

The California Supreme Court's Recent Flood of CEQA Decisions

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA),¹ with its mandate on public agencies to lessen or avoid the unwelcome environmental effects of proposed projects, has generated hundreds of lawsuits in the state's trial courts and intermediate appeals courts over the statute's 40-year history. Perhaps no other California law matches CEQA in this respect. With so many lawsuits, commentators have noted wryly that it is not difficult to find a CEQA case standing for almost any proposition. Lead agencies and project proponents expend untold millions each year defending or settling those suits and in paying their opponent's attorney's fees when public interest plaintiffs prevail under the state's private attorney general statute.² Moreover, these sums do not account for the enormous expenses arising from the delays that can ensue once a project is challenged in court.³

While the supply of CEQA cases in the lower courts appears inexhaustible, historically only a minute fraction of those cases have been accepted for review by the California Supreme Court. The relatively few CEQA cases taken by the supreme court each year is not surprising given the court's discretion to grant review and the narrow circumstances under which it does so. What is surprising, however, is the number of CEQA cases decided by the court in the last four years, and particularly in late 2009 and the first quarter of 2010. The court decided four CEQA cases in as many months—a new record eclipsing by a wide margin the number of CEQA cases decided by the court in previous years.

Why is CEQA drawing so much attention from the court now? Have the supreme court's actions revealed discernable trends? The answers to these questions may portend the direction of the court's CEQA jurisprudence and the fate of future cases.

In CEQA cases, like almost all civil cases,⁴ the California Supreme Court's review is discretionary and typically granted in limited circumstances when necessary to settle an important question of law or resolve a conflict in decisions among the state's six appellate districts.⁵ Indeed, of the roughly 7,000 petitions received by the court each year, only 1 to 2 percent are accepted for review.⁶ The court has decided about 40 CEQA and CEQA-related cases since the statute was approved by the California Legislature in 1970—an average of one per year.⁷ According to Justice Kathryn Werdegar, when a conflict emerges among the appellate districts, the court “almost always grants review” unless 1) the case at issue involves a “maverick opinion” that is nonetheless heading in the right direction, 2) the case is not a good vehicle due to unusual facts or procedural difficulties, 3) recent legislation may solve the problem, or 4) the court wants the issue to “percolate” further among the lower courts.⁸

Enacted to inform decision makers and the public about the potentially significant environmental effects of proposed projects before those projects are approved, CEQA requires lead agencies to prepare an Environmental Impact Report (EIR) whenever the agency finds that a project may have a significant impact on the environment.⁹ The EIR, in turn, must evaluate ways to avoid or reduce the environmental effects of the project through changes to the project or the

use of feasible alternatives or mitigation measures.¹⁰

When the lead agency finds that the project will have a less-than-significant effect on the environment, the agency may adopt a negative declaration instead of preparing an EIR.¹¹ CEQA and its implementing guidelines also provide a series of exceptions or exemptions from CEQA's environmental review requirements.¹² If any apply, the lead agency need not prepare a negative declaration or an EIR. Once the agency approves the project, it may issue a notice that triggers a short 30- or 35-day statute of limitations period.¹³

The state supreme court first grappled with CEQA just two years after its enactment. Referring to the statute as “EQA” at the time, Justice Stanley Mosk authored the decision in *Friends of Mammoth v. Board of Supervisors* that answered a simple but fateful question: Does CEQA apply to private activities for which a government permit or other entitlement is needed?¹⁴ The court's answer is apparent to anyone familiar with the endless stream of litigation involving private projects since that time. In *Friends of Mammoth*, the court first articulated the oft-cited rule of statutory construction that “the Legislature intended CEQA to be interpreted in such manner as to afford the fullest possible protection to the environment...”¹⁵

Following *Friends of Mammoth*, the court has had occasion to resolve a number of seminal questions under CEQA. For example, in *Laurel Heights Improvement Association v. Regents of University of California (Laurel Heights I)* the court first held that the “rule of reason” governs the range of project alternatives that the agency must consider in an EIR, as well as the level of detail and analysis that the EIR must include concerning those alternatives.¹⁶

In *Western States Petroleum Association v. Superior Court*, the court considered the evidentiary standards that apply in CEQA cases. It set considerable limits on the admissibility of extra-record evidence—that is, evidence that was not before the agency when it made its decision.¹⁷ While the court did not entirely “foreclose” the admissibility of extra-record evidence under “unusual circumstances or for very limited purposes,” the court emphasized that extra-record evidence “can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision.”¹⁸

In balancing the earlier rule that CEQA be interpreted in a manner that affords the “fullest possible protection to the environment,” the court held in *Napa Valley Wine Train, Inc. v. Public Utilities Commission* that this general rule of construction does not apply when “the Legislature has, for reasons of policy, expressly exempted several cat-

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egories of projects from environmental review.”¹⁹ In those circumstances, the court “does not sit in review of the Legislature’s wisdom in balancing these policies against the goal of environmental protection because, no matter how important its original purpose, CEQA remains a legislative act, subject to legislative limitation and legislative amendment.”²⁰

The 2006-2009 CEQA Docket

Six of the seven justices currently seated on the California Supreme Court have been together since January 2006, when Justice Carol Corrigan, the most junior justice, joined the court. Since then, the court has rendered 11 CEQA or CEQA-related decisions, 6 of which have been authored by Justice Werdegar.²¹ Of those decisions, all but one were unanimous,²² and all but two reversed the lower

court decisions. The only two lower court decisions to survive review (albeit on separate grounds) arose from the Second Appellate District in Los Angeles.²³ In the 11 decisions issued since 2006, the court has shown no clear preference for plaintiffs or defendants or for environmental groups or public agencies. Indeed, the decisions constitute an almost even split.

Between 2006 and 2009 the court ruled on broad substantive issues of statewide importance. In 2007, for example, the court in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* held that an EIR for a 22,000-acre, multi-phased development project should have identified and evaluated long-term water supplies for future phases of the project.²⁴ Within the same year, the court in *In re Bay-Delta Programmatic Environmental Impact Report*

Coordinated Proceedings decided whether the state in its programmatic EIR for the operation and restoration of the Sacramento/San Joaquin Delta should have evaluated an alternative to diverting water to southern California—an alternative that presumed an end to years of population growth in California and would have rendered most years of fierce political battles over the allocation of water between north and south.²⁵ Deferring to the public agencies’ discretion to set program objectives, the court decided that the state was not required to evaluate a no-export alternative that conflicted with the program’s overall purpose—to “achieve ecosystem restoration goals and meet current and projected water export demands.”²⁶

During the 2006-2009 period, the court also addressed more technical and narrow procedural issues—from the standards for determining when a mitigation measure is “legally infeasible” to what sort of activity does or does not constitute a “project” under CEQA. In *City of Marina v. Board of Trustees of the California State University and Save Tara v. City of West Hollywood*, the court sided with project opponents and imposed a heightened duty on public agencies to consider mitigation measures more carefully and to conduct environmental review earlier in the project development process.²⁷

But in *Muzzy Ranch Company v. Solano County Airport Land Use Commission*, the court deferred to the state CEQA guidelines and the agency’s decision about whether the action in question—approval of an airport land use plan—fell within the “commonsense” exemption for projects with no possible significant effect on the environment.²⁸ Taken together, these three cases reveal that the court is willing to parse the language and procedural requirements in CEQA and its guidelines but is not predisposed for or against lead agencies.

Procedural Focus in 2009-2010

The California Supreme Court’s pace in deciding a steady stream of CEQA cases since 2006 has been remarkable—and this past year was unprecedented. Nevertheless, the court’s recent CEQA jurisprudence would not be considered groundbreaking because it does not address the reach of the statute or the momentous environmental issues of our time, like climate change or water supply. Instead, the cases involve day-to-day procedural issues left unresolved by the lower courts—the sort of procedural issues that, as Justice Joyce Kennard quipped at oral argument in *Committee for Green Foothills v. Santa Clara County Board of Supervisors*, only a “CEQA aficionado” could love.²⁹ As posited by Justice Werdegar, this recent trend is not due to the composition of the court but

Incoming Chief Justice Cantil Sakauye and CEQA

California Supreme Court Chief Justice Tani Cantil Sakauye—who this month replaces retiring Chief Justice Ronald George—may yet alter the fate of future CEQA cases. Justice Cantil Sakauye is a 20-year veteran of the California courts and has served on the Third Appellate District since 2005. No stranger to CEQA, the justice has authored five CEQA decisions during the last five years—three published and two unpublished—and has concurred in numerous others. Each of those decisions has been unanimous, which evinces her willingness and ability to work with fellow justices rather than assert her independence.

Justice Cantil Sakauye’s record on appeal shows no clear alignment with her political leanings. In her first two published opinions, she ruled against the lead agency on narrow procedural grounds. First, in *California Farm Bureau Federation v. California Wildlife Conservation Board*, she found that a proposal to purchase and convert farmed land to wetland habitat, while environmentally beneficial, did not qualify for any categorical exemptions under CEQA or its guidelines because the alterations still would have resulted in some adverse impacts.¹ Second, she held in *Citizens for Open Government v. City of Lodi* that the opponents to a shopping center project had properly exhausted their administrative remedies before filing suit by attending planning commission and city council hearings and objecting to the proposed action at those hearings.² The mere fact that the group had not filed a notice of administrative appeal before filing suit, she reasoned, did not defeat their exhaustion claim.

Justice Cantil Sakauye’s third published opinion favored the lead agency and served as precursor to the California Supreme Court’s treatment of an unsettled area in its CEQA jurisprudence. She ruled in *Concerned McCloud Citizens v. McCloud Community Services District* that an agreement between a water bottling company and a local services district for the sale and purchase of spring water was not an “approval of a project” within the meaning of CEQA because the agreement was expressly conditioned on subsequent compliance with CEQA.³ Consequently, the district was not required to prepare an EIR before entering the agreement.

At that time, the supreme court in *Save Tara v. City of West Hollywood* was evaluating the same legal question but later came to the opposite conclusion—that the conditional approval of a low-income housing project did amount to “approval of a project” that first required an EIR.⁴ But while reaching an opposite result, the court was careful not to question the correctness of Justice Cantil Sakauye’s opinion.⁵ The two cases together mark the dividing line between commitments that amount to “approvals” subject to CEQA and those that do not.

Whether Chief Justice Cantil Sakauye will shift the supreme court or upset its current trends on CEQA cases in any discernable way is an open question. The California Supreme Court does not harbor any severe doctrinal leanings, particularly in CEQA cases. It appears from her record, however, that she may be willing to assert greater leadership in this area than her predecessor. Moreover, her past opinions show a willingness to decide these cases in favor of environmental or citizen plaintiffs.—C.L.M.

¹ *California Farm Bureau Fed’n v. California Wildlife Conservation Bd.*, 143 Cal. App. 4th 173 (2006).

² *Citizens for Open Gov’t v. City of Lodi*, 144 Cal. App. 4th 865 (2006).

³ *Concerned McCloud Citizens v. McCloud Cmty. Servs. Dist.*, 147 Cal. App. 4th 181 (2007).

⁴ *Save Tara v. City of West Hollywood*, 45 Cal. 4th 116, 133, 138 (2008).

⁵ Not all of Justice Cantil Sakauye’s decisions have survived. She concurred in the appellate opinion in *Sunset Sky Ranch Pilots Association v. County of Sacramento*, which was ultimately overturned by Justice Corrigan—Governor Schwarzenegger’s other appointee to the supreme court. *Sunset Sky Ranch Pilots Ass’n v. County of Sacramento*, 164 Cal. App. 4th 671 (2008). Given that Justice Cantil Sakauye did not author the opinion, this case may not be a good indicator of how her views will fare in future cases.

rather the number of conflicts and open questions that have emerged among the appellate districts.³⁰

All of the court's CEQA decisions in 2009-2010 were unanimous, and all but one reversed the lower court's decision. Unlike its earlier CEQA cases, however, three of the court's most recent decisions favored the lead agency. Also, Justice Corrigan, despite having been relatively quiet on CEQA cases and at oral argument early in her tenure on the court, was the most active justice in 2009-2010—authoring two of the four decisions and asking pointed questions from the bench.³¹

In *Sunset Sky Ranch Pilots Association v. County of Sacramento*, the court in December 2009 examined whether a county's decision to deny renewal of a conditional use permit for an existing private airport was shielded from environmental review by CEQA's statutory exclusion for projects that a public agency "rejects or disapproves."³² The Third Appellate District had concluded that the county's denial of the airport's use permit was a "project" requiring environmental review because it amounted to a "County plan to enforce its zoning code by closing the airport and transferring pilots to other airports." Thus, the county's denial of the use permit would have resulted in a number of direct and indirect environmental effects associated with the transfer of airport operations to new or alternative airfields.

The state supreme court disagreed. Writing for a unanimous court, Justice Corrigan explained that while the airstrip had been in operation since 1934, it was a private airstrip seeking a "new approval for its operations." Consequently, it was not an activity "directly undertaken by [a] public agency" and fell squarely within the statutory exclusion for projects that have been rejected or disapproved.³³

In reaching this conclusion, the court observed that the circumstances surrounding the private airport in *Sunset Sky Ranch* were distinguishable from those involving a public airport. Had the county decided to close a public airport, that would have been an "activity directly undertaken by [a] public agency" and thus subject to environmental review under CEQA. Consequently, public agency decisions to cease their own ongoing activities may no longer fit within the statutory exclusion. The court also eschewed a liberal reading of the statute in circumstances where the legislature intended to limit environmental review over projects:

Although we construe CEQA broadly...we do not balance the policies served by the statutory exemptions against the goal of environmental protection....[T]he very purpose of the

statutory CEQA exemptions is to avoid the burden of the environmental review process for an entire class of projects, even if there might be significant environmental effects.³⁴

In February 2010, Justice Corrigan again authored a unanimous opinion in *Committee for Green Foothills*.³⁵ The Sixth District had construed CEQA's short, 30-day statute of limitations to prohibit opponents from filing suit on some claims but not others. CEQA generally requires opponents to file suit within 30 days after the approving agency files a Notice of Determination.³⁶ As in *Sunset Sky Ranch*, the court reversed the lower court's ruling and affirmed the legislature's limits on environmental review and legal actions.

In *Green Foothills*, Santa Clara County years earlier had approved a community plan and EIR for the future growth of the Stanford University campus. The EIR called on Stanford to "dedicate easements for, develop, and maintain the portions of the two trail alignments which cross Stanford lands shown in the 1995 Santa Clara Countywide Trails Master Plan." To implement that measure, Stanford and the county subsequently negotiated and approved a trails agreement for two separate trail alignments. The county prepared and adopted a supplemental EIR for one trail alignment but decided that the second alignment did not require environmental review because no improvements had been proposed.

The county filed a Notice of Determination of the county's approval of the trails agreement and the fact that no improvements had been proposed for the second trail alignment. After the 30-day limitations period expired, the Committee for Green Foothills filed suit challenging the county's approval of the trails agreement, arguing that the approval violated CEQA because it approved the second trail alignment without undertaking further environmental review. The trial court dismissed the case based on the plaintiff's failure to file its suit within CEQA's 30-day statute of limitations.

The Sixth District reversed, reasoning that the nature of the underlying claim—that the county approved changes in the community plan without first determining whether those changes would have any significant effect on the environment—was not controlled by the particular notice and statute of limitations relied upon by the county. Thus, the nature of the underlying claim mattered to the Sixth District, and the 30-day limitations period did not apply.

Nevertheless, the California Supreme Court sided with the trial court, holding that the agency's filing of the notice triggers CEQA's 30-day statute of limitations for all

potential challenges to the decision announced in the notice. The limitations period cannot, as the petitioners had argued, be extended based on the nature of the CEQA violation alleged. Thus, again, the supreme court construed CEQA's statutory provisions to protect the agency's decision, and the court limited legal challenges by third parties.

In *Communities for a Better Environment v. South Coast Air Quality Management District*, its third decision of the quarter, the supreme court issued another unanimous opinion, but this time the decision was authored by Justice Werdegar.³⁷ The case involved an application by ConocoPhillips to the South Coast Air Quality Management District (SCAQMD) for a permit to construct a series of improvements at its petroleum refinery in the city of Wilmington. The improvements were intended to allow the refinery to produce ultralow sulfur diesel fuel and would have substantially increased operations at the existing refinery and associated emissions of nitrogen oxide (NOx). The projected increase in NOx emissions, however, were still generally within the levels previously authorized by SCAQMD under ConocoPhillips's existing permit for the production of gasoline, jet fuel, diesel fuel, and other petroleum products.

Because NOx emissions were not expected to increase substantially above what SCAQMD considered baseline environmental conditions—the previously permitted maximum levels of NOx emissions—SCAQMD concluded that the ultralow sulfur diesel fuel project would not have a significant effect on the environment and approved the permit under a negative declaration rather than an EIR. In so doing, SCAQMD treated the additional NOx emissions as part of the "baseline measurement for environmental review," rather than as part of the new project.

The statute itself does not define the environmental baseline. The CEQA guidelines, on the other hand, state that the "physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or...at the time environmental analysis is commenced... will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant."³⁸ SCAQMD reasoned that its approach fit within the guidelines because ConocoPhillips could have increased its operations (and hence its NOx emissions) at any time without seeking further approval from the agency.

The court disapproved of SCAQMD's approach and cited a long line of cases holding that "the impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at the time of CEQA analysis, rather than to allowable



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conditions defined by a plan or regulatory framework.” The maximum operations and emissions levels under ConocoPhillip’s existing permit did not constitute normal operating conditions, and therefore did not represent the existing physical environmental conditions that existed at the time SCAQMD conducted its environmental analysis. Consequently, those maximum emissions levels did not represent the appropriate environmental baseline, and the court sent SCAQMD back to the drawing board.

The court distinguished the circumstance in which existing environmental conditions are temporary in nature and do not fairly represent normal operating conditions. In that situation, a lead agency may use past and ongoing operations as the environmental baseline. Though the court departed from its early pattern of siding with project opponent, it again articulated practical guidelines for project proponents, lead agencies, and lower courts to adhere to in the future.

The supreme court rendered its most recent CEQA decision on April 1, 2010, in *Stockton Citizens for Sensible Planning v. City of Stockton*.³⁹ Much like the circumstances in *Committee for Green Foothills*, the court in *Stockton Citizens* examined CEQA’s statute of limitations. But unlike the prior case, *Stockton Citizens* addressed whether a Notice of Exemption (not a Notice of Determination) triggered CEQA’s 35-day statute of limitations period if the underlying approval was invalid.

In 2002, the city of Stockton approved a supplemental EIR and an amended master development plan for the Spanos Park West development comprising 138 acres in North Stockton. The development plan envisioned a mix of retail, commercial, office, and residential uses, with zoning that would remain flexible enough to continue to adapt to changing economic conditions. So long as future projects were within the density and intensity of uses already approved, no further environmental review or amendments to the plan would be required.

Although not identified in the amended development plan, Wal-Mart in 2003 began processing entitlements for a 207,000 square-foot Supercenter on 22 acres within the Spanos Park West development area. After Wal-Mart submitted building and site plans to the city’s community development department, the director issued a letter to the project applicant affirming that the Supercenter conformed to the standards in the master development plan and thereafter filed a Notice of Exemption with the county clerk. Typically, the filing of this type of notice starts the 35-day clock on “[a]ny action or proceeding alleging that a public agency has improperly determined that a

project is not subject” to CEQA.⁴⁰

Some months after the notice—and well beyond the 35-day limitations period—the Stockton Citizens for Sensible Planning filed suit challenging the Supercenter under CEQA. The group complained that the director did not have authority to administratively approve the Wal-Mart Supercenter and that the Supercenter should have been reviewed by the city council. The city and the project’s proponents argued on demurrer and at trial that the suit was barred by CEQA’s 35-day statute of limitations.

The trial court, however, ruled that the director’s notice—the only public notice of the project—was invalid. The notice, the judge reasoned, had failed to trigger the statute of limitations because the director’s conformance determination was not an “approval” of a project—a procedural predicate to a valid notice. On appeal, a majority of the Third District agreed, adding that the director’s letter was not a valid approval by a public agency because the director did not follow agency procedures in issuing the letter and he did not have the authority to approve projects that require environmental review under CEQA.

The supreme court reversed, issuing a rebuke of the lower courts’ opinions by stating that it does not matter whether the underlying claims may be meritorious or unmeritorious. If the notice is properly filed and complies in form with the statutory requirements, courts cannot look behind the notice. Instead, they must honor CEQA’s 35-day limitations period without evaluating the validity or correctness of the underlying approval. The supreme court emphasized that the CEQA limitations period, while unusually short, is necessary to “ensure finality and predictability in public land use planning decisions” and to prevent CEQA challenges “from degenerating into a guerrilla war of attrition by which project opponents wear out project proponents.” In line with its earlier decisions in *Sunset Sky Ranch* and *Committee for Green Foothills*, the court enforced procedural limits established by the state legislature and found that the group’s claims were barred.⁴¹

Future CEQA Rulings

On the heels of a record series of CEQA decisions, the California Supreme Court is showing no signs of CEQA fatigue. Just three weeks after issuing its decision in *Stockton Citizens*, the Court’s seven justices voted unanimously to review a split decision in a case from the Second District—*Save the Plastic Bag Coalition v. City of Manhattan Beach*.⁴² The court has been asked to resolve two threshold questions under CEQA: 1) When is an EIR required under the “fair

argument standard,” and 2) under what circumstances do financially motivated opponents have standing to sue under CEQA.

Save the Plastic Bag Coalition involves an ordinance adopted by the city of Manhattan Beach to limit the distribution of plastic bags at the point of sale. The purpose of the measure was to address concerns about ocean pollution and trash in the marine environment. In weighing the feasibility of the ordinance, the city found that any possible increase in the use of paper bags that might result from the new law would have a “minimal or nonexistent” effect on the environment due to a variety of reasons, including the limited scope of the ordinance, the lack of other such ordinances in the region, and the city’s program to replace plastic bags with reusable bags. The city adopted the ordinance based on a negative declaration rather than an EIR.

The Save the Plastic Bag Coalition—an association of plastic bag manufacturers and distributors in the plastic bag industry—sued to compel the city to prepare an EIR to analyze the possible effects that increased paper bag use resulting from the ordinance would have on the environment. The Second District sided with the coalition, concluding that the group had raised enough evidence under CEQA’s fair argument standard to necessitate an EIR.⁴³ Under the fair argument standard, “a public agency must prepare an EIR whenever substantial evidence supports a fair argument that a proposed project ‘may have a significant effect on the environment.’”⁴⁴

Because the fair argument standard is such a low threshold, it is not uncommon for lead agencies to prepare an EIR to avoid the risks associated with possible legal challenges even when a mitigated negative declaration would suffice.⁴⁵ Indeed, negative declarations are becoming less common in California for projects with any possible opposition. The supreme court may have granted review in this case to set new boundaries surrounding the fair argument standard and to clarify the evidentiary burden borne by would-be challengers.

Perhaps equally important, this case also marks the first opportunity in years for the court to clarify the rules of standing—a jurisdictional prerequisite to filing suit—and to set a limit on environmental lawsuits brought by financially interested parties. Plastic bag manufacturers, distributors, and other companies in the plastics industry ostensibly formed the Save the Plastic Bag Coalition to “counter misinformation about the effect of plastic bag usage on the environment.” Nonetheless, the coalition made little effort to hide its members’ financial interests in promoting the manufacture and distribution of plastic bags. A ruling adverse to the group that sets a meaningful limit on



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standing to sue under CEQA could have important implications on the myriad other groups seeking to challenge projects based on allegedly but not completely altruistic environmental purposes.

Something in the Second District’s decision has caught the supreme court’s attention, and its increasing tendency to reverse lower court decisions and place practical limits on environmental review portends a similar result here. For example, each of the court’s four decisions rendered in late 2009 and early 2010 tended to set parameters for undertaking environmental review or adhering to statutory or regulatory mandates, often in a manner deferential to the lead agency. The court seems poised to view *Save the Plastic Bag Coalition* in the same light and to provide helpful guidance on when a negative declaration is appropriate and under what circumstances financially interested parties can sue to enforce the state’s environmental laws.

Appellants have also fared well when there has been a dissenting opinion below.⁴⁶ In *Save the Plastic Bag Coalition*, an impassioned dissent was issued by Second District Court of Appeal Justice Richard Mosk—son of the late California Supreme Court Justice Stanley Mosk, who authored the court’s first CEQA (or EQA) decision in *Friends of Mammoth*. The strong voice of Justice Richard Mosk suggests the supreme court’s recent trend may continue, and the Second District’s decision in *Save the Plastic Bag Coalition* will fall.

Save the Plastic Bag Coalition will not be the last word in the supreme court’s CEQA jurisprudence. Currently at least three petitions for review in CEQA cases await a ruling by the supreme court, and five additional appellate decisions are within the time limit for petitioning for review. CEQA is such a comprehensive statute, applied broadly to almost any development activity in the state, that there will undoubtedly be a host of legal challenges and enough splits in the lower courts to warrant the supreme court’s intervention again and again. ■

¹ The California Environmental Quality Act (CEQA), PUB. RES. CODE §§21000-21178.

² CODE CIV. PROC. §1021.5; Center For Biological Diversity v. County of San Bernardino, 185 Cal. App. 4th 866, 895-902 (2010) (affirming an award of \$265,715.55 to the prevailing plaintiffs in a challenge under CEQA against a waste composting facility).

³ Stockton Citizens for Sensible Planning v. City of Stockton, 48 Cal. 4th 481, 500 (2010). In *Stockton Citizens*, the time from project approval to a decision in the California Supreme Court spanned over six years.

⁴ The state supreme court has original jurisdiction over selected civil cases, including CEQA actions filed against the California Public Utilities Commission. PUB. RES. CODE §21168.6. Even in those circumstances, the court’s review is discretionary.

⁵ CAL. R. CT. 8.500(b)(1).

⁶ Justice Kathryn M. Werdegard, Remarks at the State Bar of California 2010 Environmental Law Conference (Oct. 23, 2010) [hereinafter Justice Werdegard's Remarks]. The supreme court's Web site states that it grants review in less than 5 percent of the 5,500 petitions it receives each year. See <http://www.courtinfo.ca.gov/courts/supreme/>.

⁷ A few of the 34 cases did not directly address CEQA or its regulatory guidelines but nonetheless referenced and interpreted principles of law under CEQA. Those cases are counted here as CEQA-related cases.

⁸ Justice Werdegard's Remarks, *supra* note 6.

⁹ PUB. RES. CODE §21080(d).

¹⁰ PUB. RES. CODE §21100(b)(3)-(4).

¹¹ PUB. RES. CODE §21080(c).

¹² See, e.g., PUB. RES. CODE §21080(b); CEQA Guidelines §§15300-15333.

¹³ PUB. RES. CODE §21167(a)-(e).

¹⁴ Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247 (1972).

¹⁵ *Id.* at 259.

¹⁶ Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 47 Cal. 3d 376, 407 (1988) (Laurel Heights I).

¹⁷ Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559 (1995).

¹⁸ *Id.* at 578-79.

¹⁹ Napa Valley Wine Train, Inc. v. Public Util. Comm'n, 50 Cal. 3d 370, 376 (1990).

²⁰ *Id.*

²¹ The supreme court's decision in *Ebbetts Pass Forest Watch v. California Department of Forestry and Fire Protection* did not address CEQA directly but rather the concept of tiering in CEQA as it may apply to timber harvest plans under the Forest Practice Act. Thus, Ebbetts Pass is included in the CEQA cases counted here. *Ebbetts Pass Forest Watch v. California Dep't of Forestry & Fire Prot.*, 43 Cal. 4th 936 (2008).

²² Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal. 4th 412 (2007) (concurring and dissenting opinion by Baxter, J.).

²³ Save Tara v. City of West Hollywood, 45 Cal. 4th 116 (2008); *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.*, 48 Cal. 4th 310 (2010).

²⁴ Vineyard Area Citizens, 40 Cal. 4th 412.

²⁵ In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings, 43 Cal. 4th 1143 (2008).

²⁶ *Id.*

²⁷ City of Marina v. Board of Trs. of the Cal. State Univ., 39 Cal. 4th 341 (2006). The university was not prohibited under existing law from making financial contributions to certain off-campus infrastructure improvements as mitigation, and therefore the mitigation was not "legally infeasible." *Save Tara v. City of West Hollywood*, 45 Cal. 4th 116 (2008) (The city committed itself to a definite course of action regarding a low-income senior housing project, and thus it had impermissibly "approved" the project before undergoing CEQA review.).

²⁸ Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n, 41 Cal. 4th 373 (2007).

²⁹ Committee for Green Foothills v. Santa Clara County Bd. of Supervisors, 48 Cal. 4th 32 (2010).

³⁰ Justice Werdegard's Remarks, *supra* note 6.

³¹ The chief justice assigns opinion authors in each case and does so without sharing his or her reasons for assigning cases to a particular justice. Justice Werdegard's Remarks, *supra* note 6. Consequently, the mere fact that one justice might author a number of opinions in a given area is not evidence of the justice's interest in that area.

³² Sunset Sky Ranch Pilots Ass'n v. County of Sacramento, 47 Cal. 4th 902 (2009) (reviewing PUB. RES. CODE §21080(b)(5)).

³³ *Id.* at 908 (citing PUB. RES. CODE §21065(a)).

³⁴ *Id.* at 907 (citing Napa Valley Wine Train, Inc. v. Public Utilities Comm'n, 50 Cal. 3d 370, 376, 381 (1990)).

³⁵ Committee for Green Foothills v. Santa Clara County Bd. of Supervisors, 48 Cal. 4th 32 (2010).

³⁶ PUB. RES. CODE §21167(b)-(c), (e).

³⁷ Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist., 48 Cal. 4th 310 (2010). While unanimous, it is worth noting that Justices Kennard and Corrigan did not participate in the decision. Judges from the First and Sixth Appellate Districts were assigned to hear the case in their stead by Chief Justice Ronald George.

³⁸ CEQA Guidelines §15125.

³⁹ Stockton Citizens for Sensible Planning v. City of Stockton, 48 Cal. 4th 481, 500 (2010).

⁴⁰ PUB. RES. CODE §21167(d).

⁴¹ *Id.*

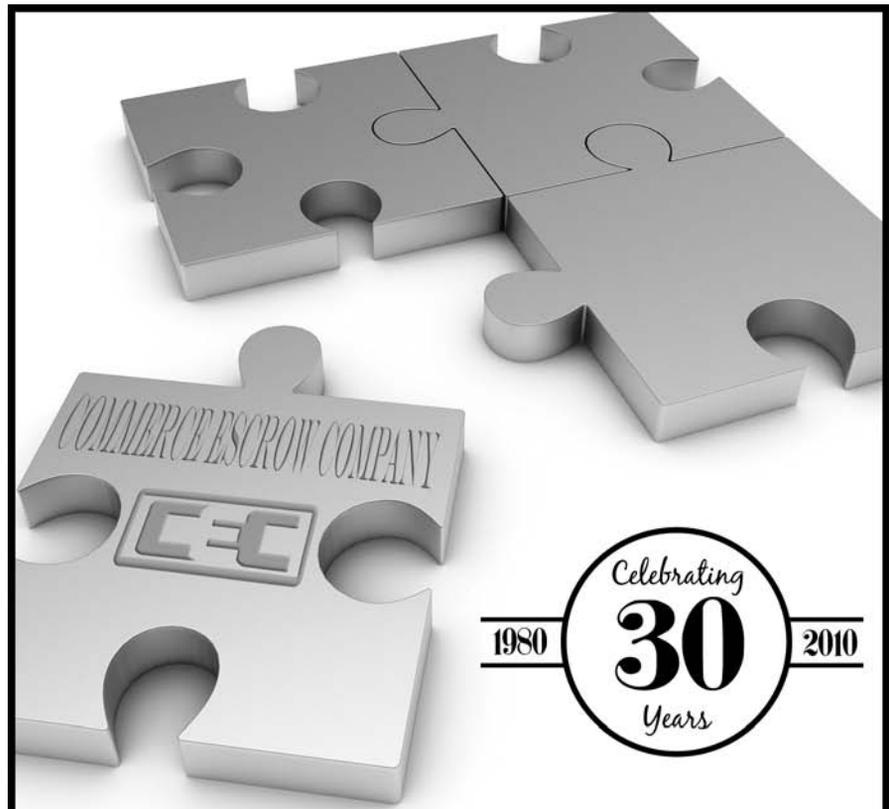
⁴² Save the Plastic Bag Coalition v. City of Manhattan Beach, 181 Cal. App. 4th 521 (2010).

⁴³ *Id.*

⁴⁴ Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., 6 Cal. 4th 1112, 1123 (1993) (Laurel Heights II); see also PUB. RES. CODE §§21080(d), 21082.2(d); CEQA Guidelines §15064(a)(1), (f)(1).

⁴⁵ See, e.g., KOSTKA & ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT §7.3, at 394 (2d ed. 2010).

⁴⁶ See Stockton Citizens for Sensible Planning v. City of Stockton, 157 Cal. App. 4th 332 (2007); City of Marina v. Board of Trs. of the Cal. State Univ., 109 Cal. App. 4th 1179 (2003); but see Save Tara v. City of West Hollywood, 147 Cal. App. 4th 1091 (2007) (Despite a dissenting opinion below, the California Supreme Court nonetheless upheld the Second District's decision.).



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