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ven in California, a state accustomed to big earthquakes, some recent appellate court decisions have been seismic in scale. Particularly notable was a 2004 decision affecting big box development in Bakersfield. The courts stopped construction on two partially completed Wal-Mart supercenters, leaving one deteriorating in the California sun and the other a mere pad.

To most residents of Bakersfield, a city of nearly 300,000 at the southern edge of California's Central Valley, the cavernous, partially completed Wal-Mart is yet another construction project. To an unlikely coalition of labor unions, environmental groups, local businesses, small town lawyers, and local citizens who sued successfully to stop the supercenters' construction, delaying the controversial big box projects is a stunning victory. To the state's large planning community, the decision is one more puzzle in the application of the California Environmental Quality Act, the state's tough environmental law.

Regardless of their viewpoints, most experts agree that this is a turning point in CEQA litigation and that the aftershocks of the December 2004 decision in Bakersfield Citizens for Local Control v. City of Bakersfield will be felt for some time to come. At the moment, the case is back with the trial court under remand from the appeals court, and the city is expected to issue studies responding to the appeals court directive this winter.

"This case provides an important precedent for using CEQA to challenge projects on environmental justice grounds or other social justice rationales, as long as there is some physical act connected with those issues," says Alan Ramo, an environmental law professor at Golden Gate University's School of Law and codirector of the Environmental Law and Justice Clinic in San Francisco. "In addition, the court's decision gives CEQA plaintiffs important victories on issues of standing, cumulative impacts, and remedies."

In fact, California remains a fertile ground for litigation, with about 300 CEQA lawsuits brought throughout the state each year.

Turning point in Bakersfield

In 2003, a local citizens group, Bakersfield Citizens for Local Control, sued both the city and the developers of two Wal-Mart shopping centers then under construction. (Wal-Mart Inc. was not a party to the suit.) The project sites are located within four miles of each other, and each site was to contain a 220,000-square-foot Wal-Mart Supercenter (a combination discount store and grocery store) as well as other retailers. Together, the two sites would add more than 1.1 million square feet of retail space to the city.

BCLC challenged the environmental impact reports for both projects, saying the documents violated CEQA because they didn't address the urban decay and cumulative environmental impacts that the two shopping centers would cause collectively. BCLC also asked the trial court for a temporary restraining order, aiming to stop all construction activities on both project sites.

Apparently agreeing with BCLC's claims, the trial court decertified both environmental impact reports in 2004. However, the court stopped short of prohibiting all construction at the two sites; instead, it halted construction on the Wal-Mart supercenters but allowed the rest of the construction to continue. Both sides appealed.

In ruling on those appeals in 2004, the fifth district court of appeals in Fresno reached several important decisions in its published opinion. (In California, only published opinions set the precedent and are citable as law.) It dismissed the defendants' argument that BCLC is a front for labor unions and economic competitors...
impact law has heads spinning.

and concluded that the citizens group had standing.

The court also dismissed the developers’ argument that CEQA compliance was moot because several businesses were already operating in the partially completed shopping centers. “As a matter of public policy and basic equity,” the court said, “developers should not be permitted to effectively defeat a CEQA suit merely by building out a portion of a disputed project during litigation or transferring interests in the underlying real property.”

“The court’s ruling on mootness is tremendously helpful to CEQA plaintiffs,” says Alan Ramo. “The court said the defendants proceeded at their own risk when they relied on the contested project approvals while litigation was pending. According to the court, the developer risked having the city compel restoration of the project sites to their original condition.”

Just what is urban decay?

Arguably, the most important issue before the appellate court was whether or not urban decay is a factor to be considered in an environmental impact report. The city and the developers dismissed the urban decay concerns voiced by the opposition during public hearings, claiming urban decay constituted a social and economic issue that was outside of CEQA’s purview.

In response, BCLC submitted an economic report prepared by a group of economics professors in San Francisco determining that “the two shopping centers are in the same shopper catchment area, and they will be competing with each other.” The report identified 29 businesses, primarily grocery stores, that might close if the supercenters were built. The appeals court called the report extremely significant and supported BCLC’s position that CEQA required analysis of urban decay.

“The development of two Wal-Mart Supercenters would force numerous nearby retailers out of business, adding to the numerous existing abandoned retail sites and malls, creating blight conditions, and adversely affecting public safety and orderly development in the blight zone,” says Philip King, chair of the economics department at San Francisco State University and the coauthor of the plaintiffs’ economic report.

Affirming the lower court’s decision, the appellate court said, “When there is evidence suggesting that the economic and social effects caused by the proposed shopping center ultimately could result in urban decay or deterioration, then the lead agency is obligated to assess this indirect impact.”

The court then remanded the case to the Kern County Superior Court, ruling among other things that future EIRs for the two shopping centers must analyze whether the centers could lead to a downward spiral of retail closures and consequent long-term vacancies—triggers for urban decay.

The Bakersfield case “provides a road map for similar claims in other cases,” says Ramo. “No previous court decision has spelled out the kind of physical impacts sufficient to establish urban decay or the type of evidence sufficient to demonstrate a nexus between the economic effects of a development and the resulting physical changes.”

In addition, the city had dismissed concerns about the supercenters’ cumulative effects on air quality, traffic, and noise. Despite the substantial evidence to the contrary, the city rejected the notion that the proximity of two Wal-Mart projects meant that they might create cumulative environmental impacts.

The court of appeals disagreed, noting that “proper cumulative impacts analysis is absolutely critical to meaningful environmental review of the shopping center projects.” It added: “We con-
clude that the EIRs are inadequate because they did not analyze the cumulative environmental impacts of other past, present, and reasonably foreseeable retail projects in the market areas served by the proposed shopping centers.”

Construction delays at the two shopping centers could add more than $100 million in construction costs, lost business, and lost tax revenue. There is also the possibility that the two shopping centers, including the incomplete Wal-Mart Supercenters, may have to be partially demolished unless the city and developers bring the EIRs into compliance with CEQA.

Following the court decisions, the city hired a new planning consultant to revise the EIRs and a new land-use attorney to oversee the compliance effort. Their reports were to be released for public comment this winter.

Evolving law

The California Environmental Quality Act was signed into law by Gov. Ronald Reagan in 1970. The law’s authors loosely based CEQA on the National Environmental Policy Act, enacted the previous year by the Nixon administration. While similarities between CEQA and NEPA remain, CEQA has evolved in a different direction. In its first two years, CEQA was applied only to state agency projects. Then, in 1972, the California Supreme Court, in its decision Friends of Mammoth v. Board of Supervisors, greatly extended CEQA’s reach to include all projects requiring a discretionary permit from a public agency. This gave sweeping powers to CEQA, and thrust it into the courts.

Experts say that CEQA’s greatest strength lies in its intentional flexibility—a trait that allows local governments to evaluate proposed projects from a local perspective. On the down side, CEQA law has become extremely complex.

Most groups challenging particular developments use one part of CEQA to fight another part—with the ultimate aim of delaying or stopping projects. Many in the planning community believe the Bakersfield case is an example. “Originally, CEQA was only concerned with impacts on the physical environment, such as air quality, noise, and traffic,” says Bill Halligan, an attorney and the vice president of environmental services at The Planning Center, a consulting firm based in Costa Mesa, California. “But you can make a decent argument that some of the law’s provisions contradict each other,” he says.

For example, one section of CEQA excludes mention of socioeconomic impacts, while another section says that socioeconomic factors may be taken into account when justifying certain project approvals.

Mark Teague, a principal with Pacific Municipal Consultants in Mount Shasta, California, agrees: “CEQA is complex, it is full of contradictions, and is subject to abuse.” As a consultant to the city of Anderson in northern California, Teague wrote the environmental impact report for the Wal-Mart Supercenter there. As anticipated, the project was challenged in court by an organized group of citizens and local businesses. In June 2005, the courts let the EIR certification stand, agreeing with the city’s position on urban decay concerns and the corresponding mitigation plans included in the document.

William Fulton, president and director of research with Solimar Research Group in Ventura, notes that CEQA is often used as a legal device for purposes other than planning. “The challenges have a different agenda. The argument that labor unions use CEQA to gain leverage over the land-use process to block particular stores from coming into the city is definitely true,” he says. “They’re trying it particularly against Wal-Mart.”

Crystal ball?

With all the controversy, what does the future hold for CEQA? Fulton advocates streamlining the law—as well as deeper changes in California’s planning system.

“CEQA puts a great deal of emphasis on doing projects, rather than doing plans. It’s a permit-driven system,” he says. “It seems to me that we need to do broader community and environmental analysis when we’re drawing up general plans, or community plans, or specific plans. It would be better than the system we have now.”

In other words, if CEQA were revised so that local officials received information earlier—in the planning stage rather than the permit stage—they could make better decisions and perhaps avoid controversy.

In the meantime, will the Bakersfield decision affect lawsuits outside of California? Alan Ramo thinks it may: “As Wal-Mart is a national phenomenon and the issue regarding the interplay of economic and physical changes is a recurring theme in state and federal environmental laws,” he says, “I would imagine that any state seeking to clarify or define its policies would look to California’s court as being persuasive, though not binding.”

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