University of Southern California Law School
Legal Studies Working Paper Series

Year 2006 *Paper* 16

CEQA Analysis of Development Displaced by Rejected Projects

George Lefcoe*

*University of Southern California, glefcoe@law.usc.edu

This working paper is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

http://law.bepress.com/usclwps-lss/art16

Copyright ©2006 by the author.

CEQA Analysis of Development Displaced by Rejected Projects

George Lefcoe

Abstract

In order to prevent the avoidable environmental degradation that often accompanies new development, the California Environmental Quality Act (CEQA) requires state and local decision makers to consider the potential environmental impacts of their discretionary approvals, even when they are voting entitlements for purely private development projects. California cities are burdened with notoriously underfunded transportation infrastructure and poor air quality, so CEQA findings can be marshaled to justify rejection of almost any proposed project. Because of California's staggeringly high growth rates, projects rejected at one location are likely to find their way to another site within the same market area. Does CEQA demand that a local government before voting to reject a project must pay attention to the likely environmental impacts of the site where the rejected (displaced) development is likely to arise? Two recently decided intermediate appellate court cases reached opposite answers to this question. This paper examines the two recent cases, Muzzy Ranch Company v. Solano County Airport Land Use Commission and Wal-Mart v. City of Turlock. The author concludes that decision makers should evaluate the environmental consequences of both the proposed project and the destination of displaced development so as better to guide development where it will do the least harm to the environment and the most good.

CEQA Analysis of Development Displaced by Rejected Projects

By George Lefcoe

In order to prevent the avoidable environmental degradation that often accompanies new development, the California Environmental Quality Act (CEQA) requires state and local decision makers to consider the potential environmental impacts of their discretionary approvals, even when they are voting entitlements for purely private development projects. California cities are burdened with notoriously underfunded transportation infrastructure and poor air quality, so CEQA findings can be marshaled to justify rejection of almost any proposed project. Because of California's staggeringly high growth rates, projects rejected at one location are likely to find their way to another site within the same market area. Does CEQA demand that a local government before voting to reject a project must pay attention to the likely environmental impacts of the site where the rejected (displaced) development is likely to arise? Two recently decided intermediate appellate court cases reached opposite answers to this question. This paper examines the two recent cases, Muzzy Ranch Company v. Solano County Airport Land Use Commission and Wal-Mart v. City of Turlock. The author concludes that decision makers should evaluate the environmental consequences of both the proposed project and the destination of displaced development so as better to guide development where it will do the least harm to the environment and the most good.

When a local government acts to restrict development, it effectively reduces the supply of available land by limiting development at the restricted site but it does nothing to reduce the demand for what would have been built there but for the restriction.[1] Yet, development banished from one site could be built at another location in the same market area. This is called 'displaced development'. There is the added possibility that displaced development could be built in a place more environmentally sensitive than the site originally put forward. The California Environmental Quality Act (CEQA),[2] signed into law by then-Governor Ronald Reagan in 1970, was intended to require all discretionary public projects that could possibly impact the physical environment to be preceded by an environmental impact report designed "to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project."[3] Does CEQA require a local government to take into account the potential environmental impacts of displaced development at the time it rejects the project proposed at the developer's preferred site?

Conflicting answers have been given in two recent intermediate appellate court opinions–*Muzzy*

---

[1] Stringent zoning throughout a state or region can lead to increased housing prices, reducing demand. Edward L. Glaeser and Joseph Gyourko, *The Impact of Zoning on House Prices*, National Bureau of Economic Research, working paper 8835 (March, 2002). Http://www.nber,org/papers/w8835.

[2] CAL. PUB. RES. CODE § 21000 et. seq. "The California Environmental Quality Act is one of California's most cherished institutions– as well as one of its most controversial. On its face, CEQA would seem to be a relatively unobtrusive law. It *does not* directly limit development (as does the California Coastal Act) or mandate environmental clean-up (as do the federal Clean Air and Water Acts.) It does require that a development proposal be accompanied by an analysis listing its environmental impacts and that, where feasible, those impacts be mitigated." John D. Landis et. al., *Fixing CEQA* California Policy Seminar, 1995).

[3] CAL. PUB. RES. CODE §21061.

bepress Legal Repository

Hosted by The Berkeley Electronic Press

Ranch Company v. Solano County Airport Land Use Commission[4] (hereafter, *Muzzy*) and *Wal-Mart v. City of Turlock* [5] (hereafter, *Turlock*). In both cases, private firms sued government entities for not complying with CEQA in the enactment of measures that frustrated the firms' development aspirations. The California Supreme Court agreed to review *Muzzy* over a year ago[6] and denied a petition for review in *Turlock*.[7] This paper describes the two recent conflicting court opinions and the considerations that should inform the ultimate resolution of the CEQA issues raised by these cases.

California courts have a long history of aggressively interpreting CEQA's open ended terms. The practice of expansive judicial interpretations of CEQA got off to a fast start with Justice Mosk's opinion in *Friends of Mammoth v. Board of Supervisors*.[8] Before this case was decided, there was confusion about whether CEQA applied only to government-sponsored actions and projects, or to all discretionary government decisions, including the issuance of permits for private development.[9] In the landmark *Friends of Mammoth* case, the court held that although the statute at the time did not define the term 'project', CEQA should be applied to government regulation of private activities, not just to public works.[10]

Scholars disagree over whether the court was simply interpreting unclear statutory language sensibly[11] or indulging in unbridled judicial activism.[12] Regardless, in *Friends of Mammoth*, the Court appeared to have read the Legislature correctly since the legislature subsequently revised the statute to codify the Court's decision.[13] When a court rules that a law is unconstitutional, it can squelch the preferences of democratically-elected legislators. This is not inevitably the situation with court opinions based on statutory interpretation. Should courts misjudge the legislative will in resolving *Muzzy Ranch*, the Legislature has the option of clarifying its preferences by revising the statute. Though it is rarely a simple matter to reform a deeply embedded, widely supported statute

---

[4] 23 Cal. Rptr. 3d 60, 35 Envtl. L. Rep. 20011 (Cal. App. 1st Dist. 2005), as modified on denial of reh'g, (Feb. 4, 2005).

[5] *Wal-Mart Stores, Inc. v. City of Turlock,* 138 Cal. App. 4th 273, 41 Cal. Rptr. 3d 420, review denied (July 12, 2006)

[6] Review granted and opinion superseded, 27 Cal. Rptr. 3d 360, 110 P.3d 289 (Cal. 2005).

[7] Docket Entry: NOTICE OF APPEAL FROM THE 1/13/05 JUDGMENT , February 5, 2005. Review denied July 12, 2006.

[8] 8 Cal. 3d 247 (1972).

[9] John D. Landis et. al., *Fixing CEQA* (California Policy Seminar, 1995) p. xvi.

[10] 8 Cal. 3d 256. Section 21000, subdivision (g), had provided: "It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage."

[11] Antonio Rossmann, *The 25-Year Legacy of Friends of Mammoth,* Environs Environmental Law and Policy Journal 63 (February, 1998).

[12] Robert S. Summers, *How Law Is Formal and Why It Matters,* 82 CORNELL L. REV. 1165, 1196 fn 51 (1997) ((("holding the California Environmental Quality Act applicable to private development despite clear language to the contrary".)

[13] 1972 Cal. Stats. ch. 1154. See K. Seneker, *The Legislative Response to Friends of Mammoth,* 48 CAL. STATE BAR J. 127 (1973)

bepress Legal Repository

http://law.bepress.com/usclwps-lss/art16

like CEQA,[14] even to neutralize a misguided court decision, changing a statute is generally accomplished more easily than bringing a constitutional amendment to fruition.

I. Relevant Aspects of CEQA

CEQA is mainly procedural, requiring that public agencies analyze environmental impacts before voting on proposed projects, and incorporate that information in an environmental impact report (EIR). An EIR is not mandated for every project. Some activities are specifically exempt.[15] So the first step in a local government's CEQA process is to make an administrative determination of whether a project is subject to CEQA at all.[16] For activities not exempt, an administrative determination is made, known as an initial study, to assess whether an EIR is needed.[17]An EIR is indicated if substantial evidence that any aspect of the project, either individually or cumulatively, may (not 'would' or 'would probably') cause a significant effect on the environment– even if, overall, the project is environmentally benign.[18]

Once a draft EIR is ready, has been circulated for public comment, and the EIR proponents respond to the comments, a legislative determination must then be made certifying the EIR as adequate.[19] For projects that don't cause significant environmental effects, the lead agency issues a 'negative declaration' or 'mitigated negative declaration'.[20]

By statute, EIRs incorporate certain features against which the *Muzzy Ranch* and *Turlock* cases play out: (1) Alternatives Analysis; (2) Cumulative Impacts, and (3) Growth Inducing Impacts.

Alternatives Analysis. One requirement of CEQA is that the lead agency must consider a range of alternatives to the proposed project in search of environmentally superior choices that are feasible

---

[14] "Demands for CEQA reform (and sometimes for CEQA's elimination tend to increase during recessionary periods and then abate during prosperous ones.") John D. Landis et. al., *Fixing CEQA* (California Policy Seminar, 1995) p. xv.

[15] For a list of categorical exemptions, see 12 Witkin, Summary 10th (2005) Real Prop, § 837, p. 1001

[16] John D. Landis et. al., *Fixing CEQA* (California Policy Seminar, 1995) p. xvi. ("Fearing legal challenge, most localities exclude only those types of projects specifically identified in the statutes as being exempt from CEQA review".)

[17] CAL. PUB. RES. CODE 2 §1080.1(" The lead agency shall be responsible for determining whether an environmental impact report, a negative declaration, or a mitigated negative declaration shall be required for any project which is subject to this division. ")

[18] 14 Cal. Code Regs §§ 15002(k),15063 (b) (2).

[19] 14 Cal. Code Regs §21151.

[20] 14 CAL. PUB. RES. CODE §21064. "A negative declaration is a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report. A "mitigated negative declaration" is one that includes mitigation measures to avoid potentially significant environmental effects." 50 Cal. Jur. 3d Pollution and Conservation Laws § 507.

bepress Legal Repository

Hosted by The Berkeley Electronic Press

in the sense that they would fulfill most of the proposed project's objectives.[21] Among the alternatives is the possibility of the project not being built at all, or the contemplated ordinance not being passed. This is called the 'no project' alternative.

CEQA requires the lead agency to study the impacts that "would reasonably be expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services."[22] EIR preparers are cautioned to resist the assumption that a presently undeveloped site is likely to remain forever unbuilt and in pristine condition. Rather, they are expected to describe "what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services."[23] "[T]he analysis should identify the practical result of the project's non-approval and not create and analyze a set of artificial assumptions that would be required to preserve the existing physical environment."[24] As this Guideline is worded, though, the focus is on the site directly impacted by the policy or proposal under review, and not on the sites to which such activity might migrate, if blocked at the subject property.

Cumulative Impacts of an Approved Project. CEQA guidelines clearly require an assessment of the cumulative impacts of a project, including "all related past, present, and reasonably foreseeable future projects".[25] There are no geographic limits to the impacts that need to be evaluated, not even jurisdictional boundaries.[26]

Growth-Inducing Affects. CEQA requires EIRs to address the growth inducing affects likely to follow in the wake of an approved project.[27] California courts have consistently ruled that environmental review of a project's potential indirect physical impacts cannot be deferred until that

---

[21] 14 CAL. CODE REGS § 15126.6: " Consideration and Discussion of Alternatives to the Proposed Project. (a) Alternatives to the Proposed Project. An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason."

[22] 14 CAL. CODE REGS §15126.6.

[23] 14 CAL. CODE REGS §15126.6 (e) (3)(C).

[24] 14 CAL. CODE REGS §15126.6 (e)(3)(B).

[25] Legislative Analyst's Office, *CEQA: Making It Work Better*, March 20, 1997, p. 10.

[26] Ibid. The notion that an environmental assessment is not limited to the jurisdiction's or agency's boundaries was established by case law early in the history of the National Environmental Policy Act. *See, e.g., Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974).

[27] 14 Cal. Code Regs § 15126.2 (d): " Growth-Inducing Impact of the Proposed Project. Discuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. Included in this are projects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects. Also discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment."

bepress Legal Repository

http://law.bepress.com/usclwps-lss/art16

development is actually proposed–even though the future development may never occur or could take various forms, and the extent and location of that development cannot be determined with certainty.[28] The difficulties of forecasting environmental effects may limit the scope of the environmental analysis required– but do not excuse a 'best efforts' CEQA study nonetheless.[29]

To glimpse what it means for a lead agency to take account of growth-inducing impacts, consider *City of Antioch v. City Council*.[30] There, a private developer had sought approval from the city of Antioch, California, for a permit to construct a 6,400 foot long roadway through its property, 84' wide, and to certify establishment of a community facilities district to finance the work, It wasn't enough under CEQA for the city to study only the direct consequences of building the road. The city was also required to assess the environmental impacts of the ensuing development that could be anticipated to follow completion of the roadway. The city had contended that such an inquiry would involve pure speculation. It would be more efficient to defer an initial study until after the city had received a completed application for a specific development.

The appellate court disagreed: "Construction of the roadway and utilities cannot be considered in isolation from the development it presages."[31] A private developer wouldn't normally incur the costs of building a new road unless confident of the development potential of the adjacent area. CEQA calls for conducting environmental assessments "at the earliest possible time", to identify the potential significant effects of a project before it becomes too late to evaluate alternatives and fashion mitigation measures that would reduce any adverse effects.[32]

Had the city simply denied the developer a permit to build the road, no CEQA analysis would have been due. CEQA is inapplicable to "projects which a public agency rejects or disapproves".[33] However, had the city amended its zoning code to reduce the allowable densities on the properties abutting the road (a pre-emptive strike against intensive development along the roadway) that down-zoning ordinance would have been subject to CEQA.[34]

These key features of an ideal EIR–a review of alternatives to the proposed project, cumulative

---

[28] *Stanislaus Audubon Soc'y, Inc. V. County of Stanislaus*, 33 Cal. App. 4th 144,158 (1995) (Quoting *City of Antioch v. City Council*, 187 Cal. App. 3d 1325,1337-38 (1986).

[29] "It does not follow, however, that an EIR is required to make a detailed analysis of the impacts of a project on housing and growth. Nothing in the Guidelines, or in the cases, requires more than a general analysis of projected growth. The detail required in any particular case necessarily depends on a multitude of factors, including, but not limited to, the nature of the project, the directness or indirectness of the contemplated impact and the ability to forecast the actual effects the project will have on the physical environment." *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors*, 91 Cal. App.4th 342, 369 (Cal.App. 1 Dist.,2001).

[30] *City of Antioch v. City Council*, 187 Cal. App. 3d 1325, 232 Cal. Rptr. 507 (Cal. App.1 Dist.1986).

[31] *Id*. at 1336.

[32] CAL. PUB. RES. CODE § 21002, 21003.1.

[33] CAL. PUB. RES. CODE § 21080(b)(5).(CEQA is inapplicable to "Projects which a public agency rejects or disapproves.")

[34] This point was made in the California Building Industry Association's Amicus Curiae Brief in Support of Muzzy Ranch Company, in the Supreme Court of California, at 2-3.

bepress Legal Repository

Hosted by The Berkeley Electronic Press

impacts, and growth inducing consequences–have the potential of yielding an exhaustive list of reasons NOT to build a project at a particular location, but fall short of pinpointing or prioritizing where development should be located to accommodate California's rapidly growing population. Researchers at the Public Policy Institute of California recently concluded: "Evidence suggests that although CEQA offers planning benefits at the project level, it does not mesh effectively with wider, more comprehensive planning, and in fact may be counterproductive."[35] The researchers pointed out that local officials often seek to reduce a project's possible environmental impacts by reducing its density. Viewed locally, the reduced density might mitigate traffic congestion or loss of open space."But viewed regionally this might only worsen the problems if development is pushed to outlying areas. If rather than displacing the lost residential units to another location, the units are simply never built, then the mitigation could serve to exacerbate housing shortages."[36]

By requiring EIR preparers to explore the environmental consequences of 'displaced development', the California Supreme Court could reduce the no-growth bias implicit in CEQA while advancing its essential mission of encouraging legislators to direct development away from environmentally sensitive locations and encourage mitigation of negative impacts that are feasibly avoidable.

II. The Two Cases

The Muzzy Ranch Case. Now, let us turn to the first of the two pending cases previously mentioned, the one involving a site known as the Muzzy Ranch situated near the Travis Air Force Base, a major economic hub in Solano County. In California, government entities in each county, known as Airport Land Use Commissions, are empowered to forecast future operations at each airport in the state, identify the areas lying outside the airport grounds that could be subject to disturbing noise levels and low-flying aircraft, and enact a land use compatibility plan to assist local governments in their zoning and planning for those potentially impacted airport-adjacent areas.[37] In order to fulfill this state mandate, the Solano County Airport Land Use Commission (SCALUC) had adopted a compatibility plan, known as The Travis Air Force Base Land Use Plan (hereafter, TALUP). To protect residents from being exposed to loud overflight noise, the TALUP sought to hold housing densities to those levels already permitted under the zoning ordinances and general plans of the affected cities and the county. This plan would have frozen housing densities for "hundreds of thousands of acres of private property in a wide swath of more than 600 square miles extending more than 35 miles through Solano County."[38]

The Muzzy Ranch brought suit against the Solano County Airport Land Use Commission because Muzzy Ranch was located directly within the TALUP recommended 'no change' zone. The ranch owner would have had to seek modifications of the local zoning and general plan in order to increase allowable housing densities. Before any modification could become effective, the SCALUC would

---

[35] Elisa Barbour and Michael Teitz, *CEQA Reform: Issue and Options* (Public Policy Institute of California, April 6, 2005),p. 18.

[36] 23 Cal. Rptr. 3d at p. 19.

[37] CAL. PUB. UTIL. CODE §21001 et. seq.

[38] *Muzzy Ranch Co. v. Solano County Airport Land Use Commission*, quoting appellant's assertion uncontradicted by the Commission.

bepress Legal Repository

http://law.bepress.com/usclwps-lss/art16

need to approve it–but probably wouldn't have, since the Commission could not approve a requested modifications inconsistent with the TALUP. The ranch owner might prevail eventually anyway. The statutory scheme gives local governments the final say in land use matters, specifically, the power to override the SCALUC, with a supermajority (two-thirds) vote.[39]

Muzzy Ranch sought to set aside the TALUP, claiming it had violated CEQA by overlooking: "where will housing for this burgeoning growth go, since the Travis Airport Land Use Plan (TALUP) precludes it within more than 600 square miles of Solano County...what are the impacts of forcing that inevitable growth into other areas?"[40]

SCALUC had contended that its plan was not a 'project' requiring CEQA review.[41] "Project" is a term of art that triggers a detailed initial study of a proposal's potential physical environmental impacts. Unless an activity is entitled to an exemption under CEQA, the lead agency must first determine whether a proposed activity is a "project".[42] By definition, an activity is a project if it has any potential for causing a direct or indirect physical change in the environment.[43] The SCALUC was advised by outside counsel, a leading CEQA expert, that the compatibility plan was not a project as defined by CEQA because it had recommended no changes to the *status quo* of any zoning or general plan designations, and so in itself could not possibly impact the environment directly or indirectly.[44] SCALUC attorneys contended that it stretched the notion of proximate 'causation' beyond reason,[45] and would call for pure speculation, to hold their client accountable for 'displaced housing,' that is, housing that might be built outside the airport influence area.[46] The county figured that the best time to assess the environmental impacts of possible housing developments would be when such developments were proposed by subdividers, and then actually approved by receptive local governments revising their zoning and general plans.[47]

---

[39] CAL. GOV'T CODE § 65301.3.

[40] Appellant's Reply Brief, *Muzzy Ranch Company v. Solano County Airport Land Use Commission*, in the Court of Appeal of the State of California, First Appellate District, Division Five, May 19, 2004, p. 12-13.

[41] Respondent's Brief, *Muzzy Ranch Co. v. Solano County Airport Land Use Commission*, in the Court of Appeal of the State of California, First Appellate District, Division Five p. 20.

[42] John Watts, *Reconciling Environmental Protection with the Need for Certainty: Significance Thresholds for CEQA*, 1995 Ecology Law Quarterly 213. Each locality is free to promulgate its own standards for determining what counts as a significant impact. Some localities have issued standards while others conduct their initial studies on a completely ad hoc basis. Hence, what counts as significant can vary from one jurisdiction to the next, and even within the same jurisdiction from one project to the next.

[43] CAL. PUB. RES CODE §§ 210065,21065(a).

[44] Respondent's Brief, *Muzzy Ranch Company v. Solano County Airport Land Use Commission*, p. 13-14. The SCALUC received legal advice from CEQA treatise author, the late Michael Remy, that the TALUP would not be a 'project' under CRQA.

[45] Opening Brief on the Merits, in the Supreme Court of the State of California, *Muzzy Ranch Co. v. Solano County Airport Land Use Commission*, p. 17.

[46] Opening Brief on the Merits, in the Supreme Court of the State of California, *Muzzy Ranch Co. v. Solano County Airport Land Use Commission*,p.29.

[47] Opening Brief on the Merits, in the Supreme Court of the State of California, *Muzzy Ranch Co. v. Solano County Airport Land Use Commission*,p. 38.

bepress Legal Repository

Hosted by The Berkeley Electronic Press

The appellate court disagreed with the SCALUC, and declared the TALUP to be a 'project' under CEQA. The SCALUC had conceded that Solano County was likely to experience significant population growth, and that pressures were mounting to urbanize undeveloped land throughout the county, including the vacant sites near the airport. The court noted: "Although it is presently unclear precisely how adoption of the TALUP will affect the environment, it is undeniable that placing a vast area of land largely off-limits to future residential development will have long term impacts on the use of land and population distribution in the region."[48] "Increased housing development in areas outside the project area is a physical change to the environment, whether because the agency's activity will increase the total anticipated regional population or because the activity will affect where the anticipated population can be housed. This conclusion is particularly appropriate in light of our obligation to interpret CEQA so as 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language'."[49]

Solano County thought its TALUP qualified for a CEQA regulatory exemption known as the general rule, that CEQA applies only to projects "which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA"[50] If a reasonable argument is made to suggest a possibility that a project will cause a significant environmental impact, "the agency must refute that claim to a certainty before finding that the exemption applies."[51]

To the county, this statement embodies a rule of law. As a matter of law, it would be impossible to know for sure "that even a single-dwelling unit will be 'displaced' or redirected from within Compatibility Zone C to outside of that Zone due to the Commission's adoption of the TALUP."[52] Housing developers would have to propose new subdivisions, general plans and zoning would have to be changed, and other constraints to development would have to be lifted. The quantity of new housing that could be built outside the compatibility zone without any zone changes would need to be measured against potential housing demand. Muzzy Ranch had proved neither the demand nor the supply side of the equation.

In formulating its opinion in the Muzzy Ranch case, the court answered the SCALUC claim that attempting to analyze displaced housing would be unduly speculative by distinguishing rank speculation from informed forecasting.[53] "It is not speculation for experts preparing CEQA analyses

---

[48] 23 Cal. Rptr. 3d at 72.

[49] 23 Cal. Rptr. 3d at 69.

[50] 14 CAL. CODE REGS §15061(3).

[51] CAL. PUB. RES.. CODE 15061(b)(3).

[52] Respondent's Petition for Rehearing, *Muzzy Ranch Co. v. Solano County Airport Land Use Commission*, in the Court of Appeal of the State of California, First Appellate District, Division Five, p. 7-8.

[53] CEQA Guidelines, 14 CAL. CODE OF REGS §§ 15144 and 15145 contrast "forecasting" (agency must use best efforts to find out and disclose all it reasonably can) with "speculation" (impacts too speculative for evaluation justify the lead agency noting its conclusion and terminating further discussion).

bepress Legal Repository

http://law.bepress.com/usclwps-lss/art16

to calculate or predict growth patterns and/or resulting changes in and use regulations in the future in Solano county and elsewhere to accommodate housing for growth that is now prohibited by the Plan. These calculations are undertaken in virtually every Environmental Impact Report (EIR) pursuant to CEQA's directive that public agencies evaluate the 'growth-inducing' impacts of their actions."[54] Most local governments already possess information about how they plan to accommodate housing needs for all income groups within their boundaries since this data is required for compliance with state housing element guidelines, and housing elements are a mandated element for the general plans that local governments are supposed to put in place as a condition to exercising land use controls.[55]

Although the county had sought to saddle the environmental challenger, the Muzzy Ranch, with the burden of proving the impacts of 'displaced development', the appellate court put that obligation firmly upon the public entity, SCALUC, as a pre-condition to its successfully claiming the 'common sense exemption'. The county would have to demonstrate with substantial evidence that its proposed land use plan could not possibly have a discernible significant environmental effect. The court's rationale was that under CEQA procedures, before the lead agency goes public with its initial environmental analysis, it must first assess whether the proposed activity has a potential to cause any physical changes in the environment (whether benign or harmful). At this early stage of environmental review, it would be virtually impossible for anyone outside the lead agency to offer unsolicited proof concerning the potential impacts of the commission's action. An agency that overlooks significant potential impacts in its preliminary environmental assessment risks having to start its decision process all over again. Any subsequent dispute about the possibility of an impact, and the agency cannot find with certainty that the project is entitled to the common sense exemption.[56]

The Turlock Case. The second of the two cases could be characterized as the anti-Muzzy. Wal-Mart desired to build a 225,000 square foot superstore– including a full service grocery–at the intersection of State Route 99 and Tuolumne Road in the city of Turlock .[57] At first, Wal Mart officials had felt quite welcome.[58] This was not especially surprising. The city was eager to receive the point-of-origin sales tax that a new Wal-Mart would yield. City officials were cognizant of how abundant such revenues could be since they were already booking substantial tax revenues from a Wal-Mart that had been ringing up sales within the city for over a decade.[59]

---

[54] Appellant Muzzy Ranch Co.'s Answer Brief on the Merits in the Supreme Court of the State of California, July 13, 2005, p. 29.

[55] CAL. GOV. CODE § 65301.

[56] Muzzy Ranch Co. v. Solano County Airport Land Use Commission at p. 9.

[57] 138 Cal. App.4th at 280.

[58] The facts in this paragraph are set forth in the opening pages of *Wal-Mart v. City of Turlock*, 138 Cal. App.4th 273, 41 Cal. Rptr. 3d 420 (Cal.App. 5 Dist.,2006).

[59] The Land Use Element of the Turlock General Plan credits increased sales tax revenues flowing to the town from general merchandise sold at Wal-Mart which opened an outlet in Turlock, May, 1993.http://www.turlock.ca.us/pdflink.asp?pdf=documents/communityplanning/generalplan/2-01.pdf (last visited 06/23/06).

bepress Legal Repository

Hosted by The Berkeley Electronic Press

The mood among city officials darkened abruptly regarding the superstore shortly after Wal-Mart superstore opponents–union and local supermarket representatives– conferred successively with each of the five city council members, and convinced each of them to vote for a city-wide ban on big box discounters selling groceries.[60] The ban applied to "discount superstores",[61] defined as "a discount store that exceeds 100,000 square feet of gross floor area and devotes at least 5 percent of the total sales floor area to the sale of nontaxable merchandise, often in the form of a full-service grocery department."[62]

Wal-Mart sued the city, challenging the Turlock ban as beyond the city's legitimate land use powers and for not complying with CEQA.[63] An intermediate appellate court upheld the ordinance against both these claims. Wal Mart assailed the ban as an abuse of local zoning powers, having been enacted not for legitimate land use reasons but simply to restrain Wal-Mart competing with unionized supermarkets, and faulted as unjustifiable the distinctions drawn in the ordinance among discount superstores, discount clubs, discount stores and freestanding supermarkets.[64]

The city countered by advancing a plausible planning justification for the ban. In an agenda report to the City Council dated December 9, 2003, the City's Planning Manager explained the case for the ban in these words:

> "Discount superstores compete directly with existing grocery stores, many of which anchor neighborhood-serving commercial centers. Many smaller stores within a neighborhood center rely upon the foot traffic generated by the grocery store for their existence. In neighborhood centers where the primary grocery store closes, vacancy rates typically increase and deterioration takes place in the remaining center. For instance, the tenants in the Turlock Town Center have been adversely impacted by the closure of Albertson's and the entire center lacks its former vitality. For the residents surrounding Turlock Town Center, longer trips are now necessary to acquire day-to-day consumer goods.
>
> The proposed zoning ordinance amendment is intended to preserve the city's existing neighborhood-serving shopping centers that are centrally located within the

---

[60] About 22% of grocery workers nationwide are union members; Wal Mart's implacable stance against unionization is well known. George Lefcoe, *The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-Mart and the United Food and Commercial Workers Union*, 58 ARK. L. REV. 833, 834 fn4, and 835 fn 8 (2006).

[61] 138 Cal. App. 4th at 280-283.

[62] 138 Cal. App. 4th 282.

[63] Petition for Review, *Wal-Mart Stores, Inc. v. City of Turlock*, p.6.

[64] Petition for Review, *Wal-Mart Stores, Inc. v. City of Turlock*, p. 26-30, citing *Hernandez v. City of Hanford*, 137 Cal. App. 4th 1397 (2006) (striking down a ban on furniture sales outside the downtown area because it excepted furniture sales by department stores); *Friends of Davis v. City of Davis*, 83 Cal. App. 4th 1004, 1013 (2000)("Where certain uses are permitted, a city cannot arbitrarily exclude others who would employ a similar use."); and *Roman Catholic Welfare Copr. v. City of Piedmont*, 45 Cal. 2d 325, 332-33 (1955) (ruling that ordinance prohibiting the construction of private schools within a certain zone district, while allowing the construction of public schools, should be invalidated.) See generally, R. Randall Kelso, *Standards of Review under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: the "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225 (2002).

bepress Legal Repository

http://law.bepress.com/usclwps-lss/art16

> [neighborhood].... This distribution of shopping and employment creates a land use pattern that reduces the need for vehicle trips and encourages walking and biking for shopping, services, and employment.
>
> In short, the proposed amendments are intended to protect grocery stores in existing neighborhood centers to prevent a significant change in land use, employment and traffic patterns throughout the city.
>
> A significant concern with discount superstores is that they combine neighborhood-serving retail [grocery] in a more remote, regional-serving retail center, such as along State Highway 99. This means that local residents are forced to drive further for basic services for groceries, causing a shift in traffic patterns, and potentially overburdening streets that were not designed to accommodate such traffic...."[65]

Wal-Mart protested that the ordinance illogically banned superstores while permitting uses that would generate even more traffic and air pollution, including discount stores[66] and discount clubs.[67] Wal-Mart's experts concluded that these uses would draw more combined traffic, more congestion, more vehicle miles traveled, and more air pollution than Wal Mart because superstore shoppers satisfy more of their retail needs under one roof.[68]

The *Turlock* court assumed for purposes of its opinion that the superstore ban was a "project" under CEQA since California Public Resources Code 21065(a) "establishes a bright-line rule of law that all enactments of zoning ordinances are discretionary projects ".[69] The appellate court held that the superstore ban was exempted from CEQA under Guideline § 15183, for projects with development densities consistent with general plan policies "except as might be necessary to examine whether there are project specific effects which are peculiar to the project or its site."[70] In alighting on this

---

[65] 138 Cal. App. 4th 280-281.For a similar justification , see *Citizen Advocates For A Livable Missoula, Inc. v. City Council of City of Missoula*,331 Mont. 269, 130 P.3d 1259 (2006). The city council voted to allow a big box Safeway grocery store even though some residents opposed it, and contended that it contradicted certain city Growth Policy goals for making neighborhood centers pedestrian friendly. The Safeway was allowed nonetheless because it was the retail anchor, the economic linchpin of that neighborhood's retail core.

[66] Quoting from the ordinance: "Discount stores" are "stores with off-street parking that usually offer a variety of customer services, centralized cashing, and a wide range of products. They usually maintain long store hours seven (7) days a week. The stores are often the only ones on the site, but they can also be found in mutual operation with a related or unrelated garden center or service station. Discount stores are also sometimes found as separate parcels within a retail complex with their own dedicated parking." 138 Cal. App. 4th 282.

[67] A "discount club" is defined as "a discount store or warehouse where shoppers pay a membership fee in order to take advantage of discounted prices on a wide variety of items, such as food, clothing, tires, and appliances; many items are sold in large quantities or bulk." 138 Cal. App. 4th 282.

[68] 138 Cal. App. 4th 281-82.

[69] 138 Cal. Rpp. 4th at 286.

[70] 138 Cal. App. 4that 286-87. Section 15183 provides in part: CEQA mandates that projects which are consistent with the development density established by existing...general plan policies for which an EIR was certified shall not require additional environmental review, except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the project or its site....any rezoning action consistent with the general plan...shall be treated as a project subject to this section."

bepress Legal Repository

Hosted by The Berkeley Electronic Press

exemption,[71] never before applied by any reported California court opinion, the court was fulfilling a legislative preference for the use of staged, program or tiered EIRs.[72] This concept is that general environmental effects should be described in a master EIR "for projects consisting of a policy, plan, program or ordinance" while later, a site-specific EIR concentrates solely on the environmental effects not analyzed as part of the prior EIR.[73]

At the time the city of Turlock prepared the EIR accompanying the general plan, it hadn't contemplated distinguishing among discount superstores, discount clubs, freestanding supermarkets, and discount retailers without grocery stores. With a particular site in mind at State Road 99 and

---

Whether the appellate court was correct to apply this exemption is contestable. The City of Turlock general plan can be found online at http://www.ci.turlock.ca.us/citydepartments/communityplanning/generalplan/index.asp

According to the Guideline quoted above, the general plan EIR suffices for projects consistent with the plan's density of development. Local governments regulate residential densities very closely but look to other factors in regulating retail uses. The plan even signals that mixed use development in the new neighborhood centers may be approved at higher densities than those indicated in the plan. The prototypical case for which the guideline appears to have been written would involve a residential development for which a change of zone or other discretionary approval is required. The land use element of the general plan would have specified a range of densities for all residential areas. As long as the proposed housing project is within the plan's density range, the applicant would only need to address site specific aspects of the proposed development but would not need to rehash the implications of population growth already covered in the general plan EIR.

Nothing in the land use element of the Turlock General Plan designates grocery stores as only belonging within the community/neighborhood commercial areas and not within the region-serving commercial zones. "Food and drug" sales are listed as appropriate within both types of zones. Not a word in the plan purports to distinguish superstores from shopping clubs or to differentiate discount retailers selling groceries from those who do not.

Further, the plan species that "Scale, rather than use, distinguishes areas serving a neighborhood versus community wide market. Large scale commercial uses (large discount centers, big box retailers, etc.) serving a region wide market area are specifically excluded from this designation."

There is mention in the land use element of protecting existing grocery stores by not approving new ones in neighborhood commercial zones larger than 2,500 square feet.

As for potential demand for supermarkets, the plan envisions no problem–contrary to the dire prediction in the staff report supporting the superstore ban that a superstore would likely result in one or more neighborhood grocery store closures. The plan projects the city's population growth at 3.38% annually. Assuming a market area of 10,000 is needed to support each grocery store, the population would be expected to grow by about 10,000 from 2006 to 2010. The plan also notes that Turlock attracts food shoppers from outside its boundaries, another fact not taken into account in the staff report supporting the superstore ban.

From the plan itself, it isn't clear whether full service grocery stores belong in neighborhood commercial centers at all since the transportation element indicates that neighborhood commercial is designed "to promote non motorized transportation". Grocery shoppers rarely come on foot or by bike unless they live nearby and plan to lug their groceries home in a stolen shopping cart.

The plan calls for a considerably expanded retail sector, particularly to increase local sales of apparel, general merchandise, home furnishings, and appliances. Arguably, the superstore ban is inconsistent with this aspiration in the general plan.

The claim that the superstore would lead to increased traffic congestion may not be consistent with the plan. The transportation element explains: "Traffic conditions within the city are generally good. Residents can travel across town by automobile in less than ten minutes. Delays, when they happen, are isolated and of short durations." Further, the transportation element sanctions a Level of Service (LOS) D for the area between Main and Monte Vista along State Route 99 which includes the Tuolumne Road intersection with State Route 99. Nothing in the record indicates whether a superstore would push traffic congestion beyond this limit.

[71] The city had added this basis for exemption at the request of the attorney representing Safeway and the union. The Turlock city attorney concluded this was a good idea "but is somewhat inconsistent with some of our earlier CEQA exemption determinations."Petition for Review, *Wal-Mart Stores, Inc. v. City of Turlock*, p. 8, fn. 1, quoting from the administrative record.

[72] 138 Cal. App. 4th 279 ("We publish this opinion because no other published opinion has upheld the approval of a project based on the application of the provisions in Guidelines section 15183.")

[73] CA. PUB. RESOURCES CODE § 21068.5..

bepress Legal Repository

http://law.bepress.com/usclwps-lss/art16

Tuolumne Road, the previously unexamined implications of this distinction could be meaningfully studied. The appellate court in *Turlock* didn't see the need for such a site specific analysis in this case because Wal-Mart had not convinced the court that any site specific effects peculiar to the ban would follow from it. In the words of the appellate court:

> "As a matter of logic, we recognize that Wal-Mart's possible reactions can be divided into two categories–either Wal-Mart will build a supercenter near City or it will not. Each category is foreseeable. Nevertheless, substantial evidence must exist in the administrative record before a foreseeable alternative is reasonably foreseeable. Here, Wal-Mart simply assumed it would build a supercenter near City and failed to present evidence that rendered this possibility reasonably foreseeable. The building of a supercenter near City is an essential link in the causal chain that leads to the impacts on traffic and air quality alleged by Wal-Mart. Without this essential link, the causal chain is broken and the alleged impacts to traffic and air quality cannot reach the level of probability necessary to be regarded as reasonably foreseeable."[74]

Except for a discount superstore, all of the types of development that could have been constructed at the site before the enactment of the ban could still be built there afterward, and so could not be said to have resulted peculiarly from the superstore ban.[75] The site was vacant before the enactment of the ban, and for all the court could know for sure, would remain so afterward.

The court contrasted this with the kind of evidence that certain sanitation districts had introduced in a case the same court had decided a year earlier. The court had ordered Kern County to prepare an EIR depicting the secondary physical consequences of an ordinance the county had enacted imposing stringent controls against the spreading of sewage sludge across agricultural lands.[76] Employees of the sanitation districts responsible for disposing of enormous quantities of treated sewage had made the uncontradicted assumption that sewage sludge would continue to be produced, and if it couldn't be spread as before over agricultural lands in Kern County, the districts would almost certainly have to elect one of these disposal options: "(1) further treatment to convert Class B biosolids to EQ biosolids followed by land application, (2) land application of Class B biosolids somewhere other than Kern County, (3) incineration, or (4) disposal in a landfill."[77] The intermediate appellate court had held that these were the alternatives that Kern County needed to analyze in an EIR before enacting a law that would disrupt existing sludge disposal practices.

As the court in *Turlock* noted, Wal Mart had an option not available to the sanitation districts. It could just elect not build a superstore within the Turlock market area. Sanitation districts that had been spreading sewage sludge on farms in Kern County would have to find another home for the sludge. For them, pulling up stakes was not an option.

---

[74] 138 Cal. App. 4th 298.

[75] 138 Cal. App. 4th 291,295.

[76] *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern*,127 Cal. App.4th 1544, 27 Cal. Rptr. 3d 28 (Cal.App. 5 Dist. 2005).

[77] 127 Cal. App.4th. at 1583.

bepress Legal Repository

Hosted by The Berkeley Electronic Press

Indirect physical impacts only need to be analyzed under CEQA if "reasonably foreseeable". To see where courts have drawn the line separating pure speculation from responsible forecasting of the reasonably foreseeable, we can compare two cases involving the application of CEQA to annexations. Annexations of unincorporated territory to a city require approval by a Local Area Formation Commission (LAFCO).

In the first of the two cases, the venerable *Bozung v. Local Agency Formation Commission*,[78] LAFCO had approved annexation of 677 acres zoned agricultural from unincorporated Ventura County to the city of Camarillo. The land owner had pushed for the annexation so that it could develop the property. Ventura County had a strict policy against re-zoning land from agricultural to urban uses. The county's view was that development should only take place within the boundaries of incorporated cities. The city of Camarillo had indicated it would be receptive to the property being developed if the annexation were approved. LAFCO had not prepared an Environmental Impact Statement since the annexation itself wouldn't have a direct physical impact on the environment. But given the realities of development politics in Ventura County and Camarillo, and the manifest desire of the property owner to develop, the California Supreme Court envisioned indirect physical impacts flowing from the annexation. The Court sent the case back to the LAFCO for a CEQA analysis with this explanation: "Vital to our disposition of this case is that the land was presently used for agriculture and would be used for residential, commercial and recreational uses anticipated in the near future."[79]

Conversely, the Ventura County Board of Supervisors needed no CEQA analysis when it ordered the detachment of 10,000 acres of open space (4,200 acres of it located within a state park) from the Simi Valley Park and Recreation District to the county. The county Board of Supervisors believed that the site could be administered more efficiently by the county than by the Recreation and Park Commission. The detached site was near the then unincorporated community of Moorpark, and separated from the balance of the park district's turf by a mountain range. The use of the land would remain open space since Ventura County has a firm policy against the urbanization of agricultural land located within the unincorporated area.[80] Significantly, the county's resolution imposing the detachment of acreage from the Simi Valley Recreation and Park District asserted: "[t]here is no present development planned for the detached area."[81] Another appellate court cogently summarized the distinction between Bozung and Simi Valley as the difference between "an essential step culminating in action which may affect the environment (*Bozung*) and approval of a reorganization which portends no particular action affecting the environment (Simi Valley)."[82]

---

[78] 13 Cal.3d 263, 118 Cal. Rptr. 249 (Cal.1975).

[79] 13 Cal. 3d at 269-270.

[80] *Simi Valley Recreation & Park Dist. v. Local Agency Formation Com.* 51 Cal.App.3d 648, 651-53 (Cal.App.2.Dist.,1975).

[81] 51 Cal. App. 3d at 660.

[82] *Fullerton Joint Union High School Dist. v. Bd. of Education*, 32 Cal. 3d 779, 797 (1982).

bepress Legal Repository

http://law.bepress.com/usclwps-lss/art16

Was the *Turlock* court correct, based on such precedents as *Simi Valley* and *Bozung*, in concluding that the city could enact its superstore ban without performing a thorough investigation under CEQA since there was no reasonably foreseeable 'displacement development' to be analyzed? Admittedly, no one except Wal Mart had proposed any development for the site at State Road 99 and Tuolumne Road and no authorized Wal Mart rep had identified an alternate site outside Turlock but within the same market area where it might locate a superstore. It is also true that the city would not be in as good a position as Wal Mart to identify other potential superstore locations.

Yet, one consequence of the superstore ban was reasonably foreseeable. Wal Mart wasn't going to be able to place a superstore in Turlock at its preferred location. In mid-August, before the superstore ban had been enacted, the city announced it would require an EIR of Wal Mart.[83] Much of the same traffic and air quality data as Wal Mart would have been required to produce to support its case for a superstore could also have been included in an EIR to support the superstore ban.

It is tempting for public agencies to hold private developers to a higher standard of environmental assessment than they impose upon themselves because developers requiring discretionary government approvals must pay for EIRs. When environmental review is required for government-initiated zoning or planning changes, the city must cover the often daunting costs of an EIR from its own resources. To preclude cities from holding private developers to a higher standard than they impose upon themselves, the state legislature has mandated "that projects to be carried out by public agencies be subject to the same level of review and consideration... as that of private projects required to be approved by public agencies."[84]

Significantly, the superstore ban had not come from a staff exercise in broad city planning policy. It had resulted from the city council intervening to block a particular Wal-Mart superstore proposal. In succeeding, the ban had at least the direct physical consequence of outlawing that proposed superstore, thus meriting an initial study under CEQA. Unless the consequences of keeping out the superstore are analyzed at the time of the superstore ban, they will never be assessed. Later, when a supermarket,[85] discount retailer, or shopping mall developer steps forward, those applicants, if required to prepare an EIR, will need to include within it "an analysis of the environmental impact for a range of reasonable project alternatives."[86] Those applicants may be excused by the superstore ban from having to compare the impacts of their projects with those of a discount superstore even though, if Wal Mart is correct, that would be the least damaging alternative environmentally.

---

[83] 138 Cal. App.4th 280.

[84] CAL. PUB. RES. CODE §21001.1.

[85] The appellate court thought it unlikely that the city would ever issue a conditional use permit for a large supermarket at the Route 99 site because such an issuance would be "inconsistent with the City's stated policy of favoring the use of local-serving neighborhood centers for supermarket food sales."138 Cal. App.4th 293. However, this assumes the city was truly enacting the ban for the planning reasons it advanced, and not as Wal-Mart alleged to restrain competition and protect the wages and benefits of unionized grocery store workers. It also assumes no change in political sentiment between the time the ban was enacted and the subsequent application considered.The CUP ordinance itself provides no limits relative to the protection of neighborhood grocery stores on the city's authority to issue a CUP.

[86] Legislative Analyst's Office, *CEQA: Making It Work Better*, March 20, 1997, p. 10.

bepress Legal Repository

Hosted by The Berkeley Electronic Press

As the *Turlock* court had observed a year earlier in *County Sanitation Dist. No. 2 v. County of Kern*: the environmental review contemplated by CEQA would contain a gap, and California's environment would be deprived of the benefits that might result from County's consideration of feasible alternatives, cumulative impacts, and mitigation measures."[87] It was incumbent upon the city to apply its best efforts to discover whether Wal-Mart was correct in alleging that a superstore at State Road 99 would be more benign environmentally than any of the likely alternative uses of the site.

The *Turlock* court had placed the burden of proving the reasonable foreseeability of 'displaced development' on Wal Mart. This is a questionable allocation of the evidentiary burden. Every public agency is charged with making a responsible initial determination of whether an activity is a 'project' as CEQA defines it.[88] The CEQA Guidelines specify that an agency's claim of exemption should only be made "after thorough investigation" by the lead agency.[89] As the court in *Muzzy* explained, an agency need not produce an EIR if it concludes that a project falls within the scope of a categorical exemption or the common sense exemption. But if the agency doesn't bear the burden of proof to justify a claimed exemption from CEQA, after a disappointed project proponent makes a reasonable case for the possibility of displaced development, it could frustrate CEQA's fundamental purpose of ensuring environmentally informed decision making.

Suppose Turlock city planners weren't sure where else in the region Wal Mart might place a superstore, or couldn't ascertain the type of projects likely to be built at the State Road 99/ Tuolumne Road site. They could have sought additional information from Wal-Mart. Presumably, a local government enacting a superstore ban for legitimate planning reasons would have wanted that information. At least the city would have shown good faith by trying to determine the existence of indirect physical impacts following the superstore ban.

III. Conclusion

The California Environmental Quality Act (CEQA) has become an elaborate paper filter for screening proposed development projects that require discretionary local government approvals. CEQA requires local governments to prepare environmental impact reports (EIRs) before voting on land use controls such as zoning, annexations, or general plans that would facilitate individual development projects if those projects could alter the physical environment. An EIR brings together all the community's land use concerns in one document. It also has the fiscal advantage for local governments strapped for cash that EIRs are developer-funded.

Until now, CEQA has tended to focus on the neighborhood impacts of proposed development. EIRs are particularly good at spot lighting all the imaginable harmful consequences of building at any

---

[87] 127 Cal. App. 4th 1544, 1602-03 (2005).

[88] *Davidon Homes v. City of San Jose*, 54 Cal. App. 4th 106, 114 (1997) ("It is incumbent upon the agency, in the course of a preliminary review under CEQA, to consider possible environmental effects an to produce substantial evidence to support an exemption determination. An agency abuses its discretion if there is no basis in the record its determination that the project was exempt from CEQA.")

[89] "If, after thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact." CEQA Guidelines, 14 Ca. Code Regs. § 15145.

bepress Legal Repository

http://law.bepress.com/usclwps-lss/art16

particular location. But CEQA offers scant guidance on where it would be best to locate the 600,000 or so new residents expected to arrive or to be born in California each year between now and 2015.[90] Given the state's underfunded roads and schools, and infamously poor air quality, most new development would only seem to worsen the quality of life for those of us already resident in California. Yet, growth in California appears inevitable and needs to be accommodated somewhere. CEQA should be a tool for assisting local officials to direct new development where it will do the least harm to the physical environment or the most good. As researchers at the Public Policy Institute of California concluded: "Currently, CEQA does not effectively accommodate regional strategies that trade off increases in negative effects in one geographic area or for one environmental impact in exchange for corresponding reductions in another."[91] By insisting upon EIRs taking into account the possibility of displaced development, the California Supreme Court would be interpreting CEQA to minimize environmental damage while fulfilling the legislative aspiration of "providing a decent home and satisfying living environment for every Californian."[92]

---

[90] California Department of Housing and Community Development (HCD), California's Deepening Housing Crises (August 11, 2005), http://www.hcd.ca.gov/hpd/hc081105.pdf.

[91] Elisa Barbour and Michael Teitz, *CEQA Reform: Issues and Options* (April 6, 2005, Public Policy Institute of California), p. iv.

[92] CAL. PUB. RES. CODE § 21002

bepress Legal Repository

Hosted by The Berkeley Electronic Press