First District Affirms Judgment Rejecting Challenge to CEQA Guidelines Class 32 Infill Development Exemption for 12-Unit Residential Condominium Project

By Arthur F. Coon on July 22, 2024

In an opinion filed June 27, and later ordered published (with slight modifications) on July 18, 2024, the First District Court of Appeal affirmed the trial court's judgment denying a writ petition challenging the City of Lafayette's use of the CEQA Guidelines section 15332 categorical exemption and related approval of a 12-unit residential condominium project on a 0.3-acre parcel. *Nahid Nassiri v. City of Lafayette, et al (3721 Land LLC, Real Party in Interest)* (2024) ___ Cal.App.5th ___. In disposing of appellant's arguments that the infill exemption's elements were not satisfied, the Court of Appeal held that substantial evidence supported the City's findings that the project site had no value as habitat for endangered, rare or threatened species, and that the project would not result in significant air quality impacts. The Court declined to reach the issue whether the unusual circumstances exception to the categorical exemption applied because appellant waived it by failing to properly raise it in the trial court.

Factual and Procedural Background

The developer (3721 Land LLC) applied in May 2018 to demolish a vacant building on a flat, mostly developed 0.3-acre lot on Mt. Diablo Boulevard, and to construct a new 4-story, 13-unit residential condominium building. A creek runs along the project site's southern property line, but the proposed development area would not encompass any trees, and the trees adjacent to the creek would remain standing. Commercial buildings surround the property to the east, west, and north (across Mt. Diablo Blvd.), and single family residences lie to the south across the creek.

After an extensive public review process, involving multiple hearings before the City's Planning Commission, Design Review Commission, and City Council, the project was reduced to 12 units and ultimately approved by the Council, subject to conditions of approval, as CEQA-exempt pursuant to the CEQA Guidelines' categorical exemption for infill development. The Council rejected the arguments of

neighboring office building owner (and later plaintiff and appellant) Nassiri and her expert consultants, who opined that the project was not exempt.

The Trial Court Litigation

The trial court initially *granted* Nassiri's writ petition challenging the City's project approval on the grounds that substantial evidence did not support its determination that "[t]he project site has no value, as habitat for endangered, rare or threatened species." However, it *rejected* Nassir's other CEQA-related challenges to the City's infill exemption findings, which were based on asserted general plan and zoning inconsistency; lack of substantial evidence supporting City's finding of no significant air quality impacts; and an alleged "mitigation measure" (a pre-construction nesting bird survey condition of approval) disqualifying use of the exemption.

After granting the developer's new trial motion based on *Protect Tustin Ranch v. City of Tustin* (2021) 70 Cal.App.5th 951 ("*Tustin Ranch*") (my November 1, 2021 post on which can be found *here*), and the legal argument that the "project site" for purposes of the infill exemption includes only the project footprint, and not the creek portion of the site outside the developed area, the trial court reversed course and denied the writ petition in its entirety.

The Court of Appeal's Opinion

Upon Nassiri's timely appeal, the Court of Appeal affirmed, reaching the same essential conclusion – that the City properly utilized the infill exemption – albeit by means of a different analytical route. It did not rely on *Tustin Ranch*, which it found distinguishable on its facts as involving clarification, in the fact of conflicting documents, that a project site's actual size was less than five acres (despite occurring on a portion of a larger 12-acre parcel) so as to qualify for the exemption; in the instant case, by contrast, "nothing…suggest[ed] that the City considered the project site to be just part of the [0.3-acre] parcel" or that it "exclude[d] the "creek area." " The Court of Appeal thus focused its attention on appellant's two primary arguments: that no substantial evidence supported the City's findings (1) that the project site had no habitat value for endangered, rare or threatened species, and (2) that the project would not have significant air quality impacts.

Substantial Evidence Supported City's Finding That Project Site Had No Value As Habitat For Rare Species

It was undisputed that two species of bird – the oak titmouse and Nuttall's woodpecker – had been observed on the project site. Appellant Nassiri argued that the creek area of the project site (i.e., the creek and adjacent trees) has habitat value for these species and that the species were "rare" within the meaning of the infill exemption because the US Fish and Wildlife service has listed them as "Bird Species of Conservation Concern." A species is "rare" under the CEQA Guidelines when "[a]lthough not presently threatened with extinction," it "exist[s] in such small numbers throughout all or a significant portion of its range that it may become endangered if the environment worsens" *or* if it "is likely to become endangered within the forseeable future throughout all or a significant portion of its range and be considered 'threatened' as that term is used in the Federal Endangered Species Act." (Citing Guidelines § 15380(b)(2).) While a species is presumed endangered, rare or threatened if listed in specified sections of California or federal regulations (§ 15380(c)), there was no contention that the titmouse or woodpecker were so listed, so the issue boiled down to whether substantial evidence supported the City's determination that they were not "rare" because they did not meet the above-quoted criteria of Guidelines Section 15380(b)(2).

While both Nassiri's and the City's expert biologists agreed the titmouse and woodpecker were "Bird Species of Conservation Concern," the City's expert opined they were not "rare" because they were not listed under the federal or state ESAs, nor rare or unique to the region, nor did they exist in such small numbers throughout all or a significant part of their range that they may become endangered if the environment worsens.

The Court concluded substantial evidence supports the City's finding that the project site was not known to have any habitat value for rare species. Being listed as "Bird Species of Conservation Concern" merely means "that, without additional conservation actions, [species] are likely to become *candidates* for listing under the [federal ESA]." (Quoting 16 U.S.C. § 2912(a)(3), emph. Court's.) No authority supported Nassiri's argument that such potential candidate status necessarily means a species is "rare" as defined by the Guidelines, and the City's expert evidence supported the contrary conclusion as to the species at issue here.

Substantial Evidence Supported City's Finding That Project Would Not Result In Significant Air Quality Impacts

Appellant Nassiri argued a health risk assessment prepared by his retained environmental consultants ("SWAPE") constituted unrebutted expert evidence that the project would have significant air quality impacts from emissions of diesel particulate matter ("DPM"), thus disqualifying the City from using the infill exemption for the project. Notably, SWAPE did not contend DPM emissions would exceed any BAAQMD thresholds, or contend that a health risk assessment ("HRA") was required by law for this project. Nonetheless, SWAPE prepared a CalEEMod model to estimate the total DPM emissions from construction and subsequent "operation" of the condominium project; used the model's output to estimate average emissions rates during construction and operation; used those estimated rates in an EPA-recommended screening model ("AERSCREEN") to generate "maximum reasonable estimates of single-hour DPM concentrations from the project site" at particular locations in the vicinity; and then calculated that the increased cancer risk to the "maximally exposed individual resident" over the course of project construction and operation exceeded the BAAQMD thresholds for excess cancer health risk at 10 cases in one million, which it contended demonstrated a potentially significant health risk.

The developer's expert consultant (Milani) did not specifically address SWAPE's HRA, but contended SWAPE's CalEEMod modeling was flawed because it did not accurately reflect construction conditions and emissions sources actually associated with the project; Milani prepared its own CalEEMod model using project- and site-specific information and concluded from its model's results the project will not have significant air quality impacts from construction emissions.

The Court of Appeal held Milani's report constituted substantial evidence supporting the City's finding that the project would not result in any significant air quality effects. Initially, the Court noted it was unclear whether the SWAPE report addressed the relevant issue, which is not whether the project "may" or "could" result in a significant air quality impact, but whether it "will" have a significant impact. (Citing *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269.)

In any event, because the SWAPE report did not accurately reflect the scope of construction of the proposed project, the Court held it did not constitute substantial evidence of the project's effects. While SWAPE's HRA used Milani's estimate of total project construction DPM emissions, its AERSCREEN model inaccurately assumed a constant rate of emissions, 24 hours a day for the entire 171-day construction period, when construction would not actually occur 24 hours a day or every day (e.g., it would not occur on weekends). There was no evidence that an "analysis… based on an estimated

constant rate of DPM emissions over a period of almost six months" could provide an accurate representation of the effects of project emissions "when there is unrefuted evidence that the emissions will not be constant." Per the Court: "In the absence of any showing that a model based on inaccurate assumptions about project construction nevertheless provides an accurate estimate of health risks from the construction of the project, SWAPE's report is not substantial evidence that approving the project will have a significant effect relating to air quality." In other words: "Because [SWAPE's] conclusion rests on incorrect assumptions about construction, the analysis does not concern the actual project, and therefore does not constitute substantial evidence of a significant effect relating to air quality in the form of DPM emissions." The City could, accordingly, disregard it.

Appellant Waived Argument That "Unusual Circumstances" Exception to Exemption Applied

Under the so-called "unusual circumstances" exception to CEQA's categorical exemptions (such as the infill development exemption at issue here), an 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." (CEQA Guidelines, § 15300.2(c).) For a project, like the 12-unit condominium project approved by the City, which meets the requirements of a categorical exemption, a challenger has the burden of producing evidence supporting the unusual circumstances exception, which it can meet in one of two ways: (1) by showing the project has some feature distinguishing it from others in the exempt class (i.e., the "unusual circumstance") and that there is a "*reasonable possibility* of a significant effect due to that unusual circumstance" (quoting *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1105, my 3/3/15 and 6/1/15 posts on which can be found *here* and *here*); or (2) by adducing convincing evidence that the project *will* have a significant environmental effect. (Guidelines, § 15300.2(c).)

Appellant Nassiri raised the unusual circumstances exception in its comments to the City during the administrative proceedings. The City found the exception did not apply because (1) the project's location near a creek was not unusual as the City had approved similar projects under the infill exemption, and (2) the developer's biological resources consultant provided analysis constituting substantial evidence that the project will not have a significant impact on special status species. While Appellant's mandate petition also raised the issue, none of her trial court briefing contained any arguments in support of it, and her reply brief expressly conceded in a footnote that the exception was irrelevant. Further, Nassiri did not argue the exception at the trial court hearings and that court did not address it in any of its rulings.

Observing that the general rule is that points not properly raised in the trial court are waived on appeal, the Court of Appeal noted that "allow[ing] a litigant to change his theory on appeal is not only unfair to the court but unjust to the opposing litigant." (Quoting *Guardians of Turlock's Integrity v. Turlock City Council* (1983) 149 Cal.App.3d 584, 599.) However, it also noted its discretion to reach issues not properly raised in the trial court if they present pure legal questions on undisputed factual evidence regarding matters affecting the public interest.

Nassiri argued the Court of Appeal should exercise its discretion to reach the issue of the unusual circumstances exception because impacts to special status species are of public interest and the exception presents an issue of law based on a fixed record. The Court was not persuaded. Per the Court: "[T]he applicability of the unusual circumstances exception here presents questions of fact that we review for substantial evidence, rather than a question of law based on undisputed factual evidence." (Citing *Berkeley Hillside,* at 1114.) The Court further explained its reasoning:

> "Almost every CEQA case will involve matters affecting the public interest and an administrative record that has been set. This does not mean that we must allow parties to raise substantial evidence issues for the first time on appeal. The question whether the City erred in finding that [sic; whether] the unusual circumstances exception applied could have been raised as part of Nassiri's trial court challenge to the City's determination, but was not. We decline to reach the issue here."

Conclusion and Implications

While a court interprets the language of categorical exemptions independently under a de novo standard of review (*Banker's Hill*, 139 Cal.App.4th at 268 & fn. 16), a lead agency's factual determinations – including, as relevant here, its factual determinations whether a project meets the elements of an exemption – are subject to a deferential substantial evidence standard of review. (See, e.g., *Protecting Our Water and Environmental Resources v. County of Stanislaus* (2020) 10 Cal.5th 479, 495, my 8/28/20 post on which can be found *here*.) To constitute substantial evidence sufficient to support a finding or determination, the evidence must be "of ponderable legal significance" and "reasonable in nature, credible, and of solid value[.]" (*Tustin Ranch*, 70 Cal.App.5th at 960.) Conflicts in competing substantial evidence are resolved in favor of the agency's decision, and its legitimate and reasonable inferences from the evidence are also indulged.

Here, the Court applied the deferential substantial evidence standard of review to uphold the City of Lafayette's determinations that the 12-unit condominium project met the elements of CEQA's infill development categorical exemption, including that the project site had no value as habitat for special status species and would have no adverse air quality impacts. The City properly credited the evidence provided by its own and the developer's experts in making those determinations, and properly rejected the evidence offered by the project challenger on these points, which, in the case of the air quality analysis at least, did not even qualify as "substantial evidence."

One takeaway from this case for both project proponents and opponents is to make sure that their retained experts address the relevant factual issues and legal standards, and also base their analyses and opinions on accurate factual information about the project at issue. This case also reinforces a basic but important procedural lesson for litigators, applicable in CEQA cases and more generally, which is to be sure to argue issues in the trial court if you want to preserve them on appeal.

Finally, the case underscores the continuing need for meaningful CEQA reform. In the face of a housing crisis of epic proportions in this state, the CEQA-exempt, general plan and zoning-compliant 12-unit residential infill project at issue here has been subjected to more than three and one-half years of intense (and, no doubt, very expensive) CEQA litigation simply to obtain appellate approval of its right to proceed. Whether it will, in fact, be able to proceed to construction, after being subjected to such delay and economic hardship, is another issue – the opinion states in a footnote that the developer's counsel withdrew from the representation and did not file a Respondent's Brief in the appeal, which are possibly signs that the developer could no longer afford to participate (at least through its own counsel) in the litigation challenging its project approvals.

Unfortunately, this type of scenario is not new or unique (see, e.g., my 3/21/23 post on the decision in *Pacific Palisades Residents Association, Inc. v. City of Los Angeles* (2023) 88 Cal.App.5th 1338, *here*), as project opponents are keenly aware that the delays and expense caused by CEQA litigation can effectively kill many projects, especially smaller ones, regardless of the litigation's lack of legal merit, and that such litigation can normally be prosecuted with little or no downside risk of the CEQA plaintiff ever having to pay anything substantial beyond his, her or its own attorneys' fees. This could partly explain

why housing projects are frequently the targets of NIMBY-generated CEQA lawsuits. (See, e.g., my 8/26/22 post "CEQA v. Housing: A Very Wrong Picture," *here*; see also the Little Hoover Commission's May 2024 report entitled "CEQA: Targeted Reforms for California's Core Environmental Law," at p. 5 ["According to research by both the law's defenders and detractors, housing projects are the most common single type of project challenged by CEQA litigation."].)

As acknowledged by the Little Hoover Commission, the Legislature has recently taken some positive steps to try to ameliorate CEQA's burdens, particularly those impacting housing production, and while these are laudable efforts, they aren't nearly enough. For the sake of housing – and human social, economic, and recreational development and advancement in California generally – broad CEQA reform should be a "top of mind" issue for California lawmakers.

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