

COURT RULES CITY SHOULD HAVE PREPARED EIR BEFORE ENACTING A BAN ON PLASTIC BAGS AT RETAIL STORES

The Second District Court of Appeal in Los Angeles just ruled in a 2-1 decision that the City of Manhattan Beach should have prepared an environmental impact report before it enacted an ordinance restricting retailers from providing plastic bags to customers. *Save the Plastic Bag Coalition v. City of Manhattan Beach*, Case No. B215788 (January 27, 2010). The court based its decision on CEQA's "fair argument" standard, which sets a low threshold for requiring preparation of an EIR. Under that standard, effectively an EIR is required whenever it can be "fairly argued" based on some substantial evidence that the action in question may have a significant environmental effect. This decision illustrates how broad CEQA's requirement for an EIR has become under the fair argument standard. The decision also includes an important ruling on whether a business-based coalition has standing to challenge agency actions under CEQA.

The City argued the "Save the Plastic Bag Coalition" lacked the required beneficial interest in the matter, and thus lacked legal standing to bring the challenge to the ordinance. The Coalition is an association of plastic bag manufacturers, distributors and suppliers, formed to counter what it considers to be misinformation, myths and exaggerations about the impacts of plastic bag use. The court found that this was not a purely competitive or commercial interest, as in cases where one competitor is challenging the CEQA document for another competitor's project. Instead, the Coalition was seeking to enforce CEQA's environmental review requirements, and this brought the case within the "public rights/public duty" rule of standing, where a party that is seeking to enforce a public right is found to have standing even if that party may not have a direct beneficial interest in the subject of the case. In the court's view, the fact that some members of the Coalition would benefit from the lawsuit (if the City decided to abandon the bag ban after completing the EIR) did not defeat their standing.

On the merits of the case, the court noted the City's goal was to protect the environment, and in particular to reduce the amount of plastic debris and litter that accumulates in the ocean environment both near the City and in the large garbage patch that floats out in the Pacific Ocean. The City prepared an initial study under CEQA, which concluded that the ordinance would increase the use of paper bags, which in turn could increase emissions from paper plants and from trucks carrying heavier, bulkier paper bags. The study concluded that these increased impacts would be less than significant, and that the ordinance would have a modest positive environmental impact in reducing the amount of plastic debris in the ocean.

In evaluating whether an EIR was required, the court reviewed a body of studies that had been prepared, and included in the City's record, on plastic bag restrictions, including several studies commissioned by California cities and counties. Those studies noted the environmental benefits of restricting plastic bags, and also noted potential adverse environmental effects. Under the fair argument standard, those studies were sufficient to demonstrate that the ordinance may have an adverse environmental effect, including potentially greater impacts on energy consumption, greenhouse gas emissions, solid waste and acid rain.

Justice Mosk dissented from the decision, stating the majority was stretching CEQA and the requirements for an EIR "to an absurdity." He questioned whether the action should be considered a project under CEQA in the first instance, asking

rhetorically whether this decision might require CEQA review of agency decisions about what type of product to purchase. He concluded that there was not sufficient evidence to show that the potential impact on such broad environmental concerns as acid rain and greenhouse gas emissions would be "significant".

This decision obviously has implications for the ongoing debate about plastic bag restrictions (although each case is governed by its own factual record). The decision also underscores the occasional application of CEQA outside the typical development project context to discretionary agency actions that may restrict or expand the ability to use a particular product. This product-based application of CEQA has, on occasion, frustrated both those trying to restrict certain products (as here) as well as those seeking greater flexibility to use certain products. In *Plastic Pipe & Fittings Ass'n v California Building Standards Commission* (2004) 124 Cal.App.4th 1390, for example, the court held that CEQA review was required for building code standards to allow the use of PEX plastic pipe. This product-based application of CEQA also presents challenges to EIR preparers. Even with CEQA's provisions allowing for more generalized review of broad agency decisions, the impacts of restricting or facilitating the use of a particular product are often broadly dispersed, so it is no easy task to prepare an EIR for this type of agency decision.

Note: Cox Castle attorneys recently advised a plastics manufacturer regarding an EIR prepared to allow expanded use of CPVC plastic pipe in California.

If you have any questions regarding this alert, please contact:

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