

Court Rejects Claim That Clinic Protests Might Cause Significant Environmental Impacts

A court of appeal has ruled that opponents of a new Planned Parenthood clinic did not establish a fair argument that anti-clinic protests might cause significant environmental effects. Therefore, the City of South San Francisco did not err in finding the clinic project exempt from CEQA. *Respect Life South San Francisco v. City of South San Francisco*, 15 Cal. App. 5th 449 (2017). Separately, the court's opinion raises questions about how lead agencies should respond when a project opponent raises the unusual-circumstances exception to an agency's reliance on CEQA's categorical exemptions. **Background.** The city approved a conditional use permit allowing a small downtown office building to be converted into a medical clinic and found the project exempt from CEQA under three separate categorical exemptions. Project opponents claimed the exemptions were barred by the unusual-circumstances exception because the clinic tenant was a Planned Parenthood affiliate. Under that exception, a project cannot be found exempt if there is a reasonable possibility it will have a significant effect on the environment due to unusual circumstances. The opponents claimed that use of the building for a Planned Parenthood clinic would lead to protests, an unusual circumstance that would cause significant environmental impacts. **A bifurcated standard of review applies to a claim that a categorical exemption is barred by the unusual-circumstances exception.** Under the California Supreme Court's recent *Berkeley Hillside* decision, a party claiming a categorical exemption is barred by the unusual-circumstances exception must prove two things: First, that the project presents unusual circumstances that distinguish it from other projects covered by the exemption; and second, that there is a reasonable possibility a significant effect on the environment will occur because of those unusual circumstances. To prove the first element, the challenger must surmount a relatively high hurdle; it must persuade the court there is no substantial evidence in the record that would support the agency's determination there are no unusual circumstances. If the complaining party is able to make that showing, however, it faces a much lower barrier in proving the second element; it need only show there is evidence in the record that would support a fair argument that a significant effect on the environment could occur. **A different standard may apply when the agency does not make an express determination whether or not the project's circumstances are unusual.** Nothing in the statute or CEQA Guidelines requires an agency to make findings explaining why it has concluded a project is exempt under a categorical exemption. The appellate courts have also made it clear that an agency is not required to give its reasons for relying on a categorical exemption when approving a project, or even to put exemption determinations in writing. Here, the city adopted findings showing why it found the project exempt under each of three separate categorical exemptions, but did not make a finding explaining why the exceptions to the categorical exemptions did not apply. In a surprising take on the standard of review, the *Respect Life* court declared that in the absence of an express finding explaining why the city determined the unusual-circumstances exception was inapplicable, a court's ability to affirm based on the first element --the absence of unusual circumstances--is "constrained." The court reasoned that without a finding, a court must assume that the agency determined there *were* unusual circumstances, and could only affirm based on that element if the court "concludes that the record does not contain substantial evidence of any such circumstances." It is not, therefore, sufficient for the court to identify substantial evidence in the record that there are no unusual circumstances. "This is because such an approach fails to address the possibility that the entity thought there were unusual circumstances but concluded, under the second element, that those circumstances did not support a fair argument of a reasonable possibility of a significant environmental effect." Under this novel approach, to refute the assumption it found unusual circumstances the agency would have to show it could not have done so because the evidence in the record would be insufficient to support such a determination. . Although the court discussed the standard for reviewing

the unusual circumstances element of the exception at some length, it nevertheless said it need not consider the issue further because the challengers had, in any event, failed to prove the second element--a reasonable possibility of significant environmental effect due to the project. **The challengers failed to identify evidence that the project might result in significant environmental effects.** The crux of the challengers' argument was that protests against the Planned Parenthood clinic were foreseeable, and that such protests would result in an array of environmental impacts such as sidewalk obstruction, public safety effects, traffic and parking congestion, business disruption and increased noise. The court first noted that the city and Planned Parenthood had argued that these claimed impacts are not the kind of indirect or secondary effects that are subject to CEQA because if they occur, they will be caused by the protests, not the project. The court concluded, however, that it need not address that argument: Even if it were assumed these asserted impacts could implicate CEQA, there was no evidence in the record sufficient to show a reasonable possibility significant environmental effects would occur. The court characterized the evidence the challengers relied on of the effects of protests as "minimal, vague and speculative." Although some project opponents said they would protest, no evidence was presented indicating that protests would be particularly disruptive, or that any of the indirect or secondary effects that might result would be consequential. To the contrary, the relevant evidence in the record supported the opposite conclusion: that there was no reasonable possibility of a significant effect on the environment. **A take-home message.** In the wake of *Respect Life*, where there is any dispute whether a categorical exemption might be precluded based on the unusual-circumstances exception, the safest course for the agency would be to ensure that express findings on this issue are included in the record. .

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