SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY
MARTINEZ, CA
DEPARTMENT 39
HEARING DATE: 3/5/2025

1. 9:00 AM CASE NUMBER: MSN23-2201
CASE NAME: SANDIA PEARSON VS MORAGA-ORINDA FIRE DISTRICT
SPECIAL SET HEARING RE: PETITION FOR WRIT OF MANDATE
FILED BY:
TENTATIVE RULING:

Hearing required. Unless otherwise stated, this matter will be taken under submission after the hearing. Oral argument will proceed as it ordinarily would for a trial, i.e., petitioners, followed by respondent, followed by petitioners' rebuttal. A draft of the Court's tentative ruling is provided below so that the parties may use it as a guide for oral argument:

Orinda residents, Sandia Pearson and Anita K. Pearson, bring this action against Moraga-Orinda Fire District ("District") to compel the District to follow requirements of the California Environmental Quality Act, Public Resources Code, § 21000 *et seq*. ("CEQA") and its implementing regulations, with respect to Amended Fuel Break Ordinance No. 23-08 ("Ordinance"). They contend that, contrary to the District's findings, the Ordinance should have undergone environmental review. The Court, having reviewed the arguments and the administrative record, agrees with respondent that Ordinance No. 23-08 is subject to CEQA exemptions, specifically the class 7 and 8 categorical exemptions, and the statutory emergency exemption. Accordingly the writ of mandate is **denied**.

A. INTRODUCTION

On September 20, 2023, the District approved Amended Fuel Break Ordinance No. 23-08, which adopted certain requirements for fuel breaks on certain parcels within the District boundaries. Upon approving the Ordinance, on September 21, 2023, the District filed a Notice of Exemption finding the Ordinance to be exempt under CEQA. The exemptions cited by the District include the "Category 7" and "Category 8" exemptions (concerning protection of natural resources and the environment), the "Emergency Exemption," and the "Common Sense Exemption."

Anita K. Pearson and Sandia ("Sandy") Pearson, filed this action in October 2023. At the time, they were individuals residing in Orinda, California, whose family trust owned a 9.5-acre parcel of undeveloped property in Orinda which they maintained as natural habitat for native species. (Verified Petition, ¶1.) When Anita passed away, her adult children filed the appropriate documentation to continue this action on her behalf. Accordingly, Sandia Pearson, Peter K. Pearson, and Carol Pearson Ralph are collectively referred to herein as "petitioners."

Petitioners challenge the adoption of the Ordinance and, in particular, the District's conclusion that the Ordinance is exempt from CEQA. They seek a writ of mandate ordering the District to vacate its adoption of the Ordinance and, at a minimum, conduct an initial study regarding environmental impacts and mitigation measures. For the reasons stated below, the petition is denied.

B. CEQA

"CEQA is a comprehensive scheme designed to provide long-term protection to the environment." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112.) It achieves this goal not by directly regulating activities that could adversely impact the environment, but instead by requiring public agencies to inform themselves about and consider the environmental effects of projects that they carry out or approve. (See *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 379-80; Cal. Code Regs., tit. 14, hereinafter "Guidelines," §.15002, subd. (a).) CEQA does not generally compel a particular environmental outcome. Instead, its purpose is "to compel government at all levels to make decisions with environmental consequences in mind." (Guidelines, § 15003, subd. (g) ; see also *Prentiss v. City of South Pasadena* (1993) 15 Cal.App.4th 85, 89 [purpose of CEQA "is to assist public agencies in evaluating whether projects which they have discretion to approve or disapprove will have a significant adverse effect upon the environment."].) CEQA also gives the public the opportunity to review and comment on the adequacy of the government's environmental review. (§ 21092 [public notice requirements]; § 21082,1, subd. (b) [public comment requirements].) CEQA is thus designed to force public agencies to think about the environmental effects of their activities in a meaningful way, to mitigate those effects where feasible, and to give the public access to the decision-making process. (Pub. Resources Code, § 21000, subd. (g), § 21001, subd. (d), § 21002; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.) CEQA establishes what has been described as "a three-tier process" to ensure compliance. (*Muzzy Ranch, supra*, 41 Cal.4l at 380-81.) This case involves only the second tier.

1. The first tier - is it a project?

The "first tier" is jurisdictional. (*Muzzy Ranch, supra*, 41 Cal.4th at 380.) CEQA only applies to "projects" undertaken by public agencies. "An activity that is not a 'project'… is not subject to CEQA." (*Id*.) A "project" includes any activity undertaken by a public agency "which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment," (§ 21065; see also Guidelines, § 15378.) "The adoption of a rule or regulation can be a project subject to CEQA." (*California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist*. (2009) 178 Cal.App.4th 1225, 1240.) In this case, no one contends that the Ordinance is not a project for purposes of CEQA.

2. The second tier - is the project exempt?

The "second tier" concerns exemptions. Certain activities that might otherwise meet the definition of a project are nonetheless exempt from CEQA. For example, the Legislature has provided that CEQA does not apply to "[s]pecific actions necessary to prevent or mitigate an emergency." (Pub. Resources Code, § 21080, subd. (b)(4).) Such exemptions are known as "statutory exemptions." (Guidelines, § 15061, subd. (b)(1); *World Business Academy v. State Lands Com.* (2018) 24 Cal.App.5th 476, 490 ["statutory exemptions are absolute exemptions enacted by the Legislature" and "Projects and activities can be made wholly or partially exempt, as the Legislature chooses, regardless of their

potential for adverse [environmental] consequences.’].)

CEQA also does not apply to certain "classes of projects" that the Secretary of the Natural Resources Agency has found do not have a significant effect on the environment. (Pub. Resources Code, § 21084, subd. (a).) Examples include “minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry and agricultural purposes” or “actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment.” (Guidelines, §§ 15304, 15307.) These exemptions, which are found in the CEQA Guidelines, are known as "categorical exemptions." (Guidelines, § 15061, subd. (b)(2), §§ 15300-15332; see also *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115.)

Finally, projects which are not statutorily or categorically exempt may nonetheless still be exempt if "[t]he activity is covered by the common sense exemption that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA." (Guidelines, § 15061, subd. (b)(3).) This so-called common sense exemption was adopted "[t]o guard against the possibility that some obviously exempt type of project, which was not listed in compiling the categorical exemptions, might be required needlessly to comply with the requirements of CEQA." (*Myers v. Board of Supervisors* (1976) 58 Cal.App.3d 413, 425.) It applies "only in those situations where its absolute and precise language clearly applies." (*Id*.)

"If a public agency properly finds that a project is exempt from CEQA, no further environmental review is necessary. The agency need only prepare and file a notice of exemption[.]" (*Muzzy Ranch, supra,* 41 Cal.4th at 380, citations omitted.) This is what the District did in this case.

3. The third tier - what are the environmental effects of the project?

If a project is not exempt, the agency must proceed to the third tier and conduct an “initial study” to determine whether the project may have a significant effect on the environment. (Guidelines, § 15063, subd. (a).) If the answer is no, the agency must prepare a "negative declaration" describing the reasons supporting that determination. (Guidelines, § 15063, subd. (b) (2) ; § 21080, subd. (c); *Friends of Westwood v. City of L.A.* (1987) 191 Cal.App.3d 259, 265.) If the answer is yes, the agency must prepare an "environmental impact report," or EIR, on the project. (Guidelines, § 15063, subd. (b) (1), § 15064; *Friends of Westwood, supra*, 191 Cal.App.3d at 265.)

Here, it is undisputed that the District did not conduct an initial study or prepare a negative declaration or an EIR because it determined the project is exempt from CEQA. The question presented is thus whether the District properly found the Ordinance 23-08 exempt from CEQA. (*Muzzy Ranch, supra*, 41 Cal.4th at 380.)

C. THE CHALLENGED ACTION

Ordinance 23-08, adopted in September 2023, is the subject of this litigation. The Ordinance requires that certain properties within the District be managed to include fuel breaks, as outlined in the Fire Safe Regulations. (AR00125.) Specific requirements include annually cutting grass to less than three inches, removing bark, mulch, seasonal and recurrent grasses, weeds, stubble, dry leaves, dry needles, or any other vegetation identified by the Fire Code Official, dead and dying trees, trimming tree limbs to a designated height, and ensuring adequate spacing between bushes and shrubs. (AR00125-AR00126.) Ordinance 23-08 incorporates a definition of fuel breaks from the Fire Safe Regulations, which define fuel break as, "a strategically located area where the volume and arrangement of vegetation has been managed to limit fire intensity, fire severity, rate of spread, crown fire potential, and/or ember production." (AR00115.)

Earlier in 2023, the District had adopted Ordinance No. 23-04, which was similar to the challenged Ordinance, requiring property owners to create 100-foot fuel breaks around the perimeter of parcels. (AR02116.) This 100-foot requirement replaced the previously appliable 30-foot requirement and remains the width required in the challenged Ordinance. (AR01681-82, AR01684.)

On June 7, 2023, the District issued a "Pre-Citation Notification" to Orinda resident Anita K. Pearson, demanding that she comply with Ordinance 23-04. In response, Ms. Pearson pointed out that no notice of CEQA exemption had been filed, and she threatened suit. Instead of defending Ordinance 23-04, the District opted to repeal Ordinance 23-04 and adopt Ordinance, 23-08 in September. The fuel breaks required by the Ordinance are in addition to the 100-foot defensible space requirement previously established by Ordinance No. 23-03 and requiring certain types of vegetation management around structures. (AR01500.)

The Ordinance states, "[f]uel breaks are a critical tool intended to reduce fire spread rates and intensity to allow the timely containment of wildfire. By interrupting the continuity of the fuel beds through which fire spreads, their presence decreases the potential for small fires spreading to the lands of another and slows the rate at which large fires travel, buying time for orderly evacuations and the aggregation of an effective firefighting response for the protection of lives and structures." (AR00073.)

On affected parcels, the Ordinance requires grasses to be cut to less than three inches, removal of all hazardous vegetation, removal of non-irrigated brush to provide certain spacing (dependent on the slope and height of the shrubs), removal of all combustible material, removal of dead and dying trees, maintenance of trees to remove ladder fuels, etc. The requirements are not to impact any environmental resources of concern, and must be interpreted to avoid taking of endangered species and removal of healthy trees. (AR00082-84.) The Ordinance provides for a modification process by which the District's approval may be sought to allow owners of individual parcels to implement the Ordinance in ways that are more individualized and account for, among other things, "environmental concerns." (See AR00084.)

On September 21, 2023, District filed a Notice of Exemption, which declared the Ordinance

exempt from CEQA under sections 15307 and 15308 of the CEQA Guidelines (categorical exemptions); section 15269 of the CEQA Guidelines and Public Resources Code section 21080 (a)(4) (emergency exemption), and CEQA Guidelines section 15061 (b)(3) (common sense exemption). In the notice, the District referred to its attached memoranda in support of the Ordinance, and its responses to select public comments. (AR00001.)

On October 25, 2023 the verified petition for writ of mandate was filed in this Court. Petitioners alleged two causes of action for writ of mandate: the first based on alleged violations of CEQA as a result of the notices of exemption, and the second based on the alleged improper inclusion of a certain document in the record. Petitioners dismissed their second cause of action on August 27, 2024.

Petitioners argue that none of the exemptions cited here apply. Further, even if the categorical exemptions could apply, there are exceptions (special circumstances and cumulative impacts) that prevent such exemption from CEQA. The District responds that its Ordinance and the related exemption findings are amply supported. Neither party has raised any question as to exhaustion of administrative remedies so, to the extent any exhaustion was necessary, the Court assumes the requirements were met.

D. REQUEST FOR JUDICIAL NOTICE

Judicial review of the Commission's action is limited to a review of the evidence in the administrative record. (See *Sierra Club v. California Coastal Com.* (2005) 35 Cal4th 839, 863.) The administrative record in this case was prepared and lodged by petitioners and certified by the District. (See Notice of Election to Prepare Administrative Record, filed Oct. 25, 2023; see also § 21167.6, subd. (b)(2) ["The plaintiff or petitioner may elect to prepare the record of proceedings… subject to certification of its accuracy by the public agency"].) When ruling on the petition, the Court does not and cannot - consider any documents other than those in the administrative record with which it was provided.

Nonetheless, petitioners properly request judicial notice in support of their reply brief, of a one-page document entitled, “Notice of Exemption” for the “State Minimum Fire Safe Regulations 2021,” issued by the California Board of Forestry and Fire Protection on August 19, 2022. The unopposed request is **granted**.

E. STANDARD OF REVIEW

In reviewing an agency's decision that a project is within a categorical exemption, we determine only whether the decision is supported by substantial evidence. (*California Construction & Industrial Materials Assn. v. County of Ventura* (2023) 97 Cal.App.5th 1, 12, hereinafter *“California Construction*.”) This means the reviewing court, 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 the District’s finding if there is any substantial evidence, contradicted or uncontradicted, to

support it. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1114-1115.)

"[W]hether the Project will have a significant effect on the environment is not the standard for determining whether it falls within a categorical exemption." (*Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 711, hereinafter "*Save Our Big Trees*.") To defeat a categorical exemption determination, petitioners must show either that the project does not fit the categorical exemption, or that it is subject to an exception. (*California Construction, supra*, at 13, citing *Berkeley Hillside, supra*, 60 Cal.4th at 1102.)

Under the California Public Resources Code §§21080(e) and 21082.2(c), and the Guidelines, §§15064(f)(5) and 15384, the following constitute substantial evidence: facts; reasonable assumptions predicated on facts; and expert opinions supported by facts. Substantial evidence does not include argument; speculation; unsubstantiated opinion or narrative; clearly inaccurate or erroneous evidence; evidence that is not credible; and evidence of social and economic impacts that do not contribute to, and are not caused by, physical impacts on the environment. (*Ibid*.)

F. ANALYSIS

1. Categorical Exemptions - Classes 7 and 8

The two categorical exemptions claimed here, classes 7 and 8, are nearly identical, with the former focusing on protection of "natural resources" and the latter on "the environment." Specifically, class 7 consists of "actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment." (Guidelines, § 15307.) "Class 8 is similar and consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment." (Guidelines, § 15308.)

As noted by the District, the exemptions do not require the agency to show its project assures the protection of the entire environment. The plain language of the class 7 exemption only requires the agency to show the Project assures the protection of "a natural resource." (*California Construction, supra,* 97 Cal.App.5th at 12, citing Guidelines, § 15307.) Similarly, the language of the class 8 exemption only requires the agency to show the Project assures the protection of "the environment."

One significant case, discussed by both sides here is *Save Our Big Trees, supra,* 241 Cal.App.4th 694. There, the court held that the City of Santa Cruz improperly relied on the category 7 exemption in amending its heritage tree regulations. The court's ruling had to do with the City's attempt to simultaneously reduce protections for some trees while strengthening protections for others. (*Id*. at 708-712.) The scheme, on the whole, protected "fewer heritage trees more effectively," leading the Court to conclude the City failed to carry its burden to demonstrate with substantial evidence that the Project will assure the maintenance, restoration, or enhancement of the

environment. (*Ibid*.) As in that case, here "the question before us is not whether the Project will have a significant effect on the environment but whether substantial evidence supports the determination that it will assure the maintenance, restoration, or enhancement of the environment." (*Save Our Big Trees, supra,* 241 Cal.App.4th at 711.)

In a recent (2023) case, *California Construction, supra,* 97 Cal.App.5th 1, the appellate court held that the class 8 exemption properly applied to a county ordinance that created overlay zones specifically crafted to preserve wildlife corridors. In that case, the county enacted the ordinance "to preserve corridors that allow wild animals to move freely within the zones." (*Id*. at 7.) The overlay zones themselves were designed "'to preserve functional connectivity for wildlife and vegetation'" by preserving water feature quality and access, facilitating safe wildlife passage, and minimizing impacts to wildlife from lighting, the introduction of invasive plants, and barriers to food, water, shelter, and breeding. (*Ibid*.) The court explained that the ordinance fell squarely within the meaning of the class 7 and class 8 exemptions, as "[t]here c[ould] be no rational dispute that the [ordinance] qualifies as an action taken by the [c]ounty to 'assure the maintenance, restoration or enhancement of a natural resource.' (Guidelines, § 15370.) Nor can it be disputed that the [ordinance] involves 'procedures for the protection of the environment.' (Guidelines, § 15308.)'" (*Id*. at 12.) Therefore, the court upheld the County's exemption determination.

Finally, in *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, the court held that the Fish and Game Commission's decision to remove the Mojave ground squirrel from the threatened species list under the California Endangered Species Act did not fall within the scope of the class 8 exemption. (*Id*. at 110, 124.) The court explained that the removal of a species from the endangered or threatened list "withdraws existing levels of protection," it creates "at least the potential for population reduction or habitat restriction." (*Id*. at 124.) The court therefore concluded that removal of the species "may have a significant effect on the environment," so it cannot be categorically exempt from CEQA. (*Ibid*.)

2. There is No Evidence the Ordinance Removes Existing Protections

Petitioners argue that the area impacted by the Ordinance is "known to provide habitat to sensitive species." (Reply, 6:27-28.) After all, the phrase "actions … to assure the maintenance, restoration, or enhancement" embraces projects that combat environmental harm, but not those that diminish existing environmental protections." (*Save Our Big Trees, supra,* 241 Cal.App.4th at 707.)

It is unclear what petitioners contend are the "existing levels or protection" that are diminished or withdrawn. Petitioners have not identified any specific protections that are defeated by the Ordinance. Petitioners make reference to the City of Orinda's General Plan (Opening Brief, 5:27-6:5), but the policies set forth therein are not specific and do not provide any concrete protections to habitat on private property. (See AR02169 ["4.1.1 Conservation Element: Guiding Policies"].) Petitioners also cite to pages from a plan developed for a specific land trust parcel ("Bodfish Land Trust") with respect to the existence of protected species on that parcel. (AR02154-2158.) These

citations do not demonstrate that existing protections are being taken away.

On the contrary, the record indicates that the District is willing to accommodate any demonstrated need for protection of habitat, even if it requires sending biologists to individual properties for consultation. (See AR00103 [response to comment that habitat protections are not sufficient].) The Ordinance itself includes a modification process to account for, among other reasons, "to address an environmental concern." (See AR00084 ["Section 5: Modifications"].)

The Bodfish Land Trust example cited by petitioners is, in fact, helpful to the District on another point: that the Ordinance includes "procedures for protection of the environment" in its "regulatory process," as required by the class 7 and 8 exemptions. (Guidelines , §§ 15307-15308.) There, a plan was created in 2014 for management of the "special status species at the Bodfish Property." It outlines specific best practices to accommodate the existing species found at the property. When Tyler Rust (caretaker of the Bodfish Trust parcel) submitted comments concerning the Ordinance, Chief Winnacker responded by email noting that the trust-specific plan is precisely the sort of plan to which the District would defer to allow for modification of the Ordinance requirements. (AR02147-2148; see also AR00084-85 [Ordinance, Section 5, "Modifications"]; AR00103 [response to comment regarding species endangerment indicating District can "provide biologists and other experts on request" in order "to evaluate these issues on a site-by-site basis"].)

Chief Winnacker's email response states, "[i]n cases such as yours where an environmental review has occurred and habitat for special status species has been identified, MOFD defers to the Management Recommendations […] for the nature of work that can be done […]. The process to document the plan for mitigation at your site, consistent with these best management practices, begins with submission of a modification request." (See AR02147.) This appears to satisfy the requirement in the class 7-8 categorical exemptions that the Ordinance contain "procedures for protection of the environment."

3. Substantial Evidence Indicates the Ordinance Protects Natural Resources and the Environment

Petitioners argue that, at least as to Ordinance 23-04, "[t]he only rationale offered for increasing the size of the mandatory fuel breaks was the unsupported opinion that uniformity in size would simplify implementation by eliminating any question as to which width was appropriate for various parcels." (Opening Brief, 6:11-14.) This is not entirely accurate. In response to comments, the District stated, "[t]he Ordinance and similar requirements that exist throughout the state and in other fire-prone areas operate by requiring fuel management along parcel lines to mimic the natural state of a varied fuel mosaic. The 100-foot distance is utilized in the Ordinance because it is more effective at accomplishing this than the prior requirement." (AR00105.)

The Ordinance was buttressed with significant factual information from the Fire Chief, Dave Winnacker. In his technical memorandum (AR00146-156), Chief Winnacker outlined five areas of concern specific to the District: Weather / Climatic Conditions, Geological Conditions, Topographical Conditions, Vegetative Conditions, and Communities at Risk. Each of these areas provide compelling

reasons for aggressive efforts to reduce risk from wildfires. The high winds from the northeast, challenging narrow roads built in the early 20th century, earthquake-prone areas crossed by many utilities, fluctuating humidity and delayed seasonal rains, and an overgrown landscape (partly due to decades of fire suppression) with many non-native (and non-fire resistant vegetation) together make it necessary for the District to determine ways to decrease fire risk.

While achieving fire safety may come from a "combination of hardening structures and fire-resistant landscapes," the former is subject to practical and regulatory constraints associated with structural retrofits, leading to the primary focus needing to be on mitigating fuels. (AR01498; AR01489 at 3:44:20-3:45:36.) Accordingly, the District must work within constraints to regulate in favor of fire-resistant landscapes.

The Ordinance is aimed at precisely this. It seeks to prevent the catastrophic effects of wildfires, including fires that occur in the built environment (i.e., structure fires), which include the obvious loss of life and homes, but a regulatory action may serve more than one function, including protection of the environment. The record demonstrates wildfires destroy local natural resources. (See AR00320 ["Research Roadmap: Environmental Impact of Fires in the Built Environment"].) Examples include loss of vegetation and biodiversity, increased erosion and landslides, debris flows, adverse air quality and increased greenhouse gases, water quality impacts, and contaminated and hazardous material disposal challenges. (AR00151-152.)

The ongoing "Governor's State of Emergency Proclamation" is one of several examples forming the urgent backdrop against which the District was forced to act, sometimes in the face of incomplete or delayed data. (AR00152; AR00432 [noting "[f]uel break effectiveness in wildland-urban interface (WUI) is not well understood […] However, fuel break width mattered" and "[b]ecause there is no consensus on optimal fuel break widths, more research is required to understand how fuel breaks in the WUI interact with severe downslope wind-driven fires."]; AR01511 [noting challenges in modeling wildfire spread]; AR00333 [noting most fires occurring in the built environment impact the emissions to air, soil and water]; AR01397-1398 [minutes from Chief discussing limitations in modeling]; AR01489 at 03:27:00-03:29:00.)

Studies show that low intensity, controlled fire enhances biodiversity by controlling invasive and noxious weed species, allowing native plants to compete more effectively, as well as opening overgrown understory to allow for wildlife to move more freely across the landscape. Additionally, several of the endemic species of the region require fire to germinate. With low-intensity fire (one of the methods permitted in Ordinance for managing vegetation) the chaparral habitat would become more stratified in life stages, increasing fire resiliency. (AR00152-153.)

At a September 20th meeting of the District, Chief Winnacker addressed the implementation of different sorts of fuel breaks, and the benefits of a traditional "varied fuel mosaic" in the region. He noted Ordinance 23-08 accomplishes the sort of natural environment that would exist absent modern fire suppression practices. (AR01489 at 3:33:00-3:40:00.) Partially in an attempt to explain a personal article he had written around the time the Ordinance was being considered (see AR01594-1595), he

distinguishes "internal fuel breaks" (like those being mandated by Ordinance 23-08) from "external fuel breaks" (like those described in his article). (AR01489 at 3:38:00-3:40:00; see also AR02147 [distinguishing "different purpose of a perimeter fuel break as opposed to interior fuel mitigation efforts like the "fuel breaks" in the Ordinance]; AR00303 [article discussing evolving concept of fuelbreaks and potential for designs like shaded fuelbreaks that address concerns of critics while also meeting the needs of fire managers].) According to the Chief, the "internal" fuel breaks enhance defensible space around structures and create a mosaic landscape that mimics the natural environment. (AR01498.) "The 100-foot distance is utilized in the Ordinance because it is more effective at accomplishing this than the prior [30-foot] requirement." (AR00105.)

Petitioners argue the 100-foot width, as compared to the previous 30-foot width requirement, is not supported. (See, e.g., Opening Brief, 13:15-16.) Narrowing the question in this manner does not permit a general inquiry consistent with the substantial evidence standard.

Petitioners assert that the only rationale offered by the District for increasing the fuel break widths was the "unsupported opinion that uniformity in size would simplify implementation." (Opening Brief, 6:11-14.) It is true that Chief Winnacker explained the change would "simplify and reduce the complexity and uncertainty associated with applying the requirements," but this does not preclude the existence of other rationale. The precise measurements, or the increase from a 30-foot perimeter to a 100-foot perimeter, were not discussed in the Ordinance itself, but there is clear evidence in the record to suggest that a wider fuel break is more effective at slowing down spread of fire. (See AR00432-449 [article examining the efficacy of WUI fuel breaks under the influence of strong winds and dry fuels, using the 2018 Camp Fire as a case study, noting "fuel break width mattered"]; AR00414 [article noting that, while fuel treatments have become indispensable for managing fire, the theory and practice of fuels management is supported by limited data on fuel and treatment quantification].)

There is also evidence in the record that, while multiple factors affect the appropriate amount of defensible space (and, presumably, also fuel breaks), making uniformity in standards difficult, uniformity is necessary for enforcement. (See, e.g., AR01522 [noting that fire behavior and, as a result, necessary defensible space, is affected by fuels, ignition, topography, wind, temperature, and humidity]; (AR01489 at 3:18:20 – 3:21:40 [Chief Winnacker discussing hotter, drier future, and other inputs in understanding fire risk]; 3:36:15-3:36:50 [acknowledging "fuel breaks are one size fits all," and stating District's goals will be equally met if those with means to deliver more nuanced and expertly-developed plans come forward with requests for modification].)

Petitioners' focus on the Ordinance's precise fuel break width is not consistent with the deferential substantial evidence standard. The backdrop against which the District adopted the Ordinance is clear (the rise in frequency and intensity of wildfires), as is the goal: to reduce hazardous vegetation and create a more complex maze through which a fire would have to navigate, thereby slowing its pace and allowing firefighting resources to catch up with the fire. It is reasonable to infer that, like with the 2018 Camp Fire, wider fuel breaks would be more effective at accomplishing the

District's goals.

Based on the record and the authorities relevant to this issue, there is substantial evidence to support the District's finding of class 7 and class 8 exemptions with respect to the Ordinance.

4. No Exception to the Exemptions Applies

The CEQA Guidelines also provide specified "blanket exceptions" to the categorical exemptions. (Guidelines, § 15300.2.) One of these is that the "categorical exemption shall not be used for activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (*Id*., subd. (c).) Where a categorical exemption applies, the burden shifts to the party challenging the exemption to show that the exception applies, and the agency's determination in this respect is also reviewed under section 21168.5's substantial evidence prong. (*Berkeley Hillside, supra,* 60 Cal.4th at 1102, 1114, citations omitted.)

While the District here did make explicit findings that the exceptions did not apply, this was not necessary. In declaring the applicability of categorical exemptions, the agency makes implied findings that no exception bars the exemptions. (*Arcadians for Environmental Preservation v. City of Arcadia* (2023) 88 Cal.App.5th 418, 437, citations omitted.)

i. Unusual Circumstances

The CEQA Guidelines describe the "unusual circumstances" exception as follows: "Significant Effect. 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." (Guidelines, § 15300.2, subd. (c).)

"A party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to that unusual circumstance. Alternatively, under our reading of the guideline, a party may establish an unusual circumstance with evidence that the project will have a significant environmental effect. That evidence, if convincing, necessarily also establishes 'a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (*Berkeley Hillside, supra*, 60 Cal.4th at 1105, citing Guidelines, § 15300.2, subd. (c).) Thus, Petitioner must show (1) there are unusual circumstances and a reasonable possibility of a significant effect due to that unusual circumstance or (2) that the project *will* have a significant environmental effect.

Whether the project presents unusual circumstances under the first alternative is a factual inquiry subject to the traditional substantial evidence standard of review. (*Berkeley Hillside, supra*, 60 Cal.4th at 1114.) "This standard requires that we resolve all evidentiary conflicts in the agency's favor and indulge in all legitimate and reasonable inferences to uphold the agency's finding." (*Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 820, citations omitted.)

Here, the District determined that there are *no* unusual circumstances. (AR00154.)

Petitioners argue that the Ordinance is distinct from others of its kind because it "delegates responsibility for resource protection to private citizens." (Opening Brief, 17:6; AR00130 ["The Ordinance also is required to be interpreted and applied to avoid the taking of any special status species, significant erosion and sedimentation of surface waters, and the removal of healthy, mature, scenic trees."]) Petitioners acknowledge the Ordinance's modification process, which they characterize as "vague," but there are various examples in the record of the District clarifying what sort of circumstance would give rise to the granting of a modification (street trees surrounded by concrete, parcels such as the Bodfish parcel, mentioned above, that provide endangered species habitat, trees a biologist positively identifies as environmentally significant, two adjoining properties without houses that could be responsible for 50 feet each, etc.). Petitioners also fail to reference evidence of regulations that do *not* impose obligations on property owners. In fact, the record indicates homeowners and residents in other jurisdictions are also typically charged with implementing environmental protections in similar contexts. (See, e.g., AR01525 ; AR01535 [Publication by Marin Wildfire Prevention Authority noting ecologically sound practices for vegetation management intended to inform individual residents or property owners].)

Nor have the petitioners met their alternative burden to show with certainty that significant environmental impacts will occur. (See *Berkeley Hillside, supra,* 60 Cal.4th at 1105, citing Guidelines, § 15300.2, subd. (c) [party may establish an unusual circumstance with evidence that the project will have a significant environmental effect[.)

Petitioners only cite hypothetical concerns regarding implementation of the Ordinance. (AR02113.) While the reply cites some speculation resulting from layperson observations (see Reply, 7:6-8), there is not any definitive indication that the cause of certain vegetation removal practices were due to the Ordinance's requirements. After all, as highlighted by petitioners themselves, the Ordinance includes merely an increase in width of an existing regulation (from 30 to 100 feet in width). (See, e.g., AR00105.)

The District justifies its determination of no unusual circumstances by noting the Ordinance's similarity to California Code of Regulations, title 14, § 1276.03, describing fuel breaks. The Ordinance "is simply a local extension of a regulatory scheme approved and implemented by [the District's] corollary at the state level." (Respondent's Brief, 19:1-11, citing AR00114-116.) Perhaps more importantly, the District points out that "state and local defensible space requirements, which govern areas around structures, also require property owners to comply." (*Id*., citing Cal. Code Regs., tit. 14, § 1299.03 [describing defensible space requirements].)

The Court does not view this case as presenting unusual circumstances or certainty that significant environmental impacts will occur.

ii. Cumulative Impacts

The cumulative impact exception applies where successive projects of the same type in the

same place, over time is significant. (Guidelines, § 15300.2 (b).) "'Cumulative impacts' refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. [¶] (a) The individual effects may be changes resulting from a single project or a number of separate projects. [¶] (b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." (Guidelines, § 15355.)

The District here found that the Ordinance would not result in cumulative impacts. This was based on the Ordinance's requirements being "performed in different locations" and "not involve[ing] new or successive projects of the same type in the same place over time." (AR00154.)

Petitioners argue that fuel clearing activities have cumulative effects based on earlier ordinances concerning fuel breaks and defensible space. They mention, but do not support, an argument that overlapping jurisdictions could create cumulative effects. Notably, the Opening Brief's one citation to the record on this point (AR02112 [comment letter from Orinda City Council noting the more restrictive requirements would apply when comparing the subject Ordinance to any previous regulation, such as 23-04]) does not amount to evidence of cumulative effects. Nor does the comment letter from Friends of Orinda Creeks, cited in the reply (AR02141).

Because the new Ordinance fuel break width is primarily a matter of degree (updating the width of the required fuel breaks from 30 feet to 100 feet), petitioners would need to show evidence that the specific quantity difference is substantively different in effect from the previous size. The time to challenge the 30-foot breaks has expired. The current Ordinance *replaces* the previous requirements and does not create an interplay between multiple regulations.

Speculation that a significant cumulative impact could occur is insufficient. (*Aptos Residents Assn. v County of Santa Cruz* (2018) 20 Cal.App.5th 1039, 1051; *Robinson v City and County of San Francisco* (2012) 208 Cal.App.4th 950, 959-60.) None of the citations provided by petitioners here rise to anything more than such speculation. Petitioners have failed to meet their burden in this respect.

5. Emergency Exemption

The exemptions cited in the District's Notice include the statutory emergency exemption, which describes "actions necessary to prevent or mitigate an emergency." (Pub Resources Code § 21080(b)(4); Guidelines, §15269(c).)

Public Resources Code § 21060.3 defines an "emergency" as follows:

> "Emergency" means a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. "Emergency" includes such occurrences as *fire*, flood, earthquake, or other soil or geologic movements, as

well as such occurrences as riot, accident, or sabotage.

(Emphasis added.)

In *Western Mun. Water Dist. v. Superior Court* (1986) 187 Cal.App.3d 1104, 1113, disapproved on another ground in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 569 – 574, the court agreed with petitioners that an agency's decision to drill dewatering wells in order to decrease groundwater pressure and thereby prevent or mitigate future earthquakes, was not subject to an emergency exemption under CEQA. (*Id*. at 1107-1108, 1115.) The evidence in that case did not amount to substantial evidence of a "clear and imminent danger, demanding immediate action." (*Id*. at 1115.)

On the other hand, in *CalBeach Advocates v. City of Solana Beach* (2002) 103 Cal.App.4th 529, the City of Solana Beach approved a special use permit to construct a seawall in light of beach bluff erosion. The City cited the emergency exemption to CEQA in its approval, despite petitioners' position that there was "no sudden, unexpected occurrence" and "no need for immediate action." (*Id*. at 536.) The court of appeal affirmed the denial of a writ of mandate. (*Id*. at 532-533.) The court noted that the exemption includes "not only projects that mitigate the effects of an emergency but also projects that prevent emergencies." (*Id*. at 537 ["If we accept CalBeach's contention that all emergencies must be unexpected, then projects can never be designed to prevent emergencies."])

Petitioners argue here that the Ordinance is not an emergency project. They distinguish the specific categorical exemption addressing defensible space (Cal. Code Regs., tit. 14, § 15304) from the fuel break requirement imposed by the Ordinance, claiming that the effectiveness of fuel breaks "is largely speculative." Petitioners also point to the delay in enforcement of the fuel break requirements as indicating lack of emergency. (Reply, 13:2-4.) They contend neither element of the emergency definition is met.

The administrative record was admittedly more supportive of the exemption in *CalBeach* than our current case. There, the agency had evidence from engineers that, "[i]f this remaining section of coastline is not stabilized, there is a high likelihood that this section of coastal bluff will also collapse this winter, placing the bluff-top residences in immediate peril. Moreover, there is no question that if construction is to be deferred until after certification of the City's EIR, this coastal bluff will collapse." (*CalBeach Advocates v. City of Solana Beach* (2002) 103 Cal.App.4th 529, 535.)

Still, as the District points out, fire is the very first example of an "emergency" in Public Resources Code § 21060.3. The imminence requirement is supported by Chief Winnacker's expert opinions and the uncontradicted facts that support them. For example, "[t]he Fire District is situated in a fire dependent landscape with a natural fire return interval of three to five years." (AR00094; see also AR01489 at 3:16:30 – 3:16:55 [noting fire return interval is known due to studies of redwood tree rings].) Further, "[t]he current landscape is dominated by overgrown mature vegetation with high dead fuel levels." (AR00094.) Chief Winnacker notes that the California Department of Forestry and Fire Protection has identified areas within the District as "Communities at Risk from Wild Fires." (See

AR00096.) The Governor has issued over 20 emergency proclamations related to fires and another related to vast tree mortality, evidencing the need for immediate action. (AR00097.)

Though there are some conflicts in the record with respect to past enforcement (see AR01489 at 3:46:17-3:46:28 [noting enforcement over past several years was more restrictive than the Ordinance requirements]), the Court is inclined to agree with petitioners' assertion that failure to enforce certain requirements is not particularly helpful in establishing the existence of an "emergency" (Reply 13:3-4), a reviewing court must affirm an agency's finding if there is any substantial evidence, contradicted or uncontradicted, to support it. (*Berkeley Hillside, supra,* 60 Cal.4th at 1114.) Under this deferential standard, the District's cited facts are sufficient to show the elements of an emergency are satisfied, and thus the exemption was properly applied in adopting the Ordinance.

6. Common Sense Exemption

The final exemption claimed by the District is the "common sense" exemption. (Guidelines, § 15061, subd. (b)(3).) The exemption applies "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment" and can be relied on only if a factual evaluation of the agency's proposed activity reveals that it applies. (*Muzzy Ranch Co., supra,* 41 Cal.4th at 385-386.)

Here, the District did not originally mention this basis for its Notice of Exemption. In the course of responding to comments prior to filing the Notice, the District did address the issue, however. The District's response was simply to point out that counsel for petitioners (the commenter who claimed the exemption did *not* apply) provided "no additional arguments for why there could be environmental impacts that would render the project ineligible for this exemption."

The District itself describes the interaction between the Ordinance and the environment: "it calls for basic vegetation management, like limiting the height of grasses, cutting tree limbs to a certain height, removing dry debris, and creating space between bushes and shrubs. (AR00125.)" (Respondent's Brief, 26:17-19.) With no additional basis, the District requests this Court to find substantial evidence that it can be seen "with certainty" that there is "no possibility" that the Ordinance "may" have a significant effect. The record, at least insofar as the District has cited it, is insufficient to make this finding.

G. CONCLUSION

The exemptions applied by the District here are reflective of the District's goal to protect the public and the environment in the face of an increasing threat: wildfires. While there are multiple reasons for decreasing the intensity and speed of wildfires, there is little doubt that a significant rationale for the goal is to protect natural resources and the environment, as required by the categorical exemptions. Another rationale is to prevent loss of health and property, as outlined in the emergency exemption. The petitioner's concern that some uncertainty exists with respect to the effectiveness of 100-foot fuel breaks is related to the evolving nature of fire science and of the

vocabulary used to describe it. The possibility that some uncertainty exists also does not undermine the substantial evidence relied on by the District.

Petitioners cite no significant data that the District ignored. While the District's ultimate decision was based on CEQA exemptions, the decision was consistent with statutory and regulatory mandates.