Filed 3/17/08

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| VALLEY ADVOCATES et al.,<br>Plaintiffs and Appellants,<br>v.<br>CITY OF FRESNO et al.,<br>Defendants and Respondents;<br>PEREZ, WILLIAMS & MEDINA,<br>Real Party in Interest and Respondent. | F050952<br><br>(Super. Ct. No. 05CECG01752)<br><br>**ORDER MODIFYING OPINION AND DENYING REHEARING**<br>[NO CHANGE IN JUDGMENT] |

**THE COURT:**

It is ordered that the opinion filed herein on February 15, 2008, and reported in the Official Reports (160 Cal.App.4th 94) be modified in the following particulars:

1. On page 10, in the first full paragraph, beginning "Our analysis" the ending clause is modified to read:

> starting with mandatory historical resources and ending with discretionary historical resources.

2. On page 13, in the first full paragraph, beginning "Based on the contents" the second and third sentence and the accompanying citation are deleted.

3. On pages 13-15, part III. is deleted in its entirety and the following heading, subheadings, paragraphs, and footnotes inserted in its place, which will require renumbering of subsequent footnotes:

## III. Presumptive Historical Resources

### A. Applicable Text of CEQA and Guidelines

The category of presumptive historical resources is created by the third sentence of section 21084.1, which states:

> "Historical resources included in a local register of historical resources, as defined in subdivision (k) of Section 5020.1, or deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1, are presumed to be historically or culturally significant for purposes of this section, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant."

The Guidelines reiterate this definition by stating that "the term 'historical resources' shall include … [¶] … [a] resource included in a local register of historical resources, as defined in section 5020.1(k) of the Public Resources Code or identified as significant in an historical resource survey meeting the requirements of section 5024.1(g) of the Public Resources Code, shall be presumed to be historically or culturally significant. Public agencies must treat any such resource as significant unless the preponderance of evidence demonstrates that it is not historically or culturally significant." (Guidelines, § 15064.5, subd. (a)(2).)

These provisions create three types of presumptive historical resources. The first two types involve a resource included in a local register of historic resources. A "local register of historic resources" is defined as a "list of properties officially designated *or* recognized as historically significant by a local government pursuant to a local ordinance or resolution." (§ 5020.1, subd. (k), italics added.) The use of the disjunctive "or" has been interpreted to mean that a building is an historic resource if it is either "designated" to a local register or "recognized" as historically significant by local ordinance or resolution. (*League for Protection of Oakland, supra*, 52 Cal.App.4th at pp. 906-907.) The third type of presumptive historical resource is a resource identified as significant in certain surveys of historical resources. (§ 5024.1, subd. (g).) The historical resource survey must meet all four of the criteria set forth in section 5024.1, subdivision (g). (See part III.B.3, *post*.)

### B. Application to Facts of this Case

Valley Advocates, in its petition for rehearing, argues that the Flats qualify as one of the three types of presumptive historical resources. Specifically, Valley

Advocates contends that under section 5020.1, subdivision (k), the Flats have been "recognized" as historically significant in a manner similar to the recognition given to the Montgomery Ward Building by the City of Oakland. (See *League for Protection of Oakland, supra*, 52 Cal.App.4th at pp. 907-908.) We address all three types of resources that qualify as presumptive historical resources because of ambiguity in Valley Advocates' initial appellate briefing. Also, our discussion of the first and third type of presumptive historical resources will provide context for our analysis of the type relied upon by Valley Advocates.

***1. Designated for listing***

First, it is undisputed that the Flats have not been "officially designated" (§ 5020.1, subd. (k)) for inclusion in a formal local register of historical resources. Therefore, we can reach only one conclusion—the Flats did not qualify as the first type of presumptive historical resource when the City Council made its CEQA determinations in May 2005.

***2. Recognized by local ordinance or resolution***

Second, Valley Advocates' petition for rehearing asserts that City "adopted resolutions approving and adopting the 2025 Fresno General Plan and the Master Environmental Impact Report (MEIR) for the 2025 Fresno General Plan on November 19, 2002. [4 AR 407] These documents included express findings by the City which recognized … the proposed L Street Historic District, along with other specifically adopted local plans which recognized the historical value of the proposed L Street Historic District, including the Central Area Community Plan and the Fulton Lowell Specific Plan."[8] Valley Advocates contends that these resolutions fall within the ambit of subdivision (k) of section 5020.1 and, thus, the Flats qualify as presumptively historical resources. In other words, Valley Advocates contends that City included the Flats in a "list of properties … recognized as historically significant by a local government pursuant to a … resolution." (§ 5020.1, subd. (k).)

In *League for Protection of Oakland*, upon which Valley Advocates relies, the Montgomery Ward Building had not been officially designated in any formal register of the City of Oakland. (*League for Protection of Oakland, supra*, 52 Cal.App.4th at p. 903.) Nonetheless, the City of Oakland's "own internal documentation consistently recognized the historical significance of the Montgomery Ward Building." (*Id*. at p. 908.) Among other things, the "Historic Preservation Element of the City's general plan [stated] that 'for CEQA purposes'

[8]Page 407 of the administrative record is the cover page of the 2025 Fresno General Plan. Pages 148 through 155 of the general plan (pages 595 through 602 of the administrative record) address historical resources. Those pages do not mention the Flats.

the building is 'considered historic.'" (*Ibid*.) Under the circumstances, the court regarded "the authoritative 'historic' designation of the property in the City's general plan as equivalent to recognition of it 'as historically significant' by local ordinance or resolution under section 5020.1, subdivision (k)." (*Ibid*.) As a result, the court concluded that the Montgomery Ward Building was a presumptively historical resource under section 21084.1. (*Ibid*.)

Here, however, the circumstances surrounding the property that has, allegedly, been recognized as historically significant—i.e., the Flats—are quite different from the circumstances concerning the Montgomery Ward Building in *League for Protection of Oakland*. First, City's own documentation has not "consistently recognized the historical significance of the [Flats]." (*League for Protection of Oakland*, *supra*, 52 Cal.App.4th at p. 908.) Second, City's general plan does not state that the Flats are considered historic for purposes of CEQA. (*Ibid*.) Third, unlike the City of Oakland, City here expressly rejected an attempt to designate the buildings in question to the formal local register of historical resources. We conclude these circumstances distinguish the recognition given the Flats from the recognition the City of Oakland had given the Montgomery Ward Building.

Further, we conclude that under the circumstances presented here, the building has not been included in a list of properties recognized as historically significant by local ordinance or resolution for purposes of sections 21084.1 and 5020.1, subdivision (k).

Therefore, we conclude that the Flats did not qualify as the second type of presumptive historical resource under sections 21084.1 and 5020.1, subdivision (k).

### *3. Historical resource survey*

Valley Advocates does not argue explicitly that the Flats are identified as significant in a survey that meets the statutory criteria set forth in paragraphs (1) through (4) of section 5024.1, subdivision (g).[9] Valley Advocates has,

[9]Section 5024.1, subdivision (g) provides: "A resource identified as significant in an historical resource survey may be listed in the California Register if the survey meets all of the following criteria: [¶] (1) The survey has been or will be included in the State Historic Resources Inventory. [¶] (2) The survey and the survey documentation were prepared in accordance with office procedures and requirements. [¶] (3) The resource is evaluated and determined by the office to have a significance rating of Category 1 to 5 on DPR Form 523. [¶] (4) If the survey is five or more years old at the time of its nomination for inclusion in the California Register, the survey is updated to identify historical resources which have become eligible or ineligible due to changed circumstances or further documentation and those which have been demolished or altered in a manner that substantially diminishes the significance of the resource."

nonetheless, made certain arguments that reference the 1994 Powell Historic Building Survey, Historic Resources Survey.[10]

We have located, and Valley Advocates has cited, no evidence that establishes or supports a reasonable inference that the Flats were identified as significant in a survey meeting all four of the statutory criteria. For instance, the 1994 survey is more than five years old, and there is no evidence that it has been updated in accordance with section 5024.1, subdivision (g)(4). (See *Citizens for Responsible Development v. City of West Hollywood* (1995) 39 Cal.App.4th 490, 502-503 (*West Hollywood*) [survey did not meet criterion in subd. (g)(4) because survey was over five years old and had not been updated].)

A request for modification submitted by a nonparty contended that only the first three criteria in section 5024.1, subdivision (g) apply when the survey is being evaluated during a CEQA review as opposed to evaluation for listing in the California Register of Historical Resources. We reject this interpretation. The language in section 5024.1, subdivision (g) refers to a "survey [that] meets *all* of the following criteria" (italics added), and Guidelines section 15064.5, subdivision (a)(2) refers to "an historical resource survey meeting the requirements of section 5024.1(g) …." This text does not exclude the fourth criterion from the requirements. Thus, we will not interpret the phrase "the requirements of section 5024.1(g)" used in Guidelines section 15064.5, subdivision (a)(2) to mean only the first three requirements of that subdivision. In addition, our interpretation is the same as the interpretation impliedly adopted by the Second Appellate District when it concluded the survey it was evaluating did not meet the fourth criterion. (*West Hollywood*, *supra*, 39 Cal.App.4th at pp. 502-503.)

Based on the foregoing, the only conclusion that can be reached under the record presented is that the Flats did not qualify as the third type of presumptive historical resource.

***4. Summary***

The City Council's May 2005 CEQA determination does not contain error with respect to the application of the presumptive historical resources category to the Flats. Therefore, unless the relevant circumstances have changed since that determination, City need not consider that alleged ground for noncompliance with CEQA on remand.

4. On page 23, the citation appearing in the first paragraph under part V. is modified to read as follows:

(*West Hollywood*, *supra*, 39 Cal.App.4th at pp. 505-506.)

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[10]Valley Advocates also refers to this survey as the Ratkovich Plan survey.

5. On page 26, the first full paragraph, beginning "In summary" is deleted and the following paragraph inserted in its place:

> In summary, to the extent Valley Advocates' petition and appeal are construed to present a challenge to City Council's February 2005 administrative decision not to list the Flats in the local register, the challenge must fail because the administrative decision is supported by substantial evidence. It follows that City Council did not err in May 2005 when it decided the Flats were not presumptive historical resources for purposes of CEQA.

6. On page 26, in the third sentence of the third full paragraph, beginning "Under Fresno Municipal Code" the word "historic" is changed to "historical" so that the sentence reads:

> Thus, a building can qualify for treatment as an historical resource based on the stated criteria and the City Council, in its discretion, may still choose not to list it in the local register.

7. On pages 27-31, part VI. is deleted in its entirety and the following heading, subheadings, paragraphs, and footnotes are inserted in its place, which will require the renumbering of subsequent footnotes:

> **VI. Fair Argument Standard**
>
> The parties disagree about the standard a lead agency should apply when considering whether a building is an historical resource during the environmental review conducted prior to the preparation of an EIR. This pre-EIR review includes, among other things, the question whether an exception to a categorical exemption applies. Valley Advocates contends the fair argument standard applies. City and Perez disagree.
>
> The fair argument standard establishes a low threshold that is met when there is substantial evidence in the record supporting a fair argument on the matter in controversy. (*Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1109-1110 (*County of Monterey*).) Whether the record contains sufficient evidence to support a fair argument is a question of law. (*Ibid.*)
>
> **A. Scope of *County of Monterey***
>
> Valley Advocates contends that, in accordance with *County of Monterey*, the fair argument standard should govern the determinations made in applying the three historical resources categories. City argues the court's approach to the fair argument standard in *County of Monterey* is not good law and the fair argument standard does not apply here because it is inconsistent with the language in section 21084.1 and legislative intent.

We conclude that (1) the circumstances in *County of Monterey* are distinguishable from the circumstances of this appeal, and (2) the fair argument standard is not applicable to the determination whether the Flats qualify as historical resources at this stage of the CEQA review process.

In *County of Monterey* the court stated: "In this case, the fair argument standard applies to all three substantive issues—historicity, impact and mitigation—since they all bear on the question of whether an EIR is required." (*County of Monterey*, *supra*, 122 Cal.App.4th at p. 1109, citing *League for Protection of Oakland*, *supra*, 52 Cal.App.4th at p. 905.)

We conclude that the court introduced its statement that the fair argument standard applied to historicity with the phrase "[i]n this case" because the facts and circumstances of that case were unusual and critical to its decision to apply the fair argument standard. In other words, the court's statement should not be read to mean that the fair argument standard always, or even generally, applies to the question whether a building or object is an historical resource during the environmental review conducted before the preparation of an EIR.

The court's statement in *County of Monterey* must be viewed in context. Part of that context is created by the arguments actually presented by the parties. Because both parties adopted the fair argument standard in presenting their positions to the court, the court was not asked to decide whether a different standard applied. For example, the county took the position that "the record does not contain substantial evidence supporting a fair argument that the Old Jail is historic …." (*County of Monterey*, *supra*, 122 Cal.App.4th at p. 1108.) In contrast, the parties in this case clearly dispute whether the fair argument standard should apply.

Moreover, *County of Monterey* is distinguishable because it involved the unusual circumstance of a lead agency attacking its own determination of historicity by claiming the determination lacked sufficient evidentiary support. In that case, the initial study explicitly stated that "'the old jailhouse is a significant historical resource as defined by CEQA [Guidelines] Section 15064.5.'" (*County of Monterey*, *supra*, 122 Cal.App.4th at p. 1113.) Accordingly, when *County of Monterey* is read in context, it stands for the following proposition: when a lead agency (1) determines in its initial study that a building is an historical resource and (2) subsequently wishes to claim the determination was not supported by sufficient evidence, the lead agency must establish there was no substantial evidence supporting its determination of historicity. Requiring a lead agency to show the record lacks substantial evidence is simply another way of saying the lead agency is required to show the fair argument standard was not met. (See *County of Monterey*, *supra*, at pp. 1109-1110 [the fair argument standard is met when there is substantial evidence in the record supporting a fair argument on the matter in controversy].)

Here, City is not seeking to overturn an earlier determination of historicity. Instead, City contends that its determination that the Flats did not meet the criteria for being an historic resource is supported by sufficient evidence and contends the sufficiency is gauged under the substantial evidence test. Thus, this appeal is readily distinguishable from *County of Monterey*, and the statement in *County of Monterey* regarding the application of the fair argument standard to the question of historicity does not necessarily apply to this case.

### B. The Fair Argument Standard Does Not Apply Here

Next, we address whether City was required to employ the fair argument standard when considering whether the Flats qualified as an historical resource. We conclude the fair argument standard did not apply.

#### *1. Statutory ambiguity*

Sections 21084.1 and 21084, subdivision (e) do not state explicitly whether the fair argument standard is used to determine historicity. Similarly, Guidelines section 15064.5 does not provide an explicit answer.

Where the words of the statute and implementing regulation do not provide an unambiguous answer to the question presented, "then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history. [Citation.] In such circumstances, we '"select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." [Citation.]'" (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.) The apparent intent of the Legislature can be determined in part by the principle that the meaning given a particular section must be in harmony with the statute as a whole. (*Neumarkel v. Allard* (1985) 163 Cal.App.3d 457, 461.) Under this principle, we must harmonize section 21084.1 with CEQA by considering that section in the context of the statutory framework.

#### *2. Policies guiding statutory interpretation*

Valley Advocates contends that the fair argument standard must be applied in this case to further a long-standing public policy identified by the California Supreme Court—specifically, CEQA is "to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259, disapproved on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888, 896-897; see §§ 21000 & 21001.) This statement of public policy, however, provides little guidance in the present situation. It begs the threshold question whether the Flats are part of the "environment" and ignores the policy's stated limitation—that it controls "within the reasonable scope of the statutory language." This limitation brings the analysis back to construing section 21084.1 in a reasonable manner. That statutory construction must promote the

legislative purpose underlying section 21084.1 and fit within the framework of CEQA. We cannot simply leap from the general policy of protecting the environment to the conclusion that a fair argument of historicity is all that is needed to trigger the preparation of an EIR.

### *3. Legislative history and statutory context*

Section 21084.1 was enacted in 1992 as part of Assembly Bill No. 2881 (1991-1992 Reg. Sess.). The original bill was amended before passage, and a staff analysis, which appears to be attached to or included in an analysis of Senate Floor Amendments by the Senate Committee on Natural Resources and Wildlife, states the following regarding section 21084.1:

> "2. Resources on a local register of historical resources or included in the State Inventory of Historic Resources with a ranking of 5 or higher would NOT be statutorily significant for CEQA purposes but would be PRESUMED to be significant unless the weight of evidence demonstrated they were not. A lead agency would almost certainly have to consider such resources significant for CEQA purposes. However, the door would be left open for someone to argue against significance and if convinced by such argument, a lead agency would have the discretion to consider the resource not to be significant. *If this occurred, neiither [sic] an EIR nor a mitigated negative declaration would be required*.
>
> "In effect, this means that for CEQA purposes, local properties or those in the State Inventory are not considered quite as important as properties included in or eligible for inclusion in the California Register.
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> "3. Resources which have not been considered for the California Register, for a local register or for the State Historic Resources Inventory may, at the discretion of a lead agency, be evaluated to determine if they are significant for purposes of CEQA." (Sen. Com. on Natural Resources and Wildlife, Analysis of Amends. to Assem. Bill No. 2881 (1991-1992 Reg. Sess.) Aug. 8, 1992, p. 1, italics added.)[19]

The italicized sentence in this legislative history shows that the Legislature was considering how application of the definition of an "historical resource" would affect the need for an EIR or mitigated negative declaration. In particular, it demonstrates that the Legislature intended that an EIR would not be required when the presumption that a resource was historically significant was rebutted. Consequently, we consider whether the rebuttal of the presumption of historicity is

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[19]We take judicial notice of this legislative history pursuant to City's unopposed motion of July 26, 2007. (See Evid. Code, § 452, subd. (c) [judicial notice]; *People v. Ledesma* (1997) 16 Cal.4th 90, 98 & fn. 4 [judicial notice of legislative staff analyses].)

compatible with the application of the fair argument standard to the question of historicity.

A fair argument is not extinguished by the existence of substantial or even a preponderance of the evidence on the opposite side of an issue.[20] This court has stated: "A logical deduction from the formulation of the fair argument test is that, if substantial evidence establishes a reasonable possibility of a significant environmental impact, then the existence of contrary evidence in the administrative record is not adequate to support a decision to dispense with an EIR." (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1580.) In the particular context of historical resources, it appears that the mere listing in the local register or inclusion in a qualified survey would be substantial evidence supporting a fair argument that the resource is historically significant. Rebutting this substantial evidence would not negate the existence of a fair argument. As a result, we conclude that the fair argument standard cannot apply at the same time as a rule that allows a presumption of historicity to be rebutted by a preponderance of the evidence. In other words, the fair argument standard is not compatible with the rebuttable presumption.

In addition, we note, use of the fair argument standard would be incompatible with the concept of a *discretionary* historical resources category because the fair argument standard presents a question of law. As a question of law, the presentation of substantial evidence supporting a fair argument would decide the matter, and there would be no need to exercise discretion by weighing evidence or competing interests or values.

Based on these incompatibilities and the legislative history of sections 21084 and 21084.1, we conclude the Legislature did not intend that the fair argument standard apply to the question of historicity during the preliminary review stage of an environmental review.

Therefore, the only reasonable interpretation of section 21084.1 is that the fair argument standard does not govern a lead agency's application of the definition of an historical resource. Of course, once the resource has been determined to be an historical resource, then the fair argument standard applies to the question whether the proposed project "may cause a substantial adverse

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[20]For example, Guidelines section 15064, subdivision (f)(1) provides in part: "[I]f a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect [citation]." (See Guidelines, § 15384, subd. (a) [role of substantial evidence in creating a fair argument].)

change in the significance of an historical resource" (§ 21084.1) and thereby have a significant effect on the environment.

Our interpretation of section 21084.1 is consistent with the analysis adopted by the court in *League for Protection of Oakland*, *supra*, 52 Cal.App.4th at pages 908 to 909. First, the court "conclude[d] that the Montgomery Ward Building must be classified as a presumptively 'historical resource' within the meaning of section 21084.1." This unqualified statement would not have been necessary if the court was applying the low threshold of the fair argument standard. Second, the court addressed the rebuttal of the presumption by stating: "We further conclude that the presumption of historic status has not been rebutted by any evidence in the record." (*Id.* at p. 908.) If it had been applying the fair argument standard to the question of historicity, it would not have needed to address whether the presumption had been rebutted.

***4. Exceptions to CEQA exemptions***

Valley Advocates specifically contends that the fair argument standard applies to the question whether the Flats are historic resources for purposes of applying exceptions to the categorical exemptions. We reject this contention.

First, the Legislature added sections 21084.1 and 21084, subdivision (e) to CEQA at the same time as part of Assembly Bill No. 2881 (1991-1992 Reg. Sess.). (See Stats. 1992, ch. 1075, §§ 7 & 8.) Subdivision (e) of section 21084 provides for an exception to categorical exemptions: "No project that may cause a substantial adverse change in the significance of an historical resource, as specified in section 21084.1, shall be exempted from [CEQA] pursuant to subdivision (a)." This provision demonstrates that the Legislature intended that the definition of "historical resources" contained in section 21084.1 apply at the stage of environmental review where exemptions are considered by the lead agency. Therefore, our previous analysis of the legislative intent as to the review that occurs before the preparation of an EIR applies with equal force to the standard of review for exceptions to the categorical exemptions.

Second, Valley Advocates' reliance on *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249 (*Banker's Hill*) is misplaced. In *Banker's Hill*, the court concluded "that an agency must apply a fair argument approach in determining whether, under Guidelines section 15300.2(c), there is no reasonable possibility of a significant effect on the environment due to unusual circumstances." (*Id.* at p. 264.) Guidelines section 15300.2, subdivision (c) states a blanket exception to CEQA's categorical exemptions. (*Banker's Hill*, at p. 260.)

In *Banker's Hill*, the court did not address whether any objects or buildings should be considered to be within the scope of protected environment because they were historical resources. That case is not authority for the proposition that,

when considering the exception contained in Guidelines section 15300.2, subdivision (c), the fair argument standard is applied to determine whether the environment includes an object because of its historical significance.

Third, we have not located or been directed by the parties to any authority adopting or rejecting the view that a project opponent need only present a fair argument that a building is an historical resource when applying Guidelines section 15300.2, subdivision (c).

Accordingly, our earlier conclusion that the fair argument standard does not apply to the question whether a building qualifies as an historical resource also applies in the specific context of exceptions to the CEQA exemptions.

With respect to other aspects of determining whether an exception to an exemption applies, we confirm our statement in an earlier published decision that the project opponent, not the lead agency, has "the burden of producing substantial evidence showing a reasonable possibility of adverse environmental impact sufficient to remove the [project] from the categorically exempt class. (See *Davidon Homes v. City of San Jose* [(1997)] 54 Cal.App.4th [106,] 115; see also Guidelines, § 15300.2, subd. (c).)" (*Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 476.) In other words, the fair argument standard applies to the other determinations that are necessary to apply Guidelines section 15300.2, subdivision (c). This also is the view taken by the court in *Banker's Hill* when it addressed whether there was a reasonable possibility of a significant effect on the environment due to any of the purported unusual circumstances. (*Banker's Hill*, *supra*, 139 Cal.App.4th at p. 278.)

***5. Summary***

Accordingly, City was not required to apply the fair argument standard when determining whether one or both of the Flats is an historical resource for purposes of CEQA's three historical resources categories, even when that inquiry was made in the context of exceptions to the categorical exemptions. Therefore, City did not violate CEQA on this ground.

8. On page 40, part IX. in the unpublished portion is deleted.

9. On page 40, the citation appearing in footnote 23 is modified to read:

(E.g., *County Sanitation Dist. No. 2 v. County of Kern*, *supra*, 127 Cal.App.4th at p. 1637 [superior court directed to require public agency to respond to writ by filing a return].)

Except for the modifications set forth, the opinion previously filed remains unchanged. There is no change in the judgment.

The petition for rehearing filed by appellants is denied.

_____
DAWSON, J.

WE CONCUR:

_____
GOMES, Acting P.J.

_____
KANE, J.