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California Supreme Court Makes Critical CEQA Ruling Regarding Categorical Exemptions

Court Clarifies the Unusual Circumstances Exception



In a victory for public agencies and developers, the California Supreme Court issued its heavily anticipated ruling in *Berkeley Hillside Preservation v. City of Berkeley*, reversing the Court of Appeal. At issue was the City of Berkeley's determination that a proposed 6,478 square-foot home with an attached

3,394 square-foot garage, on a steep slope in a heavily wooded area, was categorically exempt from the California Environmental Quality Act pursuant to the categorical exemptions for single-family residences (CEQA Guidelines section 15303) and in-fill development projects (CEQA Guidelines section 15332).

Project opponents argued the exemptions should not apply because of the presence of "unusual circumstances" per CEQA Guidelines section 15300.2(c) – namely, the house will be built on a steep slope. The Court of Appeal agreed, holding that evidence demonstrated a "fair argument" that the project might have an effect on the environment, which is *itself* an "unusual circumstance," and thus the exemptions could not be used. The Supreme Court rejected this ruling and articulated a detailed test and standards of review for assessing the "unusual circumstances" exemption. It sent the case back to the Court of Appeal for further hearing consistent with that test and standards.

Answering the key question posed in the litigation, the court held that the "unusual circumstances" exception can only be used to preclude the use of a categorical exemption if a two-prong test is satisfied. First, an agency must evaluate whether there is an "unusual circumstance" that differentiates the project from the general class of similarly situated projects. Second, the agency must consider whether the unusual circumstance that pertains to the project creates a "reasonable possibility" that the project may result in a "significant environmental impact." The court expressly rejected the appellate court's interpretation of the "unusual circumstances" test, finding that "the Court of

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Appeal erred by holding that a potentially significant environmental effect itself constitutes unusual circumstances.”

Next, in a move that will help agencies in their use of categorical exemptions, the court ruled that the “substantial evidence” standard of review applies to judicial review of an agency’s decision as to whether “unusual circumstances” are present. The court observed that such a determination is a factual inquiry, with the agency serving as a finder of fact, and thus a court should uphold an agency’s decision if it is supported by substantial evidence in the record. This holding is a terrific outcome for public agencies, as this standard of review is highly deferential.

As to the second prong of the test, the court ruled that, once the presence of an “unusual circumstance” is established, a categorical exemption may not be used if there is a fair argument, supported by substantial evidence, that “there is a reasonable possibility of a significant effect on the environment” due to the “unusual circumstance.” While the “fair argument” standard of review does not grant a high level of deference to public agencies, it will be difficult for a project opponent to get to the second prong of the test because, if an agency’s decision that there are no “unusual circumstances” is upheld by a court under the “substantial evidence” standard of review, the test is concluded.

While the court did not provide a bright line definition for what constitutes an “unusual circumstance,” it did provide guidance for agencies in considering this question. It noted that “evidence that a project *will* have a significant effect *does* tend to prove that some circumstance of the project is unusual.” Further, it held that a party could also invoke the “unusual circumstances” exception by showing that a project “has some feature that distinguishes it from others in the exempt class, such as its size or location.” It also ruled that agencies have the discretion to consider conditions in the vicinity of a proposed project when determining whether the environmental effects of a project are unusual, holding that the Court of Appeal erred in finding that the unusual circumstances inquiry excluded consideration of the typical circumstances in a particular neighborhood.

If you have any questions about this case or how it might impact your agency, please contact one of the attorney authors of this alert listed at right in the [Environmental Law & Natural Resources](#) practice group, or your [BB&K attorney](#).

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