Second District Affirms Judgment Voiding CEQA Infill Exemption For Hollywood Hotel Project That Would Demolish Affordable Housing Units Because City Deemed Inapplicable And Never Considered Project's Consistency With General Plan Housing Element Policies To Preserve Affordable Housing

By Arthur F. Coon on August 7, 2023

In an opinion filed June 28, 2023, and later ordered published on July 25, 2023, the Second District Court of Appeal (Div. 5) affirmed a judgment granting a writ of mandate setting aside (1) the City of Los Angeles' (City) approval of a 10-story hotel project (with three levels of subterranean parking) to be located on a half-acre site in the Hollywood Community Plan area, and (2) the City's accompanying determination that the hotel project was exempt under CEQA's Class 32 categorical exemption for infill projects. Because the hotel project would result in the demolition of 40 apartments subject to the City's rent stabilization ordinance (RSO), and the City failed to consider whether it was consistent with "all applicable general plan policies" – including Housing Element policies to preserve affordable housing – the record failed to contain substantial evidence supporting City's use of the exemption. *United Neighborhoods for Los Angeles v. City of Los Angeles (Fariborz Moshfegh, et al., Real Parties in Interest)* (2023) ___ Cal.App.5th ___.

The Class 32 Infill Exemption and Relevant Standard of Review

CEQA's Class 32 infill development projects exemption applies to projects that: (a) are "consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations," (b) are located "within city limits on a project site of no more than five acres substantially surrounded by urban uses[,]" (c) have "no value, as habitat for endangered, rare or threatened species[,]" (d) "would not result in any significant effects relating to traffic, noise, air quality, or water quality[,]" and (e) "can be adequately served by all required utilities and public services." (CEQA

Guidelines, § 15332.) Courts review an agency's factual determination that a project falls within an exemption for supporting substantial evidence in the administrative record.

As relevant to the infill exemption's first required element of general plan consistency – which was the key issue in this case – the agency bears the burden to show the determination is supported by substantial evidence and the party challenging the agency's consistency determination bears the burden to show why it is unreasonable. (Citing *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.* (2015) 242 Cal.App.4th 555, 568 (my 11/30/15 post on which can be found here), and *Holden v. City of San Diego* (2019) 43 Cal.App.5th 404, 413 (my 1/16/20 post on which can be found here).) Normally, the challenger's burden in this regard is a heavy one because judicial review of an agency's general plan consistency finding is extremely deferential, such that the agency's consistency determination will be reversed "only if it is based on evidence from which no reasonable person could have reached the same conclusion." (Quoting *Holden,* at 412-413 (cleaned up).)

This deferential standard of review never came into play in this appeal, however, because despite the petitioner raising (and adequately exhausting on) the issue of the hotel project's consistency with City's General Plan Housing Element policies to *preserve* affordable housing – due to its demolition of 40 RSO units – the City never addressed it. Instead, at each level of administrative decision and appeal, the City simply treated its housing preservation policies as *inapplicable* because the *hotel* project was not a *housing production* project. Per the Court, the City accordingly never considered and balanced *all* applicable general plan policies – including housing preservation policies – as required by the Class 32 exemption and never made the required consistency determination.

The Court of Appeal's Opinion

Like the trial court, the Court of Appeal roundly rejected the City's arguments that its General Plan Housing Element's housing preservation policies were inapplicable to the hotel project under the facts of the case. Preliminarily, it rejected the argument that petitioner failed to raise its Housing Element inconsistency argument sufficiently to exhaust the issue in the administrative proceedings. To the contrary, the Court held petitioner's invocation of the Housing Element's first "goal" – which consisted of 2-1/2 pages comprising four objectives and 22 policies – and its objections making clear it was concerned with the "handful of Housing Element policies relating to the preservation (as opposed to the *production*) of affordable housing" sufficiently apprised the City of its position that removal of the 40 RSO units was inconsistent with those policies.

The Court next rejected the City's argument that it implicitly found that the housing preservation policies were inapplicable and that substantial evidence supported that implied finding. While the Court noted that formal, written findings weren't required, it found that, even setting aside the lack of such documentation, there was no substantial evidence in the record to support such an implied finding. In rejecting the City's first argument in this vein, i.e., that "construction of a hotel does not bear on housing production[,]" the Court found that it mischaracterized both the project and the applicable Housing Element policies. Per the Court:

> "To say that the Project, which requires the demolition of 40 RSO units, is not a housing "project" says nothing about its impact on housing. And the suggestion that the Housing Element is only concerned with the production of new housing is contrary to the Housing Element's first goal ("production *and preservation*," emphasis added), objective 1.2 ("[p]reserve quality rental and ownership housing"), and policy 1.2.2 ("[e]ncourage and incentivize the preservation of affordable housing"). Housing Element programs also underscore the emphasis on preservation."

The Court further noted that the City ignored the relevant portions of the Housing Element, cited to inapposite and out-of-date Framework Element snippets, and offered only "uniformly unhelpful" citations to case law that failed to support its position.

In addressing and rejecting the City's second, alternative contention that "affordable housing" is a "term of art that excludes RSO housing," the Court noted that "nothing in the Housing Element suggests its use of the phrase diverges from the ordinary meaning." Consulting the 2023 online version of the Oxford English Dictionary, the Court concluded: "Because the RSO prohibits landlords from raising rents to reflect "normal market value" under certain circumstances, RSO housing units are affordable housing within the ordinary meaning of the phrase."

In addressing the City's argument that its decision was nonetheless entitled to "consistency analysis" deference, the Court observed:

> "No such deference is warranted … with respect to the City's determination of which policies to apply to the Project. The principle that the City is uniquely positioned to weigh the priority of completing policies does not extend to the question of which policies are to be placed on the scales. [citation] Accordingly, the City's suggestion that the trial court improperly "substituted its own judgments for those of the City" in finding which Housing Element policies are applicable to the Project is flawed to the extent that it conflates judicial review of what policies are applicable and the weight to be given various policies."

While the Court noted that the City took inconsistent positions on appeal as to whether or not it actually made an implied consistency finding, and the Court ultimately agreed with the City that no *express* finding was legally required, the Court nevertheless found "there must be some indication [in the record] that the agency actually considered applicable policies." It found no such indication with regard to City's consideration of its Housing Element's affordable housing preservation policies, and concluded its opinion thusly:

> "Although we affirm the trial court, we do not suggest that the City was necessarily required to make formal findings that Housing Element policies are outweighed by competing policies favoring the Project. Nor do we hold that such a decision would necessarily conflict with the General Plan. Rather, we affirm the trial court's judgment because we cannot defer to the City's "weigh[ing] and balanc[ing] [of] the [General] [P]lan's policies" where there is no indication the City weighed and balanced all applicable policies." (citation omitted.)

Conclusion and Implications

While the Class 32 infill exemption can be a very useful CEQA compliance tool for some development projects, it has its limits and requires proper documentation and evidentiary support, as illustrated by this case. The exemption's inclusion of a general plan consistency element makes for an interesting interplay of standards of judicial review, but as the Court held here, the agency can avail itself of the extremely deferential standard applied to general plan consistency determinations relevant to that element only if the record reflects that it actually considered and balanced all applicable policies and made a consistency determination. To avoid risking the fate suffered by the City and hotel developer here, a lead agency attempting to utilize the infill exemption should not rely on implied findings, should take care to expressly address and consider all general plan policies that opponents raise in the administrative proceedings as being inconsistent with project approval, and should also make an express consistency finding to facilitate judicial review.

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