

WEDNESDAY, JANUARY 21, 2012

GOVERNMENT

Give me back my CEQA exemption

By Brian J. Bergman

The purpose of the California Environmental Quality Act is to inform the public and government officials of the environmental consequences of discretionary projects requiring government approvals prior to project approval. Not all projects are subject to CEQA's environmental review requirements. The CEQA regulations include categorical exemptions, a list of classes of projects that are exempt from CEQA review because they have been determined to be the types of projects that are not likely to have a significant effect on the environment. (Public Resource Code Section 21084).

CEQA provides several exceptions to the use of categorical exemptions, including that a categorical exemption cannot be utilized if "there is a reasonable possibility that the activity [at issue] will have a significant effect on the environment due to unusual circumstances." (14 California Code of Regulations Section 15300.2(c)). Until recently, courts have interpreted this "unusual circumstance" exception to require a two-part inquiry: does the activity present unusual circumstances; and is there a reasonable possibility of a significant effect on the environment due to the unusual circumstances. "A negative answer to either question [meant] the exception [did] not apply." (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 278; see also *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 800).

Under this once-established law, project opponents often sued under CEQA to stop the approval of a project utilizing a CEQA categorical exemption by arguing that the "unusual circumstances" exception applied, but they frequently lost their challenges because they were unable to satisfy both elements of the test, particularly the need to show an unusual circumstance.

The 1st District Court of Appeal's recent decision in *Berkeley Hillside Preservation v. City of Berkeley* (2012) 203 Cal.App.4th 656, significantly changes the analysis when determining whether the "unusual circumstances" exception applies. The decision essentially removes the requirement that the project opponent must show an unusual circumstance to utilize the particular exception, making it far more likely that the exception will be used to defeat the use of CEQA categorical exemptions in the future.

In *Berkeley*, property owners of a 29,714 square-foot lot in the city of Berkeley filed an application

to demolish their existing two-story property, and to construct a 6,478 square-foot home with an attached 3,394 square-foot, 10-car garage. Even though the proposed construction was larger than the existing structure, the new construction would only cover 16 percent of the lot, and the immediate neighbors supported the project.

The Berkeley Zoning Adjustment Board unanimously approved the project and found it categorically exempt from CEQA under the in-fill exemption (14 California Code of Regulations Section 15332) and the small structures exemption (14 California Code of Regulations Section 15303). The board also determined that no exceptions to the CEQA exemptions were triggered, specifically concluding the project would have no significant effect on the environment due to unusual circumstances.

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Even though many of the project's neighbors were in support, 34 Berkeley residents challenged the approval. They stressed that the project would be one of the largest single-family dwellings in Berkeley (the project was estimated to be in the city's top 1 percent of all single family dwellings in size), and that the project's unusual size, location, nature and scope may have significant impacts on its surroundings.

Additionally, project opponents submitted a declaration from a local geotechnical engineer with significant experience on projects in the Berkeley area. The engineer opined that the projected slopes of the house were not sound, and that to achieve the elevations shown on the architectural drawings, additional shoring and major retaining walls would be needed. The engineer further stated that this additional shoring and retained wall work would require extensive trucking operations to accommodate the construction, and that such construction activity would not be of the type associated with a normal single family dwelling, but rather, with large regional infrastructure projects. Lastly, the expert opined that the project as proposed underestimated the risks to the stability of the hillside during a seismic event.

After holding a hearing and reviewing all the evidence, the Berkeley City Council approved

the project, finding it exempt from CEQA with no applicable exceptions. The trial court upheld the city council's determination, holding that the appellants had raised a fair argument that the project would create a substantial impact on the environment, but that there was no evidence that this would occur as a result of unusual circumstances.

The appellate court reversed, concluding that it was error for the trial court to find a fair argument of a significant effect on the environment, but not apply the "unusual circumstances" exception even though no unusual circumstance was found. The court acknowledged the existence of the two-part test articulated in *Banker's*, but ignored the requirement that there must be a separate finding of an unusual circumstance. Instead, the court held that a CEQA categorical exemption is never applicable where there is a fair argument of a reasonable possibility that a project may have a significant effect on the environment, whether or not unusual circumstances were independently involved, because "the fact that [the] proposed activity may have an effect on the environment is itself an unusual circumstance...."

The *Berkeley* court also applied a "fair argument" standard of review to the question of whether the "unusual circumstances" exception applied, instead of a "substantial evidence" standard. The fair argument standard presents a much lower threshold for project opponents to defeat CEQA exemptions as the fair argument standard gives limited deference to the public entity's decision. The court's decision to utilize the fair argument standard represents a continuation of a longstanding dispute over the correct standard for CEQA exception review, with many appellate decisions coming down on both sides of the divide.

The state Supreme Court is currently determining whether to accept review of the *Berkeley* decision. If the decision's reasoning is not overturned by the Supreme Court, it will become much easier to defeat CEQA categorical exemption determinations with CEQA exceptions, and project opponents will gain a significant advantage when trying to overturn approvals on exempt projects.



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