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Client Alert News Flash

Latham & Watkins Environment, Land & Resources Department March 5, 2015 | Number 1809

California Supreme Court Protects CEQA Categorical Exemptions

Court gives more deference to an agency's decision to use a categorical exemption, likely thwarting environmental opponents.

On Monday March 2, the California Supreme Court upheld the use of a California Environmental Quality Act (CEQA) exemption for a large single-family residence. The holding has broad implications for home builders and developers. The court confirmed the use of categorical exemptions to CEQA that avoid the need for preparing CEQA documents — such as a negative declaration or environmental impact report (EIR) — for certain projects that require discretionary approval.

Berkeley Hillside Preservation v. City of Berkeley, S201116, (Cal. Mar. 2, 2015) overturned a Court of Appeal decision that held that categorical exemptions did not apply to the construction of a single-family home (6,478 square feet) in the hills of Berkeley. The Court of Appeal based its decision on a determination that opponents presented a "fair argument" that the project would have a significant environmental effect, thereby making a CEQA exemption inapplicable.

Background

CEQA generally requires that an agency prepare an EIR for any project that may have a significant effect on the environment.[1] But the state has determined that several types of projects do not typically cause a significant environmental effect. These projects are exempt from CEQA under so-called "categorical exemptions" promulgated by the Secretary of the Natural Resources Agency.[2] These exemptions include single-family homes and limited in-fill development projects.[3] But those exemptions do not apply if "there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."[4] This exception to the categorical exemptions was at issue in *Berkeley Hillside*.

The Agency Decision

The City of Berkeley (the City) adopted a zoning board's approval of a 6,478-square-foot house with an attached 3,394-square-foot 10-car garage without an EIR because the City found that the project fell within two categorical exemptions: it was both a single-family home and an in-fill project. The City found that the exception to those exemptions — a "reasonable possibility" of a "significant effect on the environment due to unusual circumstances" — did not apply.

Litigation in the Lower Courts

Berkeley Hillside Preservation, an unincorporated group of Berkeley residents, filed a petition for writ of mandate to stop the project. It argued that the exception applied because:

- The "proposed single-family residence to be constructed was unusual, based on its size."[5]

- There was "substantial evidence showing a reasonable possibility of adverse environmental impact sufficient to remove the project from the categorically exempt class."[6]

To support its "significant effect" argument, Berkeley Hillside alleged that the proposed project was not feasible, and that additional, unapproved work likely would be necessary to complete the project, which would have a significant environmental effect.[7]

The trial court found that the exception did not apply because the project was not "unusual" when compared to other family residences in the immediate vicinity.

The Court of Appeal reversed trial court, holding that there was "substantial evidence upon which it could be fairly argued that the proposed construction may have significant environmental impact."[8] The Court of Appeal based its holding on evidence which the project opponents introduced that the project would, among other impacts, "result in steepening of the already existing steep slope," and "necessitate 27-foot retaining walls."[9] The Court of Appeal also decided that because the "proposed activity may have an effect on the environment" it is an "unusual circumstance."[10] Thus, the court concluded that the exception applied, that no categorical exemptions could apply, and that an EIR was required.

The Court of Appeal also held — as a matter of law — that the project was unusual when compared to typical single-family homes, and that the City erred in comparing the project to conditions in the immediate vicinity.[11]

Supreme Court Decision

In a five to two split decision, with only five of the seven current members of the Court participating, the California Supreme Court reversed the Court of Appeal. The Supreme Court held that the exception must be interpreted to avoid "interpretations that render any language surplusage."[12] In contrast, the Court of Appeal had ruled that a "reasonable possibility of significant effect on the environment" is "an unusual circumstance," which according the California Supreme Court, did not give effect to "unique circumstances."

The Court reasoned that treating "significant effect" and "unique circumstances" as two separate requirements "gives effect to the Secretary's general finding that projects in the exempt class typically do not have significant impacts." But the Court did note that "evidence that the project *will* have a significant effect *does* tend to prove that some circumstance of the project is unusual."[13]

Hence, the Court created the following alternative tests, either of which can be used to determine whether the exception is applicable:

- Alternative Test 1: "A party … may establish an unusual circumstance without evidence of 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 … [then] the party need only show a reasonable possibility of a significant effect due to that unusual circumstance."

- Alternative Test 2: [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.'"[14]

The Court then decided the standards of review when courts review agencies applying both these tests:

- An agency's "unusual circumstances" determination is reviewed under the more-deferential "substantial evidence" test: an "unusual circumstances" determination must be supported by substantial evidence, "after resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding."

- An agency's "significant effect" determination is reviewed under the less-deferential "fair argument" test: if there is an unusual circumstance, then the reviewing court must determine whether substantial evidence supports the agency's conclusion as to whether a "fair argument" could be made that the unusual circumstance gives rise to a "reasonable possibility" of a "significant effect."[15]

Conclusion

Under *Berkeley Hillside*, lead agencies and project applicants once again have a reasonable chance of litigation success when they use CEQA categorical exemptions. By its alternative tests, and its decision to apply a more deferential standard of review to the "unusual circumstances" determination in both tests, the Court confirmed the opportunity to rely on categorical exemptions without automatically falling solely into the non-deferential "fair argument" standard of review that can be very easy for project opponents to meet.

Interestingly, since the five to two majority opinion relied on two justices that are no longer members of the Court, this opinion was just three to two when looking only to the Court's current members. In other words, only five of the seven *current* Supreme Court justices participated in this case, as the two newest justices were not seated in time to participate. Because four justices constitute a majority, this potential shortfall raises the question whether a majority of the *current* membership of the Court would have voted for this opinion, which may have implications for how the decision is applied in the future.

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Endnotes

[1] Cal. Pub. Res. Code § 21100.

[2] Cal. Pub. Res. Code. § 21084(a); Cal. Code Regs., tit. 14, § 15300 et seq.

[3] Cal. Code Regs., tit. 14, §§ 15303(a), 15332.

[4] Cal. Code Regs., tit. 14, § 15300.2(c).

[5] *Berkeley Hillside Preservation v. City of Berkeley*, 203 Cal. App. 4th 656, 673 (1st Dist. 2012) ("*City of Berkeley*").

[6] *Id.* at 665–68, 674–76.

[7] *Id.* at 674–75; *Berkeley Hillside*, at 41–43.

[8] *City of Berkeley*, 203 Cal. App. 4th at 674.

[9] *Id.*

[10] *Id.* at 670.

[11] *Berkeley Hillside*, at 40.

[12] *Id.* at 9, 20.

[13] *Id.* at 20–21.

[14] *Id.* at 21.

[15] *Id.* at 31, 34–35.