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Cal Supremes Wrestle With "CEQA In Reverse" Case

By Martha Bridegam on 8 October 2015 - 3:27pm

California Environmental Quality Act

California's Supreme Court justices were picking doubtfully Wednesday morning at the famous "CEQA in reverse" argument -- a claim that the California Environmental Quality Act can require an environmental impact report (EIR) not only when a project may threaten the environment, but also when a project would draw users to a place with hazardous environmental conditions.

The question before the court in California Building Industry Association v. Bay Area Air Quality Management District is not so much whether projects should be built near hazards, but whether CEQA is the appropriate law to regulate such proposals. (Last year Bill Fulton suggested that if CEQA doesn't apply "in reverse", then maybe local officials will have to dust off other planning tools to protect the public more affirmatively.)

Justices Mariano-Florentino Cuéllar, Goodwin Liu and Carol Corrigan led the questioning. They appeared to view full-on "reverse" CEQA as too radical, and instead were inviting rationales for compromise outcomes.

They particularly asked Ellison Folk, counsel for the Bay Area Air Quality Management District (BAAQMD) for reassurances that her position would not over-multiply the number of EIRs required in California. The California Building Industry Association (CBIA), in briefing, had claimed the argument would create " 'EIR Only Zones' in urbanized areas." Folk, an attorney with Shute, Mihaly & Weinberger, insisted CEQA's established regulatory controls would restrain the number of added reviews under the air district's proposed interpretation, so they would not address "every possible nuisance effect of living in urban life."

Corrigan pushed Folk for an example of a project that, under a "reverse CEQA" interpretation of the law, would not create a potential significant impact by drawing additional people to its site. Corrigan seemed unsatisfied with responses to her question as framed, but Folk countered that merely bringing a project into "the CEQA world" would not necessarily take it past the usual stages of preliminary scrutiny to require an actual EIR.

The underlying dispute is a challenge by the CBIA construction lobbying group to the air district's 2010 "TAC [Toxic Air Contaminant] Receptor Thresholds", which were designed to scrutinize

projects near sites with known sources of air pollution such as freeways and freight yards. After a fact-specific First District ruling favored BAAQMD, the state Supreme Court granted review on the generic issue of when -- if ever --CEQA could "require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?"

At argument, Chief Justice Tani Cantil-Sakauye suggested the "reverse" argument was not clearly supported by legislative action, and asked if there instead had been "palpable inaction". Justices Kathryn Werdegar and Ming Chin joined in once each; Justice Leondra Kruger not at all.

Stuart Flashman, a CEQA petitioners' attorney with conceptually related cases before the high court, attended the argument and wrote afterward, "I have to say it seems like the court is, at best, going to give only a very limited win to the Air District, and might go against them entirely."

The "CEQA in reverse" question is sometimes analyzed in terms of picturesque natural hazards such as landslide risks, rising sea levels, and earthquake faults. But a weighty urban planning aspect of the dispute has to do with more prosaic human-created hazards -- especially in urban landscapes where developers are replacing and adding residential density.

Now that investment is returning to cities and public policy is discouraging private car use, it matters more that new urban projects, including housing, are sometimes built on fouled land in bad air. This is especially true of sites near rail lines and freeways that make good candidates for transit-oriented development. It's also especially true of the nuisance-burdened urban parcels that are typically offered as sites for subsidized housing. (Several large subsidized-housing builders and nonprofit housing organizations backed the developers' call for review of the First District ruling in 2013.)

As the attorneys discussed late the oral argument, any attempt to build an oil refinery next to a residential subdivision would face serious environmental review under the California Environmental Quality Act (CEQA). But the court had to consider whether, if a developer proposes a subdivision next to an existing refinery, CEQA should require environmental review of the proposal based on the "impact" of inviting more people to live where they would breathe the refinery's emissions. Should other regulatory schemes, such as the air quality element of the local general plan, go to work on such issues in CEQA's place? And in light of specific CEQA exemption language for certain housing projects, is the answer different for, say, an attempt to build agricultural workers' housing next to an existing smelter?

Cuéllar and Liu tag-teamed the attorneys through these hypotheticals and the briefed arguments. Both tried to draw out rationales explaining when a new project could be viewed as worsening an existing hazard rather than merely attracting new people within its reach.

Liu said: "I guess I'm having a pretty hard time" seeing how the effect of existing conditions on humans could be a significant effect on the environment: "That's the effect of the project on the

people -- that's not an effect on the environment in ordinary parlance."

At a technical level, the major jumping-off point for the argument was Sec. 15126.2(a) of the CEQA Guidelines, which provides in part: "The EIR [Environmental Impact Report] shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected." BAAQMD argued that Sec. 15126.2(a) was justified by a portion of the CEQA authorizing statute, Public Resources Code Sec. 21083(b)(3), which provides for guideline criteria on whether "The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly."

CBIA's legal team, led by Andrew Sabey with the firm of Cox, Castle & Nicholson, argued that Sec. 15126.2(a) was a regulatory overreach by the Department of Natural Resources, unsupported by the statute. Sabey argued that 21083(b)(3) referred to a "causal effect" flowing from a project itself to "substantial adverse effects on human beings" and therefore did not apply to effects from the project's surroundings. Folk, in rebuttal, argued that the provision had antecedents as old as CEQA itself.

In briefing and argument, CBIA leaned on a line of cases reining in 15126.2(a) that began with *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464. Possibly the best known is *Ballona Wetlands Land Trust v. City of Los Angeles* (2011), 201 Cal.App.4th 455, where opponents unsuccessfully claimed a project had failed sufficiently to account for future sea level rise. *Ballona Wetlands* is the case most often used by local governments in not engaging in a "CEQA In Reverse" process.

Sabey answered Cantil-Sakauye's question about "palpable inaction" by noting the legislature rejected two bills in the 2013 session, AB 953 and SB 617, that were attempts to overrule the Baird cases.

In briefing and argument, BAAQMD's team deprecated the "reverse" idea, arguing that a project has a "significant effect on the environment" when it attracts more people to a place with an existing environmental hazard because that causes it to have "substantial adverse effects on human beings" under Sec. 21083(b)(3).

The air district's main brief quoted one of its board members as saying "CEQA should be just as good ... [at] protecting people as well as moths and Manzanita bushes."

Folk emphasized repeatedly at argument that the Legislature included natural and preexisting environmental hazards in CEQA's ambit by mentioning them as limiting factors on specific exemptions from review. Examples included exemptions affecting schools and airports, but Folk returned most to a set of review exemptions for housing development in Pub. Resources Code Sec. 21155.1 and Secs. 21159.21 through 21159.24. Those sections create exemptions for "transit priority projects" and for specified infill, low-income and farmworker housing. But they include

provisos withholding the exemption from sites with an enumerated list of heightened risks from surroundings, including flooding, earthquake, wildfire, or public health dangers caused by activity on nearby properties. Folk argued that the enumerated hazards would not appear in CEQA statutes at all unless the Legislature viewed them as within CEQA's scope.

Liu questioned whether the Legislature might have meant to express special concern, beyond the usual routine, for vulnerable populations to be served by the types of housing under the exemptions -- a query that backhandedly expressed concern for the futures of marginalized people who in practice are often relegated to damaged environments.

But Liu also challenged Sabey to answer Folk's reiterated argument -- which Liu wryly described as "exceptions to exemptions -- only lawyers love this kind of thing." He asked Sabey for an argument why the legislature would express concern about risks such as wildfires or landslides with respect to specific types of construction, but not with respect to the main CEQA analysis.

Sabey argued that the CEQA law of cumulative impacts and baselines necessarily distinguished a project from existing conditions: "You need to have the existing environment be something other than the project." Otherwise, he said, the issue becomes "the impact of the project on itself."

He noted that CEQA Guidelines Sec. 15064(h)(4) refused to find "cumulatively considerable" effects based on "the mere existence of significant cumulative impacts caused by other projects alone". (Flashman commented afterwards, "it's hard to see how you'd have a cumulative impact concern about placing a new project in an earthquake, flooding, or wildfire zone.")

Sabey further argued that when the legislature chooses to exempt a big project such as a stadium from CEQA for policy reasons, "that does not necessarily translate those criteria into CEQA concerns." He said it would be necessary to "reverse engineer the meaning of CEQA to say this exception explains how CEQA works." He argued that urban nuisances such as obscured views or shadows from existing neighboring buildings could become grounds for objections to urban projects: "You would be arming all of the anti-development forces" across the state, he said.

The case is *CBIA v. BAAQMD*, Case No. S213478, available via http://appellatecases.courtinfo.ca.gov.

Major California Supreme Court briefing is at http://www.courts.ca.gov/33098.htm.

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