Not a CEQA Question

Until the California Supreme Court speaks, the environment’s impact on a project is not subject to environmental review, explains Golden Gate University law professor Alan Ramo.

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The California Environmental Quality Act creates an open process for reviewing the environmental impacts of proposed projects. It is grounded on the principle that public-agency decision makers and the public should be fully informed about a project’s potential impacts on the environment, possible ways to minimize or mitigate any significant impacts, and reasonable alternatives to the project.

Normally, an agency’s focus when reviewing a project is its potential physical impacts on the environment. The environment includes humans and other species of animals, plant species and natural resources. In including humans as part of the physical environment, CEQA and federal cases interpreting federal environmental review statutes have nevertheless drawn a line between harm to the aesthetics of a physical environment, which are reviewable, and pure psychological impacts unrelated to physical impacts.

CEQA can require far reaching analysis of impacts. Impacts from a chain of causation that might include economic factors. For example, so-called growth-inducing impacts can be reviewed if they ultimately involve physical impacts to the environment. A subdivision’s attraction of new homeowners who may take to their cars and demand new roads, services and other activities that may foster future growth with its accompanying traffic and pollution must be considered.

But what if a project attracts people into an unhealthy environment? That is, what if a project rather than harming the environment, attracts people into an environment that has already been harmed. Are the potential impacts from the environment on new occupants of a site a matter for environmental review?

The common sense answer might be, if a project is going to lead to people being affected by their physical environment, than that should be part of a project’s environmental review. But surprisingly, a series of four California appellate cases, including one decided only late last year, argue that CEQA was never expected to cover these situations.

To be sure, the typical problems posed by projects are the impacts upon the existing environment, including the people and the resources already present. Will a new housing project near a shoreline damage wetlands? Will a factory discharge pollutants into the air? Will a power plant pose a risk of an explosion from natural gas lines leading to the facility?

New development dynamics are creating some interesting situations. The desire to create urban core infill development to lessen dependence upon the automobile means that people are being encouraged to live in areas that may not be pristine due to past contamination or ongoing industrial emissions or pollution from nearby freeways. Climate change itself is threatening to change our shorelines due to sea level rise, so project sites that seem safe today may one day be underwater or vulnerable to saltwater intrusion. People are being moved perhaps into harm’s way.
The first court to squarely face this issue was the First District Court of Appeal in *Baird v. County of Contra Costa*, 32 Cal.App.4th 1464 (1995). In *Baird*, the county had approved the construction of a residential facility for treating young male drug and alcohol users. The owner already operated an addiction treatment facility for 56 adult residents and wanted to add a 20-bed facility for male adolescents. Perhaps not surprisingly, the neighbors were concerned with potential social and economic impacts on the neighborhood. If this was the extent of their arguments, it would have been a typical zoning case, rather than a CEQA case. CEQA does not address socioeconomic impacts unless they are tied to physical impacts.

The neighbors, however, added an additional argument. They asserted that the land and adjacent property near the proposed facility site was contaminated by oil, which had been stored in open ponds by a prior landowner more than 40 years previously. In addition they claimed there was a spill in 1975 from an old abandoned mercury mine. And if that was not bad enough, the area according to the neighbors had been contaminated by wastewater and sewage from overburdened septic tanks.

The *Baird* court never reached the issue of whether the site was indeed contaminated as claimed. Instead, the court held as a threshold matter that CEQA did not protect the future facility residents from the site’s impacts: “*Baird*’s complaint is not that the proposed facility will cause an adverse change in the environment—that is, in any of the physical conditions within the affected area. [footnote omitted]. Rather, *Baird*’s point is that pre-existing physical conditions, consisting of the various forms of purported contamination, will have an adverse effect on the proposed facility and its residents. Any such effect is beyond the scope of CEQA.”

Later in 1995, the Second District faced the same issue in *Goleta Union School Dist. v. Regents of University of California*, 37 Cal.App.4th 1025 (1995). In *Goleta*, the local school district challenged a supplemental environmental impact report for the University of California’s long-range 15-year plan for expansion of its Santa Barbara campus. The district argued that expansion would lead to more families in the area, which would mean more students in the school district. Indeed the environmental analysis showed that there would be too many students for the available seats. The district wanted the university to agree to finance the building of new classrooms as mitigation. Building new classrooms was only one of many options to address potential overcrowding described in the environmental review and there was no commitment to build new classrooms.

The *Goleta* court held that mere overcrowding may be a socioeconomic effect, but alone, was not a physical impact that required mitigation (e.g., the construction of new classrooms). Only if the project proposed to build classrooms, as was the case in an older opinion cited by the court, would it cause physical impacts. Bringing families into a potentially overcrowded school district was not a matter for CEQA review.

In a third case, the Second District in 2009 addressed a proposal to site a school on the edge of Long Beach in *City of Long Beach v. Los Angeles Unified School Dist.*, 176 Cal.App.4th 889 (2009). The city challenged the school district’s environmental review, focusing particularly on the cumulative impacts from various sources of air pollution, including from two nearby freeways.

This case did involve the building of a school, so the court gave careful scrutiny to the environmental analysis of the school’s impacts on the surrounding community and ultimately upheld the project. However, the court also made clear that there was one category of impacts that need not be analyzed, that is, the impacts to the children and staff who would attend the school: “[T]he purpose of an environmental impact report is to identify the significant effects on the environment of a project ... [citations omitted], not the impact of the environment on the project, such as the school’s students and staff.”

In the most recent case, the Second District in November 2011 became the first court to extend this doctrine into the realm of global warming. In *Ballona Wetlands Land Trust v. City of Los Angeles*, 201 Cal.App.4th 455 (2011), the Ballona Wetlands Land Trust and Ballona Ecosystem Education Project challenged an environmental review of the second phase of a new coastal, master-planned, mixed retail/residential community in the Playa Vista area of Los Angeles. The principle objection was that the project, about two miles from the coast, might be inundated as a result of climate change that is anticipated to cause sea levels to rise.

The court found this was not a consideration under CEQA. The court reprimed its doctrine that “[t]he purpose of an EIR is to identify the significant effects of a project on the environment, not the significant effects of the environment on the project.” While the court noted that the environmental record found little basis to believe sea levels would in fact ever inundate the site, it did not require that finding to uphold the environmental analysis.

Putting people in harm’s way would seem to contravene CEQA’s primary mission. These cases hold otherwise. However it would be a mistake for project sponsors to believe such considerations are irrelevant in project design. The *Baird* case noted specific Legislature prohibitions on citing a residential facility on a toxic waste site. The *Long Beach* court discussed various legislative requirements regarding safety for school sites. State and federal civil rights laws may be applicable to any zoning requirements or other government decisions, whose effects is to channel people of a certain race or national origin into communities threatened by environmental harms, whether toxic pollution or future climate change impacts. And CEQA will continue to protect people already present in these overburdened communities from new polluting projects.

But the impacts of the environment on a project and its future occupants? Until the Supreme Court speaks to this issue that is not a CEQA question.

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