High court case takes a different twist on CEQA

By Fiona Smith
Daily Journal Staff Writer

The California Supreme Court is stepping into a debate over the reach of the state's bedrock environmental law as the building industry fights with Bay Area air pollution regulators over the health risks to people living near freeways. The California Environmental Quality Act, or CEQA, requires public agencies approving projects such as power plants, road construction and city land use plans to analyze their impacts and address major harms. The high court is asking if the reverse is also true: Does CEQA require looking at how the environment affects a project?

"[The case] has pretty far-reaching implications and import for the scope and cost of CEQA analysis," said Anna C. Shimko, a partner with Sedgwick LLP.

"This is clearly a very hot topic and one that is debated and worried about," she added.

In the dispute before the court, the California Building Industry Association objects to the idea that agencies should use CEQA to address the potential harm facing residents moving into a new development near a freeway or busy road.

The group sued the Bay Area Air Quality Management District after it created guidelines in 2010 to help local governments assess whether pollution levels were high enough at a specific site to trigger a CEQA analysis. After the 1st District Court of Appeal upheld the guidelines, the association, known as CBIA, petitioned for high court review. It filed its opening brief Friday. *CBIA v. BAAQMD*, S213478.

The group argues, among other things, that the guidelines are invalid because the environmental law doesn't require such a reverse analysis.

Using CEQA to force developers to deal with a problem they didn't create — air pollution — turns the law on its head, wrote Andrew B. Sabey of Cox, Castle & Nicholson LLP in CBIA's brief.

"If building in an area affected by air quality issues triggers CEQA because future residents who will be attracted to live there may be exposed to degraded air quality, what principled distinction prevents CEQA from invading every aspect of project development?" wrote Sabey, who declined to comment for this story.

Ellison Folk, an attorney with Shute, Mihaly & Weinberger LLP who is representing the air district in the case, rejected that notion.

"People are part of the environment," Folk said. "If one of the impacts of a project is to bring people near an environmental hazard, you want to look at that effect on human health."

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It's important to look at not just air pollution, but how forces such as landslides, wildfires, flooding and sea level rise could hurt residents of a project, Folk said.

Without such analysis, "it will make it harder for agencies to look at the impacts associated with developing in certain areas and, more importantly, requiring mitigation and project redesign," Folk said.

In this case, the air district recommendations under CEQA could lead a local government either to disapprove certain projects near freeways or to require changes such as air filtering devices in the building if it believes there is an elevated cancer risk from vehicle pollution.

In its ruling upholding the air district guidelines, the 1st District Court of Appeal found that there were valid ways to use such guidelines under CEQA, including analyzing if a proposed school location near heavy traffic would put children at risk.

But the state Legislature put a specific provision in CEQA requiring agencies to examine air pollution impacts on a new school, and it did not intend for such an analysis to apply across the board, wrote Sabey in his brief.

He pointed to other appellate court decisions that he said support his position, the most recent being the 2011 case *Ballona Wetlands Land Trust v. City of Los Angeles* (2011), 201 Cal. App. 4th 455.

In *Ballona*, environmentalists challenged the CEQA review for a large mixed-use development in Los Angeles called Playa Vista. One of the opponents' arguments was that the CEQA review failed to adequately look at the risk of rising sea levels on the project.

The court rejected that notion, then went further and echoed two earlier appellate decisions that CEQA does not require analysis of the environment's impact on a project.

Environmental groups revile *Ballona*, and unsuccessfully sought state Supreme Court review.

Legislators introduced two bills that would have reversed *Ballona*, but both failed to pass. Groups including the Planning and Conservation League and the Bay Area Air Quality Management District supported the bills.

Rather than focus on whether CEQA applies in reverse, the better approach is to ask whether or not an environmental impact is speculative or not, said Damon P. Mamalakis, a CEQA attorney with Armbuster Goldsmith & Delvac LLP. Under CEQA, you do not need to analyze speculative impacts, he said.

"It's wrong to say CEQA has a bright-line rule that you never have to look at the effects of the environment on a project," Mamalakis said. "It doesn't mean you have to analyze every crazy existing impact that a project opponent can come up with."

Mamalakis represented the developer of Playa Vista in earlier stages of its CEQA litigation but did not work on the court of appeal case that led to the 2011 *Ballona* decision.

But while it is common practice for agencies to look at some impacts of the environment on a project, "that doesn't mean it fits with the current rubric of CEQA as it's written," Shimko said.

Shimko co-wrote a letter to the state Supreme Court on behalf of the California Business Properties Association urging the court to take up the building industry association case. It is better to address such issues, including how to protect people living near freeways, during the broader land use planning process rather than on a project-by-project basis in CEQA, Shimko said.

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