

## Court Upholds Infill Development Categorical Exemption for Gas Station in Existing Shopping Center



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petitioner, Protect Tustin Ranch, challenged the City of Tustin's approval of a conditional use permit for a new Costco gas station in an existing shopping center. The shopping center contained a Costco warehouse, a tire center, a fast-food restaurant, and other retail businesses. The shopping center was located along a major commercial thoroughfare and was surrounded by commercial and residential uses. The project would involve demolishing the tire store and building a 16-pump gas station and 56 new parking spaces. The City determined that the project qualified for the Class 32 categorical exemption for infill development (CEQA Guidelines section 15332). The infill exemption applies to projects that meet the following criteria: (1) the project is consistent with the general plan and zoning, (2) the project site is within city limits and no more than 5 acres substantially surrounded by urban uses, (3) the project site has no value as habitat for protected species, (4) the project would not have significant effects relating to traffic, noise, air quality, or water quality, and (5) the project site can be served adequately by all required utilities and public services. The petitioner argued that the project site was more than 5 acres and, therefore, the second condition for the infill exemption was not met. The

petitioner also argued that the infill exemption could not be used because there was a reasonable probability that the project would have a significant environmental effect due to unusual circumstances. **Standards of Review.** The substantial evidence standard of review applied to the City's finding that the criteria for the infill exemption were met. Because the petitioner did not argue that the project would have a significant environmental effect, the court reviewed its claim of unusual circumstances under the two-part test set forth in *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal. 4th 1086 (2015): First, whether substantial evidence supported the city's finding that the project did not have a feature that distinguished it from others in the exempt class; second, whether there was a fair argument of a reasonable possibility that the project would have a significant environmental impact due to that unusual circumstance. **Project Size.** Although the total size of the shopping center was approximately 12 acres, only 2.38 acres of the shopping center site would be altered by the project. The court held that substantial evidence supported the City's conclusion that the size of the project site was less than 5 acres. **Unusual Circumstances.** The petitioner claimed that three unusual circumstances were present: (1) part of the project site was formerly a tire center where tires were installed and automotive fluids were changed, (2) the gas station would be unusually large, and (3) the project would use retractable bollards and additional employees to direct traffic during peak times. The petitioner did not explain, however, why these features distinguished the gas station from other projects that would qualify for the infill exemption. The court held that substantial evidence supported the City's finding that the project was not unusual in relation to other projects that qualified for the infill exemption: The size of the project was not remarkably different from other Costco gas stations in California; the project was consistent with the applicable general plan, specific plan, zoning, and development and design standards; and the project would be consistent with the characteristics of the surrounding setting, as it was located in an existing shopping center, adjacent to an auto center, and along a major commercial thoroughfare. Because there was not an adequate showing of an unusual circumstance, the court did not reach the second part of the inquiry (i.e., whether there was a fair argument of a reasonable possibility of a significant environmental impact). Even so, the court held that there was no evidence in the record to support the petitioner's assertion that the project site was contaminated due to its prior use as a tire center.

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