

MEMO

TO: *Perry Mason*
FROM: *Atticus Finch*
RE: *Kind & Generous/City of Mayberry Application for Design Review Approval*
DATE: *August 25, 2011*

I. BRIEF ISSUES

1. Is the proposed dental office exempt from California's Environmental Quality Act ("CEQA")?
2. Are there any "unusual circumstances" that would vitiate the CEQA exemption?

II. BRIEF ANSWERS

1. Yes, the project satisfies the criteria to be exempt as "infill development."
2. No. There is no substantial evidence of any unusual circumstances that would invalidate the exemption.

III. FACTS

Doctors Kind and Generous (collectively "the Applicant"), are dentists who purchased a 3,384 square feet office and parking lot to expand their practice. The office was previously used for medical offices. The City of Mayberry's ("City") General Plan and zoning allow medical office buildings on this property. The building was constructed as a single-story building some time ago and is located in a developed area, surrounded by upscale residential uses. The Applicant proposes to add a second story and other items that total 3,382 square feet to the building ("Proposal").

After several public hearings, during which neighbors complained about the Proposal, the Applicant redesigned the office by: reducing the height of the second story; reducing the

waiting room from two stories to one; and other items. The Applicant also eliminated second story windows on the side of the building that looks into residential backyards in order to accommodate privacy concerns from neighbors.

The Mayberry City Council (“Council”) conducted many public hearings and received public comments. When it considered the Proposal, the City found that the Proposal would be served by public services, such as water, sewer and electricity. The public comments alleged that the proposed dental office would cause traffic and privacy problems for the surrounding residences. After considering these comments, the Council approved the project and found that it was categorically exempt from California’s Environmental Quality Act (“CEQA”).

III. ARGUMENT

1. The Proposal is categorically exempt from CEQA.

Public Resources Code §21084(a) empowered the Secretary of the Resources Agency to identify classes of projects that are exempt from CEQA because they will not have a significant effect on the environment. These exemptions are called “categorical exemptions.” All exemptions are narrowly construed in order to provide maximum protection to the environment. (*Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243.) Additions to existing facilities are categorically exempt from CEQA if: (a) the addition is less than 10,000 square feet; (b) the project is in an area where all public services are *available to allow for maximum development permissible in the General Plan*; and (c) the project is not located in an environmentally sensitive area. (Cal.Code Regs., tit. 14, §15301(e).) A key consideration when using this exemption is that it is limited to negligible or no expansions of an existing use. (Cal.Code Regs., tit. 14, §15301.)

The Proposal will add 3,382 square feet to an existing 3,384 square foot structure, well below the 10,000 square foot maximum in the categorical exemption. As was noted by city staff,

public services such as water, sewer, electricity, etc. are available to serve the Proposal. The City Council even made a specific finding of fact that public services and facilities were available to serve the Proposal. The City further found that the Proposal site is not in an “environmentally sensitive area.” On its face, the Proposal complies with CEQA Guideline §15301(e) and is exempt from CEQA.

2. There is no substantial evidence supporting a fair argument that there are “unusual circumstances” that will result in a significant environmental impact to the public at large.

The relevant exception to the general rule of categorical exemptions is that an agency may not use a categorical exemption if there is a reasonable possibility that the project will have a significant effect on the environment *due to unusual circumstances*. The unusual circumstances must make a project *different from the class of projects* contemplated by the exemption and the unusual circumstances must result in a physical, environmental impact. (*Fairbank v. City of Mill Valley, supra*, 75 Cal.App.4th 1234, 1259.) The issue is not whether the unusual circumstances will result in an impact on certain people, but rather is whether they will *impact the environment of people in general*. (*Association for Protection of Environmental Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 734.) The party challenging the exemption has the burden of demonstrating that there are “unusual circumstances” that vitiate the exemption. (*Fairbank v. City of Mill Valley, supra*, 75 Cal.App.4th 1234, 1259.)

For example, traffic, parking, and access problems are not “unusual circumstances” negating a CEQA exemption for a school consolidation. (*San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1393-1395.) Likewise, concerns about height, view obstruction, privacy, and water run-off are normal considerations for hillside development and do not constitute “unusual

circumstances” that vitiate an exemption for a house. (*Association for Protection of Environmental Values v. City of Ukiah, supra*, 2 Cal.App.4th 720, 736.)

In *Fairbank v. City of Mill Valley*, the City approved a new 5,855 square foot office/retail building on a portion of an existing parking lot behind existing commercial buildings. (*Fairbank v. City of Mill Valley, supra*, 75 Cal.App.4th 1234, 1249.) The new building was to house a restaurant and retail uses, and the city found that it was categorically exempt under CEQA. The categorical exemption was challenged on the grounds that the new building would exacerbate parking and traffic problems in downtown Mill Valley, relying on public comments about them in the administrative record. The court found that this was not a showing of “unusual circumstances” and noted that:

[T]he addition of any small building to a fully developed downtown commercial area is likely to cause minor, adverse changes in the amount and flow of traffic and in parking patterns in the area, such effects cannot be deemed “significant” without a showing of some feature of the project that distinguishes it from any other small, run-of-the-mill commercial building and use. Otherwise, no project . . . could ever be found to be exempt from CEQA. (*Id.* at 1260.)

Here, the only evidence the opposition gave that the Proposal will have unusual impacts on the environment is public comments that the Proposal will increase traffic and create privacy issues for adjacent and nearby residences. These generic conclusions are not substantial evidence of impacts that are greater than would be expected for a project subject to the categorical exemption. Just as in *Fairbank*, traffic and parking conditions may change as result of the Proposal, these changes are minor and the opposition has not pointed to any evidence that would prevent the City from applying the categorical exemption.

In the *Ukiah* case, the city approved a site development permit for a new 2,700-square-foot, single-family home on a nonconforming lot and found that project was exempt from CEQA. (*Association for Protection of Environmental Values v. City of Ukiah, supra*, 2

Cal.App.4th 720.) It was the last lot in the neighborhood to be developed. (*Id.* at 724.) A group of 16 neighbors challenged the exemption on the grounds that the new house would impact their drainage, views, and privacy. (*Id.* at 734.) The court found that while the new house may impact the neighbors, their concerns did not constitute “unusual circumstances” because the project would not affect the environment of persons generally and that the neighbors’ concerns were “normal and common considerations in the construction of single family dwellings.” (*Id.* at 736.)

Here, some of the neighbors objected to the office because it will affect the privacy, airflow and sunlight *in their backyards*. The concerns they raise are unique to them and do not reflect a change in the public-at-large’s physical environment. Thus, the opposition failed to submit any evidence of “unusual circumstances” of a significant impact on the environment for the public-at-large. Therefore, there are no unusual circumstances that would vitiate the CEQA exemption.

IV. CONCLUSION

The Proposal meets the criteria for a categorical exemption from CEQA, with substantial evidence supporting the City’s finding of exemption. Furthermore, there is no substantial evidence supporting a fair argument of unusual circumstances that will create significant environmental impacts for the public in general. The public comments reflect individual impacts to adjacent neighbors, which does not meet the requirement of a significant environmental impact to the public-at-large.