



COURT NARROWS USE OF CATEGORICAL EXEMPTIONS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

In a recent decision, *Berkeley Hillside Preservation v. City of Berkeley* (2012) 203 Cal.App.4th 656, the court of appeal significantly limited categorical exemptions to the California Environmental Quality Act (CEQA) that are regularly relied upon by public agencies to avoid undertaking further environmental analysis of discretionary projects.

There is a relatively complex set of considerations when undertaking CEQA review. The first determination that must be made is whether or not the contemplated action or activity is a "project" within the meaning of CEQA. What some agencies may overlook is that even very simple actions giving final approval of a discretionary activity may meet the broad definition of a "project," and thus be subject to CEQA. Projects can sometimes include actions as seemingly benign as relocating a program, or closing a facility.

If the determination has been made that the contemplated action is a project under CEQA, public agencies may be able to rely upon various "categorical exemptions" contained in CEQA. The CEQA guidelines contain 33 categories of projects that are presumed not to have a significant effect on the environment and are therefore exempted from a requirement of further CEQA review. Filing of a Notice of Exemption triggers a 35-day deadline for any legal challenge under CEQA. However, the CEQA guidelines also contain *exceptions* to the exemptions.

One exception is the "significant effect" exception, which states that even if an activity falls into a categorical exemption, the exemption does not apply if there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances. Previously, courts have interpreted this to mean that there must be *both* unusual circumstances and a reasonable possibility of a significant environmental impact due to the unusual circumstances to disqualify the categorical exemption.

In *Berkeley Hillside Preservation*, the court of appeal examined the significant effect exception, and greatly broadened its scope, potentially narrowing the availability of all categorical exemptions and effectively doing away with the "due to unusual circumstances" part of the test. In this case, the City of Berkeley approved construction of a large new home, authorizing two categorical exemptions to keep the project from needing to undergo further CEQA review. The project opponents sued under CEQA. The trial court ruled in favor of the City, and found that while there was the potential for significant environmental impact, the exception was not triggered because the potential significant impact was not "due to unusual circumstances."

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The appellate court overturned the trial court's decision. In what appears to be a new standard, the court held that evidence of a "fair argument" that a project will have a significant impact "is *itself* an unusual circumstance" that invalidates a categorical exemption. Because opponents to the home project submitted an expert's opinion alleging a significant environmental impact, the court found that additional investigation must be done to determine the true potential for significant effects from the project, regardless of whether or not there was anything particularly unusual about the project.

In light of this ruling, public agencies must be aware that project opponents now have an easier method to challenge a categorical exemption for a project. As a result, agencies may be forced to undertake some environmental analysis in order to justify the use of the exemption. This has the potential of doing away with the benefits of the exemption in the first place. The case also potentially empowers any individual "expert" to offer an opinion that blocks the use of a categorical exemption.

We have spoken to the attorneys representing the property owners in *Berkeley Hillside Preservation*, and they have indicated that they have already filed a petition for review with the California Supreme Court. We also understand that various statewide organizations representing public agencies are filing *amicus* letters in support of the appeal. Regardless of the outcome with the Supreme Court, which may elect not even to hear the appeal, the case serves as a cautionary tale regarding CEQA. Even when it appears on the surface that a project is exempt from CEQA, it is prudent to review that determination closely before relying on it.

For a checklist prepared by Lozano Smith regarding the different levels of CEQA review and when each may apply, please visit [CEQA Checklist for School Districts](#). To monitor the latest CEQA developments that affect public agencies, or if you have any questions about the *Berkeley Hillside Preservation* decision and CEQA, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#) or follow Lozano Smith on [Facebook](#).

Written by:

[Harold M. Freiman](#)

Shareholder

Walnut Creek Office

hfrieman@lozanosmith.com

[Benjamin C. Rosenbaum](#)

Associate

Fresno Office

brosenbaum@lozanosmith.com



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