

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

BERKELEY HILLSIDE  
PRESERVATION et al.,

Plaintiffs and Appellants,

v.

CITY OF BERKELEY et al.,

Defendants and Respondents;

DONN LOGAN et al.,

Real Parties in Interest and  
Respondents.

A131254

(Alameda County  
Super. Ct. No. RG10517314)

ORDER DENYING REHEARING  
AND MODIFYING OPINION  
[NO CHANGE IN JUDGMENT]

THE COURT:

Respondent and real parties in interest’s petition for rehearing is denied. The opinion filed February 15, 2012, is modified by deleting the seventh paragraph under part II.A.3. and replacing it as follows:

Although the trial court’s conclusion arguably is consistent with the two-step approach set forth in *Banker’s Hill*, we note that the *Banker’s Hill* court did not actually employ such a two-step procedure. Instead, it “streamlined” its approach by “proceed[ing] directly to the question of whether, applying the fair argument standard, there is a *reasonable possibility of a significant effect on the environment* due to any . . . purported unusual circumstances.” (*Banker’s Hill, supra*, 139 Cal.App.4th at p. 278, italics added.) Indeed, much of the court’s opinion focused on all the reasons an agency must apply the fair argument approach in determining whether there is no reasonable possibility of a significant effect on the environment due to unusual circumstances (Guidelines, § 15300.2, subd. (c)). (*Banker’s Hill, supra*, 139 Cal.App.4th at pp. 264-265.) Relying on *Wildlife Alive, supra*, 18 Cal.3d at pages 205-206, the *Banker’s Hill* court emphasized that an agency is precluded under the Guidelines from “relying on a categorical exemption when there is a fair argument that

a project will have a significant effect on the environment.” (*Banker’s Hill, supra*, at p. 266.) In other words, the court acknowledged “ ‘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.’ ” (*Ibid.*, italics added by *Banker’s Hill.*) Our conclusion that the unusual circumstances exception applies whenever there is substantial evidence of a fair argument of a significant environmental impact is thus not inconsistent with *Banker’s Hill*.

The above modification does not effect any change in the judgment.

Trial Court: Alameda County Superior Court

Trial Judge: Honorable Frank Roesch

Counsel for Appellants: Susan Brandt-Hawley

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