

MARCH 3, 2015

## LAW ALERT

### IT'S NOT UNUSUAL: SUPREME COURT DEFINES CEQA'S "UNUSUAL CIRCUMSTANCES" EXCEPTION TO CATEGORICAL EXEMPTIONS

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On March 2, 2015, in *Berkeley Hillside Preservation v. City of Berkeley*, the California Supreme Court held that the potential to cause a significant environmental effect was not an "unusual circumstance" that would prevent the City of Berkeley's use of a categorical exemption to approve a large single-family home. *Hillside Preservation* sets forth a deferential two-prong standard of review for courts to apply in resolving disputes over the unusual circumstances exception.

**Background.** In *Hillside Preservation*, Berkeley approved an application to build a 6,478 square-foot home with a 3,394 square-foot attached 10-car garage on a steep slope. The City found that the home was categorically exempt from environmental review under the California Environmental Quality Act (CEQA) as a single-family home eligible for a Class 3 categorical exemption, applicable to single-family residences, and as an infill project eligible for a Class 32 categorical exemption for infill development. Opponents argued that the home was far larger than similar homes in the City and that "massive grading" would be required, and that these constituted "unusual circumstances" that precluded use of the categorical exemptions. The City found that the size of the home and the required grading were not "unusual," and project opponents

filed suit challenging the City's application of the categorical exemptions. After the trial court found in the City's favor, the Court of Appeal held that "the fact that proposed activity may have an effect on the environment is itself an unusual circumstance."

**Ruling.** Categorical exemptions cannot be used when "there is a reasonable possibility that the activity will have a significant effect on the environment *due to unusual circumstances*" (emphasis added). *Hillside Preservation* makes it clear that the use of a categorical exemption is precluded *only* if a significant effect is caused by unusual circumstances – if a potentially significant effect on the environment is not caused by unusual circumstances – a categorical exemption may still be used.

*Hillside Preservation* establishes a two-prong test to resolve disputes related to the unusual circumstances exception. First, as long as the agency's determination regarding the presence or absence of unusual circumstances is supported by substantial evidence in the record, a court will defer to the agency, even if there is also substantial evidence that could support the opposite conclusion. Second, if unusual circumstances are present, a court will apply the

"fair argument" standard: whether there is substantial evidence of a fair argument that a significant effect may result from the unusual circumstances. Agencies may use categorical exemptions unless there are *both* unusual circumstances *and* evidence that these circumstances cause a significant effect.

In an effort to provide further guidance to applicants and agencies, the Court explains that substantial evidence that a proposed activity *would* result in a significant environmental effect tends to prove that some circumstance of the project is "unusual." However, agencies have discretion to consider a project's local conditions and context when considering if unusual circumstances are present. Additionally, if an agency improperly uses a categorical exemption, the proper remedy is a writ of mandate requiring compliance with CEQA, not the preparation of an EIR. Local agencies maintain discretion about how to comply with CEQA and may decide if a Negative Declaration, Mitigated Negative Declaration, or Environmental Impact Report is appropriate after completing an initial study for the project.

**Concurring Opinion.** Justices Liu and Werdegar joined in a concurring opinion stating that the lower courts failed to limit their review to the environmental effects of the project as approved, and it was therefore necessary to remand the case. However, the concurring Justices did not agree with the majority regarding the unusual circumstances exception and would have held that a fair argument that a project may result in significant environmental effects is by itself evidence of unusual circumstances. Two of the five members of the Court majority were appointed only for this case and have been replaced by the newest justices, Mariano-Florentino Cuéllar and Leondra R. Kruger. It remains to be seen how the remaining eight CEQA cases at the Supreme Court will be interpreted by the newest justices.

If you have any questions, please contact Barbara Kautz, Lynn Hutchins, Caroline Nasella, Eric Phillips, or any other attorney at Goldfarb & Lipman.

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