

# Client Alert

March 3, 2015

## It's Not Unusual: California Supreme Court Declines to Expand "Unusual Circumstances" Exception to CEQA Categorical Exemptions

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In an important and highly anticipated decision under the California Environmental Quality Act (CEQA), the California Supreme Court overturned a Court of Appeal's decision that would have severely limited public agencies' ability to rely on commonly used "categorical exemptions" from CEQA's environmental review mandates. The Court's [opinion](#) in *Berkeley Hillside Preservation v. City of Berkeley* introduces a new test for determining the applicability of the "unusual circumstances" exception to categorical exemptions, potentially complicating agencies' process for evaluating applicable exemptions and may create new avenues for project opponents to attack their use.

### BACKGROUND

In 2010, a group of residents sued the City of Berkeley, challenging its approval of a large home in the Berkeley hills—nearly 10,000 square feet, including a 10-car garage. The City had concluded that the project did not require an Environmental Impact Report (EIR) or another form of CEQA environmental review because it qualified under two independent categorical exemptions found in the CEQA Guidelines—an exemption for "In-Fill Development Projects" (Guidelines § 15332) and another for the "New Construction or Conversion of Small Structures," single-family residences (Guidelines § 15303(a)). The City found that the project did not trigger any *exceptions* to the exemptions, specifically finding that the project did not present any "unusual circumstances" that would result in significant effects on the environment (Guidelines § 15300.2(c)).

The petitioners sued the City, claiming that the project's grading and fill on steep slopes would cause significant landslide risks, and that the City should have prepared an EIR to address these and other environmental impacts. Applying a two-step inquiry previously adopted by the courts, the trial court found that, although petitioners had presented evidence of a "fair argument" that the project would cause significant effects on the environment, these effects were not *due to* "unusual circumstances." For this reason, the exception was not triggered and it was proper for the City to rely on the categorical exemptions.

The First Appellate District in San Francisco reversed the trial court's judgment, holding that "the fact that proposed activity may have an effect on the environment is *itself* an unusual circumstance" and, in this situation, the City was prohibited from using a categorical exemption (203 Cal. App. 4th 656 (2012)). The City and homeowner filed a petition for review by the California Supreme Court.

The Court of Appeal's opinion generated a wide range of criticism, from the California Building Industry Association to the California League of Cities and California Attorney General Kamala Harris—all of whom filed amicus briefs with the Supreme Court. Among other things, they argued the decision improperly narrowed the

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opportunities for local governments to use categorical exemptions, as intended by the Legislature, rather than engage in time-consuming and expensive preparation of environmental review documents for classes of projects that generally have low impacts. Public agencies, developers, and environmental groups have all been closely following the case's progress and seeking clarity from the Supreme Court as to whether the customary use of categorical exemptions will be restored to agencies' CEQA toolkits.

## SUPREME COURT REVERSES COURT OF APPEAL

On March 2, 2015, the Supreme Court filed its opinion reversing the judgment of the Court of Appeal and remanding for further consideration. Based on a comprehensive review of CEQA's legislative history and case law, a majority of the Court rejected the Court of Appeal's holding that evidence of a potential environmental effect is in itself an unusual circumstance. The majority held that the petitioners' interpretation of the unusual circumstances exception "would render useless and unnecessary the statutes the Legislature passed to identify and make exempt classes of projects that have no significant environmental effect."

Rather than retaining clear demarcations between the "unusual circumstances" and "significant effect" inquiries, however, the majority opinion recognized that evidence of a significant environmental effect "does tend to prove that some circumstance of the project is unusual," and articulated a new standard of review for public agency decisions regarding categorical exemptions—fact-specific determinations of whether unusual circumstances exist will be reviewed under the deferential "substantial evidence" standard, but if such circumstances are found to exist, and the agency nevertheless determines that these circumstances will not result in significant environmental effects, this determination will be subject to the less deferential "fair argument" standard of review.

Because neither the trial court nor the Court of Appeal applied the principles announced by the Supreme Court, the matter was remanded for further consideration. Until remand is completed, the fate of the project itself will remain unknown—and it may take additional litigation to clarify how the new rules will affect public agencies' ability to use categorical exemptions, even when projects appear to fall neatly within the categories created by the CEQA Guidelines.

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