

California Courts Explore Issues Relating to CEQA Exemptions

Continuing a recent trend, another California Court of Appeal has reviewed a public agency's reliance on a Notice of Exemption under the California Environmental Quality Act (CEQA). In *Coalition for Clean Air v. City of Visalia* (Sept. 14, 2012) __ Cal.App.4th __ (2012 WL 4653808), the court confirmed that a Notice of Exemption must be filed *after* project approval in order to trigger a 35-day statute of limitations for any challenge to the exemption.

CEQA is a complicated body of law which requires public entities to consider environmental effects of their projects before approving them. This generally involves a three-step process. First, an agency must determine whether or not a given activity is a discretionary activity which may cause either a direct or indirect physical change in the environment, meaning that it is a "project" governed by CEQA. If the activity is a project subject to CEQA, the second step is to determine whether the project is exempt under either a statutory or categorical exemption. Statutory exemptions are those created by the Legislature, while categorical exemptions are established by regulation in the CEQA Guidelines (Cal. Code Regs., tit. 14, §§ 15000 et seq.). The categorical exemptions are classes of projects that are presumed not to have a significant effect on the environment. School districts, for example, often rely on the categorical exemption for "minor additions to existing schools within existing school grounds where the addition does not increase original student capacity by more than 25% or ten classrooms, whichever is less."

If no exemption applies, the public agency proceeds to a third step of considering whether the project may have a significant effect on the environment. If all impacts are insignificant or can be mitigated to a level of less than significant, the agency may prepare a negative declaration. If the possibility of an unmitigated impact remains, then a more extensive environmental impact report (EIR) is required. Particularly where an EIR is required, CEQA can be a time consuming, expensive process. The categorical exemptions exist to streamline this process in cases where the Secretary of the Natural Resources Agency has pre-determined that a class of projects will generally not have a significant effect on the environment. However, there are also exceptions to these exemptions, including where there is a reasonable possibility that an otherwise exempt activity will have a significant effect on the environment due to "unusual circumstances". (Cal. Code Regs., tit. 14, § 15300.2(c).)

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When an agency determines that an exemption applies, it may file a Notice of Exemption (NOE) with the county clerk in each county where the project will be located. Although an NOE is not legally required, the filing of the NOE will trigger a brief, 35-day statute of limitations for any person or entity to challenge the project under CEQA. With no NOE, an exemption may still apply, but the limitations period for challenge would be longer: 180 days from project approval or, if the project is undertaken without a formal decision by the public agency, 180 days from commencement of the project.

In *Coalition for Clean Air v. City of Visalia*, the court reviewed and upheld the plain meaning of CEQA Guidelines section 15062, which provides that an NOE “shall be filed, if at all, *after* approval of the project.” The case involved development of a laboratory supply and distribution facility in Visalia, California. The City filed an NOE on November 3, 2010, claiming that the project was a ministerial action statutorily exempt from CEQA. Five days later, the City approved the project, and on December 28, 2010, more than 35 days after the City filed its NOE, a lawsuit was filed challenging the City’s action under CEQA. Based on the allegations in the petition, the court found that the NOE failed to trigger the shorter 35-day limitations period since its filing was alleged to have preceded final project approval. While the *Coalition for Clean Air* case does not create new law, it underscores the importance of having documented project approval *prior* to filing an NOE.

This is just the latest of several recent opinions addressing CEQA and its exemptions. A prominent example is *Berkeley Hillside Preservation v. City of Berkeley* (2012) 203 Cal.App.4th 656, where the Court of Appeal significantly narrowed categorical exemptions relied on by public agencies by expanding the scope of the “unusual circumstances” exception. The court there held that evidence of a fair argument that a project will have a significant impact *is itself* an unusual circumstance, which invalidates a categorical exemption. ([See Lozano Smith Client News Brief No. 16](#) (April 2012) for a discussion of the case.) This would mean that whenever there is any supported argument that an impact may occur, the exemption can no longer apply. The court thus severely restricted the ability to rely on exemptions. However, the validity of the *Berkeley Hillside Preservation* opinion is unsettled since the California Supreme Court has accepted it for review. The case presents a very important issue for school districts and other public agencies which often depend on CEQA exemptions to save time and money in accomplishing necessary projects. Lozano Smith is preparing an amicus brief to the Supreme Court on behalf of the California School Boards Association’s Education Legal Alliance, and will continue to monitor the case as it unfolds.

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Due to the complicated and evolving state of the law surrounding CEQA exemptions, public agencies may wish to consult with an attorney before relying on an NOE. School districts are also invited to consult Lozano Smith's "CEQA Checklist for School Districts", which can be obtained by visiting the following link: <http://www.lozanosmith.com/pdf/CEQAChecklist.pdf>.

If you have any questions regarding the cases discussed in this Client News Brief or regarding CEQA in general, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#) or follow Lozano Smith on [Facebook](#).

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