MILLER STARR REGALIA

DECEMBER 4, 2014

California Supreme Court Divided In Key CEQA Case

Related Lawyers: **Arthur F. Coon**

Related Practices: **Land Use & CEQA**

Law360 - On a gray and rainy Los Angeles morning — the final day of oral arguments in retiring Justice Marvin Baxter's long and distinguished career — the California Supreme Court presided over a spirited oral argument session in what promises to be a landmark California Environmental Quality Act case. The high court's decision in Berkeley Hillside Preservation v. City of Berkeley is expected within 90 days of the Dec. 2 argument, and is anticipated to determine the fundamental legal nature and practical utility of CEQA's regulatory exemptions — commonly known as categorical exemptions — as well as the exceptions to those exemptions. The case's outcome will have far-reaching consequences for the state and local lead agencies, project developers and courts throughout the state that must routinely interpret, apply and defend CEQA challenges to approvals based on categorical exemptions.

The immediate issue for the parties in Berkeley Hillside Preservation is whether a full environmental impact report (EIR) must be prepared for a proposed two-story, 6,478 square foot single-family residence and 3,394 square foot garage on a steep, residentially zoned Berkeley hillside lot — structures that counsel for plaintiffs opposing the project, Susan Brandt-Hawley, argued to the court would be "perched like a little hat on this big slope." Brandt-Hawley characterized the project as placing a "huge home" in a "landslide zone," resulting in environmental impacts including seismic lurch and construction traffic problems.

From a broader perspective, at stake is the amount of discretion reviewing courts must accord to lead agencies' decisions as to whether CEQA's categorical exemptions apply to projects those agencies approve. The city of Berkeley's attorney, Amrit Kulkarni, argued that the deferential "substantial evidence" standard of review should apply both to the agency's decision whether an exemption applies and to its decision whether "unusual circumstances" exist giving rise to an exception to the exemption. Kulkarni argued that the Court of Appeal "read out" of the CEQA guidelines the words "due to" and "unusual" by mistakenly "collapsing" these distinct elements of the exception and incorrectly applying the "fair argument" standard.

As background, the CEQA guidelines contain a lengthy list of categorical exemptions promulgated by the state Natural Resources Agency pursuant to the express direction of a CEQA statute (Pub. Resources Code § 21084). Unlike CEQA's statutory exemptions, which typically exempt projects for legislative policy reasons without regard to their environmental effects, the categorical exemptions purport to exempt classes of projects that the secretary of the Resources Agency has determined do not typically have significant environmental effects. As relevant to the residential structures approved by the city in Berkeley Hillside Preservation, the CEQA guidelines contain an exception to categorical exemptions for single-family residential, infill and other project classes where substantial evidence presented to the agency shows there may be a significant environmental impact "due to unusual circumstances."

Plaintiffs in the case, who prevailed in the First District Court of Appeal, contend that the guidelines' "unusual circumstances" language is merely "descriptive" or tautological and of no independent legal significance; in their view, CEQA's low-threshold "fair argument" test is the standard of judicial review applicable in any challenge to an agency decision applying a categorical exemption.

Under this test, if an agency is presented with substantial evidence — for example, a qualified expert's opinion letter or report — supporting a "fair argument" that a particular categorically exempt project may have a significant environmental impact, the exemption would be defeated and an EIR required notwithstanding the existence of contrary substantial evidence presented to and relied on by the agency. In other words, plaintiffs contend that a mere "fair argument" that any project — categorically exempt or not — may have any significant environmental effect suffices to remove it from the exemption and subject it to full CEQA review. If plaintiffs' view prevails, it is easy to foresee that the practical usefulness of categorical exemptions could be severely curtailed, if not wholly lost.

The justices' questions and comments at oral argument did not point toward any clear result but appeared to express a fair amount of skepticism regarding plaintiffs' arguments and position. As Justice Goodwin Liu observed during questioning of Brandt-Hawley at oral argument, the "fair argument standard" is "not very onerous" and is a "very light trigger," which would easily put categorically exempt projects "back in the quagmire" of CEQA review from which they had been exempted.

In his extensive questioning of both Kulkarni and Brandt-Hawley, Justice Liu acknowledged the guidelines' "unusual circumstances" language is "tricky," but proposed that CEQA's legislative and regulatory scheme may well contemplate that categorical exemptions are intended as a "rough cut" of projects, about which "in the main" CEQA shouldn't be concerned — even though "some outliers" in the classes may still have significant effects. He identified the key question as being whether CEQA allows some projects with significant effects to be treated as exempt on a "wholesale basis" such that standard CEQA review is not required on a "case-by-case" basis.

Kulkarni picked up on Justice Liu's comments, arguing that categorical exemptions carry a "presumption against environmental review," and that CEQA seeks in this area to harmonize competing policy goals. He criticized plaintiffs as simplistically viewing CEQA as a "single purpose" policy statute whereas he contended the Legislature actually viewed it "more holistically."

In his questioning of both sides, Justice Liu noted a "definitional problem" exists regarding both "who decides what is unusual" and the relevant factors to be considered in making this decision; for example, is compliance with local zoning rules determinative, or is it the number of houses of that size in the jurisdiction that matters, or other factors? Justice Liu pressed both sides as to what the "proper metric" would be, assuming the guidelines' plain language was given effect as urged by the city.

In his questioning of Brandt-Hawley, Justice Liu also turned to the practical implications of plaintiffs' position, stating: "The problem with your reading [of the guidelines] is: what's the point of a categorical exemption?" He also commented that the "due to" language of the exception to exemptions implied a "causal link must be present" between the project's unusual circumstances and any potential significant impacts in order to remove it from an exemption — a repudiation of plaintiffs' position that the low-threshold "fair argument" test applies in this situation.

Justice Liu pressed Brandt-Hawley with other questions: "What is wrong with your opponents' position? ... What about giving [the guidelines' language] independent meaning? Why does that necessarily undermine CEQA? Why can't we say the Legislature authorized "rough cut" exemptions in the interest of efficiency?"

Brandt-Hawley stood her ground and consistently argued plaintiffs' theme that a literal interpretation of the guidelines in accordance with their plain language would contravene statutory authority and seminal Supreme Court case law. She asserted the "unusual circumstances" exception stated in the guidelines "has taken on a life of its own without statutory or regulatory authority."

While Justice Liu's questions seemed to dominate the arguments, other justices weighed in as well. Justice Baxter inquired as to "what weight [the courts should] place on the administrative process?" His brief comments seemed to suggest a view that deference should be paid to factual determinations as to size, slope and the like made by entities that "deal on a day to day basis with what is appropriate for [their] community."

Justice Ming Chin asked the reason for having a "statewide standard," and also conducted a rather pointed cross-examination of Brandt-Hawley regarding the credibility of plaintiffs' expert engineer, Lawrence Karp, and the materials he relied on in giving his opinions of impacts due to grading and seismic hazards posed by the project.

Justice Kay Werdegar, perhaps the most well-known and senior “CEQA jurist” on the high court, also weighed in with a number of questions and comments, inquiring regarding the appropriate factors to be considered in deciding whether “unusual circumstances” exist and what specific unusual circumstances were presented by the project. She pointed out that the city’s administrative bodies had rejected plaintiffs’ expert evidence on impacts and unusual circumstances, and asked whether the court should review such decisions as “discretionary,” on the one hand, or by applying the “fair argument” test, on the other.

Justice Carol Corrigan suggested such questions ought to be decided “on the ground” by the local agencies, i.e., “here’s our rules in Berkeley.” At one point, she criticized Brandt-Hawley’s response to one of Justice Liu’s question when Brandt-Hawley stated that the extent of current judicial guidance on “unusual circumstances” was simply that they weren’t present with “run of the mill” projects. Corrigan said that sounded like an “I know it when I see it” standard.

Chief Justice Tani Cantil-Sakauye asked “how much depends [on the expert’s position that the house can’t be built per the plans that were approved?]” Brandt-Hawley responded: “If the Court needed to find it, I’d suggest there are unusual circumstances here.” Justice Liu noted that “most houses” aren’t 10,000 square feet, and mused at one point that what is unusual in Berkeley may not be unusual in Beverly Hills. He asked Kulkarni, regarding “values of predictability and consistency, ... what do you offer?” Corrigan asked whether Berkeley couldn’t decide to zone a maximum square footage for homes, to which Kulkarni replied that it — like other jurisdictions — could do so.

It appears from their questions and comments that the court’s justices are divided on details of the appropriate legal standards of review for exceptions to exemptions, but are at least seriously considering reversing the Court of Appeal’s decision and upholding the express language of the CEQA guidelines’ two-part test for exceptions to categorical exemptions. It remains unclear from their comments precisely what factors they would, in that event, conclude must be considered in any “unusual circumstances” determination — although it is a safe bet they would look for objective factors in the guidelines themselves, and other regulations, that can be applied statewide and that will enhance CEQA’s predictability and consistency.

In this regard, Kulkarni suggested to the court that a categorically exempt development project’s compliance with legislatively adopted local land use rules should control and rule out a finding of “unusual circumstances” absent an odd circumstance leading to a clear health and safety impact (e.g., no available sewage capacity for the last single-family home proposed to be built in a subdivision) or violation of state or federal law (e.g., the proposed location of a project in endangered species critical habit) — or something akin to the construction of a “single family residence” like the Hearst Castle. Barring such extreme instances, however, he argued that a categorically exempt project that complies with all local development rules should remain exempt. He added that compliance with objective general plan and zoning regulations that themselves have undergone CEQA review provides “layers of [environmental] protection” for exempt projects that are consistent with such regulations.

While the oral argument revealed a Supreme Court apparently still divided on a number of relevant issues, under the 90-day rule it must render its decision by March 2, 2015. The CEQA community continues to await with interest what promises to be a blockbuster decision.
