

**TENTATIVE RULINGS
SPECIAL SET LAW & MOTION CALENDAR
Wednesday, April 1, 2026, 10:00 a.m.
Courtroom 15 – Hon. Christopher M. Honigsberg
600 Administration Drive, Santa Rosa**

PLEASE NOTE: In accordance with the Order of the Presiding Judge, a party or representative of a party may appear in Department 15 in person or remotely by Zoom, a web conferencing platform.

CourtCall is not permitted for this calendar.

If the tentative ruling is accepted, no appearance is necessary via Zoom unless otherwise indicated.

TO JOIN D15 ZOOM ONLINE:

Meeting ID: 160 768 1348

Passcode: 375537

<https://sonomacourt-org.zoomgov.com/j/1607681348>

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The following tentative rulings will become the ruling of the Court unless a party desires to be heard. If you desire to appear and present oral argument as to any motion, **YOU MUST NOTIFY** Judge Honigsberg’s Judicial Assistant by telephone at **(707) 521-6723**, and all other opposing parties of your intent to appear, and **whether that appearance is in person or via Zoom**, by **4:00 p.m. the court day immediately preceding the day of the hearing.**

24CV06671, Casadidio v. County of Sonoma

Petition for Writ of Mandate DENIED.

Facts

Petitioners challenge the decision by Respondent County of Sonoma (“Respondent”) to approve (“the Approval”) the permit (the “Permit”) for the construction of a 70-foot cellular tower (the “Tower”) and related work (the “Project”). The Project proponents are Real Parties in Interest (“RPIs”) T-Mobile West LLC (“Tmobile”) and VB BTS II LLS (“VB”), as well as Garth Harding and Dena Harding (collectively, the “Hardings”). As part of the Approval, County issued a Notice of Exemption (“NOE”) finding the Project to be exempt from the California Environmental Quality Act (“CEQA”).

RPIs submitted the Project application on August 31, 2022, for the construction of the Tower designed as a faux tree in a 2,500 sq. ft area on real property which the Hardings own at 9300 Mill Station Road, Sebastopol (the “Property”). AR I:1, 4, 33-36.

The county Board of Zoning Adjustments (“BZA”) denied the Project application. RPIs appealed that decision to Respondent’s Board of Supervisors (the “Board”) in June 2024. The Board heard the appeal and approved the Project, reversing the BZA decision, on October 8, 2024. The Board found the Project to be Exempt from CEQA and issued the NOE finding the Project to be

categorically exempt... pursuant to the Provisions of Title 14 of the California Administrative Code, 15303(e) Accessory (appurtenant) structures including garages, carports, patios, swimming pools, and fences.

No exceptions listed under Section 15300.2 apply. There is no reasonable possibility that the project would have a significant effect on the environment.

Administrative Record (“AR”) 1.

The Project as approved includes the 70-foot-tall Tower designed as a “faux water tower,” and it includes antennas, cabling, jumpers, ground-mounted radio cabinets on a raised concrete pad, cable ice bridge, utility backboard and meter, all in a 50’x50’ fenced area (the “Project Site”) with landscaping, and with no water or sewer service. AR 1:1. It is not in a scenic resources area. AR IV:1114. The Property containing the Project Site is a 14.35-acre parcel containing a single-family dwelling, a bar, and an apple orchard. AR I:34. The Project is about 200 feet from a creek on border of the Property. AR I:34, 36.

The Arguments

The matter has come on calendar for the petition itself. Petitioners in their Opening Brief (“OB”) argue that the Approval violates CEQA because the Class 3 exemption does not apply and because, even if that exemption applies, the Project falls within the “unusual circumstances” exception to the exemptions due to evidence in the record showing the presence of a blue-line stream connected to protected habitat, the potential for environmental impacts, and the significant visual impacts of the Project. Petitioners also argue that Respondent violated its own zoning standards, failed to address the determination of the BZA, and disregarded the BZA determination even though substantial evidence supported the BZA determination. In addition, they argue that the Board violated zoning standards by adopting a different design for the Project during proceedings when there was no clear, identifiable design but instead changing designs. This, they assert, caused it to be impossible to determine what was actually being approved.

Respondents and RPIs both oppose the petition. They argue that the NOE and Approval comply with CEQA because substantial evidence shows that the Class 3 exemption applies while there is no basis for finding the unusual circumstances exception to apply. They contend that the BZA’s decision, and whether substantial evidence supported the BZA decision, is irrelevant, the Board correctly applied

federal law in the Federal Communications Act in conjunction with Respondent's own zoning laws; and the Project complies with Respondent's zoning laws.

Petitioners reply to the opposition. They acknowledge in their reply that "Respondents are correct that the Board of Supervisors was not bound by the Board of Zoning Adjustments' (BZA) denial when it heard the administrative appeal," but argue that this does not excuse the Board from making reviewable findings based on substantial evidence. They contend that they are relying on the BZA findings as evidence and specifically as evidence conflicting with the Board's determinations. They also contend that the CEQA Class 3 exemption does not apply at all and reiterate their position that the unusual circumstances exception applies. With respect to telecommunications law, Petitioners acknowledge that federal law does to some extent preempt state or local entities from regulating telecommunications or imposing requirements that prohibit telecommunications but assert that this still leaves such entities discretion regarding details of such projects. Finally, they reiterate their position that the design was a vague "moving target" which changed multiple times. For the first time, they contend in their reply that this not only violated applicable zoning standards and the proceedings, but that it also violated CEQA's requirement that there be a stable, accurate project description.

Request for Judicial Notice

Respondents request judicial notice of two rules from the Board's Board Rules of Procedures. These are judicially noticeable, and the court grants the request.

Authority Governing Administrative Mandamus

Administrative mandamus under CCP §1094.5 governs review of final administrative decisions taken after a hearing, where the body had *discretion* in determining the facts. CCP §1094.5(a). Review is restricted solely to the *administrative record*. CCP § 1094.5.

Section 1094.5(b) states that in cases of administrative mandamus the test is "whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." It also sets forth a test for abuse of discretion, which "is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

Subdivision (c) sets forth the test for a claim that "the findings are not supported by the evidence." It states that where "the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if... the findings are not supported by substantial evidence in the light of the whole record." As stated in *Shapell Industries, Inc. v. Governing Board* (1991) 1 Cal.App.4th 218, at 231, "[i]f fundamental rights are implicated the court may be

authorized to exercise its independent judgment to determine whether the findings are supported by the weight of the evidence.” Otherwise, in an action for administrative mandate pursuant to section 1094.5, “the inquiry is directed to whether *substantial evidence* supports the decision.” *Bunnett v. Regents of Univ. of California* (1995) 35 Cal.App.4th 843, 849.

A party ordinarily must raise an issue at the administrative proceedings in order to raise it on a petition for administrative mandamus under CCP section 1094.5. *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019-1020; *Bohn v. Watson* (1954) 130 Cal.App.2d 24, 37 (a party may waive the right to raise an argument or issue in a writ proceeding if failing to raise it in the underlying administrative proceedings). As the court ruled in *Walnut Creek*, when faced with an argument on a 1094.5 petition that had not been raised in the administrative proceedings, in actions ‘under section 1094.5 of the Code of Civil Procedure, appellate review is limited to issues in the record at the administrative level. “It is fundamental that the review of administrative proceedings provided by section 1094.5...is confined to the Issues appearing in the record of that body as made out by the parties to the proceedings, though additional Evidence, in a proper case, may be received. (Citation.) It was never contemplated that a party to an administrative hearing should withhold any defense then available to him or make only a perfunctory or ‘skeleton’ showing in the hearing and thereafter obtain an unlimited trial de novo, on expanded issues, in the reviewing court. (Citation.)” *Walnut Creek*, 1020.

Normally a party must exhaust administrative remedies before challenging an agency’s actions, and yet a party need not do so if the effort would clearly be futile. See *Jonathan Neil & Assocs, Inc. v. Jones* (2004) 33 Cal.4th 917.

CEQA

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. The public and public participation, after all, 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, at 392, “[t]he EIR process protects not only the environment but also informed self-government.”

An environmental impact report (“EIR”) is required for a project which substantial evidence indicates may have a significant effect on the environment. Guidelines for the Implementation of CEQA (“Guidelines”), 14 California Code of Regulations (“CCR”) section 15063(b) (hereinafter, the court shall cite to Guidelines simply by stating “Guideline” and the section number); Public Resources Code

(“PRC”) sections 21100, 21151. 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*).

An agency must prepare, cause to be prepared, or certify completion of, an EIR when for a project which “may have a significant effect on the environment.” See, e.g., PRC sections PRC section 21068, 21100(a), 21151(a); Guideline 15382. CEQA is accordingly concerned with whether an agency action may cause physical effects on the environment, whether direct or indirect. PRC 21080, setting forth the basic standards for determining whether an action implicates CEQA, explains that an agency must prepare an EIR where there is “substantial evidence” in the record “that the project may have a significant effect on the environment,” unless the project is exempt from CEQA. PRC 21080(c). It also provides the definition of “substantial evidence” at subdivision (e), stating at (e)(2) that “substantial evidence” does *not* include “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.”

The Supreme Court in *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, at 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 is required. This was further explained 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., whether the activity is a “project” being “approved” as defined in CEQA and, if it is, whether it is 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 (“ND”). See also, *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.* (App. 3 Dist. 2015) 242 Cal.App.4th 555, at 568.

Basic Principles Applicable to Review of Agency Decisions Under CEQA

The burden of investigation rests with the government and not the public. *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1378-1379. The court in *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, at 1202, finding that a city failed to consider an issue, ruled that the city could not rely on information to make good the gap in its analysis where the record did not show that the information had ever been available to the public. Similarly, as the court explained in *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, at 311, an “agency should not be allowed to hide

behind its own failure to gather relevant data.... CEQA places the burden of environmental investigation on government rather than the public.” See also *Gentry, supra* (quoting *Sundstrom*).

At the same time, in judicial review, agency actions are presumed to comply with applicable law unless the petitioner presents proof to the contrary. Evid. Code section 664; *Foster v. Civil Service Commission of Los Angeles County* (1983) 142 Cal.App.3d 444, 453. 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. Accordingly, the petitioner in a CEQA action thus has the burden of demonstrating that there was a violation of CEQA. *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 740.

Under CEQA, a court may only issue a writ for any abuse of discretion, including making a finding without substantial evidence, if the error was *prejudicial*. PRC section 21005; *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143. Accordingly, 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, at 1073. When substantial evidence does support a decision, but there is no prejudicial abuse of discretion, the court must defer to the agency’s substantive conclusions and uphold the determination. *Chaparral Greens, supra*; see PRC 21168, 21168.5, *Laurel Heights I, supra* 47 Cal.3d 392, fn.5.

An “error is prejudicial ‘if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process.’” *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, at 721-722, quoting *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, at 712.

CEQA Exemptions

PRC section 21084 is the statutory authority for exemptions from CEQA and exceptions to those exemptions, which forbid an agency to rely on an exemption if an exception applies. An agency need not conduct further environmental review pursuant to CEQA once it determines that a Project is exempt from CEQA. The court in *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.* (App. 3 Dist. 2015) 242 Cal.App.4th 555, at 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 what level of review is necessary. It explained, 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.”

Similarly, 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.]

Guideline 15061 governs “Review for Exemption” from CEQA. Guideline 15061(a) states that a lead agency, upon finding that a project is subject to CEQA, “shall determine whether the project is exempt from CEQA” and subdivision (b) sets forth the types of exemptions. Guideline 15061 states, in pertinent part,

(a) Once a lead agency has determined that an activity is a project subject to CEQA, a lead agency shall determine whether the project is exempt from CEQA.

(b) A project is exempt from CEQA if:

...

(2) The project is exempt pursuant to a categorical exemption (see Article 19, commencing with Section 15300) and the application of that categorical exemption is not barred by one of the exceptions set forth in Section 15300.2.

...

Guideline 15303 governs the exemptions of Class 3 for new construction or conversion of small structures. It applies to “construction and location of limited numbers of new, small facilities or structures; installation of small new equipment and facilities in small structures; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure.” It states, in full,

Class 3 consists of construction and location of *limited numbers of new, small facilities or structures*; installation of *small new equipment and facilities in small structures*; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure. The numbers of structures described in this section are the maximum allowable on any legal parcel. Examples of this exemption include but are not limited to:

(a) One single-family residence, or a second dwelling unit in a residential zone. In urbanized areas, up to three single-family residences may be constructed or converted under this exemption.

(b) A duplex or similar multi-family residential structure totaling no more than four dwelling units. In urbanized areas, this exemption applies to apartments, duplexes, and similar structures designed for not more than six dwelling units.

- (c) A store, motel, office, restaurant or similar structure not involving the use of significant amounts of hazardous substances and not exceeding 2500 square feet in floor area. In urbanized areas, the exemption also applies to up to four such commercial buildings not exceeding 10,000 square feet in floor area on sites zoned for such use if not involving the use of significant amounts of hazardous substances where all necessary public services and facilities are available and the surrounding area is not environmentally sensitive.
- (d) Water main, sewage, electrical, gas, and other utility extensions, including street improvements, of reasonable length to serve such construction.
- (e) *Accessory (appurtenant) structures including garages, carports, patios, swimming pools, and fences.*
- (f) An accessory steam sterilization unit for the treatment of medical waste at a facility occupied by a medical waste generator, provided that the unit is installed and operated in accordance with the Medical Waste Management Act (Section 117600, et seq., of the Health and Safety Code) and accepts no offsite waste.

Guideline 15300.2 sets forth exceptions to categorical exemptions and states that if an exception to the exemptions applies, the agency may not rely on an exemption and must conduct further CEQA review. Subdivision (b) sets forth an exception due to cumulative impacts and states, in full, “Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.”

Standard of Review and Analysis of Exemptions and Exceptions Therefrom

Courts have established an approach for applying the standard of review regarding a determination that a project is exempt from CEQA. See *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. Briefly, this has three parts. Initially, the court must determine de novo the scope of the exemption. *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 185. The deferential, substantial-evidence then applies to the agency determination 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. Third, once an agency has shown that a categorical exemption applies, the party challenging the determination has the burden of demonstrating evidence supporting a finding that an exception to the exemptions applies. *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 185.

Accordingly, where an agency has determined that a project is exempt from CEQA under a categorical exemption, the court 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; *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, at 185.

The court in *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, at 966, explained, "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.]"

On the burden and standard of review, *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.* (App. 3 Dist. 2015) 242 Cal.App.4th 555 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, with emphasis added,

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.*"

Accordingly, "[a]n agency's determination that a project falls within a categorical exemption includes an implied finding that none of the exceptions identified in the Guidelines is applicable. The burden then shifts to the challenging party to produce evidence showing that one of the exceptions applies to take the

project out of the exempt category.” *Save Our Carmel River v. Monterey Peninsula Water Mgmt. Dist.* (2006) 1412 Cal.App.4th 677, 689; quoted and followed also in *San Francisco Beautiful v. City & County of San Francisco* (2014) 226 Cal.App.4th 1012, at 1022-1023.

The Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, at 1105, reiterated that “[a]s to projects that meet the requirements of a categorical exemption, a party challenging the exemption has the burden of producing evidence supporting an exception.” Nonetheless, the court added, at 1103, that after finding a project to be categorically exempt, the agency must consider evidence in the record which shows that an exception to the exemption may apply. See also Guideline 15300.2.

The end result of the above authority is that the standard of review and the burden shift for different issues. First, the court reviews and determines the scope of the exemption as a matter of law. Second, should that scope potentially encompass the project, the court must determine if the agency relied on substantial evidence to support its determination that the project falls within that exemption. Third, petitioners must then point to evidence indicating that an exception to the exemption applies and an agency must consider such evidence should it be in the record.

“Unusual Circumstances” Exception

Guideline 15300.2 sets forth the exceptions to the categorical exemption classes. These include, relevant here as on which Petitioner relies, is the “significant effect” or “unusual circumstances” exception. This states, “A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.”

The Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, at 1105, explained 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 v. State ex rel. 14th Dist. Ag. Assn.* (App. 3 Dist. 2015) 242 Cal.App.4th 555, at 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 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.]

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.]

Under the first method, therefore, Respondent must consider if there are “unusual circumstances” and the court will uphold the Respondent’s determination if substantial evidence supports it. *Berkeley Hillside*, 1114; *Citizens for Environmental Responsibility*, 574. As explained in *Respect Life South San Francisco v. City of South San Francisco* (2017) 15 Cal.App.5th 449, at 456-457,

“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.]

If the record demonstrates unusual circumstances, 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 reviews under the stricter, less deferential, fair-argument standard. *Berkeley Hillside, supra*; *Citizens for Environmental Responsibility, supra*. In the words of *Citizens for Environmental Responsibility*, at 574, “[t]he 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 the court put it in *Azusa*, at 1207, the unusual circumstances exception applies where “the circumstances of a particular project (i) differ from the general circumstances of the projects covered by a particular categorical exemption, and (ii) those circumstances create an environmental risk that does not exist for the general class of exempt projects.”

Finally, in considering the unusual circumstances exception, the court in *Association for Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, at 734, explained that courts must differentiate between adverse impacts upon particular persons and adverse impacts upon the environment of persons in general. As recognized by the court in *Topanga Beach Renters Assn. v. Department of General Services* (1976) 58 Cal.App.3d 188, 129 Cal.Rptr. 739: “[A]ll government activity has some direct or indirect adverse effect on some persons. The issue is not whether [the project] will adversely affect particular persons but whether [the project] will adversely affect the environment of persons in general.

Whether the Project Qualifies for the Class 3 Exemption

Respondent based the NOE specifically, and solely, on the Guideline 15303(e) Class 3 exemption. This, as noted above, is for “Accessory (appurtenant) structures including garages, carports, patios, swimming pools, and fences.” This is one example of projects falling within the overall Class 3 category, described in Guideline 15303 as encompassing the “construction and location of *limited numbers of new, small facilities or structures*; installation of *small new equipment and facilities in small structures*; and the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure.” Emphasis added. The list of projects falling in the Class 3 exemption is expressly non-exhaustive.

Petitioners contend that the Project is not comparable to the structures listed in Guideline 15303(e). Respondent argues that it clearly falls within the Class 3 category as whole and that the NOE “inadvertently cited subdivision (e)” when it merely intended to rely on Category 3, Guideline 15303, as whole. Petitioners in their reply reiterate their position and assert that projects which Respondent cites as having been found to be within the exemption, such as telecommunications boxes and a 35-foot-tall faux-tree cellular tower are also fundamentally different in nature and scale.

The court in *Don't Cell Our Parks v. City of San Diego* (2018) 21 Cal.App.5th 338, at 360 expressly held that the Class 3 exemption applied to a project consisting of a 35-foot-tall cellular tower in the shape of a faux tree and a related small equipment structure. After noting the “paucity of case law applying this exemption,” it explained,

Here, applying the plain language of Guidelines section 15303, the Project consists of the construction and location of a new small facility or structure, which qualifies for a Class 3 exemption. The Project is a new small facility that will be 534 square feet, including the aboveground branch diameter of the faux tree. While none of the examples of the exemption are directly applicable (ante, fn. 9), the Project is much smaller than a single-family residence, store, motel, office or restaurant. Accordingly, we hold that as a matter of law, the Project falls within the scope of the Class 3 categorical exemptions under the Guidelines.

The *Don't Cell Our Parks* court relied on two other decisions finding the Class 3 exemptions applicable to other types of smaller telecommunications projects. In one of these, *San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012, the court, at 1021-1022, found the Class 3 exemption applicable to 726 telecommunications equipment boxes. In the other, *Robinson v. City and County of San Francisco* (2012) 208 Cal.App.4th 950, at 956, the court found the exemption applicable to the installation of small new telecommunications equipment on numerous

existing small structures in scattered locations. Similarly, in *Aptos Residents Assn. v. County of Santa Cruz* (2018) 20 Cal.App.5th 1039, at 1047, the court found the Class 3 exemption to cover installation of 10 microcell units in various locations.

The Court finds, based on the above authority, that the Class 3 exemption scope encompasses a cellular tower of the type approved in this Project. Petitioners have provided no authority to the contrary and the Court itself has found none to the contrary. The Court also finds substantial evidence in the record supporting Respondent's decision that the Class 3 exemption applies.

The Court preliminarily notes that the NOE's specific reference to subdivision (e) of Guideline 15303 on its face appears inapplicable but that this is not material. The key point is that Respondent found the Project to fall within the Class 3 exemption. Guideline 15303, moreover, as set forth above, expressly states that the subdivisions with different types of projects falling within the exemption merely set forth a list of examples and that the list is expressly non-exhaustive. Therefore, each subdivision is not itself an exemption but merely an example of some types of projects which fall within the exemption. Had Respondent published the NOE based solely on an entirely different categorical exemption, that would involve a different analysis. However, the reference to a specific subdivision in the Class 3 exemption is immaterial here since, again, it is merely an example of an expressly non-exhaustive list and not a binding or specific exemption itself.

This Project is roughly analogous to the tower approved in *Don't Cell Our Parks* and, like that project, on its face it appears comparable to, or more limited than, some of the examples of projects in the Class 3 exemption set forth in Guideline 15303. It is about twice as tall as the *Don't Cell Our Parks* tower and it is not disguised as a tree, but otherwise the two are fundamentally similar. Both are cellular communications towers with appurtenant structures. AR 1:1. This Project Tower is 70 feet tall with antennas, cabling, jumpers, ground-mounted radio cabinets on a raised concrete pad, cable ice bridge, utility backboard and meter in a 50'x50' fenced area with landscaping, with no water or sewer service. AR 1:1. Petitioners assert that this also differs from the one in *Don't Cell Our Parks* because that was in the form of a faux tree and they contend that this is an undisguised tower. However, the record shows that this Tower is also disguised, but in this case as a "faux water tower." AR 1:1, 14-16, 17-18, 3:742. The Board expressly found the water tower design to be preferable because "the faux water tower design is the most fitting design for the site to address aesthetic concerns as it has the most realistic appearance and because water towers are historic features of agricultural lands making them not out of place in the landscape," it will not cause the problem of shedding plastic particles in the area as is common with faux tree, and it "will help the proposed facility blend in with existing rural landscape within the project vicinity." AR 1:14-16; see also IV AR 1114 (staff report explaining that the faux water tower would be

consistent with “typical” agricultural structures in the area). The antennas will be concealed within the faux tank on top of the faux water tower, which will be covered in brown faux wood siding. AR 1:18. The Project Site is 2,500 sq. ft., 50’x50’ and thus contains a total footprint no larger than the small structures expressly given as examples in the Class 3 exemption.

Petitioner’s argument that this fundamentally differs from the examples in Guideline 15303 and in the cases discussed above is unpersuasive. Petitioners rely on two points: the height and the “undisguised” tower appearance. The Tower is twice as tall as the one approved in *Don’t Cell Our Parks*, but that difference is merely one of scale, not type, and this Court finds no basis for finding the limited nature of the greater scale to be significant enough to bring the Project out of the exemption. It is still a single tower with limited appurtenances and the Project contains a small footprint of the fenced-in tower. It is, as the *Don’t Cell Our Parks* court found, “much smaller than a single-family residence, store, motel, office or restaurant,” as examples of other projects which may fit within the exemption. With respect to the appearance, this Court has already explained above that while this is not disguised as a tree, it is clearly not a bare, obvious cellular tower, Respondent having approved a faux-wood-agricultural water tower to blend in in with traditional agricultures structures in the area.

The Court finds that substantial evidence in the record supports Respondent’s determination that the Class 3 exemption applies.

Unusual Circumstances Exception to the Exemptions

Petitioners claim that even if the exemption applies, it falls within the unusual circumstances exception to the exemptions. They point to 1) a blue-line stream flowing into Atascadero Creek, citing to AR I:50, 72-73, 93-95, 112-115, 188; 2) use of synthetic material which could degrade over time and create a risk of pollution affecting the stream and fish habitat, citing to the same pages; 3) significant visual impacts regarding views of mountains, citing to AR I:72-77, II:487-492, 4:931, VI:1532-1536, 1382-1384, VII:163-1633, 1748-1750, 1753; and 4) inconsistency with the local rural agricultural character resulting from a 70-foot “industrial” structure, citing to AR I:209.

With respect to the stream, there is no dispute that the record shows the presence of the stream as Petitioners describe, but nothing shows that this is an unusual circumstance. Petitioners merely note the presence of the stream and its value regarding wildlife habitat. They provide no further evidence or explanation or analysis whatsoever.

Even if evidence showed this to be an unusual circumstance, moreover, Petitioners point to no evidence in the record showing that this circumstance might potentially result in significant impacts while the evidence which the Court has seen demonstrates no possibility of significant impacts. As Respondent notes, Petitioners’ own evidence, a letter in the record opposing the Project, admits that the stream is at

least 200 feet from the Project site and that the Project is “outside the code-required 125’ setback.” AR I:73 This setback, actually 100 feet, is found in Sonoma County Code (“SCC”) 26-65-005 and is on its face a setback designed to provide the very environmental protection which Petitioners claim is required. Here, the record unequivocally demonstrates that the Project is at least twice the required distance.

The Court notes, although Petitioners do not address it, that generally compliance with already-adopted environmental requirements, general plans, and zoning standards which are themselves no longer subject to challenge for violation of CEQA, will shield a project from subsequent CEQA challenges. See, e.g., Guideline 15183, PRC 21083.3 (when addressing a project consistent with existing zoning, community plan or general plan, a CEQA document only needs to consider and address those environmental effects which are “peculiar to the project or parcel” on which the project would be located); Guidelines, Appendix G (generally indicating that CEQA is only concerned with inconsistencies with a regulation, plan, or policy that was adopted to protect the environment in some manner); *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1010–1011.

The other evidence in the record also demonstrates that this characteristic will not result in significant impacts. Petitioners base the claim of impacts regarding the stream on the assertion that the Tower will be built as a faux-tree and evidence that this sort of design may involve degradation of the synthetic materials used to mock foliage, etc. , which may cause ecological harm. Petitioners cite to evidence in the record regarding the breakdown of synthetic materials used in faux-tree towers, with small pieces or particles of the ersatz foliage falling off into streams and soil. However, nothing in the record shows that the Project will use such materials and instead the record unequivocally demonstrates that the Project will *not* use such materials. As explained above, Petitioners themselves expressly *admit* in their papers that the Tower will *not* include such material or faux-tree design. In fact, as also discussed above, Respondent *rejected* the faux-tree option and instead approved the Project disguised as an agricultural water tower. AR I:1, 14-16, 17-18. The Board explained that it did so precisely in part to avoid the very problem which Petitioners cite: the faux-tree material falling off and causing ecological problems. AR I:1, 14-16, 17-18. Respondent expressly found that the water tower design would eliminate those problematic items from the construction. AR I:1, 14-16, 17-18. Petitioners fail to demonstrate to the contrary and provide nothing to show that the adopted design includes such materials which would degrade into the environment.

Finally, even if Petitioners had claimed other causes of impacts related to the stream location, the record does not reveal other possible impacts that the Project may have on the stream and habitat. Petitioners do not mention any other possible impacts regarding the stream, much less cite to any evidence of such possible impacts. The Court’s review of the record, moreover, demonstrates no other

possible cause of an impact resulting from the stream presence and only demonstrates no other possible impacts. For example, the record shows that it does not involve any water usage, sewer usage, or the like, and it is not staffed. AR I:1.

Related to the above alleged circumstance and impacts, Petitioners also separately claim that the use of synthetic faux-tree material is an unusual circumstance which could cause a significant impact. For the reasons explained above, Petitioners also fail to demonstrate an unusual circumstance arising from the use of synthetic materials which will degrade and affect the environment. The record is clear that the Project will not use such materials, demonstrating unequivocally that this possible unusual circumstance does not exist and that there will be no significant impacts as a result.

As for visual impacts of a cellular tower obstructing views of mountains, Petitioners again cite to nothing demonstrating an “unusual” circumstance. They essentially cite only to evidence from project opponents, specifically neighbors of the Project, that some people in the area “enjoy” the views of mountains and the landscape and that the Project will impair that view. AR I:72, 75 (neighbors complaining that “The Tower would obliterate our sought-after and long-enjoyed view”); 266 (referring to “owners choosing to reside in the area based on country atmosphere” and that “Many properties enjoy views of the... Mountains...”). The evidence is vague and generalized, without specific details other than the statements that some residents enjoy these rural or mountain scenes. No evidence whatsoever indicates that this is unusual and in fact the evidence implies that views of agricultural land and mountains characterize the region as a whole. This appears to be a normal, not unusual, characteristic of hilly rural areas in general and of this region. A staff report on visual impacts in fact states, at AR IV:1114 that the Project “is not located within a scenic resource designation” with “moderate” site sensitivity. Respondent correctly notes that the unusual circumstances exception, by definition, will not apply in the absence of unique characteristics in the Project’s setting. Respondent also notes that evidence only indicates that the Project may at most impair the views from a few nearby properties. See, e.g., AR III:745. Petitioners’ evidence discussed above is exceedingly vague and non-specific, lacking actual evidence on the numbers of people or properties affected, or of how widespread the possible effect might be. To the extent that it contains any evidence on this point at all, merely indicates that at most this potential view impairment will only affect “some” nearby residents who enjoy the views from their homes. On the other hand, as RPIs point out in their opposition, the record shows that RPIs provided drone aerial imaging demonstrating that the Project would be visible from fewer than 10 nearby residential properties. AR I:213, II:550, 561, II:636.

Petitioners also fail to point to any evidence which could support a finding that the circumstances might potentially cause a significant impact. As explained above, the record is clear that the Project is not

in a designated scenic resource area and the evidence indicates that the Project may affect the views of at most a few neighbors. Petitioners, once more, fail to provide evidence or analysis showing how this Project could have a significant impact on views of the mountains or other scenery.

Although a “project that interferes with scenic views has an adverse aesthetic effect on the environment,” courts have found a project’s impact on the views of only a small number of people such as a limited number of neighbors not to be a significant impact for purposes of CEQA review. *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 586 (finding no significant impact from the effect on a few neighbors’ views and summarizing case law to that effect). The *Bowman* court expressly noted that impacts on scenic views may qualify as a significant environmental impact under CEQA but found the impacts on the views of a limited number of people in that case not to be a significant impact. It explained,

obstruction of a few private views in a project's immediate vicinity is not generally regarded as a significant environmental impact. [Citations.] The only view at stake in this flat urban neighborhood is that of the Berkeley hills to the east of the Project. It appears that some nearby residents may have that view diminished by the Project, but as the City pointed out, the neighbors to the east will be unaffected, and relatively few to the west will be affected because of the width of Sacramento Street. Given the limited scope of the impact, the Project's effect on scenic views cannot be considered environmentally significant.

The court in *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, at 492–493, distinguished public and private views, explaining that “[u]nder CEQA, the question is whether a project will affect the environment of persons in general, not whether a project will affect particular persons.” Similarly, in *Association for Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, at 734, the court, addressing the unusual circumstances exception to exemptions, expressly found “that no substantial evidence was presented supporting a reasonable possibility that construction of this residence would have a significant effect upon the environment due to unusual circumstances.” Among other things, it noted that the project would affect the views of “only a few of the neighbors,” not “persons generally.”

Finally, and related to the above issue regarding views, Petitioners claim that the Project will cause significant impacts from unusual characteristics because the 70-foot “industrial” structure is inconsistent with the local rural character. They cite to AR I:209, which merely is evidence of the rural agricultural character of the location, a fact not in dispute and one clear from the record in general. See, e.g., AR I:9. As discussed above, this argument conflicts with the evidence in the record which demonstrates that the Project will not be an undisguised cellular tower or “industrial” structure, but will be built as a faux water tower with faux wood siding imitating traditional local agricultural structures.

Petitioners ignore this fact entirely and they present neither evidence from the record nor discussion which could support the finding of either a claimed unusual circumstance or resulting significant impacts.

Respondent also shows that its staff went further by using Visual Assessment Guidelines, which had been adopted for assessment of visual impacts in preparation of Initial Studies and Environmental Impact Reports pursuant to CEQA. AR V:1242-1248. Respondent's staff did not ignore the possibility of visual impacts and used these adopted guidelines to assess the possibility of such impacts, determining that the impacts would be less than significant. AR IV:1113-1114, V:1316-1317. Petitioners fail to address this entirely.

Failure to Analyze Environmental Impacts Before Claiming an Exemption

Petitioners next contend that Respondent violated CEQA, and failed to proceed in the manner required by law, because it found the Project to fall within an exemption without studying the environmental impacts of the Project. This argument fundamentally fails as a matter of law. As explained above, if an agency finds a Project to be within an exemption, aside from the issue of whether that determination itself complies with CEQA standards as addressed above, no further environmental review is necessary. This is the very purpose of the exemptions and an inherent determination in the development of the exemptions in the first place. To repeat the authority discussed above, as the court in *Citizens for Environmental Responsibility, supra*, 242 Cal.App.4th at 568, explained, once an agency finds a project to be exempt from CEQA, “no further agency evaluation under CEQA is required....” 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.]”

Project Description

Petitioners claim that the Project design was a vague “moving target” which changed multiple times and made it impossible to determine exactly what was being approved. In their opening brief, they only argue that this violated standards regarding zoning and this impeded with the hearings. However, in their reply they also contend that this violated CEQA's requirement that there be a stable, accurate project description. Since they never argued this CEQA issue in their opening brief, they could arguably be foreclosed from raising it in their reply. Nonetheless, Petitioners did raise the basic issue of the alleged unclear, changing Project design in their opening brief, even if they did not raise it as a CEQA issue. The Court also notes that the petition itself does allege this issue as a violation of CEQA. The Court therefore finds it appropriate to consider the merits of this argument.

Under CEQA, an EIR must contain an accurate and consistent project description. Guideline 15124. As stated in *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3^d 185, at 193, “[a]n accurate, stable

and finite project description is the *sine qua non* of an informative and legally sufficient EIR.” The clear and logical reason is that a clear, consistent description “is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity.” *McQueen v. Board of Directors of the Mid-Peninsula Regional Open Space District* (1988) 202 Cal.App.3d 1136, 1143 (discussing a notice of exemption). Only this way can those involved, particularly outsiders, assess the impacts, benefits, mitigation, and alternatives. *County of Inyo, supra*, 192-193.

On the other hand, the CEQA process should normally lead to changes in the project to reduce environmental impacts and the like. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736-737; *County of Inyo, supra*. After all, the “CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights may emerge... evoking revision of the original proposal.” *Kings County Farm Bureau*, 736-737 (quoting *County of Inyo, supra*).

Petitioners provide no evidence or explanation for these assertions whatsoever. They do not discuss how the decision was “ill-defined” other pointing to the decision to adopt the water tower design instead of the original faux tree design.

RPIs originally presented the option of a faux pine tree design but subsequently presented three alternative designs for consideration and the record contains substantial documentation on these designs, with specifications, detailed plans, concept images, visual analyses, and other information on all of the alternatives. AR 1:1, 14-16, 17-18, 51-61, II:380-384 526-527, III:742, IV:1113-1114, V:1154-1159, 1251-1253, 1315-1318, IX2121, 2124, 2129, 2134-2135, 2137. RPIs also lowered the height from 80 feet as originally proposed to 70 feet in response to requests and concerns about the height. AR I:213, III:596, 701. Prior to the BZA hearing, RPIs presented the alternative faux eucalyptus and later included the alternatives for a faux windmill and faux water tower. *Ibid.* As noted above, Respondent made findings to support this decision, findings which in fact were directly intended to avoid the very problems of which Petitioners complain. AR 1:1, 14-16, 17-18, 3:742. The Board expressly found the water tower design to be preferable because “the faux water tower design is the most fitting design for the site to address aesthetic concerns as it has the most realistic appearance and because water towers are historic features of agricultural lands making them not out of place in the landscape,” it will not cause the problem of shedding plastic particles in the area as is common with faux trees, and it “will help the proposed facility blend in with existing rural landscape within the project vicinity.” AR 1:14-16; see also IV AR 1114 (staff report explaining that the faux water tower would be consistent with “typical” agricultural structures in the area). Other parts of the record show that, in addition to a bare cellular tower, all four different designs were presented as alternative options from which the Board would choose. See, e.g., AR V:1154-

1159, 1251-1253, 1315-1318. The record is clear about all of these designs, showing that they were very specific designs for a faux pine tree, faux eucalyptus tree, and faux windmill, along with the faux water tower, all with plan specifications, pictures, and detailed descriptions of each. It is also clear, as discussed, that the Board chose the water tower design.

The result is that the Court can find no support for Petitioners' claims. It is certain what the Board approved, contrary to Petitioners' claims. Nothing shows that the decision to choose the water tower style was arbitrary, but that the Board made a considered decision to adopt one of three alternatives which had been presented in detail and that it did so to avoid both pollution problems from concerns over the faux-tree material and visual concerns of having a bare cellular tower, adopting a style which the record shows to be consistent with traditional structure in the area.

The Court further points out that under CEQA, as long as the record is clear about what the plans are, what the options are, and what plan is being adopted, it is both legal and in fact preferable that project review should result in changes to a project by the time of the final decision, in order to accommodate concerns being raised in the proceedings. That all that happened here: RPIS presented a single, well-defined project consisting of the cellular Tower and they presented four different disguise options for Respondent to choose from. They presented detailed, clear, consistent descriptions of each option. Respondent considered issues of aesthetics and pollution which the public raised about some of the design options, and Respondent chose the option which it felt best ameliorated those concerns.

The Court finds that Respondent considered and adopted a project with a clear, stable description in compliance with CEQA.

Conclusion: CEQA Claim

The Court finds that Respondent did not violate CEQA because substantial evidence in the record supports the finding that the Project falls within the Class 3 categorical exemption; Petitioner failed to meet its burden of demonstrating that the unusual circumstances exception applies; and because Respondent did not need to conduct additional environmental review upon finding the Project to be exempt from CEQA.

Decision to Overturn the BZA's Denial of the Project Application

Petitioners' next argument, outside the scope of CEQA, is that the Board abused its discretion by overturning the BZA's denial of the Project application without substantial evidence to support that decision. Although CEQA does not apply to this argument, it is subject to the authority set forth above for administrative mandamus. Petitioners effectively acknowledge this in their assertions but confuse the issue by relying on equivalent federal authority rather than discussing CCP section 1094.5 and applicable California authority applying and interpreting review under that provision. Petitioners refer to "California

law” but cite to a range of federal decisions without explaining why, or how such authority could control. Even if the authority did control, the Court finds no material difference from California law regarding the standard for reviewing agency decisions which would compel a different outcome.

Substantial Evidence Supporting the BZA Decision

Petitioners contend that substantial evidence supported the BZA decision which the Board later overturned. As Respondent argues, this is irrelevant. The decision at issue is the Board’s decision, not the BZA decision, and this Court must determine whether substantial evidence supported the Board’s decision. Whether there is contrary substantial evidence, or whether substantial evidence supported the BZA decision, are factors which are themselves irrelevant. The Court must determine if substantial evidence supported the Board’s decision and uphold if it the Court so finds, any contrary evidence notwithstanding. Petitioners cite to no authority, and provide no legal analysis, demonstrating that the sufficiency of evidence supporting the BZA decision has any bearing. As set forth in the authority above, and in the authority which Petitioners themselves cite throughout their brief, this Court reviews the *Board’s* decision to determine if it proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. This involves a determination as to whether respondent proceeded in the manner required by law and whether substantial evidence supports the findings, regardless of contrary evidence.

As part of this argument, Petitioners also contend that the Board’s review did not sufficiently consider feasible alternatives, but this argument is not persuasive and also lacks any legal basis. Petitioners cite to no authority indicating that the Board was required to consider such alternatives. This argument instead appears to be drawn wholly from CEQA, which does require consideration of alternatives when conducting environmental review of projects subject to CEQA, as in an EIR. As already discussed, Respondent found this Project to be exempt from CEQA, obviating the need to conduct such review, and this Court has determined that the record supports this decision pursuant to the applicable standard of review.

Petitioners argue that the Board failed to address the BZA findings. However, they cite to no authority showing that the Board was required to do so and instead cite only authority showing that reasons and substantial evidence must support the Board’s decision, as already discussed above. That is not the same thing as requiring the Board to address the BZA findings. In addition to the lack of authority for their assertion, Petitioners also provide no explanation or citation to the record that the failure to address the BZA findings was required or otherwise would have compelled a different outcome.

After all, as Respondent contends, it is well-established that a board or council of a local governmental entity may typically conduct independent, de novo review of the decisions of the agency’s

own lower boards. See, e.g., *Anderson v. Pittenger* (1961) 197 Cal.App.2d 188, at 189-195. This is true, at least, where the agency's own administrative provisions or ordinance allow for such review. *Ibid.* The court in *Anderson* stated that the city council there could conduct de novo review of a lower commission's findings based on the provisions of its own ordinance. Here, Respondent shows that SCC section 26-92-050 requires the Board to conduct a duly noticed public hearing. The Board's Rules of Procedure 21 and 22, subject of judicial notice, require the Board to allow everyone wishing to speak at the hearing to be heard and to base the decision solely on the public record and the information provided at the hearing.

The Supreme Court has long made it clear that, in general, an agency's interpretation and application of its own laws and regulations is entitled to great deference. *In re Cabrera* (2012) 55 Cal.4th 683, 690; *Environmental Protection Information Ctr. v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 490 ("*EPIC*") (deferring to agency's interpretation of its own regulation governing information a timber company needed to submit); *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11-13 (discussing deference, history, and approaches). As the court stated in *EPIC*, and repeated in *In re Cabrera*, "[a]s a general matter, courts will be deferential to government agency interpretations of their own regulations, particularly when the interpretation involves matters within the agency's expertise and does not plainly conflict with a statutory mandate.... [W]e will not disturb the agency's determination without a demonstration that it is clearly unreasonable."

Courts, on the other hand, give no deference to an agency's interpretation which is *facially* erroneous, or *facially* contrary to language which the court finds to be clear and unambiguous. See, e.g., *Department of Corrections & Rehabilitation v. State Personnel Bd.* (2016) 247 Cal.App.4th 700, 708; *Advanced Real Estate Services, Inc. v. Sup.Ct. (Calif. Dept. of Gen. Services)* (2011) 196 Cal.App.4th 338, 350.

Board's Understanding of the Legal Standard

Petitioners argue that the Board misunderstood the legal standard, incorrectly interpreting the law, apparently federal law governing telecommunications, to require the Board to approve the Project. They cite to AR IX:2162-2165, part of the transcript of the Board hearing.

Petitioners cite to no specific portion or language of the record and do not explain why they make this assertion, stating only that they 'allege that the Board misunderstood the legal standard for reviewing cell tower projects, believing it must approve all such projects rather than exercising proper discretion. (AR Vol. IX 002162-002165.) This misunderstanding, if true, would constitute failure to "proceed in a manner required by law,"....' OB 10:27-11:3. Accordingly, their own discussion is vague and inherently indicates speculation.

Nothing in this transcript, moreover, supports Petitioner’s vague assertion. One supervisor mentioned that federal and state law have “preempted” a local agency from having “full discretion” over such projects “in different areas,” but that is all. Otherwise, county counsel set forth a legal standard regarding a high evidentiary requirement and shifting burden with respect to denying a project where there are service gaps and no alternative sites, so that the “recommended action is to approve” unless substantial evidence contradicts the conclusions. This does involve some discussion of the applicable legal standard but does not in any way demonstrate that the Board believed that it had no discretion and was required to approve the Project. It actually shows that the Board believed, and was advised, that it did have discretion, but merely that there were limits to this discretion. In fact, the full totality of the record clearly demonstrates that the Board believed it had the power to exercise discretion and that it in fact did so. One example of this is the determination to require the faux water tower design rather than a faux tree or plain tower, discussed above. Petitioner’s brief, vague, and speculative argument fails to address the legal standards discussed in the transcript, much less demonstrate that there was an error of law or that any error was prejudicial.

In their reply, Petitioners expressly acknowledge that federal law partly preempts and restricts aspects of state and local regulation intruding on telecommunications. They cite to 47 USC section 253. This states, in pertinent part,

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Petitioners also correctly rely on *City of Rancho Palos Verdes v. Abrams* (2002) 101

Cal.App.4th 367 for the proposition that “California authority recognizes federal preemption in the distinct context of local attempts to regulate radio frequencies and technical frequency allocation-matters within exclusive Federal Communications Commission jurisdiction.” In *City of Rancho Palos Verdes*, at 376, the court of appeal held that federal law preempted the trial court’s injunction against a radio operator because the injunction conflicted with federal regulation, which preempts conflicting state or local regulation.

In short, the authority and legal standards which Petitioners set forth in their reply basically are consistent with the legal discussion set forth in the transcript which Petitioners cite in their opening brief. This underscores the determination that nothing in the record shows that Respondent misunderstood the legal standards, but in fact apparently had an accurate picture of the standards.

Petitioners then contend in their reply that despite the preemption on certain aspects of telecommunications projects or operations, the issues regarding setbacks and visual compatibility are traditional local land-use regulation which federal law does not preempt. This does not seem to be in dispute but, as explained above, the record is clear that Respondent exercised its discretion on exactly these issues, specifically it found the Project to comply with the setback requirements based on substantial evidence, and used its discretion to determine the visual style of the Project by choosing a design which, in its view, was most compatible with the locale and had the least visual impact. Nothing in the record contradicts this or indicates that Respondent abdicated its decision-making powers on these issues.

“Changing” Project Design

As noted above, Petitioners assert that the Board arbitrarily changed the Project design by choosing the water tower design over the plain cellular tower and faux tree, claiming that this “made it unclear what was actually approved, further demonstrating the arbitrary nature of the Board’s decision.” OB 11:11-13. They add the vague and conclusory statement, wholly devoid of evidence or explanation, that the Board’s approval of the “project with an ill-defined design suggests that it failed to consider important aspects of the problem and offered an explanation that runs counter to the evidence.” OB 11:19-22.

Petitioners provide no evidence or explanation for any of these assertions. They do not discuss how the decision was “ill-defined” other than pointing to the decision to adopt the water tower design. As

noted above, Respondent made findings to support this decision, findings which in fact were directly intended to avoid the very problems of appearance of which Petitioners complain. AR 1:1, 14-16, 17-18, 3:742. The Board expressly found the water tower design to be preferable because “the faux water tower design is the most fitting design for the site to address aesthetic concerns as it has the most realistic appearance and because water towers are historic features of agricultural lands making them not out of place in the landscape,” it will not cause the problem of shedding plastic particles in the area as is common with faux tree, and it “will help the proposed facility blend in with existing rural landscape within the project vicinity.” AR 1:14-16; see also IV AR 1114 (staff report explaining that the faux water tower would be consistent with “typical” agricultural structures in the area). Other parts of the record show that four different designs, including also a windmill and two different tree styles, were presented as alternative options from which the Board could choose, with plan specifications and detailed descriptions of each. See, e.g., AR V:1154-1159, 1251-1253, 1315-1318. It is also clear, as discussed, that the Board chose the water tower design.

The result is that the Court can find no support for Petitioners’ claims. It is certain what the Board approved, contrary to Petitioners’ claims. Nothing shows that the decision to choose the water tower style was arbitrary, but that the Board made a considered decision to adopt one of three alternatives which had been presented in detail and that it did so to avoid both pollution problems from concerns over the faux-tree material and visual concerns of having a bare cellular tower, adopting a style which the record shows to be consistent with traditional structure in the area.

Due Process Concerns

Petitioners next claim vaguely that there “due process concerns,” but they fail to explain this and do nothing more than make an unsupported, unexplained reference to the allegation that substantial evidence does not support the decision. This, accordingly, seems to provide no other actual alleged violation or defect in the Board’s decision.

Alleged Violation of Zoning Requirements

Whether the Board Owed Deference to the BZA Decision

Although their discussion is not entirely clear, Petitioners in their opening brief apparently contend that the Board owed deference to the BZA decision but this argument is devoid of support under the law or in the record and lacks any explanation of why it would compel the Board to affirm the BZA decision. Petitioners certainly go out of their way to argue that local agencies are accorded great deference in their section claiming that “Local Zoning Authority Is Entitled to Substantial Deference,” an assertion which would otherwise support Respondent’s general position. OB 12:3-19. Respondent at least views Petitioners as making this argument and, if Petitioners are in fact taking this position, it is

unpersuasive. At the same time, the Court notes that Petitioners in their reply seem to explain that they are not making such an argument but are instead merely arguing that the BZA findings are part of the evidence in the record which conflict with the Board's decision. The Court finds it appropriate to address this issue briefly nonetheless.

If, as their opening brief appears to indicate, Petitioners feel that the Board should have employed a standard of review akin to that of administrative mandamus, this is unpersuasive. Petitioners cite to no authority supporting such a determination and this Court is aware of none. After all, as discussed above, it is well-established that a board or council of a local governmental entity may conduct independent, do novo review of the decisions of the agency's own lower boards where the agency's own administrative provisions or ordinances allow for such review. Here, that appears to be the case. As also discussed above, local agencies are accorded deference, except where facially incorrect, in their interpretation and application of their own rules and ordinances.

Petitioners cite only to authority generally showing that local agencies are accorded great deference in their regulation of land use through zoning and other ordinances, basically an aspect of the deference accorded to agencies when they are interpreting their own laws and rules. This may be true, but if anything, this applies to the power of the Board and nothing about this shows that the Board owes such deference to the findings of one of its own lower commissions or bodies.

Respondent also notes that the record fails to show that Petitioners raised this argument in the proceedings before the Board, thereby failing to exhaust administrative remedies regarding it, with the result that they waived the right to bring this argument now. As explained above, a petitioner may not seek a writ based on arguments or issues not made in the underlying proceedings, absent a showing as to why such as where the evidence or issue was hidden or unknown, or where the petitioner can demonstrate futility. Respondent also notes that Govt. Code section 65009(b)(1) states that in actions seeking to set aside or otherwise attack a decision of a public agency, the issues raised are limited to those raised in the underlying proceedings.

Failure to Comply with Specific Zoning Requirements

Petitioners next argue that the Project does not comply with aspects of Respondent's own zoning requirements. Again, as both the law set forth above and Petitioners' own cited authority at OB 12:3-19 demonstrate, the Court must accord Respondent great deference in interpreting and applying its own zoning rules and ordinances, unless they are facially incorrect.

In this section, Petitioners first assert that the Project violates the requirement for a 100-foot setback from the blue-line stream. This argument is *wholly* without support and even Petitioners' own assertions inherently contradict the claim. Petitioners cite to the ordinance provision including this

setback, discussed above, and they cite to portions of the record showing the stream, before asserting that the Project violates this requirement, without citing to any evidence in the record supporting the assertion.

The record and Petitioners' own admission unequivocally demonstrate that the Project complies with the setback requirement. The record is clear that the Project complies with this requirement because the Project is at least 200 feet from the blue-line stream, and therefore at least twice the distance which the ordinance requires.

AR I:26, 27, 36, 50, 72-73, 93-95, 188, 211-212, 266-267. Petitioners' own evidence, letters in the record opposing the Project, admit that the stream is at least 200 feet from the Project site, the Project is "outside the code-required 125' [sic] setback," and the Project is "approximately 1,500 ft from the nearest waterway, Atascadero Creek." AR I:73, 93.

Petitioners also argue that the Project fails to meet visual compatibility requirements that such facilities be "located, designed, and screened to blend with the existing natural or built surroundings so as to minimize visual impacts and to achieve compatibility with neighboring residences and the character of the community to the extent feasible considering the technological requirements of the proposed telecommunication service." This is based on SCC 26-88-130(a)(3)(ii). They cite to the BZA finding that the design and appearance would make it "dominant", but this is simply the BZA's own interpretation of the Project and, as discussed above, this Court must consider the Board's determinations and the evidence before the Board.

As already discussed above, the Board chose to approve the faux water tower design expressly because it would fit in stylistically with the local traditional agricultural structures. AR I:1, 9,-10, 14-16, 17-18. Respondent expressly found that the water tower design would be consistent and visually superior to the alternatives, which it rejected precisely in order to further the very goal which Petitioners cite. As also noted above, the record is unequivocal that this is an agricultural setting where agricultural structures such as water towers are traditionally common. A staff report found the water tower design, with setbacks and vegetation landscaping or screening, sufficient to make the Project stylistically appropriate and consistent with the zoning standard. AR I:35. As noted above, the applicant proposed four different designs to disguise the Tower, in addition to the option of a plain tower, with two different trees, the water tower, and a windmill tower. AR V:1154-1159, 1251-1253, 1315-1318. Respondent adopted the water tower specifically because it would be the least dominant and most stylistically compatible with the area, a determination which Petitioners themselves apparently admit is accorded great deference. In order to lessen the visual impact, Respondent also chose a shorter tower, so that RPIS reduced the height from an original 80' tower to the adopted 70' height. AR V:1147. Petitioners cite to nothing in the local

ordinance or the record showing that any of this is facially incorrect and they provide no analysis to support such a conclusion.

Alleged Failure to Adequately Address Zoning Compliance Issues

Petitioners argue that the Board’s decision “fails to adequately address the project’s non-compliance with zoning requirements.” OB 13:23-14:11. This essentially is a repeat of the above arguments, claiming that no substantial evidence supports the Board’s determination that the Project complies with zoning requirements despite the BZA’s determination that it did not comply. As discussed above, the record clearly demonstrates at the very minimum a reasonable basis for finding the Project to comply with the zoning requirements, based on substantial evidence. In fact, as also pointed out above, the record appears even to demonstrate unequivocally that the Project complies. What the BZA determined, once more, is not material since the issue is whether the Board had substantial evidence to support its findings and final decision.

Conclusion: Non-CEQA/Zoning Issues

For the reasons explained above, the Court DENIES the petition on the non-CEQA claims as well.

Conclusion

The prevailing party shall prepare and serve a proposed order consistent with this tentative ruling within five days of the date set for argument of this matter. The opposing party shall inform the preparing party of objections as to form, if any, or whether the form of order is approved, within five days of receipt of the proposed order. The preparing party shall submit the proposed order and any objections to the Court in accordance with California Rules of Court, Rule 3.1312.