

Supreme Court to Decide Scope of Categorical Exemptions from CEQA

In what is perhaps the most controversial CEQA decision this year, the court of appeal in *Berkeley Hillside Preservation* invalidated permits for construction of a single-family home, ruling that the project did not qualify under CEQA's categorical exemption for construction of a single-family residence or its categorical exemption for infill development. The California Supreme Court has now decided to review the court of appeal decision.

The city had determined that none of the exceptions to the categorical exemptions in Guideline 15300.2 were triggered, including the exception for significant effects on the environment due to "unusual circumstances." The trial court agreed, ruling that while there was evidence significant impacts might occur, no showing was made that they would occur due to "unusual circumstances."

The court of appeal rejected this approach, holding that the circumstances that might result in significant environmental impact don't matter. The possibility a proposed activity will have a significant effect on the environment "is *itself* an unusual circumstance," the court stated, which bars reliance on a categorical exemption. The court ruled that EIR was required before permits for the home could be approved.

The court's ruling is difficult to square either with other court decisions that have addressed the issue or the language of the Guideline itself, which provides that "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*." Guideline 15300.2(c). The court's decision effectively erases the usual circumstances language from the Guideline.

An untold number of activities are found exempt under one or more of the categorical exemptions every year. Because the court's decision could severely limit the situations in which categorical exemptions can be used, it has attracted an unusual amount of attention throughout the state, particularly from public agencies.

The city's petition for review of the decision by the California Supreme Court was granted on May 23, 2012.

Berkeley Hillside Preservation v City of Berkeley, A131254 (1st Dist. Feb. 15, 2012), Sup. Ct. No. S01116.

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