



Failure to Pursue and Exhaust Administrative Appeal Remedy Results In Forfeiture of CEQA Challenge To Categorical Exemption Despite Lower Body’s Defective Hearing Notice

By [Arthur F. Coon](#) on April 13, 2021

In a published opinion filed on February 1, 2021, in an action arising from plaintiffs/appellants’ (“plaintiffs”) “potpourri” of unsuccessful legal challenges to the City of San Francisco’s decision to remove a controversial public monument celebrating California’s pioneer era, the First District Court of Appeal upheld dismissal of a CEQA claim for failure to exhaust administrative remedies. *Schmid v. City and County of San Francisco* (2021) 60 Cal.App.5th 470.

The project at issue was the San Francisco Historic Preservation Commission’s (HPC) granting, at the request of the City’s Arts Commission, of a Certificate of Appropriateness (COA) to remove and store the 1894 “Early Days” bronze statue – part of the “Pioneer Monument” in the City’s Civic Center area – due to complaints that it exhibited racial insensitivity. Because the Pioneer Monument is located in a landmarked historic district, the HPC’s action on the Arts Commission’s motion for the COA was the first step in the City’s administrative process. The HPC concurred with the Planning Department’s staff-level determination that removal of “Early Days” was categorically exempt from CEQA; no one raised environmental issues at the hearing; and the HPC granted the COA. No one appealed the categorical exemption determination to the Board of Supervisors, although plaintiffs appealed the HPC’s adoption of the COA to the City’s Board of Appeals, which ultimately upheld it. (While plaintiffs alleged a number of “creative” claims – including claims for violations of state and federal civil rights and historic resources and public trust laws – this post will discuss only the disposition of the CEQA claim.)

The Court of Appeal affirmed the trial court’s determination that no CEQA claim had been stated because plaintiffs’ failure to appeal the HPC’s COA approval to the Board of Supervisors constituted a fatal failure to exhaust administrative remedies. Exhaustion of administrative remedies is a “jurisdictional prerequisite” to a CEQA lawsuit and “not a matter of judicial discretion.” (Citing *Tahoe Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 589.)

The case serves as a reminder that CEQA implicates two types of exhaustion requirements: statutory and common law. Under the first, per the Court, a CEQA plaintiff must personally raise some claim of CEQA noncompliance before the close of the final public hearing on the project, and can allege in its action only issues timely presented by any person to the public agency within that time frame. (Pub. Resources Code, § 21177(a), (b).) These statutory prerequisites are excused, however, when the agency's hearing notice is defective. (§ 21177(e).) Here, that exception applied because there was no notice given by the City in advance of the HPC's hearing that it would be considering a CEQA categorical exemption. (See, *Defend Our Waterfront v. State Lands Commission* (2015) 240 Cal.App.4th 570, 583-584, my September 28, 2015 post on which can be found [here](#).)

But the HPC's defective hearing notice only relieved plaintiffs from any obligation to present CEQA issues and objections to that body, and did not vitiate their common law duty to exhaust any additional administrative review remedies available to them. Here, they failed to meet that independent requirement because they did not pursue an appeal of the HPC's categorical exemption determination to the City's Board of Supervisors – a remedy provided by both CEQA (Pub. Resources Code, § 21151(c); CEQA Guidelines, § 15061(e)) and the City's Administrative Code. Plaintiffs instead presented their CEQA objections only to a different administrative body – the City's Board of Appeals – which lacked jurisdiction; they therefore “sacrificed [their] right to bring a CEQA cause of action.”

Finally, plaintiffs did not show that pursuit of the neglected administrative appeal should be excused as futile; per the Court, “because the Board of Supervisors was never presented with reasoned arguments addressing the appropriateness of a categorical exemption, we can only speculate about what it would have done.”

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