LOS ANGELES
Daily Journal
www.dailyjournal.com
TUESDAY, MARCH 3, 2015

COVER STORY

CEQA exemption for houses reinforced

Daily Journal

Amrit S. Kulkarni of Meyers Nave represents tech millionaire Mitchell Kapor in his bid to build a mansion on a steep hill without being subject to a CEQA review.

By Fiona Smith / Daily Journal Staff Writer

The state Supreme Court appeared to ease the way for a tech multimillionaire to build a mansion in the Berkeley hills Monday, issuing a long awaited decision that will affect how public agencies handle common exemptions from California's bedrock environmental law.

Under the California Environmental Quality Act, or CEQA, certain categories of projects — including smaller buildings like single-family homes — can bypass review because it is assumed they will have little environmental impact. But there are exceptions to those exemptions for projects that present "unusual circumstances."

The case centered on a fight over plans by tech entrepreneur and philanthropist Mitchell Kapor to build a nearly 10,000-square-foot home with a 10-car garage on a steep hillside. Critics of the project sued the city of Berkeley after it exempted the project from CEQA, arguing that the project's scale and location created an "unusual circumstance" with potentially significant environmental impacts.

In a unanimous decision, the court stopped short of ruling on Kapor's specific situation, but rather set out a two-part test for agencies to use when deciding whether to invoke a CEQA exemption. *Berkeley Hillside Preservation v. City of Berkeley*, 2015 DJDAR 2411 (Cal. March 2, 2015).

The test gives the public agency a wide berth, at least at the outset of its decision-making process. An agency must first decide whether a project that would normally be exempt has any "unusual circumstances" at play. If it does, then it must decide whether the project could have significant environmental impacts. For the first part of the test, the courts must be highly deferential to the public agency, but if the agency moves to the second part of the test, the court has more leeway to overturn a decision.

Justice Ming W. Chin, writing for the court, reversed the 1st District Court of Appeal's one-part test that stated if a project has a potentially significant environmental impact, it's automatically "unusual" and subject to CEQA review. Such an interpretation "would render useless and unnecessary the statutes the Legislature passed to identify and make exempt classes of projects that have no significant environmental effect," Chin wrote.

"Nothing suggests that either the Legislature or the Secretary [of Natural Resources] intended the categorical exemptions to have such minuscule value," he continued. "Had that been their intent, surely they would have expressed it in a more clear, concise, direct, and obvious way."

Chin was joined by Chief Justice Tani Cantil-Sakauye, Justice Carol A. Corrigan, now retired Justice Marvin R. Baxter, and 2nd District Court of Appeal Justice Roger W. Boren, who sat pro tem.

Justice Goodwin Liu wrote a concurrence and was joined by Justice Kathryn M. Werdegar. The concurrence takes issue with the two-part test, arguing it adds unnecessary complexity to CEQA.

"It is unfortunate that today's opinion, instead of simplifying the law in accordance with the CEQA statute and guidelines, adds further complexity to an area that many courts, practitioners, and citizens already find difficult to navigate," Liu wrote. "Nevertheless, I expect that after today's decision, as before, courts reviewing agency determinations … will be guided by that guideline's basic purpose, which echoes the statutory mandate: to ensure that projects with a reasonable possibility of significant environmental effects are not exempted from CEQA review."

The Supreme Court's decision is an acknowledgement of the importance of categorical exemptions, said Amrit S. Kulkarni, a partner with Meyers Nave Riback Silver & Wilson PLC who represented Kapor in the case. If the 1st District's interpretation had been upheld, it "would have significantly expanded the reach of CEQA to a group of projects that the Legislature never intended CEQA to apply to," Kulkarni said.

Susan Brandt-Hawley, Berkeley Hillside Preservation's attorney, said her client is strongly considering filing a petition for rehearing before the court based on Liu's concurrence, but added that she would expect to prevail at the 1st District Court of Appeal under the new test.

Beyond the project at issue in the case, the decision "will make it much more difficult for agencies to process exemptions because there is this initial test to look at unusual circumstances, which they don't really do now," Brandt-Hawley said.

While Monday's ruling does not clear up all the uncertainty around the use of categorical exemptions in CEQA, it at least sets out a framework for government agencies to follow, said Miles H. Imwalle, a CEQA attorney at Morrison & Foerster LLP.

"There's essentially a new standard of review that no court has articulated before for exemptions, so there will be a certain period of uncertainty as people figure out what it means," Imwalle said.