

## California Supreme Court Upholds Most Commonly Used CEQA Categorical Exemptions

The California Supreme Court has issued its long-awaited decision in [Berkeley Hillside Preservation v. City of Berkeley](#), No. S201116 (March 2, 2015). The Court's decision clears up some of the ambiguity that has surrounded the standard of review for challenges to CEQA exemptions under the unusual circumstances exception. In doing so, the Court rejected the controversial approach taken by the court of appeal and instead opted for a middle ground, balancing the interest in giving effect to the legislatively-mandated exemptions against CEQA's overarching goal of ensuring review of significant environmental effects. **Background** The project at issue was a large house to be built in the City of Berkeley. The city granted a use permit and found the project exempt from CEQA under the Class 3 (construction and location of limited numbers of new, small facilities or structures) and Class 32 (in-fill development) exemptions. The city also determined that none of the exceptions to categorical exemptions listed in CEQA Guidelines section 15300.2 were triggered, including the exception for a "significant effect on the environment due to unusual circumstances." An organization sued, alleging, among other things, that the exemptions were barred by the unusual circumstances exception. The court of appeal overturned the City's exemption determination, holding that the *possibility* that a proposed activity might have a significant effect on the environment "is itself an unusual circumstance," barring reliance on a categorical exemption. **A Potentially Significant Environmental Effect Alone Is Not Sufficient to Trigger the Unusual Circumstances Exception.** The California Supreme Court reversed and remanded, holding that a party bringing a challenge under the unusual circumstances exception must establish *both* 1) that there are unusual circumstances that justify removing the project from the exempt class; and 2) that there is a reasonable possibility of significant environmental impacts due to those unusual circumstances. The Court began by examining the text of section 15300.2, which provides: "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." According to the Court, the plain language of this provision supported the view that there must be some showing of unusual circumstances for this exception to apply. The court of appeal's interpretation would, the Court found, render the phrase "due to unusual circumstances" mere surplusage. The Court further found that under the court of appeal's interpretation, the categorical exemptions would have little, if any, effect. The Court noted that under CEQA section 21080(c) and (d) and Guidelines section 15061(b)(3), when there is no substantial evidence that an activity will have a significant effect on the environment, "further CEQA review is unnecessary; no CEQA exemption is necessary to establish that proposition." Thus, under the court of appeal's interpretation, the categorical exemptions would serve no purpose, applying only when the proposed project is already outside the scope of CEQA review. The Court proceeded to review the legislative history of categorical exemptions. Responding to the Court's 1972 [Friends of Mammoth](#) decision, which held that CEQA applies not just to public projects but also to private activities requiring a government approval, the legislature enacted urgency legislation to establish classes of projects that would be exempted from CEQA because they have been determined not to have a significant effect on the environment. The legislation directed the Secretary of the Natural Resources Agency and the Office of Planning and Research to apply their expertise to identify classes of projects that they found would not have a significant effect on the environment and to exempt these classes from CEQA. The Court reasoned that the approach used by the court of appeal would subvert CEQA into an "instrument for the oppression and delay" by requiring review of projects "that one could argue *may* have a significant environmental effect, but that the OPR and the Secretary, exercising the authority the Legislature has by statute delegated to them and required them to exercise, *have already determined do not, in fact*, have a significant effect on the environment" (emphasis in original). In other words, a claim that a project

had a reasonable possibility of a significant effect on the environment was not, standing alone, enough to overcome the determination by OPR and the Secretary that the project would not have such an effect. **Factors that Can Establish Unusual Circumstances** The Court next described how unusual circumstances could be established. The court of appeal had indicated that the unusual circumstances inquiry excluded consideration of "the typical circumstances in one particular neighborhood." The Court rejected this limitation, stating: "local agencies have discretion to consider conditions in the vicinity of the proposed project" to determine whether the unusual circumstances exception applies. The Court adopted an expansive view of how unusual circumstances may be demonstrated. First, a party invoking the exception may establish an unusual circumstance by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location. In such a case, to render the exception applicable, the party need only show a reasonable possibility of a significant effect due to the unusual circumstance. Second, a party may alternatively establish an unusual circumstance with evidence that the project will have a significant environmental effect. That evidence, the Court stated, "if convincing necessarily also establishes a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." **Two Standards of Review** The Court held that Pub. Res. Code section 21168.5 establishes the standard of review governing under both elements -- the unusual circumstances determination and the significant effect determination -- but that two different standards apply. The agency's determination whether there are "unusual circumstances" is reviewed under the more deferential substantial evidence standard. Whether a particular project presents circumstances that are unusual for projects in an exempt class is an essentially factual inquiry. Consequently, reviewing courts, after resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, must affirm that finding if there is any substantial evidence, contradicted or contradicted, to support it. A different approach applies to the question whether there is a reasonable possibility that an unusual circumstance will produce a significant effect on the environment. The Court reasoned that due to the close textual similarities between Pub. Res. Code section 21151 (describing the EIR requirement for local agencies) and the language of the unusual circumstances exception, the "fair argument" standard announced in *No Oil v. City of Angeles* applied to the agency's decision. Accordingly, where there are unusual circumstances, agencies must apply the fair argument standard in determining whether the project opponent showed a reasonable possibility of a significant effect on the environment. The reviewing court's function is to determine whether substantial evidence supports the agency's conclusion as to whether the prescribed "fair argument" could be made. **Evidence Regarding Activities Not Approved as Part of Project Is Not Relevant** The Court also had occasion to consider the scope of the potential environmental impacts that must be analyzed under CEQA. At issue was an expert's testimony before the city council that the proposed project could not be built as proposed and would require side-hill fills and would likely have significant environmental impacts due to seismic lurching of oversteepened side-hill fills. The court of appeal allowed the expert's testimony to be considered in establishing a reasonable possibility of a significant environmental effect. The Court reversed this ruling, holding that a "finding of environmental impacts must be based on the proposed project as actually approved and may not be based on unapproved activities that opponents assert will be necessary because the project, as approved, cannot be built." If a proposed project cannot be built as approved, the Court reasoned, then the project's proponents will have to seek approval of any additional activities and, at that time, address the potential environmental effects of those additional activities. **Remedy** The Court also reiterated the appropriate remedy where a court determines an agency improperly relied on an exemption. In this case, the court of appeal ordered preparation of an EIR. This was erroneous, the Court concluded -- the correct remedy following a determination that a project is not exempt from CEQA is an order to proceed with further CEQA compliance (in this case, preparation of an initial study and a determination of whether further environmental review would require an EIR or a mitigated negative declaration). A court may order preparation of an EIR only if, under the circumstances, the agency lacks discretion to apply another exemption or to issue a negative declaration. **The Concurrence** The concurrence, authored by Justice Liu (joined by Justice Werdegar), agreed that the court of appeal decision should be reversed and remanded because it was based on the purported effects of an unapproved activity (the purported side-hill fill), but sharply disagreed with the Court's conclusions about the standard

governing the unusual circumstances exception. The concurrence took the same position as the court of appeal, arguing that no separate demonstration of "unusual circumstances" should be needed where a reasonable possibility of a significant environmental effect is established. **Conclusion** The new standard created by the Supreme Court for evaluating the unusual circumstances exception is not a total victory for local agencies and project proponents. The Court's standard charts a middle ground in two important respects: First, the standard requires that "unusual circumstances" be established, but allows evidence of significant environmental impacts to help establish the existence of unusual circumstances. Second, the Court's approach applies two separate standards of review to different element of the inquiry—the more deferential substantial evidence standard to the agency's determination of whether there are unusual circumstances and the less deferential "fair argument" standard to whether there is a reasonable possibility of significant environmental effects. The Court's opinion should have implications for all of the exceptions under Guidelines section 15300.2. The Court's conclusion that CEQA section 21168.5 governs the standard of review for the unusual circumstances exception should be equally applicable to the other exceptions as well. Generally, this will mean that the substantial evidence standard of review will govern an agency's determination of whether an exception to an exemption applies. It remains to be seen how this standard will play out and whether it will create new difficulties, but the Supreme Court has declined the invitation to undermine many of the most commonly used CEQA categorical exemptions.

## Authors



### [Julie Jones](#)

Partner

[JJones@perkinscoie.com](mailto:JJones@perkinscoie.com) [415.344.7108](tel:415.344.7108)

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