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The California Supreme Court Takes on the Eternal Question: Paper or Plastic?

The Court answered two questions in its ruling: (1) a corporate entity is not subject to a heightened standard in determining whether it has "standing" to bring a lawsuit under CEQA; and (2) the City of Manhattan Beach was not required to prepare an Environmental Impact Report to study the potential adverse environmental impacts stemming from an ordinance banning the use of plastic bags by local businesses.

July 28, 2011

The California Supreme Court has resolved one of the more provocative CEQA (California Environmental Quality Act) cases presented in recent years (*Save the Plastic Bag Coalition v. City of Manhattan Beach*, (2011 DJDAR 10645)). The Court answered two questions in its ruling: (1) a corporate entity is not subject to a heightened standard in determining whether it has "standing" to bring a lawsuit under CEQA; and (2) the City of Manhattan Beach was not required to prepare an Environmental Impact Report ("EIR") to study the potential adverse environmental impacts stemming from an ordinance banning the use of plastic bags by local businesses. Although the "*Plastic Bag*" decision likely will be most noted for answering these two questions, the case ultimately may also be known for confusing the "fair argument" standard.

The Court appeared to show unusual deference to the City Council's decision-making. When addressing the question of whether the ban on plastic bags would result in greater paper bag usage, which was a fundamental initial determination, the City drew only superficial conclusions that the Supreme Court did not question. The City calculated the City's population and the number of retail establishments using paper bags, and noted that paper bags had greater volume than plastic bags. This was useful information but the City never took the next step to use that information to quantify, even roughly, the projected increase in paper bag use resulting from its plastic bag ban. Knowing the extent of the increase was fundamental to knowing the environmental impacts of that increase (that the plastic bag ban would reasonably lead to). Moreover, knowing the extent of the increase would be necessary to making the analysis in the City's initial study legally adequate. (See, e.g., *Sundstrom v. County of Mendocino*, 202 Cal.App.3d 296 (1988).) The Supreme Court never questioned this weakness in the City's CEQA work, leaving one to wonder if the Court was seeking a particular result.

Turning to the first question the Court answered, the term "standing" refers to a plaintiff's qualification to file a lawsuit. If the plaintiff does not have standing, the case will be dismissed. The issue of standing for corporate



entities in the CEQA context has been under some dispute since the case of *Waste Management of Alameda County, Inc. v. County of Alameda*, 79 Cal.App.4th 1223 (2000). In that case, the Court of Appeal held that the corporate plaintiff could not qualify for "public interest" standing because public interest standing was available only for "citizens," and corporations were not citizens. In order to qualify for public interest standing, held the Court of Appeal, a corporation had to meet a heightened standard by demonstrating that it should be accorded the attributes of a citizen litigant.

The Supreme Court rejected the conclusion of the *Waste Management* court that corporations are not "citizens" for purposes of public interest standing. The Court pointed out that standing generally is to be construed liberally, and rejected the conclusion by the *Waste Management* court that corporations will act only out of concern for what is good for the corporation. Therefore, held the Supreme Court, corporations will no longer be subject to a heightened standard in establishing their public interest standing.

The Court next addressed the EIR issue. Oftentimes, under CEQA, when a local agency grants an approval designed to protect the environment, the local agency's action is exempt from CEQA. No environmental review is required because the proposed activity is expected to prevent, not cause, environmental impacts. So thought the City of Manhattan Beach when it first proposed an ordinance banning the use of plastic bags. The City's thinking was that discarded plastic bags pollute the environment, particularly the ocean, and therefore banning them protected the environment. Although the City eventually moved away from its conclusion that the ordinance was exempt from CEQA, it ultimately concluded that an EIR would not be necessary because there was no evidence that the plastic ban would adversely impact the environment.

However, the City's ban on plastic bags did not exist in a vacuum. The ban on plastic bags meant, consequently, that the use of paper bags would likely increase. And, as argued to the City by the Save the Plastic Bag Coalition (comprised of plastic bag manufacturers), such an increase in the use of paper bags results in increased environmental impacts. The Coalition argued that the increased demand for paper bags would result in increased paper bag production, which in turn would result in increased environmental impacts where paper bags were produced (air emissions, pollutant discharges, increased tree harvesting), and an increase generally in environmental impacts caused during a paper bag's "life cycle." Nevertheless, the City determined an EIR was not necessary and approved the plastic bag ban. The Coalition sued, and both the trial court and the Court of Appeal agreed with the Coalition, holding that a fair argument had been raised that an adverse impact might result from the plastic bag prohibition (*i.e.* increased paper bag production); and thus an EIR – that would analyze such potential impact – was necessary.

The Supreme Court disagreed. Any environmental impacts caused by the potential increase in paper bag production were, according to the Court, "both indirect and difficult to predict." The Court reasoned that because environmental review under CEQA is generally limited to the vicinity of the activity being studied, greater detail was required to support an argument

that environmental impacts would increase outside the vicinity of the plastic bag ban. However, the "fair argument" test does not require certainty of impact, it only requires substantial evidence supporting a fair argument that there "may" be a significant adverse impact – the result is an EIR that provides the detail of analysis the Court was interested in seeing. Nor did the Court believe that the increased use of paper bags by the relatively small population of the City was likely to cause a cumulative impact in combination with other jurisdictions also imposing plastic bag bans. Finally, the Court concluded that any increased landfill impacts and impacts caused by an increase in local traffic due to the delivery of paper bags would be minimal (although the basis for that conclusion was unclear).

The Court's analysis of the Coalition's evidence of environmental impacts seems to stand the "fair argument" standard on its head. The fair argument standard is a very low standard, designed to encourage the use of an EIR to study potentially significant impacts. However, in the *Plastic Bag* case, the Court, in rejecting the evidence of impacts set forth by the Coalition, seemed intent to itself perform the environmental analysis normally reserved for the EIR. The Court seemed to acknowledge at least a certain amount of evidence pointing to environmental impacts. But instead of having an EIR study the extent of those potential impacts, to the benefit of decision-makers and the public, the Court appears to have assumed the role of the EIR.

Another troubling aspect of the decision was the Court's conclusions concerning the location of the potential impacts caused by increased paper bag use. The Court minimized the level of impacts because they would not be located geographically close to the City. However, this reasoning arguably contradicts CEQA requirements concerning greenhouse gas emissions; CEQA requires the analysis of greenhouse gas emissions even though the impacts of such emissions are not local – they instead contribute to *global* climate change.

The *Plastic Bag* decision is no doubt likely to be an influential one. However, in the authors' view, many of its more important ramifications may confuse more than resolve the "fair argument" standard.

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