CEQA Categorical Exemptions Defeated by Mere "Fair Argument" of Impact, First District Holds

By Arthur F. Coon and Nadia Costa on February 23rd, 2012

In a CEQA challenge to the City of Berkeley's approvals to demolish an existing single-family home and replace it with a larger one and an attached 10-car garage, Division 4 of the First District Court of Appeal held in an opinion filed February 15, 2012, and certified for publication, that the proposed project was not categorically exempt from CEQA. (*Berkeley Hillside Preservation, et al. v. City of Berkeley, et al.* (2/15/12) ___ Cal.App.4th ___, Case No. A131254.) Applying the "fair argument" standard to its review of the City's and trial court's contrary conclusion, the Court held that *whenever* there is substantial evidence of a fair argument that a significant environmental impact may occur, this *automatically* satisfies the "unusual circumstances" exception and therefore precludes reliance on a categorical exemption.

The project at issue in *Berkeley Hillside* involved demolition of an existing single-family home and construction of a new 6,478 square foot single-family residence with an attached 3,394 square-foot, 10-car garage, situated on property with a relatively steep slope. The City concluded the project was categorically exempt pursuant to the In-fill exemption (CEQA Guidelines § 15332) and the "New Construction or Conversion of Small Structures" exemption (CEQA Guidelines § 15303(a)).

Project opponents alleged reliance on the categorical exemptions was improper given that (1) the combined size of the residence and garage, (2) the "massive grading" that would be required given the steep slopes, and (3) the potential "seismic lurching" given its purported location near a major earthquake trace and within a State-designated landslide hazard zone, would result in the project having significant environmental impacts. Accordingly, they contended such evidence demonstrated the "unusual circumstances" exception of Guidelines § 15300.2 applied, and further environmental review was warranted. In support of their claims, the opponents submitted information regarding the relative size of "typical" homes in Berkeleyas well as expert testimony from a geotechnical engineer. The City and the applicants submitted evidence to the contrary, including, of particular note, expert testimony concluding that the geotechnical engineer's opinion was based on a *misreading* of the project plans and that further investigation documented that no landslide risk was present from construction of the project as actually approved.

The trial court agreed with the City's position that an exemption was appropriately relied on. It found that while there was substantial evidence supporting a fair argument that the project would cause significant environmental impacts relating to the geotechnical issues, any such potentially significant impacts were not due to "unusual circumstances" and therefore a necessary element of the exception was not met.

The Court of Appeal concluded otherwise and reversed the trial court's judgment denying a writ. Specifically, the Court held that a *categorical exemption does not apply where there is any*

reasonable possibility that the proposed activity may have a significant effect on the environment. The Court held that the very fact the proposed activity may have an effect on the environment is itself an unusual circumstance, because this circumstance takes the project outside of the class of activities the exemptions were designed to cover; i.e., those projects that normally do not threaten the environment.

In applying this premise to the facts at hand, the Court emphasized the application of the "fair argument" standard, and concluded that information submitted regarding the atypical size of the combined structures, along with testimony of "potential massive grading and seismic lurching" was sufficient for the exception to apply. Tracing its interpretation of the § 15300.2 exception back to statements made in a 1976 California Supreme Court case, *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, the Court essentially *rejected* the two-step approach enunciated in *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 278, which had been followed by the trial court. That approach was: (1) "inquire whether the Project presents unusual circumstances" and (2) "inquire whether there is a reasonable possibility of a significant effect on the environment *due to* the unusual circumstances." In emphasizing that each step is an *independent* element, *Banker's Hill* had stated that: "A negative answer to either question means the exception does not apply." (*Id*. at 278.).

Without acknowledging any split of authority regarding the standard of review or interpretation of the exception, the First District stated: "Our conclusion that the unusual circumstances exception does not [sic] apply whenever there is substantial evidence of a fair argument of a significant environmental impact is thus not inconsistent with *Banker's Hill*."

In light of the split of authority on the standard of review and application of the unusual circumstances exception, and the decision's potentially devastating effect on the usefulness of categorical exemptions promulgated pursuant to findings of the Secretary of the Natural Resources Agency to implement CEQA, it will be interesting to see whether this decision remains published or whether the California Supreme Court will grant review if petitioned. Stay tuned.

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