discusses is not the fair argument standard.
20 For example, Petitioner asserts, correctly, that "the Class 7 and 8 exemptions ... do not
21 apply as an initial matter unless substantial evidence supports their facial applicability
22 ...." OB 12:1-2. However, following this prefatory passage in his brief, Petitioner then
23 incorrectly relies on the fair argument test when actually arguing how the adoption of the
24 exemptions is improper at OB 14, et seq. Petitioner argues that "an agency is required
25 to prepare an [EIR] whenever substantial evidence in the record supports a "fair
26 argument" that a project may have a significant effect ...." OB 14: 3-4. He contends
27 then sets forth the fair argument standard and subsequently reiterates his contention
28 that reliance on the exemptions was improper because "there is abundant evidence ...

that the Reach Code may have a variety of substantial impacts ...." OB 16: 12-13. In his discussion, he largely relies on assertions about purported substantial evidence which he claims supports a fair argument that there may be significant impacts.

Instead, however, as noted above, the more deferential, substantial-evidence test applies to the initial agency determinations that a categorical exemption applies to a project. *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251. It is important to note that there was for some time apparently some disagreement over the specific standards of review to apply to agency determinations regarding exemptions and exceptions to exemptions. See, *Dunn-Edward Corporation v. Bay Area Air Quality Management District* (1992) 9 Cal.App.4th 644; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1406, fn.24. In the past, courts, as discussed in the above two cases, often, but not uniformly, applied the fair-argument test to the finding that a project fit within a categorical exemption. Courts have since, however, become uniform in breaking down the standard of review into three basic parts. *Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106.

As noted above, the court in *Citizens for Environmental Responsibility, supra,* 242 Cal.App.4th, 568, set forth a detailed description of the steps and necessary determinations which are required when an agency studies an activity to determine if CEQA applies and also what level of review is necessary, explaining, with emphasis added, that if an agency finds a project to be exempt from CEQA, "*no further agency evaluation under CEQA is required* .... If, however, the project does *not* fall within an exemption *and it cannot be seen with certainty that the project will not have a significant effect* on the environment, *the agency takes the second step* and conducts an initial study to determine *whether the project may have a significant effect* on the environment." On the burden and standard of review, it explained, at 568 with emphasis added,

> The lead agency has the burden to demonstrate that a project falls within a categorical exemption and the agency's determination must be supported by substantial evidence. [Citation.] Once the agency establishes that the project is exempt, the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions listed in Guidelines section 15300.2.

Similarly, the court in *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, at 185, also explained,

> Where the specific issue is whether the lead agency correctly determined a project fell within a categorical exemption, we must first determine as a matter of law the scope of the exemption and then *determine if substantial evidence supports the agency's factual finding that the project fell within the exemption*. (Citations.) The lead agency has the burden to demonstrate such substantial evidence. (Citations.)
>
> Once the agency meets this burden to establish the project is within a categorically exempt class, "the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions listed in Guidelines section 15300.2."

In the words of *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, at 966, " 'Where a project is categorically exempt, it is not subject to CEQA requirements and "may be implemented without any CEQA compliance whatsoever." ' [Citation.] [¶] In keeping with general principles of statutory construction, exemptions are construed narrowly and will not be unreasonably expanded beyond their terms. [Citations.] Strict construction allows CEQA to be interpreted in a manner affording the fullest possible environmental protections within the reasonable scope of statutory language. [Citations.] It also comports with the statutory directive that exemptions may be provided only for projects which have been determined not to have a significant environmental effect. [Citations.]"

The fair argument test thus applies when an agency finds a project to be subject to CEQA and publishes a negative declaration, which it may do if no substantial evidence in light of the record indicates that the project may have a significant impact. PRC 21080(c)(1); Guideline 15064(a)(1). As the Supreme Court stated in *Laurel Heights Improvement Ass'n. v. Regents of University of California* (1993) 6 Cal.4th

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1112, 1135 (*Laurel Heights II*), "the 'fair argument' test has been applied only to the decision whether to prepare an original EIR or a negative declaration."

This establishes several key points regarding the standard of review, and the applicable burden, at issue in this petition. First, the substantial-evidence test applies to an agency's determination that a project falls within a categorical exemption from CEQA. Second, the test by which an agency may find a project exempt only if it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment is the standard for the "common sense" exemption only and does not apply to findings that a project falls within a categorical exemption. Third, once an agency has determined that a project under CEQA is exempt from CEQA review, the agency conducts no further environmental review. Only if the agency does not find the project to be exempt does it continue further and determine from the initial study whether the project may have a significant effect on the environment and thus require an EIR or if it may instead approve an ND.

The Exception to Exemptions due to Unusual Circumstances

As explained above, once an agency has found, based on substantial evidence, that a project falls within an exemption, the burden shifts to a party opposing the project, such as Petitioner here, to demonstrate that an exception to the exemptions applies. As the Supreme Court stated in *Berkeley Hills, supra*, 60 Cal.4th at 1105, "As to projects that meet the requirements of a categorical exemption, a party challenging the exemption has the burden of producing evidence supporting an exception." See also, e.g., *California Farm Bureau Federation, supra*, 143 Cal.App.4th 185. The Supreme Court continued to explain how one challenging an exemption determination must challenge it based on the unusual circumstances exception, stating, with original emphasis,

> As explained above, to establish the unusual circumstances exception, it is not enough for a challenger merely to provide substantial evidence that the project *may* have a significant effect on the environment, because that is the inquiry CEQA requires absent an exemption. (§ 21151.) Such a showing is inadequate to overcome the Secretary's determination that the

typical effects of a project within an exempt class are not significant for CEQA purposes. On the other hand, evidence that the project *will* 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.

The Supreme Court therefore set forth two ways in which someone might support an argument that the unusual circumstances exception applies. As the court in *Citizens for Environmental Responsibility, supra*, 242 Cal.App.4th, 574-576, described the ruling of Berkeley Hillside,

> In *Berkeley Hillside*, ... our high court added additional clarification to the unusual circumstance exception analysis. The court identified two alternative ways to prove the exception. [Citation].
>
> In the first alternative, as this court said in *Voices*, a challenger must prove both unusual circumstances and a significant environmental effect that is due to those circumstances. In this method of proof, the unusual circumstances relate to some feature of the project that distinguishes the project from other features in the exempt class. [Citation.] Once an unusual circumstance is proved under this method, then the "party need only show a *reasonable possibility* of a significant effect due to that unusual circumstance." (Ibid. italics added.)
>
> The court in *Berkeley Hillside* made clear that "section 21168.5's [10] abuse of discretion standard appl[ies] on review of an agency's decision with respect to the unusual circumstances exception. The determination as to whether there are 'unusual circumstances' [citation] is reviewed under section 21168.5's substantial evidence prong. However, an agency's finding as to whether unusual circumstances give rise to 'a reasonable possibility that the activity will have a significant effect on the environment' [citation] is reviewed to determine whether the agency, in applying the fair argument standard, 'proceeded in [the] manner required by law.' [Citations.]" [Citation.]
>
> As for the first prong of the exception–whether the project presents circumstances that are unusual for projects in an exempt class–this question is essentially a factual inquiry for which the lead agency serves as " 'the finder of fact.' " [Citation.] Thus, reviewing courts apply the traditional substantial evidence standard incorporated in section 21168.5 to this prong. [Citation.] Under that relatively deferential standard of review, our role in considering the evidence differs from the agency's. (Ibid.) " ' "Agencies must weigh the evidence and determine 'which way the scales tip,' while courts conducting [traditional] substantial evidence ... review generally do not." ' [Citation.] Instead, reviewing courts, after resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, must affirm that finding if there is any substantial evidence, contradicted or uncontradicted, to support it. [Citations.]" (Ibid.)

> As for the second prong of the exception–whether there is "reasonable possibility" that an unusual circumstance will produce "a significant effect on the environment"–our high court has said "a different approach is appropriate, both by the agency making the determination and by reviewing courts." [Citation.] "[W]hen there are 'unusual circumstances,' it is appropriate for agencies to apply the fair argument standard in determining whether 'there is a reasonable possibility of a significant effect on the environment due to unusual circumstances.' " (Ibid. italics added.) Under the fair argument test, " 'an agency is merely supposed to look to see if the record shows substantial evidence of a fair argument that there may be a significant effect. [Citations.] In other words, the agency is not to weigh the evidence to come to its own conclusion about whether there will be a significant effect. It is merely supposed to inquire, as a matter of law, whether the record reveals a fair argument .... " '[I]t does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.' " [Citation.]' " [Citation.] Thus, a lead agency must find there is a fair argument even when presented with other substantial evidence that the project will not have a significant environmental effect. [Citation.] Accordingly, where there is a fair argument, "a reviewing court may not uphold an agency's decision 'merely because substantial evidence was presented that the project would not have [a significant environmental] impact. The [reviewing] court's function is to determine whether substantial evidence support[s] the agency's conclusion as to whether the prescribed "fair argument" could be made.' " [Citation.] Thus, the "agency must evaluate potential environmental effects under the fair argument standard, and judicial review is limited to determining whether the agency applied the standard 'in [the] manner required by law.' " [Citation.]
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> In the second alternative for proving the unusual circumstance exception, "a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect." [Citation.] "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.' [Citation.]" [Citation.] But a challenger must establish more than just a fair argument that the project will have a significant environmental effect. [Citation.] A party challenging the exemption, must show that the project will have a significant environmental impact. (Ibid.) Again, as our high court has noted, we review the determination of the unusual circumstances prong of the exception under the deferential substantial evidence test. [Citation.]
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> As for the second prong under this second alternative, no other proof is necessary. Evidence that a project will have a significant environmental effect, "if convincing, necessarily also establishes 'a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.' [Citation.]" [Citation.]

With respect to the exception to exemptions based on the possibility that "unusual circumstances" may cause significant impacts, determining whether a circumstance is "unusual" is a "legal" issue. See, *Azusa Land Reclamation Co., Inc. v.*

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1 *Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1207; *Bloom v.*
2 *McGurk* (1994) 26 Cal.App.4th 1307, 1315-1316.

3 Courts have come to apply a 2-step test for determining whether "unusual
4 circumstances" may cause a significant impact so that the exception applies and an
5 agency may not rely on an exemption. *Berkeley Hillside Preservation v. City of*
6 *Berkeley* (2015) 60 Cal.4th 1086, 1096-1117; *Citizens for Environmental Responsibility*
7 *v. State ex rel. 14th Dist. Ag. Assn.* (App. 3 Dist. 2015) 242 Cal.App.4th 555, 573-574;
8 *Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster* (1997) 52
9 Cal.App.4th 1165, 1207. Under this test, agencies must first consider whether a project
10 reflects "unusual circumstances" compared to others in this class, and courts review this
11 step under the more deferential substantial-evidence test. *Berkeley Hillside*, at 1114;
12 *Citizens for Environmental Responsibility*, at 574. Second, agencies must determine if
13 those unusual circumstances give rise to a reasonable possibility that the activity will
14 have a significant effect, which the court review under the stricter, less deferential, fair-
15 argument standard. *Berkeley Hillside, supra*; *Citizens for Environmental Responsibility,*
16 *supra*. In the words of *Citizens for Environmental Responsibility*, at 574, ' "[t]he
17 determination as to whether there are 'unusual circumstances' [citation] is reviewed
18 under section 21168.5's substantial evidence prong. However, an agency's finding as
19 to whether unusual circumstances give rise to 'a reasonable possibility that the activity
20 will have a significant effect on the environment' [citation] is reviewed to determine
21 whether the agency, in applying the fair argument standard, 'proceeded in [the] manner
22 required by law.' [Citations.]" [Citation.]'

23 As the court put it in *Azusa*, at 1207, "the circumstances of a particular project (i)
24 differ from the general circumstances of the projects covered by a particular categorical
25 exemption, and (ii) those circumstances create an environmental risk that does not exist
26 for the general class of exempt projects." The Supreme Court noted in *Berkeley*
27 *Hillside*, at 1105, "to establish the unusual circumstances exception, it is not enough for
28 a challenger merely to provide substantial evidence that the project may have a

significant effect on the environment, because that is the inquiry CEQA requires absent an exemption."

The court in *Citizens for Environmental Responsibility, supra*, 242 Cal.App.4th 589, explained the process for challenging application of an exemption based on the argument that the project falls within the "unusual circumstances" exception to the exemptions. It stated,

> We now turn to the alternate way a challenger can establish the unusual circumstances prong of the unusual circumstances exception. While our high court in *Berkeley Hillside* held that a mere reasonable possibility a project may have a significant environmental effect is insufficient to establish the unusual circumstances exception (*Berkeley Hillside, supra*, 60 Cal.4th [1086] at pp. 1097, 1104...), the court also held that "a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect." (Id. at p. 1105..., italics added.) The 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." (Ibid.) 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.' " (Id. at p. 1106....) A project challenger must prove that the project will have a significant effect on the environment. (Id. at p. 1105....) Thus, a challenger seeking to prove unusual circumstances based on an environmental effect must provide or identify substantial evidence indicating: (1) the project will actually have an effect on the environment and (2) that effect will be significant. (Ibid.) A "significant effect on the environment" is "a substantial adverse change in the physical conditions which exist in the area affected by the proposed project." (Guidelines, § 15002, subd. (g).)

Substantial-Evidence Test

When the substantial-evidence test applies to an agency's decision, the court must uphold the decision if it is supported by substantial evidence in the record as a whole. *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1075; see, *River Valley Preservation Project v. Metropolitan Transit Develop. Bd.*(1995) 37 Cal.App.4th 154, 166; see, *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 703. Put differently, the "substantial evidence" test requires the court to determine "whether the act or decision is supported by substantial evidence in the light of the whole record." *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143; *River Valley Preservation Project v. Metropolitan Transit*

Develop. Bd. (1995) 37 Cal.App.4th 154, 168. When such substantial evidence does support the decision, and there is no prejudicial abuse of discretion, the court must defer to the agency's substantive conclusions. *Chaparral Greens, supra.*

When applying the substantial evidence standard, in other words, the court must focus not upon the "correctness" of a report's environmental conclusions, but only upon its "sufficiency as an informative document." *Laurel Heights I,* 47 Cal.3d 393. The court must resolve reasonable doubts in favor of the findings and decision. *Id.*

Substantial evidence is not simple "uncorroborated opinion or rumor" but "enough relevant information and reasonable inferences" to allow a "fair argument" supporting a conclusion, in light of the whole record before the lead agency. Guideline 15384(a); PRC §21082.2; *City of Pasadena v. State of California* (2nd Dist.1993) 14 Cal.App.4th 810, 821 822. "[S]ubstantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." PRC 21080; see also, Guideline 15384. It is not "argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to or are not caused by, physical impacts on the environment." *Ibid.* Guideline 15384 sets forth the definition of "substantial evidence" and states, in full,

> (a) "Substantial evidence" as used in these guidelines means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.
>
> (b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

Other decisions describe "substantial evidence" as that with "ponderable legal significance," reasonable in nature, credible, and of solid value. *Stanislaus Audubon*

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Society, Inc. v. County of Stanislaus (1995) 33 Cal.App.4th 144; *Lucas Valley Homeowners Association v. County of Marin* (1991) 233 Cal.App.3d 130, 142.

The Fair Argument Standard

The fair argument test, which here governs whether unusual circumstances may cause a significant impact on the environment so that the Project falls within the unusual circumstances exception to exemptions, is essentially a reverse of the substantial evidence test. It creates a "low threshold" for requiring an EIR. *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754. Under the "fair argument" test, an EIR must be prepared whenever "it can be fairly argued" based on substantial evidence in the record that the project may have a significant environmental impact. *Laurel Heights Improvement Ass'n. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1113, 1134-1135 (*Laurel Heights II*). As a result, even if other substantial evidence supports the conclusion that there are no significant impacts and that no EIR is needed, the agency must prepare an EIR whenever substantial evidence in the record supports a fair argument that a significant impact may occur. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1000-1003.

As essentially the reverse of the substantial evidence test, this test thus still requires substantial evidence to support the argument and it is subject to the same definition and standard of substantial evidence as set forth above.

Respondents' Reliance on the Categorical Exemptions

The two categorical exemptions on which Respondents rely are very similar but with a slight difference. As noted above, Guideline 15307 sets forth the Class 7 categorical exemption for actions taken to protect natural resources. It states, in pertinent part and with emphasis added, "Class 7 consists of 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.* Guideline 15308 sets forth the Class 8 categorical exemptions for actions

taken "for Protection of the Environment." It states, in pertinent part and with emphasis added,

> "Class 8 consists of actions taken ... *to assure the maintenance, restoration, enhancement, or protection of the environment* where the regulatory process involves procedures *for protection of the environment.*"

Preliminarily, the Court also notes that facially the purported purpose and effect of Reach Code appear to fall within the scope of the categorical exemptions. Class 7 applies to actions taken to preserve or maintain a natural resource and the Reach Code is an action taken in part to preserve and maintain natural resources, most expressly natural gas but also water and any others involved in providing heating, lighting, and the like. Similarly, Class 8 applies to actions taken to protect the environment and again the Reach Code in both its facial purpose and purported effect is intended to, and purportedly will, help protect the environment by reducing pollution and use of natural resources through reduced reliance on traditional energy supply. Petitioner at no point actually challenges the findings that to this extent the Reach Code is, at least facially and potentially, within the scope of these categories.

Petitioner instead, as noted above, contends that the exemptions do not apply because there is substantial evidence that the Reach Code may cause significant impacts. This, as explained above, is the incorrect standard of review and, in fact, does not even address the actual questions which this Court must address: 1) what is the scope of the exemptions and does the Project facially or potentially fall within it; and 2) does substantial evidence support the agency's determination that the Project falls within the exemption.

Petitioner relies on *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644 to argue that Respondents cannot assume that the Reach Code will be beneficial and preserve resources or protect the environment because it simply replaces one energy source with another and may have other impacts. In *Dunn-Edwards*, the agency relied on the same two categorical exemptions for a regulation reducing a solvent in paint in order to reduce emissions from them. The

court of appeal affirmed the trial court decision that the agency could not rely on the exemptions due to substantial evidence which could support a fair argument that the regulation may have a significant effect. In short, both the appellate court and the trial court relied on the fair argument test. As explained above, this is incorrect. Notably, *Dunn-Edwards* was decided during the period of uncertainty and doubt over which standard of review to apply and the clarification that courts must apply the substantial-evidence test rather than the fair argument test occurred later. The analysis in *Dunn-Edwards* is therefore inapplicable.

Petitioner similarly relies in vain on the older case of *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205-206. He again argues that under this decision the Court must find that the Reach Code cannot be exempt as long as there is substantial evidence supporting a fair argument that it may cause a significant impact. Again, this reliance is misplaced. The Supreme Court there rejected an agency's claim that its actions were exempt from CEQA, specifically discussing the Class 7 exemption. However, the primary basis for the Supreme Court's decision was its determination that the activity did not fall within the exemption, the court explaining, at 205, "[t]he fixing of hunting seasons, while doubtless having an indirect beneficial effect on the continuing survival of certain species, cannot fairly or readily be characterized as a preservation activity in a strict sense." It contrasted this activity with those which the Class 7 exemption clearly did cover, the activities of the Department of Fish and Game for propagating, feeding, and protecting wildlife. The court then addressed another reason for its conclusion, and at that point discussed the potential impacts of the setting of hunting seasons, but did so in the context of early application and interpretation of the exemptions and based on the decision that to allow an exemption to cover the activity would improperly and unreasonably expand the Legislature's intent in allowing for categorical exemptions. The court explained, at 206,

> Another consideration moves us to our conclusion that the commission is not categorically exempt from CEQA. Even if section 15107 was intended to cover the commission's hunting program, it is doubtful that such a

1 categorical exemption is authorized under the statute. We have held that no regulation is valid if its issuance exceeds the scope of the enabling
2 statute. [Citations.] The secretary is empowered to exempt only those activities which do not have a significant effect on the environment.
3 [Citation.] It follows that where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an
4 exemption would be improper.

5 Much of this analysis is inapplicable here for the primary issue in *Wildlife Alive*
6 was actually, as the Supreme Court stated, at 195, "whether the California
7 Environmental Quality Act of 1970 (CEQA) [Citation] applies to the Fish and Game
8 Commission (the commission)." The court explained that no specific project was at
9 issue but simply a blanket exemption for the commission and it discussed the
10 commission's activities in regulating hunting permits and seasons in this context of this
11 blanket exemption. The court explained that courts may not find implied exemptions
12 and discussed specific issues such as the Class 7 exemption in addressing the various
13 possible exemptions which could apply to the commission as a whole, finding that they
14 do not.

15 Petitioner, accordingly, relies on an inapplicable standard and addresses the
16 wrong argument. Instead of attempting to demonstrate that substantial evidence does
17 not support the finding that the adoption of the Reach Code falls within an exemption,
18 he argues that the exemptions do not apply because there is substantial evidence
19 supporting a fair argument that the Reach Code may cause significant impacts.

20 Respondents, by contrast, cite to evidence supporting the exemption
21 determinations. Opposition 18-19. Respondents relied on the already approved State
22 Energy Code, and the adopted CEQA review for it in the State ND. The code requires
23 PV systems to offset 100% of electricity use in mixed-fuel homes and neither the
24 installation nor use of those systems will cause a significant impact, as found in the
25 State ND. 2 AR 22, 28-29, 32, 34, 49-50; 24 AR 324, 335-337, 358. Respondents
26 relied on the CEC's calculation that adoption of the new statewide standards would
27 annually reduce statewide electricity consumption by about 653 gigawatt-hours and
28 natural gas consumption by 9.8 million therms, reduce nitrous oxide emissions by about

1 225,000 pounds, sulfur oxides by 590 pounds, carbon monoxide by 61,000 pounds, and
2 particulate matter by 7,400 pounds. 53 AR 1150. Respondents' evidence includes
3 calculations and data on energy consumption, generation, and use showed that the
4 Reach Code will "further reduce energy consumption" with specific findings that that the
5 PV systems will reduce energy consumption by specific amounts compared to multi-fuel
6 homes; they will reduce the need for additional transmission infrastructure; they will
7 reduce the impacts of power shut-offs; they will reduce consumption of natural gas or
8 water for generating electricity; data indicated that most would install PV systems which
9 will provide at least 2.07 more kilowatts than the code minimum, further reducing annual
10 electricity consumption to 847 kWh; and the proposal will promote the policies of the
11 City's CAP. 56 AR 1150-1156. Evidence showed that any increase in electricity use as
12 a result of reduction in gas use would also be within the capacity of the current major
13 transmission systems and in areas where such systems are already in place, so that the
14 Reach Code will not lead to construction of new major transmission systems. 54 AR
15 1152. Respondents also relied on evidence from the State ND and code that
16 installation of PV systems will conserve water resources by reducing reliance on power
17 plants to provide electricity and concludes that the Reach Code will further this by
18 increasing efficiency. 54 AR 1154.
19 Petitioner makes no effort to challenge this evidence or these conclusions in his
20 opening brief and, as noted, he does not even truly address this standard at all. In his
21 reply, he again insists on his view of the standard of review and argues that
22 Respondents have "not engaged with the substantial evidence adduced by Petitioner
23 and other commenters that the Reach Code may have significant impacts ...." Reply
24 11:5-8. He still offers no real explanation as to why substantial evidence does not
25 support Respondents' exemption findings. He does briefly take issue with two possible
26 pieces of the evidence supporting Respondents, the conclusion that most homes will
27 have at least 4.87 kW PV systems and the statement that many gas appliances have
28 electric ignitions and will not work without electricity, but his discussion of these fails to

show a lack of substantial evidence. He addresses only two small points of the evidence which has no bearing on the rest of the evidence which Respondents cite, and his discussion is minimal conclusory without analysis showing how this evidence cannot be part of the total substantial evidence supporting the exemptions.

Petitioner complains that Respondents have no basis for concluding that most homes will have at least 4.87 kW PV systems but bases this solely on the fact that the Reach Code only requires 2.8 kW systems. He ignores the fact that Respondents base this finding on data about actual installation of PV systems, specifically evidence from Sonoma Clean Power that in Sonoma County, and particularly Santa Rosa, the typical size of PV systems installed is 8.5 kW, almost twice the system on which the conclusions are based and about thrice the Reach Code's minimum. 54 AR 1151. Respondents however, actually based their findings on a more restrictive and pessimistic prediction of actual PV installations that the evidence suggested and yet still found that even the 4.87 kW system would reduce impacts and preserve both the environment and resources. Yet, the actual evidence in the record shows that the likely typical system installed will be even more effective, and significantly so.

Petitioner also takes issue with the finding that many gas appliances have electric ignitions and will not work without electricity, part of the discussion regarding implications of possible power outages. However, this is of minimal and tangential relevance to Respondents' determinations and is truly only a part of the analysis for the common sense exemption. Petitioner also fails to cite to anything showing that this determination is incorrect and merely notes that some appliances have pilot lights or that people may manually light their natural-gas systems, without citing to any evidence or analysis in the record to support this.

Finally, Petitioner in his opening brief never actually argued that Respondents' findings of exemptions lack substantial evidence, and also never even mentioned these points which he now raises in reply. The result is that he is raising these issues for the first time in his reply, when he should have raised them in his opening brief. He is

raising an entirely new argument in support of his petition which he did not raise in the opening brief. The court therefore should, properly, disregard them. As the court explained in *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010, in the context of appellate briefing, "[t]he salutary rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before." It is "[t]he general rule" that a party may not present evidence for the first time in a reply if the moving party should reasonably have presented it in the opening papers, unless specifically provided to rebut opposition points. *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-1538.

Accordingly, the Court rejects Petitioner's claim that Respondents incorrectly found the categorical exemptions to apply.

Respondents' Reliance on The Common Sense Exemption

The common-sense exemption, as set forth above, applies "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." Guideline 15061(b)(3) It may be used "only in those situations where its absolute and precise language clearly applies." *Myers v. Board of Supervisors* (1st Dist. 1976) 58 Cal.App.3d 413, 425. Where one can raise a legitimate question of a possible significant impact, the exemption does not apply and, because it requires a finding that such impacts are impossible, it requires a factual evaluation based on evidence which shows that it could have no possible significant impact. *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116-117. The agency thus bears the burden of basing its decision on substantial evidence that shows no such possibility. *Ibid.*

The same substantial evidence standard applies to the common sense exemption but here the question is whether substantial evidence supports Respondents' determination that there is no possibility that the Reach Code may have a significant effect on the environment. The record contains substantial evidence that the Reach Code falls within the Class 7 and Class 8 exemptions because it will protect the

environment and preserve resources but Respondents need more. They cite to no evidence in the record demonstrating any basis for finding that there is no possibility that the Reach Code may have a significant effect on the environment. There is evidence which supports a finding that it may not, but no meaningful evidence or indeed analysis to support the conclusion that there is no possibility it will cause a significant impact.

That said, this is alone immaterial if indeed the Court finds that Respondents' properly relied on the Class 7 and 8 exemptions because the result will be the same: the adoption of the Reach code is exempt from CEQA. This error would thus by definition not be prejudicial.

"Unusual Circumstances" Exception to the Exemptions

In approving the Reach Code and issuing the NOE, Respondents also found no exception to the exemptions applied, specifically discussing the "unusual circumstances" exception as set forth above. It determined that there were no "unusual circumstances."

As noted above, once the agency establishes the project is categorically exempt, the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions. *Citizens for Environmental Responsibility, supra*, 242 Cal.App.4th 568; *California Farm Bureau Federation, supra,* 143 Cal.App.4th 185.

The examination of the unusual circumstances exception, again as explained above, is a 2-step test. *Berkeley Hillside Preservation, supra,* 60 Cal.4th 1096-1117; *Citizens for Environmental Responsibility, supra*, 242 Cal.App.4th 573-574. Respondents must consider if there are "unusual circumstances" and the court will uphold the Respondents' determination if substantial evidence supports it. *Berkeley Hillside*, 1114; *Citizens for Environmental Responsibility*, 574. Respondents must then determine if those unusual circumstances give rise to a reasonable possibility that the activity will have a significant effect, which the court review under the stricter, less

deferential, fair-argument standard. *Berkeley Hillside, supra*; *Citizens for Environmental Responsibility, supra*.

Petitioner in his papers provides only a brief, conclusory argument that Respondents fail to explain why there are no unusual circumstances. He then lists circumstances which he claims are unusual but these are not from the record and Petitioner cites to nothing in the record on this issue. OB 27: 12-25. Instead, he appears to argue that Respondents must provide substantial evidence now to support a finding that these circumstances he now raises, without any evidence from, or citation to, the record, are not "unusual." He also fails to explain why the circumstances he mentions are "unusual circumstances" or how they might lead to significant impacts.

Respondents cite only to the evidence in the record that "over fifty other cities and counties throughout the state have either adopted, or intend to adopt, the same or similar programs." 56 AR 1156. This alone, in truth, does not appear to qualify as substantial evidence sufficient to support a finding that there are no unusual circumstances.

However, Respondents do not need to show more. As explained above, once Respondents found the Project to be within an exemption, based on substantial evidence, the burden shifts to anyone challenging that decision to demonstrate a basis for finding that an exception to the exemptions applies. Anyone seeking to demonstrate that the unusual circumstances exception applies must demonstrate to the City that there is a basis for finding that there may be unusual circumstances which may cause the Project to result in significant impacts. Here, Petitioner points to nothing in the record which even raised the issue of unusual circumstances, much less demonstrated a possible basis for finding there to be unusual circumstances. Respondents therefore did not actually need to address the issue at all.

Petitioner argues that the threats of wildfires or blackouts are unusual circumstances but this argument is unpersuasive. He fails to cite to anything, and

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certainly not to anything in the record, showing that a threat of fires or blackouts might be an unusual circumstance.

Moreover, even assuming that Petitioner or anyone else met the burden of demonstrating a basis for finding unusual circumstances, so that Respondents were required to find that there are no unusual circumstances, and that Respondents' finding fails to satisfy the requirements of CEQA, the second element of the test defeats Petitioner. As noted above, Petitioner must demonstrate substantial evidence in the record which could support a fair argument that the Project may cause significant impacts due to the unusual circumstances.

Even if these circumstances which Petitioner raises could be found to be unusual circumstances, Petitioner offers no evidence or explanation, much less anything in the record, which could possibly support a fair argument that the Reach Code could cause a significant environmental impact simply because of these circumstances, i.e., threat of such fires or blackouts. He does not even identify what that impact might be. Petitioner does cite to information in the record showing a range of problems or threats to safety which such fires or blackouts may cause, but none these threats appears attributable to the Reach Code and Petitioner fails to offer any evidence or explanation at all, much less anything from the record, which could demonstrate how these possible impacts could result from the Project due to unusual circumstances. To the extent that Petitioner offers some claim that the Reach Code itself may cause significant impacts due to these circumstances, his assertions are vague, tenuous, and conclusory, and they consist of nothing more than unsupported "argument, speculation, unsubstantiated opinion or narrative," which Guideline 15384(a), as noted above, expressly states is not substantial evidence which may support a fair argument. Petitioner provides no "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts" showing that the Reach Code may cause any significant impacts due to these circumstances. Moreover, Petitioner almost entirely focuses on "evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on

the environment," which, again, Guideline 15384(a) expressly states "does not constitute substantial evidence."

Petitioner's papers otherwise merely argue that "the ample evidence in the record as to … potential impacts establishes the existence of unusual circumstances by itself." Reply 14: 2-4. As, once more, explained above, this is patently inadequate. There is evidence in the record of potential impacts but Petitioner cites to nothing showing unusual circumstances, much less that the unusual circumstances themselves give rise to these potential impacts. The case law, and specifically the Supreme Court, make it expressly clear that a party must do more than show potential impacts, no matter how many or severe, to provide a basis for this exception. The party must demonstrate that those impacts arise from unusual circumstances. A party may also, as explained, demonstrate that the Project "will" have significant impacts, but Petitioner provides nothing to support such a conclusion and nothing more than evidence of potential impacts.

At the hearing, Petitioner relied heavily on *Respect Life South San Francisco v. City of South San Francisco* (2017) 15 Cal.App.5th 449 to argue that City needed to make explicit findings about the unusual circumstances exception. *Respect Life* addressed a challenge to an exemption finding based on the unusual circumstances exemption. The court there reiterated the standard which the Supreme Court articulated in *Berkeley Hillside*, explaining, at 456-457,

> We start with the standards that governed the City. *Berkeley Hillside* explained that a party seeking to establish that the unusual-circumstances exception applies has the burden to show two elements. These elements are (1) "that the project has some feature that distinguishes it from others in the exempt class, such as its size or location" and (2) that there is "a reasonable possibility of a significant effect [on the environment] due to that unusual circumstance." [Citation.]
>
> …
>
> Turning to the standards that govern our review of the City's determination, *Berkeley Hillside* explained that when an entity determines whether the unusual-circumstances exception applies, a court must assess the determination under the abuse of discretion standard set forth in section 21168.5. [Citation.] Section 21168.5 provides that an "[a]buse

> of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." [Citation.] The Supreme Court clarified that "both prongs of section 21168.5's abuse of discretion standard apply on review of the agency's decision. ... The determination as to whether there are 'unusual circumstances' [citation] is reviewed under section 21168.5's substantial evidence prong. However, an agency's finding as to whether unusual circumstances give rise to 'a reasonable possibility that the activity will have a significant effect on the environment' [citation] is reviewed to determine whether the agency, in applying the fair argument standard, 'proceeded in [the] manner required by law.'" [Citation.]
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> Elaborating on these standards, the Supreme Court explained that whether a project presents unusual circumstances—the first element needed to establish the applicability of the unusual-circumstances exception—"is an essentially factual inquiry," and a court applies "the traditional substantial evidence standard." [Citation.] "Under that relatively deferential standard of review, ... reviewing courts, after resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, must affirm that finding if there is any substantial evidence, contradicted or uncontradicted, to support it." [Citation.]
>
> ...
>
> To sum up, when a party seeks to establish that the unusual-circumstances exception applies, it must prove to the entity that two elements are satisfied: (1) the project presents unusual circumstances and (2) there is a reasonable possibility of a significant environmental effect due to those circumstances. A court then assesses the entity's determinations on these elements by applying different standards of review: a deferential standard applies in reviewing the first element and a nondeferential standard applies in reviewing the second.

The court then addressed the *specific issue before it*, the standard of review applicable "when the entity makes an *implied* determination that the unusual-circumstances exception is inapplicable." Emphasis added. The court explained that the agency there had *not* made *express* findings on the unusual circumstances exception but made only implied findings, making it impossible to determine the basis for the agency's decision or how it found on either element. The court explained, with emphasis added, at 457-458,

> The City made *no explicit findings on either of the two elements.* Thus, while we know that the City found against Respect Life on at least one of the elements, *we cannot say with certainty* whether it found against Respect Life *on the first element, the second element, or both.*
>
> When an entity's determination that the unusual-circumstances exception is inapplicable is implied, a court's ability to affirm is constrained. The

> *court may affirm on the basis of the first element*—which, again, asks whether the project presents any unusual circumstances—*only if the court assumes that the entity found that there were unusual circumstances and then concludes that the record does not contain substantial evidence of any such circumstances. A court cannot, however, affirm on the basis of the first element by simply concluding that the record contains substantial evidence that there are not unusual circumstances.* This is because such an approach fails to address the possibility that the entity thought there were unusual circumstances but concluded, under the second element, that these circumstances did not support a fair argument of a reasonable possibility of a significant environmental effect.

The court therefore did not ultimately rule that an agency violates CEQA and improperly finds that the unusual exception does not apply merely by failing to make express findings on why the exception does not apply. It explained, instead, that where an agency fails to make explicit findings on the two prongs, a court may not simply assume that the agency found there to be no unusual circumstances, i.e. the first prong. It must instead move to the second prong, and apply the standard of review generally more favorable to a petitioner, of whether substantial evidence supports a fair argument that the project may result in significant impacts due to unusual circumstances.

Petitioner argues that Respondents failed to make such explicit findings, as in *Respect Life*, but this is incorrect. Petitioner in fact quotes a statement from the analysis where Respondents expressly state that "[t]here is nothing unusual" and "there are no unusual circumstances." AR 1156. This is in contrast to *Respect Life*, where the City had merely found that the unusual circumstances exception did not apply without giving any explanation as to why.

Moreover, as addressed above, Respondents did not even need to get there since Petitioner cites to nothing in the record raising the possibility of unusual circumstances or what they may be. He cites to circumstances but nothing showing that these might be unusual. Finally, again, Petitioner fails to point to substantial evidence in the record showing that the Reach Code may, because of any unusual circumstances, cause a significant impact. The *Respect Life* court reiterated this standard, as set forth above.

///

Even if this Court were to find that Respondents had failed to make explicit findings, and assumed there to be a basis for finding unusual circumstances, the result would be that the Court must merely move to the next step, instead of automatically finding a CEQA violation. The Court would need to determine if substantial evidence supports a fair argument that the Project could result in significant impacts due to the unusual circumstances. As explained above, Petitioner singularly fails to meet this burden.

Petitioner has presented no basis for finding the unusual circumstances exception to apply and the court rejects his argument on this point.

Cumulative Impacts Exception

Petitioner also alleges in the petition that the adoption of the Reach Code falls within the cumulative impacts exception to the exemptions. However, he does not discuss this allegation in his opening brief so fails to demonstrate that this exception applies.

Conclusion: CEQA Claim

The Court DENIES the Petition as to the CEQA claim. Petitioner has failed to demonstrate a lack of substantial evidence to support Respondents' determination that the adoption of the Reach Code falls within the Class 7 and 8 categorical exemptions and has failed to show that an exception to the exemptions applies.

Failure to Comply with Reach Code Law

In addition to claiming that the adoption of the Reach Code violated CEQA, Petitioner argues that the Reach Code does not comply with law governing reach codes.

He first contends that 24 CCR 10-106(b)(4) requires Respondents to prepare and submit to the CEC an ND or EIR under CEQA and that the failure to do so renders the Reach Code "invalid per se." This argument ignores the full language of section 10-106(b)(4). Subdivision (b) states that local agencies "wishing to enforce locally adopted energy standards shall submit an application with" the listed materials. Subdivision

(b)(4) states that these materials must include "Any findings, determinations, declarations or reports, including any negative declaration or environmental impact report, required pursuant to the California Environmental Quality Act ...." It therefore merely requires the agency to provide whatever CEQA findings and documents is adopted, which may or may not be either an ND or EIR. Respondents also submitted its application and documentation to the CEC and the CEC has approved the Reach Code based on the documentation which Respondents submitted. RJN, ¶1, Ex. A.

Petitioner next argues that Respondents also violated the requirement in 24 CCR 10-106(b) to adopt and submit a determination that the Reach Code standards are cost effective with findings and supporting analyses on the energy savings and cost-effectiveness of the proposed standards. He asserts that Respondents submitted only the State's Cost Study. Respondents point out that the Cost Study analyzed the cost effectiveness of PV systems based on the specific circumstances of each identified climate zone, including the one in which the City is located. Respondent City Council based its findings on this Cost Study and imposed requirements which will be even more economical. Respondent provides no explanation as to why reliance on the State Cost Study is inherently inadequate merely because it was a study addressing the cost effectiveness of such systems throughout every part of the state instead of only Santa Rosa. Petitioner contends that another study concluded that such reach codes would increase utility bills in the Bay Area but this is immaterial. The law at issue here only requires the agency to rely on a cost effectiveness study and submit it to the CEC when seeking approval of a reach code. It does not provide authority for challenging the reach code because a different study takes a different position. Again, also, the CEC has already approved the Reach Code based on the documentation provided, thereby finding the documentation to satisfy 24 CCR 10-106.

The Court also DENIES the Petition as to the claim that the adoption of the Reach Code violated applicable law governing reach codes.

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Conclusion

The Court therefore DENIES the Petition in full.

IT IS SO ORDERED.

DATED: April 22, 2021

PATRICK M. BRODERICK
Judge of the Superior Court

PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 600 Administration Dr., Room 107-J, Santa Rosa, California, 95403; that I am not a party to this case; that I am over the age of 18; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of *Ruling on Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief* in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: April 22, 2021

Arlene Junior
Clerk of the Court

By: *Cynthia Gaddie*
Cynthia Gaddie, Deputy Clerk

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FILING FEE EXEMPT PURSUANT TO
GOVERNMENT CODE § 6103

ELECTRONICALLY FILED
Superior Court of California
County of Sonoma
5/10/2021 1:22 PM
Arlene D. Junior, Clerk of the Court
By: Jennifer Ellis, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SONOMA

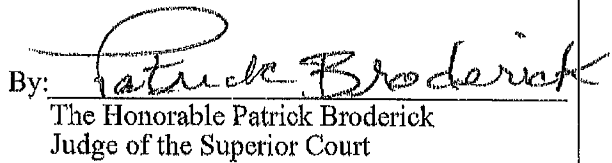
WILLIAM P. GALLAHER, an individual,. Petitioner and Plaintiff, v. CITY OF SANTA ROSA, CITY COUNCIL OF THE CITY OF SANTA ROSA, and DOES 1 through 25, inclusive, Defendants and Respondents.	Case No. SCV-265711 *Assigned for All Purposes to Hon. Patrick Broderick, Dept. 16* ~~[PROPOSED]~~ JUDGMENT Action Filed: December 17, 2019

Having entered, on April 22, 2021, a Ruling on Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, a true and correct copy of which is attached hereto and incorporated herein as **Exhibit A**, which denies Petitioner and Plaintiff William P. Gallaher's ("Petitioner") Verified Petition for Writ of Mandate and Complaint for Declaratory Relief ("Petition") in its entirety, and good cause appearing, the Court hereby enters judgment in favor of Respondents and Defendants City of Santa Rosa and City Council of the City of Santa

Rosa (collectively, the "City"), and against Petitioner, on each and every cause of action alleged in the Petition.

The City shall be entitled to recover costs from Petitioner, subject to the filing of a memorandum of costs.

Dated: 5-10, 2021

By: 
The Honorable Patrick Broderick
Judge of the Superior Court

APPROVED AS TO FORM:

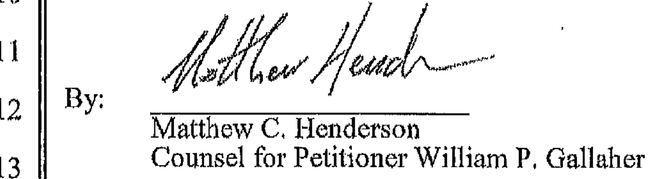
By: 
Matthew C. Henderson
Counsel for Petitioner William P. Gallaher

EXHIBIT A

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SONOMA
APR 22 2021
BY Cindy Gaddie
Deputy Clerk

1 HON. PATRICK M. BRODERICK
JUDGE OF THE SUPERIOR COURT
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3035 Cleveland Avenue
3 Santa Rosa, CA 95403
(707) 521-6729
4
5
6
7
8
9 SUPERIOR COURT OF CALIFORNIA, COUNTY OF SONOMA

10 WILLIAM P. GALLAHER, 11 Petitioner and Plaintiff, 12 v. 13 CITY OF SANTA ROSA, et al., 14 Respondents and Defendants.	Case No. SCV-265711 **RULING ON PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

15
16 The Petition for Writ of Mandate and Complaint for Declaratory and Injunctive
17 Relief filed December 17, 2019, came on regularly for hearing on January 27, 2021,
18 before the Honorable Patrick M. Broderick, Judge, presiding. Counsel Matthew C.
19 Henderson was present on behalf of Petitioner and Plaintiff William P. Gallaher.
20 Counsel Kevin D. Siegel was present on behalf of Resbondents and Defendants City of
21 Santa Rosa and City Council of the City of Santa Rosa. Also present observing on
22 behalf of Respondents and Defendants were counsel Stephen E. Velyvis and Ashle T.
23 Crocker.
24 Upon consideration by the Court of the papers and evidence filed in support of
25 and in opposition to the Petition, and having heard and considered the oral argument of
26 counsel, the Court renders the following decision:
27 **Petition for Writ of Mandate and Complaint for Declaratory and Injunctive**
28 **Relief DENIED** as explained herein.

1 **Facts**

2 Petitioner seeks a writ of mandate directing Respondents to set aside their
3 approval of Ordinance No. ORD-2019-019 Entitled: Ordinance of the Council of the City
4 of Santa Rosa Adopting by Reference, With Local Amendments, the 2019 California
5 Energy Code Including All-Electric, Low-Rise Residential Reach Code ("the Reach
6 Code" or "the Project") adopted November 19, 2019.

7 In his first cause of action, Petitioner contends that Respondents improperly
8 adopted the Reach Code without conducting required review under the California
9 Environmental Quality Act ("CEQA"). He asserts that Respondents improperly found
10 the adoption of the Reach Code to fall within three exemptions from CEQA when in fact
11 substantial evidence shows that the Reach Code may cause reasonably foreseeable,
12 potentially significant physical changes in the environment so Respondents were
13 required to prepare an environmental impact report ("EIR") under CEQA. He also
14 argues that the unusual circumstances exception and the cumulative impacts exception
15 to the exemptions apply.

16 In the second cause of action, Petitioner contends that the adoption of the Reach
17 Code violated requirements for adopting reach codes because Respondents failed to
18 prepare the requisite CEQA document and failed to do a required cost-effectiveness
19 analysis.

20 **Adoption of The Reach Code**

21 Prior to the Respondent City of Santa Rosa ("the City") adopting the Reach
22 Code, the State of California ("the State") updated its Building Standards Code with a
23 2019 Energy Code ("the Energy Code") which requires low-rise residential construction
24 to include solar photovoltaic ("PV") and battery storage systems. 2 Administrative
25 Record ("AR") 22, 28, 32, 34; 6 AR 61; 7 AR 72 23 AR 305; 56 AR 1148. The State
26 published a Negative Declaration ("the State ND") for the Energy Code finding that it will
27 not cause any significant impacts and that it will provide environmental benefits through
28 reduction of energy consumption from providers. 2 AR 3 et seq.; 3 AR 49 et seq.;

1 particularly 2 AR 28-29, 32, 34, 49-59. It also commissioned a Cost-Effectiveness
2 Study ("the Cost Study"). 24 AR 309 et seq.
3 Respondent City began exploring adoption of an all-electric Reach Code in early
4 2019 and on June 11, 2019 its Climate Action Subcommittee ("CAS") considered 3
5 options, directing staff to develop an all-electric Reach Code, partnering with several
6 other local agencies regulating climate protection and energy uses. 7 AR 74-75.
7 The City made public-outreach efforts and received comments from the public,
8 organizations, and industry groups. See, e.g., 14 AR 157, 18 AR 186 et seq., 32 AR
9 509 et seq., 43 AR 596.
10 Staff presented the proposed Reach Code requiring new low-rise residential
11 construction to provide a permanent electricity supply for space heating, water heating,
12 cooking and clothes drying, with no plumbing for natural gas. 1 AR 134, 138l 12 AR
13 139-141. Prior to the regularly scheduled City Council meeting of October 22, 2019,
14 City staff prepared a memo regarding exemption from CEQA ("the City CEQA Memo")
15 and finding the Reach Code to be exempt from CEQA, in part relying on the State ND
16 and Cost Study for the amendments in the State's 2019 Energy Code. 56 AR 1148-
17 1156. It explains that a minimum code-compliant PV system would generate electricity
18 roughly equal to that typically purchased for mixed-fuel homes while a larger system
19 would generate close to 100% of a home's typical energy needs. 24 AR 398; 56 AR
20 1151.
21 The City CEQA Memo concluded that adoption of the Reach Code would be
22 exempt from CEQA pursuant to the "common-sense" exemption set forth in 14 CCR
23 section 15061(b)(3) of the Guidelines for the Implementation of CEQA ("Guidelines"), as
24 well as two "categorical" exemptions, Class 7 and Class 8, set forth in Guidelines 15307
25 and 15308, respectively. 56 AR 1148-1156. The City CEQA Memo explained that the
26 Reach Code will "further reduce energy consumption" with specific findings that that the
27 PV systems will reduce energy consumption by specific amounts compared to multi-fuel
28 homes; they will reduce the need for additional transmission infrastructure; they will

reduce the impacts of power shut-offs; they will reduce consumption of natural gas or water for generating electricity; and the proposal will promote the policies of the City's Climate Action Plan ("CAP"). 56 AR 1150-1156. It also determined that there is no exception to the exemptions, stating that the "unusual circumstances" exception does not apply because there are no "unusual circumstances" and there is no evidence of cumulative impacts. 56 AR 1156.

Respondents ultimately found adoption of the Reach Code to be exempt from CEQA under the three exemptions as set forth in the City CEQA Memo. 6 AR 68-69. The City published a notice of exemption ("NOE") on December 12, 2020, setting forth all three exemptions. 1 AR 2.

Requests for Judicial Notice

Respondents request judicial notice of the California Energy Commission ("CEC") approval of the Reach Code, Petitioner's letter to the CEC, approved reach codes of several other municipalities, therm equivalence to kilowatt hours ("kWh"), specified details from the information published by the State of California ("the State") on solar photovoltaic systems, the State's Building Standards Codes, and Respondents' Climate Action Plan ("CAP").

Petitioner objects to the requests except for the last two items, the State Building Standards Codes and Respondents' CAP. He argues that the items are not relevant and were not part of the record or before Respondents when adopting the Reach Code.

The request is granted as to CEC approval, therm equivalence, the State's published information on photovoltaic systems, the States codes, and the CAP. Judicial notice of the CEC approval of the Reach Code, which took place after the underlying proceedings and affects Petitioner's challenge based on noncompliance with law governing reach codes, is appropriate. The therm and photovoltaic information are relevant for understanding the context of the information in the record and are judicially noticeable.

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The request is denied as to Petitioner's letter, which does not appear judicially noticeable, and the reach codes of other municipalities, which, by their nature and purpose here, would only be appropriate to consider if they were information in the record. The information on other codes appears to be an improper attempt to include information outside of the record.

Petitioner also seeks judicial notice of information from Pacific Gas and Electric Company ("PG&E") regarding rotating outage status and a newspaper article on rolling blackout during a heatwave. These are again improper for judicial notice here since the information was not part of the record but its nature and intended purpose here are such that they would only be appropriate to consider had they been part of the record. The information appears to be an improper attempt to include information outside of the record. The Court accordingly denies Petitioner's requests.

The Court notes that no decision regarding any of the items which either party presents for judicial notice is dispositive to the outcome of this Petition. The Court's ultimate ruling would be the same regardless of whether it reversed its decision on any of these items.

Overview of Reach Codes

Title 24 of the California Code of Regulations sets minimum standards for building codes in California in the Building Standards Code, including, among others, the Plumbing Code and Energy Code.

Local agencies may modify these codes based on local conditions and based on required findings. Health and Safety Code sections 17958.7, 18941.5; see 7 AR 43. In addition, no modification or change is effective or operative until the finding and the modification or change have been filed with the California Building Standards Commission.

Local agencies may also adopt energy-efficiency modifications to the Energy Code if 1) they find the modifications to be cost-effective and 2) the California Energy Commission ("CEC") finds that the rules will reduce energy consumption. PRC section

1 25402.1(h)(2); see 24 AR 317. Again, these are not enforceable or effective until the
2 agency submits required documentation to the CEC and obtains CEC approval. PRC
3 section 25402.1; 24 CCR 10-106.

4 **CEQA Overview**

5 The ultimate mandate of CEQA is "to provide public agencies and the public in
6 general with detailed information about the effect [of] a proposed project" and to
7 minimize those effects and choose possible alternatives. Public Resources Code
8 ("PRC") section 21061. After all, the public and public participation hold a "privileged
9 position" in the CEQA process based on fundamental "notions of democratic decision-
10 making." *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural*
11 *Association* (1986) 42 Cal.3d 929, 936. As stated in *Laurel Heights Improvement*
12 *Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 392, "[t]he
13 EIR process protects not only the environment but also informed self-government."

14 An EIR is required for a project which substantial evidence indicates *may* have a
15 significant effect on the environment, unless the project is exempt from CEQA.
16 Guidelines for the Implementation of CEQA (Guidelines), 14 CCR section 15063(b)[1];
17 PRC sections 21100, 21151; PRC section 21084 (governing exemptions); Guideline
18 15061 (governing exemptions). EIRs are, in the words of the California Supreme Court,
19 "the heart of CEQA." *Laurel Heights Improvement Assn. v. Regents of the University of*
20 *California* (1988) 47 Cal.3d 376, 392 (*Laurel Heights I*). Thus, an environmental impact
21 report ("EIR") is ordinarily required, and a lesser CEQA document such as a negative
22 declaration ("ND") is insufficient, if substantial evidence in light of the record indicates
23 that the project may have a significant impact. PRC 21080(c)(1); Guideline 15064(a)(1).

24 The Supreme Court in *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68,
25 74, found that CEQA sets forth a three-stage process for determining if environmental
26 review pursuant to CEQA is necessary and, if so, what level. This was further explained
27
28

[1] These are at 14 Cal Code Regs §§ 15000, et seq. Courts should at a minimum afford great weight to the Guidelines except when a section is clearly unauthorized or erroneous under CEQA. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (*Laurel Heights I*) (1988) 47 Cal.3d 376, 391, fn 2; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316.

1 and clarified in *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, at 1371-1372,
2 which stated that "CEQA lays out a three-stage process" by which 1) the agency must
3 determine whether the particular activity is covered by CEQA, i.e., the activity is a
4 "project" as defined in CEQA and is not exempt; 2) if the activity is a "project" and not
5 exempt, the agency must conduct an initial study to determine if it "may have a
6 significant effect on the environment"; and 3) it must then approve an EIR if the project
7 *may* have such an effect, or if it finds that the project *will not* have such an impact, it
8 may prepare a negative declaration. In the words of *Citizens for Environmental*
9 *Responsibility v. State ex rel. 14th Dist. Ag. Assn.* (App. 3 Dist. 2015) 242 Cal.App.4th
10 555, 568,

11 "[T]he Guidelines establish a three-step process to assist a public agency in determining which document to prepare for a project subject to CEQA.
12 (Guidelines, § 15002, subd. (k).) In the first step, the lead public agency preliminarily examines the project to determine whether the project is
13 statutorily exempt from CEQA, falls within a Guidelines categorical exemption or if ' "it can be seen with certainty" that [the] project will not
14 have a significant effect on the environment. [Citations.]' [Citation.] If so, no further agency evaluation under CEQA is required. The agency may
15 prepare a notice of exemption. [Citation.] If, however, the project does not fall within an exemption and it cannot be seen with certainty that the
16 project will not have a significant effect on the environment, the agency takes the second step and conducts an initial study to determine whether
17 the project may have a significant effect on the environment. [Citations.] If the initial study shows there is no substantial evidence the project may
18 have a significant effect on the environment or revisions to the project would avoid such an effect, the lead agency prepares a negative
19 declaration. [Citations.] If the initial study shows 'there is substantial evidence ... that the project may have a significant effect on the
20 environment,' the lead agency must take the third step and prepare an environmental impact report (EIR)." [Citation.]
21

22 **<u>Projects Subject to CEQA</u>**

23 Generally speaking, any activity a public agency has discretion to carry out or to
24 approve which has the potential for resulting in a physical change in the environment is
25 a "project." *Gentry, supra*, 1371. Under CEQA, a "Project" means the "activity which is
26 being approved and which may be subject to several discretionary approvals" and it
27 "does not mean each separate governmental approval." Guideline 15378.
28 ///

1 Respondents do not contend that the decision to adopt the Reach Code was not
2 within the definition of a "project" under CEQA.
3 **Projects Exempt from CEQA**
4 As noted above, the first step an agency must make in conducting review
5 pursuant to CEQA is determining whether an activity is a "project" and, if so, whether it
6 is "exempt" from CEQA.
7 PRC section 21084 is the statutory authority for exemptions from CEQA and
8 exceptions to those exemptions. If the project is exempt, then the agency need conduct
9 no further CEQA review. *Citizens for Environmental Responsibility, supra*, 242
10 Cal.App.4th 568. If an exception to the exemptions applies, the agency may not rely on
11 an exemption and must conduct further CEQA review.
12 Guideline 15061 governs "Review for Exemption" from CEQA and sets forth the
13 types of exemptions. These include, as relevant here, (2) pursuant to a categorical
14 exemption found in Guidelines 15300, et seq., and (3) the "common sense exemption"
15 for projects with a potential for causing a significant effect and which applies "[w]here it
16 can be seen with certainty that there is no possibility that the activity in question may
17 have a significant effect on the environment." Subdivision (b)(3) is the "common-sense"
18 exemption. See, *Apartment Association of Greater Los Angeles v. City of Los Angeles*
19 (2001) 90 Cal.App.4th 1162, 1171; *Davidon Homes v. City of San Jose* (1997) 54
20 Cal.App.4th 106, 116-117.
21 The Common-Sense Exemption
22 The common-sense exemption may be used "only in those situations where its
23 absolute and precise language clearly applies." *Myers v. Board of Supervisors* (1st
24 Dist. 1976) 58 Cal.App.3d 413, 425. Where one can raise a legitimate question of a
25 possible significant impact, the exemption does not apply and, because it requires a
26 finding that such impacts are *impossible*, it requires a factual evaluation based on
27 evidence which shows that it could have no possible significant impact. *Davidon*
28 *Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116-117. The agency thus

bears the burden of basing its decision on substantial evidence that shows no such possibility. *Ibid.*

Categorical Exemptions

In accordance with PRC section 21084, the CEQA Guidelines list a number of classes of projects which are considered generally not to result in a significant impact on the environment and are thus generally exempted from CEQA. PRC 21084; Guidelines 15300-15331; *Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165.

Guideline 15307 sets forth the Class 7 categorical exemption for actions taken to protect natural resources. It states, in full,

> Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption.

Guideline 15308 sets forth the Class 8 categorical exemptions for actions taken "for Protection of the Environment." It states, in full,

> Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.

Standard of Review

Any inquiry into whether an agency has failed to comply with CEQA "shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. PRC section 21168.5.

A threshold dispute which this case presents, and which may determine the outcome, is what specific standard of review to apply. There are several specific

1 standards which may apply under CEQA when determining if the agency has thus
2 abused its discretion, with the determination as to which applies depending on the
3 circumstances and, most specifically, the procedural stage of the environmental review.
4 These include the fair argument test, which controls when an agency is determining if it
5 should prepare an EIR or simply an ND. This is based on PRC 21080(c); see also,
6 Guideline 15064(a)(1); *Laurel Heights Improvement Ass'n. v. Regents of University of*
7 *California* (1993) 6 Cal.4th 1112, 1135 (*Laurel Heights II*). The substantial-evidence
8 test applies to decisions regarding significant impacts in approving an EIR and the court
9 must uphold the decision if it is supported by substantial evidence in the record as a
10 whole. *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1075; see, *River*
11 *Valley Preservation Project v. Metropolitan Transit Dev. Bd.* (1995) 37 Cal.App.4th 154,
12 166; see, *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114
13 Cal.App.4th 689, 703. On the other hand, failure to include required elements or
14 information is a failure to proceed in the manner required by law and demands strict
15 scrutiny involving de novo review. *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th
16 1215, 1236; *Vineyard Area Citizens for Responsible Growth, supra*, 40 Cal.4th 435.
17 Where an agency has determined if a project is exempt from CEQA under a categorical
18 exemption, the court also must uphold the agency's decision if supported by substantial
19 evidence in light of the whole record. *Citizens for Environmental Responsibility, supra*,
20 242 Cal.App.4th 568; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106,
21 115; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251.

22 Demonstrating Prejudicial Error

23 Preliminarily, agency actions are presumed to comply with applicable law unless
24 the petitioner presents proof to the contrary. Evidence Code section 664; *Foster v. Civil*
25 *Service Commission of Los Angeles County* (1983) 142 Cal.App.3d 444, 453.
26 Accordingly, the findings of an administrative agency are presumed to be supported by
27 substantial evidence absent contrary evidence. *Taylor Bus. Service, Inc. v. San Diego*
28 *Bd. of Education* (1987) 195 Cal.App.3d 1331.

Additionally, as noted above, any inquiry into whether an agency has failed to comply with CEQA must determine if the error, or abuse of discretion, was prejudicial. PRC section 21168.5; see also, *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1073.

The Applicable Standard of Review for Exemptions and Exceptions to Exemptions

Petitioner incorrectly relies on the fair argument standard here in arguing that the Project does not fall within the exemptions on which Respondents rely. As Respondents note, that test does not apply to a determination that a project is exempt from CEQA, and specifically within a categorical exemption.

Petitioner relies on the "fair argument" standard of review to argue that the court must order an agency to prepare an EIR if the record contains substantial evidence supporting a fair argument that the project may have a significant impact, despite finding that the Project falls within a categorical exemption. Petitioner's Opening Brief ("OB") 14, et seq. Although Petitioner sets forth a correct description of the fair argument test, Petitioner is incorrect in asserting that it applies here, as explained below.

Petitioner is also generally correct when initially discussing the standard of review regarding exemptions from CEQA and exceptions to the exemptions at OB 9-13, at which point the standard which Petitioner discusses is not the fair argument standard. For example, Petitioner asserts, correctly, that "the Class 7 and 8 exemptions ... do not apply as an initial matter unless substantial evidence supports their facial applicability ...." OB 12:1-2. However, following this prefatory passage in his brief, Petitioner then incorrectly relies on the fair argument test when actually arguing how the adoption of the exemptions is improper at OB 14, et seq. Petitioner argues that "an agency is required to prepare an [EIR] whenever substantial evidence in the record supports a "fair argument" that a project may have a significant effect ...." OB 14: 3-4. He contends then sets forth the fair argument standard and subsequently reiterates his contention that reliance on the exemptions was improper because "there is abundant evidence ...

that the Reach Code may have a variety of substantial impacts ...." OB 16: 12-13. In his discussion, he largely relies on assertions about purported substantial evidence which he claims supports a fair argument that there may be significant impacts.

Instead, however, as noted above, the more deferential, substantial-evidence test applies to the initial agency determinations that a categorical exemption applies to a project. *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251. It is important to note that there was for some time apparently some disagreement over the specific standards of review to apply to agency determinations regarding exemptions and exceptions to exemptions. See, *Dunn-Edward Corporation v. Bay Area Air Quality Management District* (1992) 9 Cal.App.4th 644; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1406, fn.24. In the past, courts, as discussed in the above two cases, often, but not uniformly, applied the fair-argument test to the finding that a project fit within a categorical exemption. Courts have since, however, become uniform in breaking down the standard of review into three basic parts. *Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243; *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106.

As noted above, the court in *Citizens for Environmental Responsibility, supra,* 242 Cal.App.4th, 568, set forth a detailed description of the steps and necessary determinations which are required when an agency studies an activity to determine if CEQA applies and also what level of review is necessary, explaining, with emphasis added, that if an agency finds a project to be exempt from CEQA, "*no further agency evaluation under CEQA is required* .... If, however, the project does *not* fall within an exemption *and it cannot be seen with certainty that the project will not have a significant effect* on the environment, *the agency takes the second step* and conducts an initial study to determine *whether the project may have a significant effect* on the environment." On the burden and standard of review, it explained, at 568 with emphasis added,

> The lead agency has the burden to demonstrate that a project falls within a categorical exemption and the agency's determination must be supported by substantial evidence. [Citation.] Once the agency establishes that the project is exempt, the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions listed in Guidelines section 15300.2.

Similarly, the court in *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, at 185, also explained,

> Where the specific issue is whether the lead agency correctly determined a project fell within a categorical exemption, we must first determine as a matter of law the scope of the exemption and then *determine if substantial evidence supports the agency's factual finding that the project fell within the exemption.* (Citations.) The lead agency has the burden to demonstrate such substantial evidence. (Citations.)
>
> Once the agency meets this burden to establish the project is within a categorically exempt class, "the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions listed in Guidelines section 15300.2."

In the words of *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, at 966, " 'Where a project is categorically exempt, it is not subject to CEQA requirements and "may be implemented without any CEQA compliance whatsoever." ' [Citation.] [¶] In keeping with general principles of statutory construction, exemptions are construed narrowly and will not be unreasonably expanded beyond their terms. [Citations.] Strict construction allows CEQA to be interpreted in a manner affording the fullest possible environmental protections within the reasonable scope of statutory language. [Citations.] It also comports with the statutory directive that exemptions may be provided only for projects which have been determined not to have a significant environmental effect. [Citations.]"

The fair argument test thus applies when an agency finds a project to be subject to CEQA and publishes a negative declaration, which it may do if no substantial evidence in light of the record indicates that the project may have a significant impact. PRC 21080(c)(1); Guideline 15064(a)(1). As the Supreme Court stated in *Laurel Heights Improvement Ass'n. v. Regents of University of California* (1993) 6 Cal.4th

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1 1112, 1135 (*Laurel Heights II*), "the 'fair argument' test has been applied only to the
2 decision whether to prepare an original EIR or a negative declaration."
3 This establishes several key points regarding the standard of review, and the
4 applicable burden, at issue in this petition. First, the substantial-evidence test applies to
5 an agency's determination that a project falls within a categorical exemption from
6 CEQA. Second, the test by which an agency may find a project exempt only if it can be
7 seen with certainty that there is no possibility that the activity in question may have a
8 significant effect on the environment is the standard for the "common sense" exemption
9 only and does not apply to findings that a project falls within a categorical exemption.
10 Third, once an agency has determined that a project under CEQA is exempt from
11 CEQA review, the agency conducts no further environmental review. Only if the agency
12 does not find the project to be exempt does it continue further and determine from the
13 initial study whether the project may have a significant effect on the environment and
14 thus require an EIR or if it may instead approve an ND.
15 <u>The Exception to Exemptions due to Unusual Circumstances</u>
16 As explained above, once an agency has found, based on substantial evidence,
17 that a project falls within an exemption, the burden shifts to a party opposing the project,
18 such as Petitioner here, to demonstrate that an exception to the exemptions applies. As
19 the Supreme Court stated in *Berkeley Hills, supra*, 60 Cal.4th at 1105, "As to projects
20 that meet the requirements of a categorical exemption, a party challenging the
21 exemption has the burden of producing evidence supporting an exception." See also,
22 e.g., *California Farm Bureau Federation, supra*, 143 Cal.App.4th 185. The Supreme
23 Court continued to explain how one challenging an exemption determination must
24 challenge it based on the unusual circumstances exception, stating, with original
25 emphasis,
26 As explained above, to establish the unusual circumstances exception, it is not enough for a challenger merely to provide substantial evidence that
27 the project *may* have a significant effect on the environment, because that is the inquiry CEQA requires absent an exemption. (§ 21151.) Such a
28 showing is inadequate to overcome the Secretary's determination that the

typical effects of a project within an exempt class are not significant for CEQA purposes. On the other hand, evidence that the project *will* 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.

The Supreme Court therefore set forth two ways in which someone might support an argument that the unusual circumstances exception applies. As the court in *Citizens for Environmental Responsibility*, *supra*, 242 Cal.App.4th, 574-576, described the ruling of Berkeley Hillside,

> In *Berkeley Hillside*, ... our high court added additional clarification to the unusual circumstance exception analysis. The court identified two alternative ways to prove the exception. [Citation].
>
> In the first alternative, as this court said in *Voices*, a challenger must prove both unusual circumstances and a significant environmental effect that is due to those circumstances. In this method of proof, the unusual circumstances relate to some feature of the project that distinguishes the project from other features in the exempt class. [Citation.] Once an unusual circumstance is proved under this method, then the "party need only show a *reasonable possibility* of a significant effect due to that unusual circumstance." (Ibid. italics added.)
>
> The court in *Berkeley Hillside* made clear that "section 21168.5's [10] abuse of discretion standard appl[ies] on review of an agency's decision with respect to the unusual circumstances exception. The determination as to whether there are 'unusual circumstances' [citation] is reviewed under section 21168.5's substantial evidence prong. However, an agency's finding as to whether unusual circumstances give rise to 'a reasonable possibility that the activity will have a significant effect on the environment' [citation] is reviewed to determine whether the agency, in applying the fair argument standard, 'proceeded in [the] manner required by law.' [Citations.]" [Citation.]
>
> As for the first prong of the exception--whether the project presents circumstances that are unusual for projects in an exempt class--this question is essentially a factual inquiry for which the lead agency serves as " 'the finder of fact.' " [Citation.] Thus, reviewing courts apply the traditional substantial evidence standard incorporated in section 21168.5 to this prong. [Citation.] Under that relatively deferential standard of review, our role in considering the evidence differs from the agency's. (Ibid.) " ' "Agencies must weigh the evidence and determine 'which way the scales tip,' while courts conducting [traditional] substantial evidence ... review generally do not." ' [Citation.] Instead, reviewing courts, after resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, must affirm that finding if there is any substantial evidence, contradicted or uncontradicted, to support it. [Citations.]" (Ibid.)

1 As for the second prong of the exception–whether there is "reasonable possibility" that an unusual circumstance will produce "a significant effect on the environment"–our high court has said "a different approach is appropriate, both by the agency making the determination and by reviewing courts." [Citation.] "[W]hen there are 'unusual circumstances,' it is appropriate for agencies to apply the fair argument standard in determining whether 'there is a reasonable possibility of a significant effect on the environment due to unusual circumstances.' " (Ibid. italics added.) Under the fair argument test, " 'an agency is merely supposed to look to see if the record shows substantial evidence of a fair argument that there may be a significant effect. [Citations.] In other words, the agency is not to weigh the evidence to come to its own conclusion about whether there will be a significant effect. It is merely supposed to inquire, as a matter of law, whether the record reveals a fair argument .... " '[I]t does not resolve conflicts in the evidence but determines only whether substantial evidence exists in the record to support the prescribed fair argument.' " [Citation.]' " [Citation.] Thus, a lead agency must find there is a fair argument even when presented with other substantial evidence that the project will not have a significant environmental effect. [Citation.] Accordingly, where there is a fair argument, "a reviewing court may not uphold an agency's decision 'merely because substantial evidence was presented that the project would not have [a significant environmental] impact. The [reviewing] court's function is to determine whether substantial evidence support[s] the agency's conclusion as to whether the prescribed "fair argument" could be made.' " [Citation.] Thus, the "agency must evaluate potential environmental effects under the fair argument standard, and judicial review is limited to determining whether the agency applied the standard 'in [the] manner required by law.' " [Citation.]

In the second alternative for proving the unusual circumstance exception, "a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect." [Citation.] "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.' [Citation.]" [Citation.] But a challenger must establish more than just a fair argument that the project will have a significant environmental effect. [Citation.] A party challenging the exemption, must show that the project will have a significant environmental impact. (Ibid.) Again, as our high court has noted, we review the determination of the unusual circumstances prong of the exception under the deferential substantial evidence test. [Citation.]

As for the second prong under this second alternative, no other proof is necessary. Evidence that a project will have a significant environmental effect, "if convincing, necessarily also establishes 'a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.' [Citation.]" [Citation.]

25 With respect to the exception to exemptions based on the possibility that

26 "unusual circumstances" may cause significant impacts, determining whether a

27 circumstance is "unusual" is a "legal" issue. See, *Azusa Land Reclamation Co., Inc. v.*

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1 *Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1207; *Bloom v.*
2 *McGurk* (1994) 26 Cal.App.4th 1307, 1315-1316.
3 Courts have come to apply a 2-step test for determining whether "unusual
4 circumstances" may cause a significant impact so that the exception applies and an
5 agency may not rely on an exemption. *Berkeley Hillside Preservation v. City of*
6 *Berkeley* (2015) 60 Cal.4th 1086, 1096-1117; *Citizens for Environmental Responsibility*
7 *v. State ex rel. 14th Dist. Ag. Assn.* (App. 3 Dist. 2015) 242 Cal.App.4th 555, 573-574;
8 *Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster* (1997) 52
9 Cal.App.4th 1165, 1207. Under this test, agencies must first consider whether a project
10 reflects "unusual circumstances" compared to others in this class, and courts review this
11 step under the more deferential substantial-evidence test. *Berkeley Hillside*, at 1114;
12 *Citizens for Environmental Responsibility*, at 574. Second, agencies must determine if
13 those unusual circumstances give rise to a reasonable possibility that the activity will
14 have a significant effect, which the court review under the stricter, less deferential, fair-
15 argument standard. *Berkeley Hillside, supra*; *Citizens for Environmental Responsibility,*
16 *supra*. In the words of *Citizens for Environmental Responsibility*, at 574, ' "[t]he
17 determination as to whether there are 'unusual circumstances' [citation] is reviewed
18 under section 21168.5's substantial evidence prong. However, an agency's finding as
19 to whether unusual circumstances give rise to 'a reasonable possibility that the activity
20 will have a significant effect on the environment' [citation] is reviewed to determine
21 whether the agency, in applying the fair argument standard, 'proceeded in [the] manner
22 required by law.' [Citations.]" [Citation.]'
23 As the court put it in *Azusa*, at 1207, "the circumstances of a particular project (i)
24 differ from the general circumstances of the projects covered by a particular categorical
25 exemption, and (ii) those circumstances create an environmental risk that does not exist
26 for the general class of exempt projects." The Supreme Court noted in *Berkeley*
27 *Hillside*, at 1105, "to establish the unusual circumstances exception, it is not enough for
28 a challenger merely to provide substantial evidence that the project may have a

1 significant effect on the environment, because that is the inquiry CEQA requires absent
2 an exemption."

3 The court in *Citizens for Environmental Responsibility, supra*, 242 Cal.App.4th
4 589, explained the process for challenging application of an exemption based on the
5 argument that the project falls within the "unusual circumstances" exception to the
6 exemptions. It stated,

7 We now turn to the alternate way a challenger can establish the unusual circumstances prong of the unusual circumstances exception. While our
8 high court in *Berkeley Hillside* held that a mere reasonable possibility a project may have a significant environmental effect is insufficient to
9 establish the unusual circumstances exception (*Berkeley Hillside, supra*, 60 Cal.4th [1086] at pp. 1097, 1104...), the court also held that "a party
10 may establish an unusual circumstance with evidence that the project will have a significant environmental effect." (Id. at p. 1105..., italics added.)
11 The 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
12 project is unusual." (Ibid.) This method of proving unusual circumstances requires that the project challenger provide more than " 'substantial
13 evidence' of 'a fair argument that the project will have significant environmental effects.' " (Id. at p. 1106....) A project challenger must
14 prove that the project will have a significant effect on the environment. (Id. at p. 1105....) Thus, a challenger seeking to prove unusual circumstances
15 based on an environmental effect must provide or identify substantial evidence indicating: (1) the project will actually have an effect on the
16 environment and (2) that effect will be significant. (Ibid.) A "significant effect on the environment" is "a substantial adverse change in the physical
17 conditions which exist in the area affected by the proposed project." (Guidelines, § 15002, subd. (g).)

18

19 <u>Substantial-Evidence Test</u>

20 When the substantial-evidence test applies to an agency's decision, the court
21 must uphold the decision if it is supported by substantial evidence in the record as a
22 whole. *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1075; see, *River*
23 *Valley Preservation Project v. Metropolitan Transit Develop. Bd.*(1995) 37 Cal.App.4th
24 154, 166; see, *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114
25 Cal.App.4th 689, 703. Put differently, the "substantial evidence" test requires the court
26 to determine "whether the act or decision is supported by substantial evidence in the
27 light of the whole record." *Chaparral Greens v. City of Chula Vista* (1996) 50
28 Cal.App.4th 1134, 1143; *River Valley Preservation Project v. Metropolitan Transit*

1 *Develop. Bd.* (1995) 37 Cal.App.4th 154, 168. When such substantial evidence does
2 support the decision, and there is no prejudicial abuse of discretion, the court must
3 defer to the agency's substantive conclusions. *Chaparral Greens, supra.*

4 When applying the substantial evidence standard, in other words, the court must
5 focus not upon the "correctness" of a report's environmental conclusions, but only upon
6 its "sufficiency as an informative document." *Laurel Heights I*, 47 Cal.3d 393. The court
7 must resolve reasonable doubts in favor of the findings and decision. *Id.*

8 Substantial evidence is not simple "uncorroborated opinion or rumor" but "enough
9 relevant information and reasonable inferences" to allow a "fair argument" supporting a
10 conclusion, in light of the whole record before the lead agency. Guideline 15384(a);
11 PRC §21082.2; *City of Pasadena v. State of California* (2nd Dist.1993) 14 Cal.App.4th
12 810, 821 822. "[S]ubstantial evidence includes fact, a reasonable assumption
13 predicated upon fact, or expert opinion supported by fact." PRC 21080; see also,
14 Guideline 15384. It is not "argument, speculation, unsubstantiated opinion or narrative,
15 evidence that is clearly inaccurate or erroneous, or evidence of social or economic
16 impacts that do not contribute to or are not caused by, physical impacts on the
17 environment." *Ibid.* Guideline 15384 sets forth the definition of "substantial evidence"
18 and states, in full,

19 (a) "Substantial evidence" as used in these guidelines means enough relevant information and reasonable inferences from this information that a
20 fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made
21 that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency.
22 Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic
23 impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.
24
25 (b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

26 Other decisions describe "substantial evidence" as that with "ponderable legal
27 significance," reasonable in nature, credible, and of solid value. *Stanislaus Audubon*
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Society, Inc. v. County of Stanislaus (1995) 33 Cal.App.4th 144; *Lucas Valley Homeowners Association v. County of Marin* (1991) 233 Cal.App.3d 130, 142.

The Fair Argument Standard

The fair argument test, which here governs whether unusual circumstances may cause a significant impact on the environment so that the Project falls within the unusual circumstances exception to exemptions, is essentially a reverse of the substantial evidence test. It creates a "low threshold" for requiring an EIR. *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754. Under the "fair argument" test, an EIR must be prepared whenever "it can be fairly argued" based on substantial evidence in the record that the project may have a significant environmental impact. *Laurel Heights Improvement Ass'n. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1113, 1134-1135 (*Laurel Heights II*). As a result, even if other substantial evidence supports the conclusion that there are no significant impacts and that no EIR is needed, the agency must prepare an EIR whenever substantial evidence in the record supports a fair argument that a significant impact may occur. *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1000-1003.

As essentially the reverse of the substantial evidence test, this test thus still requires substantial evidence to support the argument and it is subject to the same definition and standard of substantial evidence as set forth above.

Respondents' Reliance on the Categorical Exemptions

The two categorical exemptions on which Respondents rely are very similar but with a slight difference. As noted above, Guideline 15307 sets forth the Class 7 categorical exemption for actions taken to protect natural resources. It states, in pertinent part and with emphasis added, "Class 7 consists of 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.* Guideline 15308 sets forth the Class 8 categorical exemptions for actions

taken "for Protection of the Environment." It states, in pertinent part and with emphasis added,

> "Class 8 consists of actions taken ... *to assure the maintenance, restoration, enhancement, or protection of the environment* where the regulatory process involves procedures *for protection of the environment.*"

Preliminarily, the Court also notes that facially the purported purpose and effect of Reach Code appear to fall within the scope of the categorical exemptions. Class 7 applies to actions taken to preserve or maintain a natural resource and the Reach Code is an action taken in part to preserve and maintain natural resources, most expressly natural gas but also water and any others involved in providing heating, lighting, and the like. Similarly, Class 8 applies to actions taken to protect the environment and again the Reach Code in both its facial purpose and purported effect is intended to, and purportedly will, help protect the environment by reducing pollution and use of natural resources through reduced reliance on traditional energy supply. Petitioner at no point actually challenges the findings that to this extent the Reach Code is, at least facially and potentially, within the scope of these categories.

Petitioner instead, as noted above, contends that the exemptions do not apply because there is substantial evidence that the Reach Code may cause significant impacts. This, as explained above, is the incorrect standard of review and, in fact, does not even address the actual questions which this Court must address: 1) what is the scope of the exemptions and does the Project facially or potentially fall within it; and 2) does substantial evidence support the agency's determination that the Project falls within the exemption.

Petitioner relies on *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644 to argue that Respondents cannot assume that the Reach Code will be beneficial and preserve resources or protect the environment because it simply replaces one energy source with another and may have other impacts. In *Dunn-Edwards*, the agency relied on the same two categorical exemptions for a regulation reducing a solvent in paint in order to reduce emissions from them. The

1 court of appeal affirmed the trial court decision that the agency could not rely on the
2 exemptions due to substantial evidence which could support a fair argument that the
3 regulation may have a significant effect. In short, both the appellate court and the trial
4 court relied on the fair argument test. As explained above, this is incorrect. Notably,
5 *Dunn-Edwards* was decided during the period of uncertainty and doubt over which
6 standard of review to apply and the clarification that courts must apply the substantial-
7 evidence test rather than the fair argument test occurred later. The analysis in *Dunn-*
8 *Edwards* is therefore inapplicable.

9 Petitioner similarly relies in vain on the older case of *Wildlife Alive v. Chickering*
10 (1976) 18 Cal.3d 190, 205-206. He again argues that under this decision the Court
11 must find that the Reach Code cannot be exempt as long as there is substantial
12 evidence supporting a fair argument that it may cause a significant impact. Again, this
13 reliance is misplaced. The Supreme Court there rejected an agency's claim that its
14 actions were exempt from CEQA, specifically discussing the Class 7 exemption.
15 However, the primary basis for the Supreme Court's decision was its determination that
16 the activity did not fall within the exemption, the court explaining, at 205, "[t]he fixing of
17 hunting seasons, while doubtless having an indirect beneficial effect on the continuing
18 survival of certain species, cannot fairly or readily be characterized as a preservation
19 activity in a strict sense." It contrasted this activity with those which the Class 7
20 exemption clearly did cover, the activities of the Department of Fish and Game for
21 propagating, feeding, and protecting wildlife. The court then addressed another reason
22 for its conclusion, and at that point discussed the potential impacts of the setting of
23 hunting seasons, but did so in the context of early application and interpretation of the
24 exemptions and based on the decision that to allow an exemption to cover the activity
25 would improperly and unreasonably expand the Legislature's intent in allowing for
26 categorical exemptions. The court explained, at 206,

27 > Another consideration moves us to our conclusion that the commission is
> not categorically exempt from CEQA. Even if section 15107 was intended
28 > 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. [Citations.] The secretary is empowered to exempt only those activities which do not have a significant effect on the environment. [Citation.] 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.

Much of this analysis is inapplicable here for the primary issue in *Wildlife Alive* was actually, as the Supreme Court stated, at 195, "whether the California Environmental Quality Act of 1970 (CEQA) [Citation] applies to the Fish and Game Commission (the commission)." The court explained that no specific project was at issue but simply a blanket exemption for the commission and it discussed the commission's activities in regulating hunting permits and seasons in this context of this blanket exemption. The court explained that courts may not find implied exemptions and discussed specific issues such as the Class 7 exemption in addressing the various possible exemptions which could apply to the commission as a whole, finding that they do not.

Petitioner, accordingly, relies on an inapplicable standard and addresses the wrong argument. Instead of attempting to demonstrate that substantial evidence does not support the finding that the adoption of the Reach Code falls within an exemption, he argues that the exemptions do not apply because there is substantial evidence supporting a fair argument that the Reach Code may cause significant impacts.

Respondents, by contrast, cite to evidence supporting the exemption determinations. Opposition 18-19. Respondents relied on the already approved State Energy Code, and the adopted CEQA review for it in the State ND. The code requires PV systems to offset 100% of electricity use in mixed-fuel homes and neither the installation nor use of those systems will cause a significant impact, as found in the State ND. 2 AR 22, 28-29, 32, 34, 49-50; 24 AR 324, 335-337, 358. Respondents relied on the CEC's calculation that adoption of the new statewide standards would annually reduce statewide electricity consumption by about 653 gigawatt-hours and natural gas consumption by 9.8 million therms, reduce nitrous oxide emissions by about

225,000 pounds, sulfur oxides by 590 pounds, carbon monoxide by 61,000 pounds, and particulate matter by 7,400 pounds. 53 AR 1150. Respondents' evidence includes calculations and data on energy consumption, generation, and use showed that the Reach Code will "further reduce energy consumption" with specific findings that that the PV systems will reduce energy consumption by specific amounts compared to multi-fuel homes; they will reduce the need for additional transmission infrastructure; they will reduce the impacts of power shut-offs; they will reduce consumption of natural gas or water for generating electricity; data indicated that most would install PV systems which will provide at least 2.07 more kilowatts than the code minimum, further reducing annual electricity consumption to 847 kWh; and the proposal will promote the policies of the City's CAP. 56 AR 1150-1156. Evidence showed that any increase in electricity use as a result of reduction in gas use would also be within the capacity of the current major transmission systems and in areas where such systems are already in place, so that the Reach Code will not lead to construction of new major transmission systems. 54 AR 1152. Respondents also relied on evidence from the State ND and code that installation of PV systems will conserve water resources by reducing reliance on power plants to provide electricity and concludes that the Reach Code will further this by increasing efficiency. 54 AR 1154.

Petitioner makes no effort to challenge this evidence or these conclusions in his opening brief and, as noted, he does not even truly address this standard at all. In his reply, he again insists on his view of the standard of review and argues that Respondents have "not engaged with the substantial evidence adduced by Petitioner and other commenters that the Reach Code may have significant impacts ...." Reply 11:5-8. He still offers no real explanation as to why substantial evidence does not support Respondents' exemption findings. He does briefly take issue with two possible pieces of the evidence supporting Respondents, the conclusion that most homes will have at least 4.87 kW PV systems and the statement that many gas appliances have electric ignitions and will not work without electricity, but his discussion of these fails to

1 show a lack of substantial evidence. He addresses only two small points of the
2 evidence which has no bearing on the rest of the evidence which Respondents cite, and
3 his discussion is minimal conclusory without analysis showing how this evidence cannot
4 be part of the total substantial evidence supporting the exemptions.
5 Petitioner complains that Respondents have no basis for concluding that most
6 homes will have at least 4.87 kW PV systems but bases this solely on the fact that the
7 Reach Code only requires 2.8 kW systems. He ignores the fact that Respondents base
8 this finding on data about actual installation of PV systems, specifically evidence from
9 Sonoma Clean Power that in Sonoma County, and particularly Santa Rosa, the typical
10 size of PV systems installed is 8.5 kW, almost twice the system on which the
11 conclusions are based and about thrice the Reach Code's minimum. 54 AR 1151.
12 Respondents however, actually based their findings on a more restrictive and
13 pessimistic prediction of actual PV installations that the evidence suggested and yet still
14 found that even the 4.87 kW system would reduce impacts and preserve both the
15 environment and resources. Yet, the actual evidence in the record shows that the likely
16 typical system installed will be even more effective, and significantly so.
17 Petitioner also takes issue with the finding that many gas appliances have
18 electric ignitions and will not work without electricity, part of the discussion regarding
19 implications of possible power outages. However, this is of minimal and tangential
20 relevance to Respondents' determinations and is truly only a part of the analysis for the
21 common sense exemption. Petitioner also fails to cite to anything showing that this
22 determination is incorrect and merely notes that some appliances have pilot lights or
23 that people may manually light their natural-gas systems, without citing to any evidence
24 or analysis in the record to support this.
25 Finally, Petitioner in his opening brief never actually argued that Respondents'
26 findings of exemptions lack substantial evidence, and also never even mentioned these
27 points which he now raises in reply. The result is that he is raising these issues for the
28 first time in his reply, when he should have raised them in his opening brief. He is

1 raising an entirely new argument in support of his petition which he did not raise in the
2 opening brief. The court therefore should, properly, disregard them. As the court
3 explained in *Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010, in the
4 context of appellate briefing, "[t]he salutary rule is that points raised in a reply brief for
5 the first time will not be considered unless good cause is shown for the failure to present
6 them before." It is "[t]he general rule" that a party may not present evidence for the first
7 time in a reply if the moving party should reasonably have presented it in the opening
8 papers, unless specifically provided to rebut opposition points. *Jay v. Mahaffey* (2013)
9 218 Cal.App.4th 1522, 1537-1538.

10 Accordingly, the Court rejects Petitioner's claim that Respondents incorrectly
11 found the categorical exemptions to apply.

12 **Respondents' Reliance on The Common Sense Exemption**

13 The common-sense exemption, as set forth above, applies "[w]here it can be
14 seen with certainty that there is no possibility that the activity in question may have a
15 significant effect on the environment." Guideline 15061(b)(3) It may be used "only in
16 those situations where its absolute and precise language clearly applies." *Myers v.*
17 *Board of Supervisors* (1st Dist. 1976) 58 Cal.App.3d 413, 425. Where one can raise a
18 legitimate question of a possible significant impact, the exemption does not apply and,
19 because it requires a finding that such impacts are impossible, it requires a factual
20 evaluation based on evidence which shows that it could have no possible significant
21 impact. *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116-117. The
22 agency thus bears the burden of basing its decision on substantial evidence that shows
23 no such possibility. *Ibid.*

24 The same substantial evidence standard applies to the common sense
25 exemption but here the question is whether substantial evidence supports Respondents'
26 determination that there is no possibility that the Reach Code may have a significant
27 effect on the environment. The record contains substantial evidence that the Reach
28 Code falls within the Class 7 and Class 8 exemptions because it will protect the

1 environment and preserve resources but Respondents need more. They cite to no
2 evidence in the record demonstrating any basis for finding that there is no possibility
3 that the Reach Code may have a significant effect on the environment. There is
4 evidence which supports a finding that it may not, but no meaningful evidence or indeed
5 analysis to support the conclusion that there is no possibility it will cause a significant
6 impact.

7 That said, this is alone immaterial if indeed the Court finds that Respondents'
8 properly relied on the Class 7 and 8 exemptions because the result will be the same:
9 the adoption of the Reach code is exempt from CEQA. This error would thus by
10 definition not be prejudicial.

11 **"Unusual Circumstances" Exception to the Exemptions**

12 In approving the Reach Code and issuing the NOE, Respondents also found no
13 exception to the exemptions applied, specifically discussing the "unusual
14 circumstances" exception as set forth above. It determined that there were no "unusual
15 circumstances."

16 As noted above, once the agency establishes the project is categorically exempt,
17 the burden shifts to the party challenging the exemption to show that the project is not
18 exempt because it falls within one of the exceptions. *Citizens for Environmental*
19 *Responsibility, supra*, 242 Cal.App.4th 568; *California Farm Bureau Federation, supra*,
20 143 Cal.App.4th 185.

21 The examination of the unusual circumstances exception, again as explained
22 above, is a 2-step test. *Berkeley Hillside Preservation, supra*, 60 Cal.4th 1096-1117;
23 *Citizens for Environmental Responsibility, supra*, 242 Cal.App.4th 573-574.
24 Respondents must consider if there are "unusual circumstances" and the court will
25 uphold the Respondents' determination if substantial evidence supports it. *Berkeley*
26 *Hillside*, 1114; *Citizens for Environmental Responsibility*, 574. Respondents must then
27 determine if those unusual circumstances give rise to a reasonable possibility that the
28 activity will have a significant effect, which the court review under the stricter, less

1 deferential, fair-argument standard. *Berkeley Hillside, supra*; *Citizens for Environmental*
2 *Responsibility, supra.*
3 Petitioner in his papers provides only a brief, conclusory argument that
4 Respondents fail to explain why there are no unusual circumstances. He then lists
5 circumstances which he claims are unusual but these are not from the record and
6 Petitioner cites to nothing in the record on this issue. OB 27: 12-25. Instead, he
7 appears to argue that Respondents must provide substantial evidence now to support a
8 finding that these circumstances he now raises, without any evidence from, or citation
9 to, the record, are not "unusual." He also fails to explain why the circumstances he
10 mentions are "unusual circumstances" or how they might lead to significant impacts.
11 Respondents cite only to the evidence in the record that "over fifty other cities
12 and counties throughout the state have either adopted, or intend to adopt, the same or
13 similar programs." 56 AR 1156. This alone, in truth, does not appear to qualify as
14 substantial evidence sufficient to support a finding that there are no unusual
15 circumstances.
16 However, Respondents do not need to show more. As explained above, once
17 Respondents found the Project to be within an exemption, based on substantial
18 evidence, the burden shifts to anyone challenging that decision to demonstrate a basis
19 for finding that an exception to the exemptions applies. Anyone seeking to demonstrate
20 that the unusual circumstances exception applies must demonstrate to the City that
21 there is a basis for finding that there may be unusual circumstances which may cause
22 the Project to result in significant impacts. Here, Petitioner points to nothing in the
23 record which even raised the issue of unusual circumstances, much less demonstrated
24 a possible basis for finding there to be unusual circumstances. Respondents therefore
25 did not actually need to address the issue at all.
26 Petitioner argues that the threats of wildfires or blackouts are unusual
27 circumstances but this argument is unpersuasive. He fails to cite to anything, and
28 ///

1 certainly not to anything in the record, showing that a threat of fires or blackouts might
2 be an unusual circumstance.

3 Moreover, even assuming that Petitioner or anyone else met the burden of
4 demonstrating a basis for finding unusual circumstances, so that Respondents were
5 required to find that there are no unusual circumstances, and that Respondents' finding
6 fails to satisfy the requirements of CEQA, the second element of the test defeats
7 Petitioner. As noted above, Petitioner must demonstrate substantial evidence in the
8 record which could support a fair argument that the Project may cause significant
9 impacts due to the unusual circumstances.

10 Even if these circumstances which Petitioner raises could be found to be unusual
11 circumstances, Petitioner offers no evidence or explanation, much less anything in the
12 record, which could possibly support a fair argument that the Reach Code could cause
13 a significant environmental impact simply because of these circumstances, i.e., threat of
14 such fires or blackouts. He does not even identify what that impact might be. Petitioner
15 does cite to information in the record showing a range of problems or threats to safety
16 which such fires or blackouts may cause, but none these threats appears attributable to
17 the Reach Code and Petitioner fails to offer any evidence or explanation at all, much
18 less anything from the record, which could demonstrate how these possible impacts
19 could result from the Project due to unusual circumstances. To the extent that
20 Petitioner offers some claim that the Reach Code itself may cause significant impacts
21 due to these circumstances, his assertions are vague, tenuous, and conclusory, and
22 they consist of nothing more than unsupported "argument, speculation, unsubstantiated
23 opinion or narrative," which Guideline 15384(a), as noted above, expressly states is not
24 substantial evidence which may support a fair argument. Petitioner provides no "facts,
25 reasonable assumptions predicated upon facts, and expert opinion supported by facts"
26 showing that the Reach Code may cause any significant impacts due to these
27 circumstances. Moreover, Petitioner almost entirely focuses on "evidence of social or
28 economic impacts which do not contribute to or are not caused by physical impacts on

the environment," which, again, Guideline 15384(a) expressly states "does not constitute substantial evidence."

Petitioner's papers otherwise merely argue that "the ample evidence in the record as to ... potential impacts establishes the existence of unusual circumstances by itself." Reply 14: 2-4. As, once more, explained above, this is patently inadequate. There is evidence in the record of potential impacts but Petitioner cites to nothing showing unusual circumstances, much less that the unusual circumstances themselves give rise to these potential impacts. The case law, and specifically the Supreme Court, make it expressly clear that a party must do more than show potential impacts, no matter how many or severe, to provide a basis for this exception. The party must demonstrate that those impacts arise from unusual circumstances. A party may also, as explained, demonstrate that the Project "will" have significant impacts, but Petitioner provides nothing to support such a conclusion and nothing more than evidence of potential impacts.

At the hearing, Petitioner relied heavily on *Respect Life South San Francisco v. City of South San Francisco* (2017) 15.Cal.App.5th 449 to argue that City needed to make explicit findings about the unusual circumstances exception. *Respect Life* addressed a challenge to an exemption finding based on the unusual circumstances exemption. The court there reiterated the standard which the Supreme Court articulated in *Berkeley Hillside*, explaining, at 456-457,

> We start with the standards that governed the City. *Berkeley Hillside* explained that a party seeking to establish that the unusual-circumstances exception applies has the burden to show two elements. These elements are (1) "that the project has some feature that distinguishes it from others in the exempt class, such as its size or location" and (2) that there is "a reasonable possibility of a significant effect [on the environment] due to that unusual circumstance." [Citation.]
>
> ...
>
> Turning to the standards that govern our review of the City's determination, *Berkeley Hillside* explained that when an entity determines whether the unusual-circumstances exception applies, a court must assess the determination under the abuse of discretion standard set forth in section 21168.5. [Citation.] Section 21168.5 provides that an "[a]buse

of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." [Citation.] The Supreme Court clarified that "both prongs of section 21168.5's abuse of discretion standard apply on review of the agency's decision. ... The determination as to whether there are 'unusual circumstances' [citation] is reviewed under section 21168.5's substantial evidence prong. However, an agency's finding as to whether unusual circumstances give rise to 'a reasonable possibility that the activity will have a significant effect on the environment' [citation] is reviewed to determine whether the agency, in applying the fair argument standard, 'proceeded in [the] manner required by law.'" [Citation.]

Elaborating on these standards, the Supreme Court explained that whether a project presents unusual circumstances—the first element needed to establish the applicability of the unusual-circumstances exception—"is an essentially factual inquiry," and a court applies "the traditional substantial evidence standard." [Citation.] "Under that relatively deferential standard of review, ... reviewing courts, after resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, must affirm that finding if there is any substantial evidence, contradicted or uncontradicted, to support it." [Citation.]

...

To sum up, when a party seeks to establish that the unusual-circumstances exception applies, it must prove to the entity that two elements are satisfied: (1) the project presents unusual circumstances and (2) there is a reasonable possibility of a significant environmental effect due to those circumstances. A court then assesses the entity's determinations on these elements by applying different standards of review: a deferential standard applies in reviewing the first element and a nondeferential standard applies in reviewing the second.

The court then addressed the *specific issue before it*, the standard of review applicable "when the entity makes an *implied* determination that the unusual-circumstances exception is inapplicable." Emphasis added. The court explained that the agency there had *not* made *express* findings on the unusual circumstances exception but made only implied findings, making it impossible to determine the basis for the agency's decision or how it found on either element. The court explained, with emphasis added, at 457-458,

The City made *no explicit findings on either of the two elements*. Thus, while we know that the City found against Respect Life on at least one of the elements, *we cannot say with certainty* whether it found against Respect Life *on the first element, the second element, or both*.

When an entity's determination that the unusual-circumstances exception is inapplicable is implied, a court's ability to affirm is constrained. The

> *court may affirm on the basis of the first element*—which, again, asks whether the project presents any unusual circumstances—*only if the court assumes that the entity found that there were unusual circumstances and then concludes that the record does not contain substantial evidence of any such circumstances. A court cannot, however, affirm on the basis of the first element by simply concluding that the record contains substantial evidence that there are not unusual circumstances.* This is because such an approach fails to address the possibility that the entity thought there were unusual circumstances but concluded, under the second element, that these circumstances did not support a fair argument of a reasonable possibility of a significant environmental effect.

The court therefore did not ultimately rule that an agency violates CEQA and improperly finds that the unusual exception does not apply merely by failing to make express findings on why the exception does not apply. It explained, instead, that where an agency fails to make explicit findings on the two prongs, a court may not simply assume that the agency found there to be no unusual circumstances, i.e. the first prong. It must instead move to the second prong, and apply the standard of review generally more favorable to a petitioner, of whether substantial evidence supports a fair argument that the project may result in significant impacts due to unusual circumstances.

Petitioner argues that Respondents failed to make such explicit findings, as in *Respect Life*, but this is incorrect. Petitioner in fact quotes a statement from the analysis where Respondents expressly state that "[t]here is nothing unusual" and "there are no unusual circumstances." AR 1156. This is in contrast to *Respect Life*, where the City had merely found that the unusual circumstances exception did not apply without giving any explanation as to why.

Moreover, as addressed above, Respondents did not even need to get there since Petitioner cites to nothing in the record raising the possibility of unusual circumstances or what they may be. He cites to circumstances but nothing showing that these might be unusual. Finally, again, Petitioner fails to point to substantial evidence in the record showing that the Reach Code may, because of any unusual circumstances, cause a significant impact. The *Respect Life* court reiterated this standard, as set forth above.

///

1 Even if this Court were to find that Respondents had failed to make explicit
2 findings, and assumed there to be a basis for finding unusual circumstances, the result
3 would be that the Court must merely move to the next step, instead of automatically
4 finding a CEQA violation. The Court would need to determine if substantial evidence
5 supports a fair argument that the Project could result in significant impacts due to the
6 unusual circumstances. As explained above, Petitioner singularly fails to meet this
7 burden.
8 Petitioner has presented no basis for finding the unusual circumstances
9 exception to apply and the court rejects his argument on this point.
10 **Cumulative Impacts Exception**
11 Petitioner also alleges in the petition that the adoption of the Reach Code falls
12 within the cumulative impacts exception to the exemptions. However, he does not
13 discuss this allegation in his opening brief so fails to demonstrate that this exception
14 applies.
15 **Conclusion: CEQA Claim**
16 The Court DENIES the Petition as to the CEQA claim. Petitioner has failed to
17 demonstrate a lack of substantial evidence to support Respondents' determination that
18 the adoption of the Reach Code falls within the Class 7 and 8 categorical exemptions
19 and has failed to show that an exception to the exemptions applies.
20 **Failure to Comply with Reach Code Law**
21 In addition to claiming that the adoption of the Reach Code violated CEQA,
22 Petitioner argues that the Reach Code does not comply with law governing reach
23 codes.
24 He first contends that 24 CCR 10-106(b)(4) requires Respondents to prepare and
25 submit to the CEC an ND or EIR under CEQA and that the failure to do so renders the
26 Reach Code "invalid per se." This argument ignores the full language of section 10-
27 106(b)(4). Subdivision (b) states that local agencies "wishing to enforce locally adopted
28 energy standards shall submit an application with" the listed materials. Subdivision

1 (b)(4) states that these materials must include "Any findings, determinations,
2 declarations or reports, including any negative declaration or environmental impact
3 report, required pursuant to the California Environmental Quality Act ...." It therefore
4 merely requires the agency to provide whatever CEQA findings and documents is
5 adopted, which may or may not be either an ND or EIR. Respondents also submitted
6 its application and documentation to the CEC and the CEC has approved the Reach
7 Code based on the documentation which Respondents submitted. RJN, ¶1, Ex. A.
8 Petitioner next argues that Respondents also violated the requirement in 24 CCR
9 10-106(b) to adopt and submit a determination that the Reach Code standards are cost
10 effective with findings and supporting analyses on the energy savings and cost-
11 effectiveness of the proposed standards. He asserts that Respondents submitted only
12 the State's Cost Study. Respondents point out that the Cost Study analyzed the cost
13 effectiveness of PV systems based on the specific circumstances of each identified
14 climate zone, including the one in which the City is located. Respondent City Council
15 based its findings on this Cost Study and imposed requirements which will be even
16 more economical. Respondent provides no explanation as to why reliance on the State
17 Cost Study is inherently inadequate merely because it was a study addressing the cost
18 effectiveness of such systems throughout every part of the state instead of only Santa
19 Rosa. Petitioner contends that another study concluded that such reach codes would
20 increase utility bills in the Bay Area but this is immaterial. The law at issue here only
21 requires the agency to rely on a cost effectiveness study and submit it to the CEC when
22 seeking approval of a reach code. It does not provide authority for challenging the
23 reach code because a different study takes a different position. Again, also, the CEC
24 has already approved the Reach Code based on the documentation provided, thereby
25 finding the documentation to satisfy 24 CCR 10-106.
26 The Court also DENIES the Petition as to the claim that the adoption of the
27 Reach Code violated applicable law governing reach codes.
28 ///

Conclusion

The Court therefore DENIES the Petition in full.

IT IS SO ORDERED.

DATED: April 22, 2021

PATRICK M. BRODERICK
Judge of the Superior Court

SCV-265711

PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 600 Administration Dr., Room 107-J, Santa Rosa, California, 95403; that I am not a party to this case; that I am over the age of 18; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of *Ruling on Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief* in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: April 22, 2021

Arlene Junior
Clerk of the Court

By: *Cynthia Gaddie*
Cynthia Gaddie, Deputy Clerk

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PROOF OF SERVICE

I, Laura A. Montalvo, declare:

I am a citizen of the United States and employed in Alameda County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 1901 Harrison Street, Suite 900, Oakland, California 94612-3501. On April 28, 2021, I caused to be served a copy of the within document(s):

[Proposed] Judgment

☒ by transmitting copies, pursuant to stipulation of the parties and order by the Court, via electronic service the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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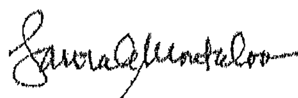
Attorneys for Defendants and Respondents City Of Santa Rosa and City Council

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on April 28, 2021, at Brentwood, California.



Laura A. Montalvo

PROOF OF SERVICE

Gallaher v. City of Santa Rosa, et al.
Sonoma County Superior Court, Case No. SCV-265711

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 Contra Costa, State of California. My business address is 1331 N. California Blvd., Fifth Floor, Walnut Creek, CA 94596.

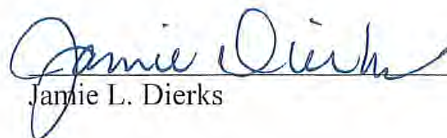
On June 21, 2021, I served true copies of the following document(s) described as **NOTICE OF APPEAL** on the interested parties in this action as follows:

Sue A. Gallagher, City Attorney Ashle T. Crocker, Assistant City Attorney City Attorney City of Santa Rosa 100 Santa Rosa Avenue, Suite 8 Santa Rosa, CA 95404-4957 Tel: 707 543 3040 Fax: 707 543 3055 Email: sgallagher@srcity.org acrocker@srcity.org Attorneys for Defendants and Respondents City of Santa Rosa and City Council for the City of Santa Rosa	Kevin D. Siegel Stephen E. Velyvis Tamar Burke Burke, Williams & Sorensen, LLP 1901 Harrison Street, Suite 900 Oakland, CA 94612-3501 Tel: 510 273 8780 Fax: 510 839 9104 Email: ksiegel@bwslaw.com svelyvis@bwslaw.com tburke@bwslaw.com Attorneys for Defendants and Respondents City of Santa Rosa and City Council for the City of Santa Rosa

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 the practice of Miller Starr Regalia for collecting and processing correspondence for mailing. On the same day that 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 am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Walnut Creek, California.

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

Executed on June 21, 2021, at Walnut Creek, California.



Jamie L. Dierks

1 **PROOF OF SERVICE**

2

3

4 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 Contra Costa, State of California. My business address is 1331 N.
5 California Blvd., Fifth Floor, Walnut Creek, CA 94596.

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Sue A. Gallagher, City Attorney Ashle T. Crocker, Assistant City Attorney City Attorney City of Santa Rosa 100 Santa Rosa Avenue, Suite 8 Santa Rosa, CA 95404-4957 Tel: 707 543 3040 Fax: 707 543 3055 Email: sgallagher@srcity.org acrocker@srcity.org Attorneys for Defendants and Respondents City of Santa Rosa and City Council for the City of Santa Rosa	Kevin D. Siegel Stephen E. Velyvis Tamar Burke Burke, Williams & Sorensen, LLP 1901 Harrison Street, Suite 900 Oakland, CA 94612-3501 Tel: 510 273 8780 Fax: 510 839 9104 Email: ksiegel@bwslaw.com svelyvis@bwslaw.com tburke@bwslaw.com Attorneys for Defendants and Respondents City of Santa Rosa and City Council for the City of Santa Rosa

8 9 10 11 12 13 14 15

16 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, or after confirming
17 the appropriate electronic service address for counsel being served, I caused the document(s) to be sent from e-mail address karen.wigylus@msrlegal.com to the persons at the e-mail addresses
18 listed in the Service List.

19 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
20

Executed on June 21, 2021, at Walnut Creek, California.
21

22

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Karen Wigylus
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