



## Government & Regulatory Law Update March 2015

### California Supreme Court Issues Decision in Berkeley Hillside Preservation v. City of Berkeley (Case No. S201116)

On March 2, 2015, the California Supreme Court issued its long awaited opinion in *Berkeley Hillside Preservation v. City of Berkeley* ("Berkeley"). The opinion clarifies two important issues relating to the California Environmental Quality Act ("CEQA"): (1) whether a potentially significant environmental effect alone is sufficient to trigger the unusual circumstances exception to categorical exemptions; and (2) the appropriate standard of review that should be applied in reviewing a lead agency's determination with respect to whether the unusual circumstances exception applies to a particular project.

In Berkeley, the project applicants obtained a discretionary permit to construct a single family home that consisted of a 6,500 square foot residence and a 3,400 square foot garage on a steeply-sloped lot in the Berkeley Hills. The City determined that the project was categorically exempt from CEQA under the small structure and infill exemptions. (Guidelines §§ 15303, 15332.) A lawsuit was filed challenging this determination. The plaintiffs argued that because of the proposed home's large size (larger than 99% of homes in the community) and potential geotechnical issues, it fell within the "unusual circumstances" exception to categorical exemptions, and thus was subject to traditional CEQA review. The Trial Court rejected the plaintiffs' contentions and the Court of Appeal reversed. In doing so, the Court of Appeal concluded "the fact that [the] proposed activity may have an effect on the environment is itself an unusual circumstance," and further, because a fair argument could be made that the unusual circumstances (i.e., the home's size) could cause one or more significant environmental impacts, the project was no longer exempt from traditional CEQA review. This decision created a substantial amount of uncertainty regarding the applicability (and subsequent review) of categorical exemptions.

The Supreme Court reversed the Court of Appeal's decision, concluding that there is a two-part test to determining whether the "unusual circumstances" exception to a categorical exemption applies. First, the lead agency must determine that in fact there are "unusual circumstances" that distinguish the project from the general class of similar projects. This determination is reviewed pursuant to the more deferential substantial evidence standard of review under which the determination will be upheld so long as it is supported by substantial evidence in the record.

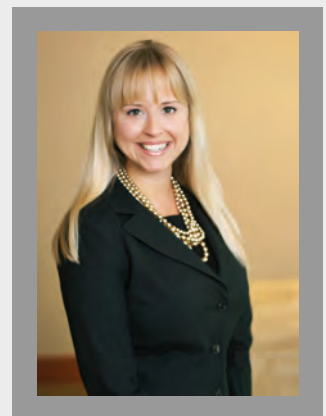
If the lead agency determines that unusual circumstances are present, it must next decide whether those circumstances could give rise to a reasonable possibility of a significant environmental impact resulting from the project. This determination is reviewed under the less deferential fair argument standard, although the fair argument must be supported by substantial evidence. Accordingly, once an unusual circumstance is identified, the deference accorded to lead agencies diminishes, and a categorical exemption may not be used if a fair argument could be made that there is a reasonable possibility of a significant impact on the environment.

The Berkeley case provides helpful guidance to local agencies, developers and CEQA practitioners regarding the appropriateness of relying on categorical exemptions for certain projects. In particular, the Supreme Court's conclusion that the unusual circumstances exception requires findings of both unusual circumstances and a potentially significant environmental impact will likely result in more exemption determinations being upheld if challenged. The full opinion in the Berkeley case can be found here: <http://www.courts.ca.gov/opinions/documents/S201116.PDF>

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