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MARCH 2, 2015

California Supreme Court Construes CEQA's "Unusual Circumstances" Exception to Categorical Exemptions in Berkeley Hillside Preservation v. City of Berkeley Decision

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In a 46-page majority opinion written by Justice Chin and joined by four other justices, punctuated by an 18-page concurring opinion (by Justice Liu, joined by Justice Werdegar) which reads like a dissent, the California Supreme Court reversed the First District Court of Appeal's judgment in *Berkeley Hillside Preservation v. City of Berkeley* (Case Nos. S201116, A131254) and remanded for further proceedings.

The Supreme Court's major ruling was that the "due to unusual circumstances" language of CEQA Guidelines § 15300.2(c) – which provides an exception to otherwise-applicable categorical exemptions "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances" – has some independent significance and utility, and is not merely meaningless surplusage. Thus, a project opponent simply showing substantial evidence supporting a "fair argument" that an otherwise-exempt project may have significant adverse environmental impacts does not defeat an exemption – the opponent must also make a "factual" showing to the satisfaction of the lead agency that "unusual circumstances" exist and have resulted in the potentially significant impacts. The Court did not precisely define what a showing of "unusual circumstances" would entail, but expressly approved local agencies' consideration of local conditions and held that the lead agency's decision on that prong of the exception would be subject to the deferential substantial evidence standard of judicial review. By contrast, under the "bifurcated" standard adopted by the Court, the determination of whether unusual circumstances have resulted in potential impacts would be conducted under the "fair argument" standard and judicially reviewed as a "procedural" matter under a de novo standard.

A little background helps place these rather abstract legal concepts in a more concrete context. The City approved – as categorically exempt from CEQA – a permit for a 6,478-square-foot house with attached 3,394-square-foot 10-car garage, covering 16% of a steeply sloped (about 50%) lot in a heavily wooded area on Rose Street in Berkeley. It relied on the CEQA Guidelines' Class 3 exemption for "new, small facilities or structures" including "[o]ne single-family residence, or a second dwelling unit in a residential zone" (14 Cal. Code Regs. § 15303), and the Class 32 exemption for "in-fill development" projects within city limits on sites not greater than "five acres substantially surrounded by urban uses[.]" (§ 15332.) The "in-fill" exemption essentially requires that the proposed development: be consistent with all applicable general plan and zoning rules; occur on a site of five or fewer acres substantially surrounded by urban uses, lacking habitat value for special status species, and amenable to all required utilities and public services; and not result in any traffic, noise, air quality or water quality impacts.

City residents administratively appealed the City zoning adjustment board's approval to the City Council, arguing in relevant part that the project's "unusual size, location, nature and scope will have significant environmental impact on its surroundings" as it would be "one of the largest houses in Berkeley, four times the average house size in its vicinity, and situated in a canyon where the existing houses are of a much smaller scale." They submitted evidence that out of 17,000 houses in Berkeley, only 17 exceed 6,000 square feet, 10 exceed 6,400 square feet, and one exceeds 9,000 square feet; they also asserted the proposed house would violate City Code height restrictions and general plan policies, and that an EIR was needed to evaluate noise, air quality, historic resources, and neighborhood safety impacts. The City's planning director responded with conflicting evidence that 68 dwellings in the City exceed 6,000 square feet, nine exceed 9,000 square feet, and five exceed 10,000 square feet, and that 16 residences within 300 feet of the project exceed its floor-area-to-lot-area ratio.

Expert evidence submitted on technical issues of impact also conflicted. Architect and geotechnical engineer Lawrence Karp submitted letters in opposition to the project claiming it could not be constructed as designed (and ultimately approved) and would instead require massive fill, retaining walls and grading not shown on the plans, and that it would likely have significant impacts both during construction and afterwards "due to the probability of seismic lurching of the oversteepened side-hill fills." The project's geotechnical engineer, Alan Kropp, disagreed, asserting he had conducted the necessary investigations and found no landslide hazard and that Karp had materially misread the project plans in raising "side-hill fill" concerns, when no such fill would occur. This response was corroborated by a letter from civil engineer Jim Toby. After hearing testimony from all three engineers, and others, the City Council denied the appeal and affirmed the permit approval pursuant to the CEQA exemptions.

The opponents then went to court. The trial court denied plaintiffs' writ of mandate challenging the approval, finding that substantial evidence supported the applicability of the Class 3 and 32 exemptions, and that Guidelines § 15300.2's exception did not apply – notwithstanding acknowledged evidence from Karp of potentially significant effects – because the proposed project presented no unusual circumstances. The Court of Appeal reversed, holding that the unusual circumstances (or "significant effects") exception applied and precluded the City's reliance on the exemptions because "the fact that proposed activity may have an effect on the environment is *itself* an unusual circumstance"; it held the "fair argument" standard applied to the agency's exception determination.

In finally reversing and remanding after its 2012 grant of review, the Supreme Court in its majority opinion made a number of key points:

- As a foundational matter, the Court treated the CEQA Guidelines as binding regulatory mandates. "[T]he rules that govern interpretation of statutes also govern interpretation of administrative regulations." (Maj. Opn., p. 9, citations omitted.) In applying the principles of "giving effect to [a statute's or regulation's] usual meaning and avoiding interpretations that render any language surplusage" the Court held that "[t]he plain language of [§ 15300.2(c)] supports the view that, for the exception to apply, it is not alone enough that there is a reasonable possibility that the activity will have a significant effect"; rather, the effect must be "*due to unusual circumstances*." (*Ibid*.) The appellants and Court of Appeal (and the concurring opinion) thus erroneously construed the phrase "due to unusual circumstances" to be "merely 'descriptive'" and *without* independent meaning. The majority opinion held that, had the Secretary of the Natural Resources Agency intended such a construction, it would have omitted the "unusual circumstances" language so as not to "confuse the issue with meaningless language"; rather, it would simply have provided "the exception applies 'if there is a reasonable possibility that the activity will have a significant effect on the environment.'"

- The appellants' and concurring opinion's construction would render "the categorical exemptions [that] the Legislature, through the Secretary, has established… [of] little, if any, effect" The majority reasoned that an EIR is required only if there exists substantial evidence that project may have a significant effect on the environment; that, as a corollary, if there is no substantial evidence, in light of the whole record, that the project may have a significant effect it is not subject to further CEQA review; and that these principles are "capture[d]" by CEQA's common sense exemption as set forth in Guidelines § 15061(b)(3), which states: "Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA." Appellants' suggested test for determining whether the "unusual circumstances" exception applies – whether there is a "reasonable possibility" the project "will" have a significant effect on the environment – is thus exactly the same test used to determine if the common sense exemption applies. (Maj. Opn. at p. 11, comparing Guideline §§ 15300.2(c) and 15061(b)(3)); accordingly, "under appellants' view, the categorical exemptions would serve no purpose; they would apply only when the proposed project is by statute and

Guidelines [§]15061[](b)(3), already outside of CEQA review."

- The majority further rejected appellant's contention that its construction was contrary to CEQA's statutory mandates, and found that "several CEQA provisions, as well as their evolution, are relevant to the issue." (Maj. Opn., p. 13.) Tracing the early legislative and judicial history of CEQA, the Court observed that its landmark *Friends of Mammoth* decision construing CEQA to apply to approvals of private projects noted that CEQA "deals…with *questions of degree*" and that "*[f]urther legislative or administrative guidance may be forthcoming on this point*…." That early decision further noted: "[C]ommon sense tells us that the majority of private projects [requiring government approval]… are minor in scope – e.g., relating only to the construction, improvement, or operation of an individual dwelling or small business – and hence, in the absence of unusual circumstances, have little or no effect on the public environment. Such projects, accordingly, may be approved exactly as before the enactment of the [CEQA]." (Quoting *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 248, 272.). The Court found significant the Legislature's immediate response to *Friends of* Mammoth – 1972 urgency legislation directing OPR to prepare and develop guidelines including categorical exemptions "for classes of projects which have been determined [by the Secretary's finding] not to have a significant effect on the environment and which shall be exempt from [CEQA]…." The Court noted "[t]his provision remains substantially the same today" and that the Legislature also included a mechanism to challenge the Secretary's categorical exemption determinations. (See Pub. Resources Code, § 21086.)

- The Legislature thus – in response to the Court's observations in *Friends of Mammoth* – required OPR and the Secretary to apply their expertise to identify classes of projects that *are* exempt from CEQA by "making a finding" that they do not have a significant environmental effect. Accordingly, "construing the unusual circumstances exception as requiring more than a showing of a fair argument that the proposed activity may have a significant environmental effect is fully consistent with the Legislature's intent." In other words, the categorical exemptions were always intended to have some teeth.

- The majority found the appellants' and concurring opinion's interpretation would render categorical exemptions essentially toothless. Because "appellants can identify no purpose or effect of the categorical exemption statutes if, as they assert, a showing of a fair argument of a potential environmental effect precludes application of all categorical exemptions[,]" such a construction contravenes the Court's duty to construe a statute giving effect to all parts of the statutory and regulatory framework, rather than rendering part of it useless and unnecessary.

- More specifically, the majority found the concurring opinion's attempt to show categorical exemptions still have "value" (even under appellants' construction) by conferring a "procedural advantage" to be unpersuasive and that the alleged advantages were "largely illusory"; again, in the majority's view, the concurring opinion rendered categorical exemptions duplicative of the common sense exemption and failed to show they have "independent value." The majority likewise rejected the concurrence's attempt to argue project proponents' ability to make "comparative arguments" as to a project's "typical" effects or characteristics conferred significant "value," as being fundamentally inconsistent with the "fair argument" standard. Moreover, even if categorical exemptions conferred *some* "value" under the concurrence's interpretation, it wasn't enough to effectuate the majority's view of the Legislature's intent, given that the interpretation still rendered the Guidelines' "due to unusual circumstances" language meaningless surplusage, and "nothing suggests that either the Legislature or the Secretary intended the categorical exemptions to have such miniscule value." (Maj. Opn., pp. 19-20.)

- The Court summarized its rule and rationales as follows: "The plain language of Guidelines [§] 15300.2[c] … requires that a potentially significant effect must be "due to unusual circumstances" for the exception to apply." A challenger has the burden "to establish the unusual circumstances exception, [and] it is not enough…, merely to provide substantial evidence that the project *may* have a significant effect on the environment, because that is the inquiry CEQA requires absent an exemption." (Maj. Opn., p. 20.)

- The Court added an evidentiary wrinkle about alternative ways that project opponents might attempt to show unusual circumstances, including when such circumstances might properly be *inferred*, observing that "evidence that the project *will* have a significant effect *does* tend to prove that some circumstance of the project is unusual." (Maj. Opn. at 21.) Accordingly, "[a] party invoking the exception may establish an unusual circumstance without evidence of an 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. In such a case, to render the exception applicable, the party need only show a *reasonable possibility* of a significant effect *due to that unusual circumstance*. *Alternatively*, … a party may establish an unusual circumstance with evidence that the project *will* have a significant environmental impact. That evidence, *if convincing*, *necessarily also*

establishes “a reasonable possibility that the activity will have a significant effect … due to unusual circumstances.”” (Maj. Opn. at 21, emph. added.) The majority deemed the above analysis consistent with the concurring opinion’s “central proposition” that the exception applies where there is evidence that a project *will* have a significant effect.

- The Court also found support for its conclusions in 1993 legislation designed to reduce uncertainty and litigation risk and provide a “safe harbor” to local entities and developers who comply with CEQA’s *explicit* (Maj. Opn. at 24, citing Pub. Resources Code § 21083.1 [directing Courts “not [to] interpret [the CEQA statutes] *or the state guidelines adopted pursuant to Section 21083* in a manner which imposes procedural or substantive requirements beyond those *explicitly stated in* [CEQA] *or in the state guidelines.”*].)

- In analyzing the standard of review, the Court observed it has previously applied the “fair argument” test only to decisions whether to require an EIR or a negative declaration, although some appellate courts have extended it to apply to the unusual circumstances determination. (Maj. Opn. at 32-33.) It then set forth the following rules: (1) “[t]he determination as to whether there are “unusual circumstances” … is reviewed under [Public Resources Code] section 21168.5’s substantial evidence prong” and (2) “an agency’s finding as to whether unusual circumstances give rise to “a reasonable possibility that the activity will have a significant effect on the environment” … is reviewed to determine whether the agency, in applying the fair argument standard,” proceeded in [the] manner required by law.”” (Maj. Opn. at 33-34, citations omitted.) This is because the “unusual circumstances” issue “is an essentially factual inquiry” as to which the agency is “the finder of fact” whose decision is reviewable only for substantial evidence support; however, where “unusual circumstances” have been established, “it is appropriate for agencies to apply the fair argument standard in determining whether “there is a reasonable possibility of a significant effect on the environment due to [the] unusual circumstances.”” (Maj. Opn. at 34-35.) The Court found that “[t]his bifurcated approach … comports with our construction of the unusual circumstances exception to require findings of *both* unusual circumstances *and* a potentially significant effect.” (Maj. Opn. at 35.) Further, it found its conclusion did not conflict with its own *Muzzy Ranch* (or other) decisions, or that of the Court of Appeal in *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, which it found *affirmatively supported* its decision by holding that a threshold historicity determination regarding a resource was subject to substantial evidence review, while the fair argument test governed the separate issue whether the project may cause a substantial adverse change in the historical resource’s significance.

- The Court did not direct a particular outcome in the case before it. Given “that neither the trial court nor the Court of Appeal applied principles like those” set forth in its decision, it determined that remand for application of these standards was “both appropriate and necessary.” Providing further guidance, the Court held the Court of Appeal erred when it indicated that the relevant inquiry precluded consideration of “the typical circumstances in one particular neighborhood.” Per the Court, local conditions are relevant, and “local agencies have discretion to consider conditions in the vicinity of the proposed project.”

- Furthermore, the Supreme Court offered the following guidance on the disputed issue whether architect/engineer Karp’s opinions constituted substantial evidence supporting a fair argument of potential impact: “We agree with respondents that a finding of environmental impacts must be based on the proposed project as actually approved and may not be based on unapproved activities that opponents assert will be necessary because the project, as approved, cannot be built.” (Maj. Opn. at 41-42.) The Court observed that “if a proposed project cannot be built as approved, then the project’s proponents will have to seek approval of any additional activities and, at that time, will have to address the potential environmental effects of those additional activities.” (Maj. Opn. at 43.) Karp’s opinion was thus legally insufficient to the extent it was based on potential impacts from “side-hill fill” not actually proposed or approved.

- Finally, in addressing the potential question of remedy on remand, the Court pointed out that nothing in CEQA authorizes a court to direct a public agency to exercise its discretion in any particular way, and that if a categorical exemption were determined inapplicable, required further CEQA compliance could consist of an EIR or a negative declaration, mitigated or otherwise. (Maj. Opn. 44-46.)

The Supreme Court's decision offers an analysis of the unusual circumstances exception to categorical exemptions that essentially "splits the baby" — although developers and local agencies appear to get by far the better part. The Court rejects the position that the low threshold fair argument test controls and that the exception's "unusual circumstances" language has no independent meaning or utility; further, an agency's threshold unusual circumstances determination is allowed to take into account local conditions and is subject to deferential "substantial evidence" review. However, the "fair argument" test still applies to the potential impacts determination once unusual circumstances are established, and "convincing" evidence that a significant impact "will" occur can itself support an inferential finding that the "factual" unusual circumstances prong of the exception to the exemption is satisfied.

Is this analysis somewhat abstruse? Probably. Complicated? Definitely. Better for developers and local agencies than the previous confusing muddle of appellate opinions on the subject? Alas, almost certainly. *Berkeley Hillside Preservation* raised very difficult legal issues, and was not an easy case for the Supreme Court to decide by any means; in my view, the Court's decision represents an earnest attempt to fashion a pragmatic solution to these thorny issues, and a hard-won victory for local agencies and project proponents that, at the very least, "moves the needle" on judicial CEQA reform in the right direction.

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