

## Court Weakens Use of CEQA's Categorical Exemptions



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In a case involving the City of Berkeley's approval of a single home, the First District Court of Appeal's decision in *Berkeley Hillside Preservation v. City of Berkeley* 203Cal.App.4th 656 (February 15, 2012, as modified March 7, 2012) could dramatically curtail the use of categorical exemptions under the California Environmental Quality Act (CEQA).

The case involved the approval of a use permit to demolish and construct a single-family home in the Berkeley Hills. The proposed home featured a 6,500 square foot residence with a 3,400 square foot, 10-car attached garage on a lot with an approximately 50% slope. The City approved the proposal and determined that the project was categorically exempt from CEQA under exemptions for new construction/conversion of small structures and infill development, as is often the case in private residence projects. 14 Cal. Code Regs §§ 15303(a), 15332. A citizen's group – "Berkeley Hillside Preservation" – contested the project and a trial court upheld the approval. The court of appeal reversed the trial court's decision.

CEQA's categorical exemptions (set forth in the CEQA Guidelines) are subject to several exceptions, including when reasonable possibility of a significant effect on the environment exists due to unusual circumstances. 14 Cal. Code Regs § 15300.2(c). Typically, courts analyzed this exception under two-prongs: (1) does a project present unusual circumstances, and (2) is there evidence of a reasonable possibility of a significant effect due to the unusual circumstances? See e.g., *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego*, 139 Cal.App.4th 249 (2006).

In the Berkeley case, however, the court of appeal found that whenever opponents present substantial evidence of a fair argument that a project could result in a significant environmental impact, that the unusual circumstances prong is satisfied and the exemption may not be used. The court noted that unusual circumstances are present when the circumstances of a particular project differ from the general circumstances of projects covered by the exemption, and where those circumstances create an environmental risk that does not exist for the general class of exempt projects. The court concluded that evidence creating a fair argument that a normally exempt project may have an effect on the environment is *itself* an unusual circumstance.

Challengers to the project claimed that the exception applied because of the large size of the residence and garage, the substantial grading required due to the slope and potential seismic risk. The opponents claimed the home was out of scale with typical homes in the City and submitted a report from a geotechnical engineer who claimed the project could not be built as planned and would require additional construction that would result in impacts.

Although the City and the applicant offered considerable contrary evidence challenging the assumptions and conclusions of the opponents' engineer, the court of appeal found that there was sufficient evidence to satisfy the fair argument standard and trigger the exception based on geotechnical impacts from the construction given the lot's slope. As such, the court ordered that the City prepare an environmental impact report (EIR) for the project. The court found that unusual circumstances exist whenever there is evidence that a typically exempt project could have a significant impact.

The decision appears inconsistent with other published court of appeal rulings, such as *Banker's Hill*, which utilized the two-pronged approach. By concluding that substantial evidence of a fair argument that a project may have a significant effect on the environment is per se an "unusual circumstance," the decision could drastically reduce reliance on categorical exemptions by lowering the bar to establish the exception through removing the need to separately demonstrate unusual circumstances. As a result, projects that intend to rely on such exemptions will be more susceptible to challenge, meaning project proponents may be more likely to prepare mitigated negative declarations or EIRs to better insulate their projects from legal attack.