

**RENA RICKLES**  
**Attorney at Law**

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1970 BROADWAY, SUITE 1200  
OAKLAND, CA 94612  
TEL: (510) 452-1600 ~ FAX: (510) 451-4115  
EMAIL: rena@rickleslaw.com

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Kristoffer Koster, President  
Alameda Planning Board Members  
2663 Santa Clara Avenue,  
Alameda, CA 94501

Re: 1208 St. Charles Street; Applicants' 'Response to Opponents' Challenge to Staff's CEQA Categorical Exemption Determination.

Dear President Koster and Alameda Planning Board Members:

This office is pleased to represent Paula Matthis and Thomas Ellebie, Jr.'s ("Paula and Tom") application to replace an unsightly, deteriorating, garage which has both structural and alleged drainage problems, with an architecturally designed 3-car garage and artist studio that will be compatible in size and architectural features with this historic property.

Despite their significant efforts to work with their neighbors to resolve their concerns, the neighbors continued to oppose the project on their stated fears of danger to the costal live oaks, drainage issues and size. Paula and Tom have provided Staff with expert, factual evidence and, additional studies to prove the project, as proposed, meets the highest standards of aesthetics, tree protection and drainage construction. It will be the focus of this letter to address opponents' challenge to Staff's determination that this project is "Categorically Exempt" under California Environmental Quality Act ("CEQA") per CEQA Guidelines Sec.15303(e)<sup>1</sup> New Construction or Conversion of Small Structures.

**The Facts Here Show Three Of The Exceptions Raised by Opponents Do Not Apply To This Matter.**

Exception (a) Location does not apply to this project: To fall within this exception the "location" must be "designated, precisely mapped, *and* officially adopted..." The word "and" requires all requirements be made. These trees are not precisely mapped. Moreover, there has to be a direct connection, supported by substantial

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<sup>1</sup> All Statutes cited will be California Public Resources Code and all Regulations cited will be Cal.Code Regs, title 14 unless otherwise indicated.

evidence, between the location of the [coastal oaks] and the impact of this project. That connection cannot be made.

Exception (b) Cumulative Impact. Because the lot merger and replacement garage are of different types, are both contained in the same approval, and, with the merger, arguably result in a *reduction of impacts*, Exception (b) is inapplicable.

Exception (f) Historic Resource. The express language of this exception, “[a] categorical exemption shall not be used for a project which may cause a *substantial adverse change in the significance of a historical resource* (emphasis added), negates its application to this case in that this project will not cause a substantial change in the coastal oaks.<sup>2</sup>

**California Supreme and Appellate Courts’ Analysis of the Unusual Circumstance, Exception (c), Support Staff’s Determination That This Project Is Categorically Exempt; The Facts There Are On All Fours With This Project.**

Staff determined that this project is exempt from CEQA under the “New construction or conversion of small structures.” (Sec. 15303(e)) There can be no reasonable argument of the applicability of that categorical exemption applies to this project.

Legislative Purpose of the Exemptions

The Legislative Intent in adopting this and the other categorical exemptions to CEQA was to create a “list or classifications of projects...*do not have a significant effect on the environment.*” (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4<sup>th</sup> 1100). The Legislature enumerated classes of projects that *are* exempt from CEQA because, notwithstanding their *potential* effect on the environment, they already have been determined not to have a significant effect on the environment. (Sec.21084, subd (a). The Guidelines implement that intent by setting forth the classes of projects that the Secretary has found that do not have a significant effect on the environment. (Guidelines, Sec. 15300; *Berkeley Hillside*, at pp.1101-1102).

Standard Required to Establish Unusual Circumstances Exception

To establish the ‘unusual circumstances’ exception, it is not enough to provide substantial evidence that the project *may* have a significant effect on the environment. That inquiry applies only to projects that are not exempt. (Sec. 21151 CEQA Regulations) A party must also establish that there is something unusual about a project that takes it out of the exempted category. Here, opponents argue the existence and proximity of the protected oak trees make the project unusual. Opponents also need to provide substantial evidence to show that the project *will* have a significant environmental effect.

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<sup>2</sup> Because the alleged impact on the coastal oaks is part of “the elements of the project” and not the project itself, the mitigation of the impact on the them is not a mitigation measure that precludes application of categorical exemptions. (*Berkeley Hillside Preservation. V. City of Berkeley* (2015) 241 Cal.App.4<sup>th</sup> 943,960)

### Requirements to Meet Substantial Evidence

The determination as to whether there are ‘unusual circumstances’ that have significant effect on the environment is reviewed under the Guidelines substantial evidence prong. Acceptable evidence under the Guidelines is evidence that provides the logical step between the ultimate decision and the facts in the record. (Public Resources Code, Section 21082.2 (c)). This includes facts, reasonable assumptions predicated on those facts, and expert opinion supported by facts. (*Ibid.*) Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous is clearly **not** acceptable evidence. (Cal. Pub. Resources Code Sec. 15384 (a))

### The California Supreme Court Determined That Even if the Facts of a Particular Project Are Rendered Unusual from Other Projects Exempted From CEQA’s ‘New Construction of Small Structures’ Exemption, That Alone does not Trigger the Unusual Circumstances Exception.

In 2110, the Berkeley City Council determined that a 10,000-square foot house and garage, in an earthquake-prone zone, in an area with unique character, did not trigger the ‘unusual circumstances’ exception. In 2015, the California Supreme affirmed that decision. (*Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal.4<sup>th</sup> 1100*). Similarly, the proximity of the coastal oaks to the proposed garage does not trigger the ‘unusual circumstances’ exemption for this project. In determining whether a particular project represents circumstances that are unusual is a factual inquiry, based on the fact finder’s experience [here, City of Alameda]. (*Berkeley Hillside, Cal.App. supra at p.952*) Staff, based on its extensive experience of construction near coastal oaks, did not find this project to be ‘unusual.’ That finding should be supported.

### Opponents’ Arborist’s Report (Barer Report)<sup>3</sup> Does Not Provide the Substantial Evidence Needed to Trigger the Unusual Circumstances Exception

In the *Berkeley Hillside Preservation* case, the expert evidence aimed at triggering the unusual circumstance exception, was based on a misreading of the plans for the construction. The Supreme Court held that this erroneous evidence could not be used to trigger the unusual circumstances exception.

Here, because the expert opinion is also clearly erroneous, it is not acceptable evidence to trigger the exception. The most egregious errors are: 1) relying an inapplicable treatise to analyze construction plans that are not being used; 2) misunderstanding the proposed pier and grade construction, the piers will go between the roots and not harm them; 3) stating that large roots will be cut, when they will not, and 4) incorrectly stating that two major limbs will be removed when they will not.

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<sup>3</sup> “Assessment of Impacts to Trees, 1208 Saint Charles Street, by Darya Barar, Certified Arborist

**Conclusion**

The 'new construction or replacement of small structures' categorical exemption is clearly applicable to this project. Opponent's assertions that any of the asserted exceptions apply in this case are without merit. I respectfully request that this Board disregard opponents' claims to the contrary.

Very truly yours,



RENA RICKLES