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ARTICLE

PAPER OR PLASTIC? A QUESTION FOR CALIFORNIA'S COURTS

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The California Environmental Quality Act,[1] better known as "CEQA," has proved to be fertile ground for the raising of legal challenges to public agency action throughout the state. Indeed, CEQA is without a doubt one of the most highly litigated statutory schemes in California. What's more, CEQA litigation often pushes the bounds of "environmental protection"—the law's *raison d'etre*—into areas that could not have been foreseen by its original advocates and enactors.

This principle is demonstrated by the recent First District Court of Appeal opinion *Save the Plastic Bag Coalition v. County of Marin*,[2] a case drawing upon the earlier California Supreme Court decision of *Save the Plastic Bag Coalition v. City of Manhattan Beach*.[3] Read together in the broader context of CEQA's procedural mandates, the cases represent a more limited and common sense approach to environmental legislation and litigation.

THE PROCESS OF CEQA REVIEW

CEQA implements a process of reviewing the environmental effects of "projects" covered by the statute. Thus, the first question in determining whether CEQA applies to an action is to see if it constitutes a "project." "Project" is broadly defined to include "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."[4] While nominally applicable only to actions by public agencies in California,

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the law has long been interpreted to include private projects subject to governmental approvals.[5]

The key threshold question in determining whether CEQA applies to a "project" or not is if the agency approvals required are "ministerial" or "discretionary" in nature. Ministerial projects are exempt from CEQA review.[6] "Ministerial" means agency action "involving little or no personal judgment" by a public official, who "merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision."[7] A "discretionary" project, on the other hand, is one that "requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity."[8]

If an action qualifies as a discretionary project, the next question is whether it is expressly exempt from CEQA review under a categorical or statutory exemption.[9] Numerous such exemptions exist, including for emergency measures, minor land use actions, measures to protect the environment, etc.[10] If a categorical exemption applies, the question then becomes whether an exception to the exemption brings it back within CEQA's scope as, for instance, where "unusual circumstances" apply giving rise to potentially significant impacts on the environment.[11]

In the case of a non-exempt project, the next step in the analysis focuses on whether it presents the possibility of a significant effect on the environment. This is done through an "initial study."[12] If the initial study discloses "substantial evidence" that the project "may cause a significant effect on the environment," an environmental impact report (colloquially known as an "EIR") must be prepared.[13] If there is no substantial evidence that the project may cause a significant effect on the environment, the agency can prepare a "negative declaration" to that effect.[14] If the study identifies a potentially significant effect on the environment but the project proponent agrees to measures that will mitigate it prior to the issuance of a negative declaration, a "mitigated negative declaration" can be used.[15]

Once an EIR is prepared, it is subject to circulation and public comment before being finalized and subject to certification by the appropriate agency.[16] The agency can then determine whether to approve the project in light of the EIR's conclusions and required mitigation measures or to deny it.

Given these detailed and comprehensive procedural requirements, litigation in CEQA matters is relatively common. CEQA thus provides a convenient sword for project opponents (which are frequently environmentalists, local "not in my backyard" or "NIMBY" groups, or project competitors) to attack and delay if not defeat project approvals, or at the very least cause project proponents to have to spend additional monies or provide further mitigation or other concessions in order to proceed. The ultimate goals of petitioners in CEQA cases are not always clear, though this is not the case in the plastic bag cases discussed below.

2011: THE SUPREME COURT TAKES ON PLASTIC BAG BANS IN *SAVE THE PLASTIC BAG COALITION V. CITY OF MANHATTAN BEACH*

In *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155, 127 Cal. Rptr. 3d 710, 254 P.3d 1005 (2011), the California Supreme Court confronted

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the question of whether or not an EIR was required for a municipal ordinance banning the use of plastic bags by local businesses. While this question may appear narrowly drawn, it has broader implications for how environmental impacts under CEQA are analyzed in terms of geographic scope and determining what constitutes a potentially significant effect on the environment.

In 2008, the City of Manhattan Beach considered an ordinance banning "point-of-sale plastic carry-out bags" for local businesses. The draft ordinance included a provision to the effect that it was not subject to CEQA because the ban would have no significant effect on the environment and because it qualified as a regulatory program to protect the environment.[17] A trade group objected to the ordinance on the basis that it would give rise to an increase in the use of paper bags, which it claimed were worse for the environment than plastic bags. The group indicated that it would sue the city if a full environmental review were not performed.

Following the trade group's objection, the city conducted an initial study of the ordinance. The study concluded that the plastic bag ban would have some negative effect on the environment from an increase in paper bag use since paper bags require more energy to produce and distribute and create more wastewater in the manufacturing and recycling processes. However, the study also stated that the environmental impacts would be less than significant because of the limited reach of the ban, the lower rate of usage of paper bags given their higher capacity and replacement with reusable bags, and the higher rate of recycling for paper bags. Accordingly, the study concluded that the impact from the increase in use of paper bags would be minimal, but that the ordinance would also result in less plastic bag litter in the city as well as the ocean. Thus, it recommended the adoption of a negative declaration finding that the ordinance could not have a significant effect on the environment.

The trade group responded to this analysis by threatening litigation and referring to two studies concluding that paper bags have a greater environmental impact than plastic bags when their respective "life cycles" are compared. The group asserted that this constituted evidence establishing a reasonable possibility of a significant effect on the environment requiring a full-blown EIR under CEQA.

The city then issued another report addressing the trade group's studies. This report reviewed five other studies and analyses and observed that conclusions on the plastic/paper comparison varied based on the assumptions used. Thus, various studies could be selectively used to support a desired conclusion. City staff recommended adopting the ordinance and promoting the use of reusable bags. The city then passed the ordinance and adopted a negative declaration to the effect that the law would not have a significant effect on the environment.

The trade group sued the city shortly thereafter. It filed a petition for a writ of mandate seeking to enjoin enforcement of the ordinance until the city prepared a full EIR. The trial court granted the writ, holding that the administrative record established the existence of a fair argument that the plastic bag ban would cause a significant effect on the environment, thereby necessitating an EIR. The court of appeal affirmed, and the Supreme Court granted review.

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After a brief survey of the general aspects of environmental review under CEQA, the court undertook its analysis of the propriety of the city's approval of the ordinance. As a preliminary matter, the court noted that the city conceded that the ordinance constituted a "project" for purposes of CEQA analysis, and that it had abandoned reliance on the "common sense" exemption, instead proceeding with an initial study and negative declaration. The court also observed that the standard of review of an agency's decision to issue a negative declaration is "prejudicial abuse of discretion," which applies where "the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence."[18]

The court also took the time to review the decision of the court of appeal below, which was based on the conclusion that "it can be fairly argued based on substantial evidence in light of the whole record that the plastic bag distribution ban *may* have a significant effect on the environment."[19] The court did not quibble with the predicate of this conclusion, observing, "On this record, it is undisputed that the manufacture, transportation, recycling, and landfill disposal of paper bags entail more negative environmental consequences than do the same aspects of the plastic bag 'life cycle.'"[20] But, continued the court:

> CEQA, however, does not demand an exhaustive comparative analysis of *relative* environmental detriments for every alternative course of action. It requires an EIR only for those aspects of a project likely to have *significant* environmental effects.[21]

Thus, the question that the court had to answer was whether the ordinance would in fact have such environmental effects, and how those effects would be measured.[22]

Accordingly, the court went on to assess the potential environmental impact of the ban within Manhattan Beach and the immediate vicinity, concluding that "the increase in the regional solid waste stream caused by discarded paper bags would be insignificant."[23] Analyzing the ordinance's environmental impacts on a broader scale proved a more daunting task, however, as the court noted.

> The impacts of this project in areas outside Manhattan Beach itself are both indirect and difficult to predict. The actual increase in paper bag use as a result of the ordinance is necessarily uncertain, given that some percentage of local residents may be expected to turn to the city's favored alternative, reusable bags. Moreover, the city could hardly be expected to trace the provenance of all paper bags that might be purchased by Manhattan Beach establishments, in order to evaluate the particular impacts resulting from their manufacture. Accordingly, under the approach we endorsed in *Muzzy Ranch Co. v. Solano County Airport Land Use Com'n*, 41 Cal. 4th 372, 388, 60 Cal. Rptr. 3d 247, 160 P.3d 116 (2007), as modified, (Sept. 12, 2007), the city could evaluate the broader environmental impacts of the ordinance at a reasonably high level of generality.[24]

Summarizing the potential extraterritorial effects of the ban, the court concluded that "Manhattan Beach is small enough that even the cumulative effects of its ordi-

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nance would be negligible."[25] Thus, the court held that the plastic bag ban would not have a sufficiently significant impact on the environment to require the preparation of an EIR under CEQA.

> When we consider the actual scale of the environmental impacts that might follow from increased paper bag use in Manhattan Beach, instead of comparing the global impacts of paper and plastic bags, it is plain the city acted within its discretion when it determined that its ban on plastic bags would have no significant effect on the environment.[26]

The court's straightforward approach to what was clearly intended as a pro-environment piece of local legislation manifested its admonition that CEQA is to be applied in a "commonsense" manner commensurate with its ultimate purpose. That the case had to be litigated to the California Supreme Court in order for this principle to hold sway helps demonstrate the convoluted legal logic that can often be found in CEQA actions.

2013: THE FIRST APPELLATE DISTRICT DECIDES *SAVE THE PLASTIC BAG COALITION V. COUNTY OF MARIN*

A mere six months before the California Supreme Court decided *Save the Plastic Bag Coalition v. City of Manhattan Beach*, in early 2011 the County of Marin approved an ordinance prohibiting some 40 retail outlets in unincorporated areas from handing out single-use plastic bags and mandating a five cent charge for every paper bag used. This followed years of study as to the environmental effects of plastic and paper bags. The same trade group that appeared in the earlier plastic bag CEQA litigation weighed in before the county took its final action, contending that a full-blown EIR would be required for the ordinance based on the same "life cycle" arguments it had made in Manhattan Beach. In spite of this, the county approved the ordinance and filed a notice of exemption asserting that the law was exempt from CEQA under categorical exemptions for actions to maintain, restore, enhance, or protect the natural environment.[27]

The trade group filed a petition for writ of mandate based on the county's alleged failure to adhere to CEQA. The trial court denied the writ, holding that there was substantial evidence in the record to support the county's reliance on the categorical exemptions. The petitioner appealed to the First District Court of Appeal, and on June 25, 2013, the court handed down its decision in *Save the Plastic Bag Coalition v. County of Marin*, 218 Cal. App. 4th 209, 159 Cal. Rptr. 3d 763 (1st Dist. 2013), review denied (Oct. 2, 2013).

Not surprisingly, the First District's opinion was heavily influenced by the *City of Manhattan Beach* case. But before the court discussed that decision, it walked through the general procedural contours of CEQA and how it applied to the county's decision. The court noted that as a legislative act was at issue, the "prejudicial abuse of discretion" was the appropriate standard of review. Thus, even though the legal issue under CEQA was different from the *City of Manhattan Beach* decision (categorical exemption versus negative declaration), the standard of review was ultimately the same. The county's burden was to show that its determination that the project was

categorically exempt from CEQA was supported by substantial evidence; once it did that, the burden would be on the petitioner to show that it fell into an exception to the exemption under the CEQA Guidelines section 15300.2(c), e.g., that there is a reasonable possibility that the project may have a significant effect on the environment due to unusual circumstances.

With that analytical throat-clearing out of the way, the court turned to the *City of Manhattan Beach* decision. Somewhat surprisingly, Save the Plastic Bag Coalition contended that the case supported its position that a full-blown EIR was required for the county's action. In the words of the First District:

> [P]laintiff draws the conclusion that an EIR is required for any plastic bag ban in (1) a city or county larger than Manhattan Beach, and (2) in smaller cities and counties based on cumulative impacts. Plaintiff then claims the population of Marin County in 2010 was 252,409, over seven times larger than Manhattan Beach.[28]

The First District expressed extreme skepticism of this position. It noted that the Marin County ordinance only applied to 40 stores as opposed to Manhattan Beach's law which covered over 200. Moreover, because the ordinance only applied in unincorporated areas, the comparison of populations affected was skewed.

More substantively, the petitioner argued that the *Manhattan Beach* case demonstrated that environmental review is required for plastic bag bans and thus categorical exemptions are not appropriate for this type of project. The First District disagreed, holding that there was no per se rule one way or another for such bans and that "[a] categorical exemption *may* apply to plastic bag bans depending upon the unique facts and circumstances presented."[29]

Save the Plastic Bag Coalition also argued that the categorical exemptions the county had relied upon only applied to regulatory agencies putting into place regulations under a preexisting state law or local ordinance. This was based on a reading of the text of CEQA Guidelines sections 15307 and 15308. As this argument was unsupported by authority, the court had little trouble concluding that the exemptions in question were not for the implementation of prior legislative or regulatory enactments.

Finally, the court noted that the petitioner had failed to challenge the county's assertion that the categorical exemptions were supported by substantial evidence. This failure to grapple with the actual substance of the issue at hand was the last nail in the petitioner's CEQA coffin, and the First District affirmed judgment in favor of the county.

CONCLUSION

Most CEQA cases tread on well-worn ground concerning "categorical exemptions," "negative declaration," "substantial evidence," or other frequently litigated parts of the CEQA scheme. The *Save the Plastic Bag Coalition* cases represent new if incremental aspects of CEQA law. The practical takeaway from these opinions is that the courts will generally view legislation that is facially pro-environment as such and not pick it over with a fine-toothed regulatory comb. The California Supreme

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Court's admonition about using common sense in applying CEQA will hopefully streamline if not prevent some of the less viable CEQA petitions. On the legal side, one of the larger takeaways is the flexibility that courts may employ in evaluating the extraterritorial effects of "projects" under CEQA. The farther one gets from a project the more attenuated the environmental effects will presumably be (with some exceptions, such as greenhouse gas emissions), but at least on a theoretical level the proverbial "butterfly effect" could make any environmental effect "significant." In a world in which pro-plastic bag coalitions can cast themselves as environmental stewards, a little common sense can go a long way, particularly where CEQA is concerned.

NOTES

1. Pub. Resources Code, §§21000 et seq. CEQA is also implemented by the "CEQA Guidelines" published in the California Code of Regulations at title 14, §§15000 et seq.
2. *Save the Plastic Bag Coalition v. County of Marin*, 218 Cal. App. 4th 209, 159 Cal. Rptr. 3d 763 (1st Dist. 2013), review denied, (Oct. 2, 2013) (*Save the Plastic Bag II*).
3. *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155, 127 Cal. Rptr. 3d 710, 254 P.3d 1005 (2011) (*Save the Plastic Bag I*).
4. Pub. Resources Code, §21065. See also Cal. Code Regs., tit. 14, §15378.
5. *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 104 Cal. Rptr. 761, 502 P.2d 1049 (1972) (disapproved of on other grounds by, Kowis v. Howard, 3 Cal. 4th 888, 12 Cal. Rptr. 2d 728, 838 P.2d 250 (1992)).
6. Cal. Code Regs., tit. 14, §15268(a).
7. Cal. Code Regs., tit. 14, §15369.
8. Cal. Code Regs., tit. 14, §15357.
9. Pub. Resources Code, §21084, subd. (a); Cal. Code Regs., tit. 14, §15061.
10. Pub. Resources Code, §21080; Cal. Code Regs., tit. 14, §§15301 to 15333.
11. Pub. Resources Code, §21084, subds. (b), (c), (e); Cal. Code Regs., tit. 14, §15300.2.
12. Cal. Code Regs., tit. 14, §15063.
13. Pub. Resources Code, §§21080, subd. (d), 21082.2, subd. (d), 21083, subd. (b); Cal. Code Regs., tit. 14, §§15063, 15064, 15065.
14. Cal. Code Regs., tit. 14, §15063.
15. Pub. Resources Code, §21064.5; Cal. Code Regs., tit. 14, §15070.
16. Cal. Code Regs., tit. 14, §15090.
17. *Save the Plastic Bag I, supra*, 52 Cal. 4th at p. 160, citing Cal. Code Regs., tit. 14, §§15061, subd. (b)(3), 15038.
18. *Id.* at 170, quoting Pub. Resources Code, §21168.5.
19. *Id.* at 171, emphasis in original.
20. *Id.* at 172.
21. *Id.*, emphasis in original.
22. The court's shorthand expression of the standard for when a negative declaration may not adopted—"likely to have significant environmental effects"—is not apparently intended as a recasting of the usual statutory standard for when an EIR must be prepared, which is whether there is a "fair argument" that there is a "possibility" that the project "may" have a significant environmental impact. See *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 83 n.1b, 118 Cal. Rptr. 34, 529 P.2d 66 (1974), supplemented, 13 Cal. 3d 486, 119 Cal. Rptr. 216, 531 P.2d 784 (1975); *Sundstrom v. County of Mendocino*, 202 Cal. App. 3d 296, 309, 248 Cal. Rptr. 352 (1st Dist. 1988).
23. *Id.* at 173.
24. *Id.* at 174.
25. *Id.* at 174, footnote omitted.

26. *Id.* at 172.
27. Cal. Code Regs., tit. 14, §§15307, 15308.
28. *Save the Plastic Bag II*, 218 Cal. App. 4th at 223.
29. *Id.* at 224-25, emphasis in original.

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