

CERTIFIED FOR PARTIAL PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

PEOPLE FOR PROPER PLANNING,

Plaintiff and Appellant,

v.

CITY OF PALM SPRINGS et al.,

Defendants and Respondents.

E062725

(Super.Ct.No. PSC1301691)

ORDER MODIFYING OPINION
[NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on April 22, 2016, and ordered partially published on May 20, 2016, is modified as follows:

1. On page 8, strike the entire first full paragraph beginning “The agency decides” and ending “(*Azusa, supra*, 52 Cal.App.4th at p. 1192.)” Footnote 3 is also deleted. The following paragraph is inserted in place of the deleted paragraph:

The agency decides whether a project is categorically exempt as a part of its preliminary review without reference to any mitigation measures. [Citation.] . . . Generally, courts apply the substantial evidence test to the agency’s factual determination that the exemption applies in the first instance” (*Committee to Save Hollywoodland, supra*, 161 Cal.App.4th at pp. 1186-1187, fn. omitted.) “As to projects that meet the requirements of a categorical exemption, a party challenging the exemption has the burden of producing evidence supporting an exception. [Citations.]” (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086,

1105; Cal. Code Regs., tit. 14, § 15300.2, subd. (c) [“A categorical 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.”].) The plain language of Guidelines section 15300.2, subdivision (c), requires that a potentially significant effect must be “due to unusual circumstances” for the exception to apply. In reviewing an agency’s decision with respect to the unusual circumstances exception, “both prongs of [Public Resources Code] section 21168.5’s abuse of discretion standard apply The determination as to whether there are ‘unusual circumstances’ [citation] is reviewed under [Public Resources Code] section 21168.5’s substantial evidence prong. However, an agency’s finding as to whether unusual circumstances give rise to ‘a reasonable possibility that the activity will have a significant effect on the environment’ [citation] is reviewed to determine whether the agency, in applying the fair argument standard, ‘proceeded in [the] manner required by law.’ [Citations.]” (*Berkeley Hillside Preservation v. City of Berkeley*, *supra*, 60 Cal.4th at p. 1114.) When an agency relies on a categorical exemption, the exemption must be narrowly construed. (*Azusa*, *supra*, 52 Cal.App.4th at p. 1192.)

2. At the end of the sentence commencing at the bottom of page 9 with “Notwithstanding the above” and ending with “exceptions to exemption,” add the following footnote 3:

³ The City does not dispute that this case presents “unusual circumstances.”

There is no change in the judgment.

HOLLENHORST

Acting P. J.

I concur:

SLOUGH

J.