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## Public Law Update - Court Applies a Deferential Substantial Evidence Standard When Determining the Application of a CEQA Exemption

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A recent California Court of Appeal decision, *Nahid Nassiri v. City of Lafayette, et. Al* (2024) 103 Cal.App.5<sup>th</sup> 910 upheld the City of Lafayette's reliance on a categorical exemption from CEQA when approving a condominium project. While the court ultimately upheld the City's reliance on the Class 32 categorical exemption for infill development, this case is a good reminder why public agencies should always strive to provide substantial evidence to support all aspects of a California Environmental Quality Act (Pub. Resources Code, § 21000 et seq., CEQA) exemption finding. As discussed further below, the substantial evidence standard of judicial review that applies to lawsuits challenging an agency's finding that a project is exempt from CEQA is deferential to agencies so long as those findings are supported by facts contained in the administrative record.

This case involved a proposed 12-unit residential condominium project on the portion of a parcel occupied by an existing but vacant and dilapidated convalescent hospital and that would avoid the 0.3 acre "creekside area" on the site's southern property line that contained a tree lined creek. The City of Lafayette City Council determined the proposed condominium project was exempt from review under CEQA because it fell within the Class 32 categorical exemption for in-fill development under the CEQA Guidelines and approved the project. (Cal. Code Regs., tit. § 15332.) Petitioners challenged the project approval asserting that the project did not qualify under the in-fill exemption.

In order to qualify for the Class 32 categorical exemption for in-fill development, a project must:

- be consistent with applicable general plan and zoning designations and all applicable general plan policies and zoning regulations;
- occur within city limits on a site that is not larger than 5 acres and is substantially surrounded by urban uses;
- be located on a site that has no value as habitat for endangered, rare or threatened species;

- not result in any significant effects relating to traffic, noise, air quality, or water quality; and
- be on a site that can be adequately served by all required utilities and public services.

Here, only the ‘value as habitat for endangered, rare or threatened species’ and ‘no air quality impacts’ criteria were at issue. Applying the deferential substantial evidence standard, the Court first upheld the City’s determination that the project site has no value as habitat for endangered, rare or threatened species despite evidence demonstrating two special status bird species were observed in the project’s creekside area. Notwithstanding contrary evidence submitted by consultants hired by the Petitioner, the Court found that the City had substantial evidence to support its finding that the site had no habitat value for rare species – pointing to correspondence from and testimony by the City’s biologist explaining why the two special status bird species observed on the site did not qualify as “rare species” as defined in CEQA Guidelines Section 15380(b)(2).

Next, the Court upheld the City’s finding that the project would not result in any significant adverse air quality impacts. Again, applying the deferential substantial evidence standard of review, the Court found the record contained evidence supporting the City’s finding. Air quality modeling analysis prepared for and testimony provided by the developer’s air quality consultant showed that when data associated with the limited amount of grading and excavation equipment actually needed for the project was used, the project’s construction emissions would not exceed the Air District’s threshold for impacts associated with increased cancer risks from toxic air contaminants in diesel exhaust. Notably, the Court so held despite contrary evidence submitted by an air quality consultant hired by the Petitioner. The Court also determined that that contrary evidence did not amount to substantial evidence because it was based on improper data that exaggerated the duration of time grading equipment would be used and because it only demonstrated that the project *may* result in an air quality impact, not that it *would* cause an air quality impact as required under the plain language of the criterion.

In sum, the City of Lafayette prevailed in this case largely because of the deferential substantial evidence standard of review that applies to challenges to CEQA exemption determinations. Remarkably, the in-fill exemption is the only categorical exemption that includes criteria with language requiring a city to find that a “project would not result in any significant effects relating to traffic, noise, air quality, or water quality” in order to qualify for the exemption. Therefore, analysis of that criteria under the infill exemption is very similar to the typical impact analysis done for projects that are not exempt and for which agencies typically prepare CEQA documents known as Mitigated Negative Declarations (“MND”).

This distinction is important because while challenges to CEQA exemption findings are reviewed under the substantial evidence standard of review that is deferential to the Respondent agency, challenges to MNDs are reviewed using the challenger-friendly, low threshold “fair argument” standard of review, which requires the Court to rule in the challenger’s favor if there is a dispute between experts or if there is *any* evidence of a potentially significant adverse impact.

Thus, had the question of this potential biological or air quality impacts come up in the context of a challenge to a MND, as opposed to a challenge to a CEQA exemption determination, the Court would likely have ruled *against* the City because it likely would have pointed to the evidence the Petitioner’s experts offered regarding the project’s potentially significant impacts on the special status birds (associated with development so close to the creekside area where the birds were observed) and on air quality (associated with potentially elevated cancer risks from toxic diesel exhaust from construction equipment).

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