



California Supreme Court Establishes the Standard of Review for the Unusual Circumstances Exception to CEQA Categorical Exemptions

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Breathing life into the use of CEQA categorical exemptions, on March 2, 2015, the California Supreme Court held that a reasonable possibility that a project may result in significant effects on the environment alone is not enough to trigger the so-called "unusual circumstances" exception to the use of categorical exemptions. *Berkeley Hillside Preservation v. City of Berkeley*, Cal. Supreme Court Case No. S201116 (February 2, 2015). The closely-watched case resolved a split within the District Courts of Appeal regarding the standard of review applicable to the unusual circumstances exception. The Court held that the more deferential "substantial evidence" standard applies to agency determinations that there are no "unusual circumstances." The Court clarified that the unusual circumstances exception does not apply unless petitioner demonstrates that the lead agency has no basis to conclude that the project is not unusual. The Court also held, however, that the less deferential "fair argument" standard applies to an agency determination that the project will not have a significant environmental impact. The practical effect of the decision will be to make it easier for agencies to use categorical exemptions in lieu of the preparation of an environmental impact report (EIR).

The decision sets forth a two-part test for review of the exception. First, a court reviews an agency's finding regarding whether unusual circumstances exist under the substantial evidence standard of review. Second, the court reviews whether the agency has, as a matter of law, appropriately determined that there was not a fair argument that the project would have a significant effect on the environment. This two-pronged standard raises the bar for petitioners, requiring that they show that the agency lacked evidence to conclude that the project is not unusual.

With respect to the second step, the Court distinguished its earlier decision in *Laurel Heights Improvement Association v. Regents of University of California*, stating that a fair argument of an impact cannot be based on future project components not part of the application or the project approval.

History of the Project

The City of Berkeley (City) approved the construction of a 6,400 square foot house with a 3,400 square foot attached garage on a steep slope in a heavily wooded area in Berkeley. The City relied on categorical exemptions for two classes of projects: (1) "Class 3" for construction of small facilities, including single family residences; and (2) "Class 32" for infill development projects, which include projects occurring within city limits on a site of no more than five acres substantially surrounded by urban uses and that meet other specified requirements.

Petitioners argued under the fair argument standard that construction of the project would have a significant environmental effect, and thus the City's use of the categorical exemptions was not permitted. Under section 15300.2, subdivision (c), of the CEQA Guidelines provides: "A categorical exemption shall be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."

The trial court disagreed with petitioners, finding that there was substantial evidence to support the City's use of the categorical exemptions for the project and denied the petition. It also held that the unusual circumstances exception did not apply merely because there was evidence to support a fair argument that the project could result in a significant effect on the environment.

The First District Court of Appeal reversed the trial court's decision. It held that a fair argument of a significant effect on the environment was, as a matter of law, "unusual" within the exception. The court of appeal also held that there was substantial evidence of a fair argument that the proposed construction of the project would cause a significant effect on the environment. The court ordered the trial court to issue a writ of mandate directing the City to set aside the permit approvals and its findings regarding the use of the two categorical exemptions, and to order preparation of an EIR.

Potentially Significant Environmental Effects Must Be Due to Unusual Circumstances for the Exception to Apply

The California Supreme Court held that a potentially significant environmental effect alone was not enough to trigger the unusual circumstances exception. It began by examining the plain language of the statute, stating that the text of section 15300.2, subdivision (c), indicates that the possibility of a significant effect on the environment must be due to unusual circumstances. The Court noted that petitioners' interpretation of the statute, which would read the "due to unusual circumstances" language out of the provision, would be contrary to principles of statutory construction, which require courts to give meaning to every word or phrase in a regulation.

The Court then embarked on a comprehensive analysis of the legislative history of section 15300.2 and its prior decisions to conclude that adopting petitioners' interpretation of the provision would render the use of categorical exemptions meaningless. CEQA already provides that it is applicable only where there is substantial evidence that a project may have a significant effect on the environment. The Court thus noted that, in the absence of evidence of a significant effect on the environment, CEQA review is not required, and the use of a categorical exemption would therefore never be necessary.

Finally, the Court opined that, in listing classes of projects as exempt, the Resources Agency has determined that environmental challenges typically associated with projects in those classes are not significant effects within the meaning of CEQA, even though an argument might be made that they are significant. The plain language of Guidelines section 15300.2, subdivision (c), requires that a potentially significant effect must be "due to unusual circumstances" for the exception to apply. This requirement recognizes and gives effect to the Secretary's general finding that projects in the exempt class typically do not have significant impacts. Accordingly, the Court held that the court of appeal erred by holding that a potentially significant environmental effect itself constitutes an unusual circumstance.

The Unusual Circumstances Exception is Subject to Substantial Evidence Review

The Court also resolved a split about the appropriate standard of review. Several courts have interpreted Public Resources Code section 21168.5's "substantial evidence" standard to apply to the identification of the unusual circumstances, while others have applied the much less deferential "fair argument" standard. The Court applied a two-part test. It held that an agency's determination as to whether there were unusual circumstances under section 15300.2, subdivision (c), is a factual issue that is reviewed for substantial evidence. However, the agency's finding of whether unusual circumstances give rise to a "reasonable possibility that the activity will have a significant effect on the environment" is reviewed as a question of law that is reviewed under the less deferential "failure to proceed" standard.

Additional Issues on Remand

The Court noted that, in addition to the above errors in the court of appeal's decision, the lower court erred in two additional respects. First, the court of appeals erred in its consideration of evidence. The Court held that, contrary to the court of appeal's determination, an inquiry involving the unusual circumstances exception can look to the conditions in the immediate vicinity of the project. Moreover, both the trial court and court of appeals erred in relying on evidence that was based on unapproved activities that opponents asserted would be necessary because the project, as approved, cannot be built. Rather, the Court agreed with respondents that a finding of significant environmental impact must be based on the project as approved.

Additionally, the Court noted that, because reversal and remand was appropriate, it need not resolve respondents' claim that the court of appeal's remedy was improper. It did determine, however, that it was appropriate to discuss the issue because the question of an appropriate remedy could arise again on remand. The Court noted that Public Resources Code section 21168.9, subdivision (c), explicitly provides that a court cannot direct a public agency to exercise its discretion in any particular way. Thus, consistent with this principle, the Court stated that, if the court of appeal determined that neither of the categorical exemptions applies, then it may order preparation of an EIR only if, under the circumstances, the City would lack discretion to apply another exemption or to issue a negative declaration.