Opinion Analysis: Berkeley Hillside Preservation v. City of Berkeley

On March 2, 2015, the California Supreme Court issued its decision in *Berkeley Hillside Preservation v. City of Berkeley*, which addressed the meaning of the "unusual circumstances" exception to the California Environmental Quality Act's ("CEQA") categorical exemptions. Specifically, the Court "granted review to consider the proper interpretation and application" of section 15300.2, subd. (c) of the Guidelines for Implementation of CEQA ("Guidelines"), known as the "unusual circumstances exception." That provision provides: "*Significant Effect*. A categorical exemption shall not 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 central dispute—and the Court's most significant ruling—concerned the meaning of the language "due to unusual circumstances" in section 15300.2, subd. (c).

The case arose from a dispute over a property owner's project proposal to build a large house on a hillside in the City of Berkeley ("the City"). The City approved a permit for the project and found it categorically exempt from CEQA regulations under section 15303, subd. (a) (exempting single family homes in a residential zone) and section 15332 (the so-called "in-fill exemption"). The City, relying on sections 15303, subd. (a) and 15332, therefore approved the project as categorically exempt from CEQA. Several Berkeley residents appealed the decision to the Berkeley City Council, which dismissed the appeal. One citizen, joined by a coalition of Berkeley residents known as the Berkeley Hillside Preservation, filed a petition for writ of mandamus in Superior Court, which was denied.

The Court of Appeal reversed. The court explained that CEQA's categorical exemptions have many exceptions, including the unusual circumstances exception. The court concluded that evidence that provides a "fair argument" that an otherwise exempt project might have an effect on the environment is, in and of itself, an "unusual circumstance" that triggers the unusual circumstances exception. In the court's words, "the fact that a proposed activity may have an effect on the

environment is itself an unusual circumstance," which renders a CEQA categorical exemption inapplicable. Because the project's opponents had provided substantial evidence of a fair argument that the project would have a significant effect on the environment due to its unusual circumstances, the court found that an environmental impact report ("EIR") was necessary.

The challengers to the City's decision argued that the unusual circumstances exception applied because of the perceived environmental effects that the project would cause. The Court of Appeal first concluded that the applicable standard to assess the issue is the more deferential "fair argument" standard, not the more stringent "substantial evidence" standard. But the court reasoned that there was sufficient evidence—and therefore a "fair argument"—that the project would have environmental impacts, which sufficed to trigger the unusual circumstances exception. In other words, the court held that "unusual circumstances" exist for CEQA purposes where there is sufficient evidence to show that a project that is generally exempt from CEQA could have a significant effect on the environment. The court acknowledged that its decision added to the split between the courts of appeal as to which standard—the fair argument or the substantial evidence standard—courts should use to assess a party's argument that the unusual circumstances exception applies.

The California Supreme Court granted review and resolved the split, holding that the substantial evidence test applies. Justice Chin authored the majority opinion, joined by Chief Justice Cantil-Sakauye, Justice Corrigan, now-retired Justice Baxter, and Justice Boren of the Second Appellate District, sitting by designation. Justice Liu authored a concurring opinion, joined by Justice Werdegar, in which he agreed with the majority's decision to reverse the Court of Appeal and remand the case, but he disagreed with the majority's interpretation of section 15300.2, subd. (c)—the primary issue in the case.

The majority held at the outset that the Court of Appeal erred by finding that a possible significant environmental effect that a project may have is itself an unusual circumstance. The majority reasoned that the Court of Appeal's decision would render meaningless the language "due to unusual circumstances" in section 15300.2, subd. (c).

The majority established a two-part test to analyze a project opponent's assertion that a project presents "unusual circumstances" that require CEQA review. First, a court must determine whether the project contains circumstances unusual for the projects in the class outlined in the relevant categorical exemption. The majority held that, rather than assessing whether a project as whole will have a significant effect on the environment, a project opponent must instead demonstrate that a project will potentially have a significant effect on the environment due to its specific unusual circumstances.

The majority then went on to address the appropriate standard of review applicable to this inquiry, holding that the substantial evidence test applies to determine whether the unusual circumstances exception applies. This means that an agency's decision that unusual circumstances do not exist will be upheld if it is supported by substantial evidence.

Second, the majority held that if the project does in fact constitute unusual circumstances, a court must determine if the unusual circumstances will cause a significant environmental effect. The majority held that if an agency determines that unusual circumstances exist (therefore requiring an EIR or negative declaration), the fair argument standard applies to determine whether the unusual circumstances create a "reasonable possibility" that the project will have a significant environmental impact. The majority noted, however, that substantial evidence of a significant environmental effect "tend[s] to prove that some circumstance of the project is unusual." Because neither the trial court nor the Court of Appeal applied the appropriate analysis, the majority reversed and remanded.

Justice Liu, joined by Justice Werdegar, agreed that, among other things, reversal and remand were necessary, but he disagreed with the majority's analysis of section 15300.2, subd. (c). In his view, "a project falling within a categorical exemption is, by definition, a project belonging to a class of projects that does not have significant environmental effects." Thus, Justice Liu reasoned:

When there is a reasonable possibility that a project otherwise covered by a categorical exemption will have a significant environmental effect, it necessarily follows that the project presents unusual circumstances. In other words, the

reasonable possibility of a significant environmental effect *means* that some circumstance of the project is not usual in comparison to the typical project in the exempt category. Instead of comprising a distinct requirement, the phrase "unusual circumstances" in section 15300.2(c) simply *describes* the nature of a project that, while belonging to a class of projects that typically have no significant environmental effects, nonetheless may have such effects.

Simply put, Justice Liu considers "[t]he sole question for courts reviewing agency determinations under §15300.2(c)" to be "whether substantial evidence supports a fair argument that the project will have significant environmental effects."

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