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It's the effect of the project on the environment – not the effect of the environment on the project.

The California Supreme Court has resolved a longstanding uncertainty regarding the scope of environmental review under the California Environmental Quality Act ("CEQA"). In 1995, a California Court of Appeal held that CEQA requires a lead agency to evaluate the effect of a project on the environment, but not the effect of the environment on the project. *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464. Three more Court of Appeal decisions followed that view in 2009 and 2011. Yet a CEQA guideline promulgated by the California Resources Agency seems to require that lead agencies must evaluate the impact that the existing environment may have on future residents or users of a project. 14 Cal. Code Regs., §15126.2(a).

On December 17, 2015, the California Supreme Court settled the issue by ruling that, except for a few situations specifically governed by statute, CEQA generally does not require lead agencies to consider the effect that the environment will have on residents and users of a project. It also partially invalidated the Resources Agency's CEQA guideline.

California Building Industry Association v. Bay Area Air Quality Management District

In *California Building Industry Association v. Bay Area Air Quality Management District,* ---P.3d ---- (2015) 2015 WL 9166120, plaintiff filed a petition for writ of mandate challenging CEQA thresholds and guidelines adopted by the Bay Area Air Quality Management District (the "District"). The superior court granted the petition, but the Court of

Appeal reversed. The Supreme Court granted review, but limited the scope of its review to only one question: Under what circumstances, if any, does CEQA require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?

The challenged thresholds and guidelines included a requirement that a lead agency evaluate health risks to "new receptors" consisting of residents and workers who will be brought into the area as a result of a proposed project. This raised an issue that has been litigated for at least 20 years, and was first addressed by the California Court of Appeal in *Baird v. County of Contra Costa, supra* 32 Cal.App.4th 1464. In *Baird*, the County approved a project to construct and operate a residential drug and alcohol treatment facility. Neighbors sued under CEQA to invalidate the approval on the ground that the facility was proposed on a site contaminated by hazardous substances, and would thus expose the patients to those hazardous substances. Although the superior court granted the petition, the Court of Appeal reversed, holding that CEQA requires the lead agency to evaluate the effect of the project on the environment, but not the effect of the environment on the project.

Nevertheless, project opponents continued to press the issue for years, citing CEQA guideline section 15126.2(a). That section provides, in part, as follows:

> "The EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected. For example, an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there. Similarly, the EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards

areas."

In its opinion, the Supreme Court looked closely at the language and legislative intent in CEQA, and found that CEQA does not provide "enough of a basis to suggest that the term 'environmental effects' . . . is meant, as a general matter, to encompass these broader considerations associated with the health and safety of a project's future residents or users." Requiring an evaluation of the environment's effects on the project's residents and users in all cases "would impermissibly expand the scope of CEQA," and "[g]iven the sometimes costly nature of the analysis required under CEQA when an EIR is required, such an expansion would tend to complicate a variety of residential, commercial, and other projects beyond what a fair reading of the statute would support."

Notably, the Supreme Court found the following portion of CEQA guidelines section 15126.2(a) to be "clearly erroneous and unauthorized":

> ". . an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there."

But the court expressly approved the following portions of section 15126.2(a):

> "The EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected. . . . Similarly, the EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas."

The difference between these two portions of the guideline – the disapproved and the approved - is that the former focuses only on

effects the project will have on future occupants of a project, while the latter focuses on environmental effects, including whether a project could exacerbate environmental hazards already present.

Finally, the Supreme Court noted that certain statutes within CEQA expressly require consideration of the effects of the environment on future residents and users for certain projects near airports (Pub. Res. Code, §§21096), school construction projects (§21151.8), and some housing development projects (§21159.21(f)&(h), §21159.22(a)&(b)(3), §21159.23(a)(2)(A), §21159.24(a)(1)&(3), 21155.1(a)(4)&(6). Unlike CEQA's general mandate – to consider the effect of the project on the environment - these statutes reflect an express legislative directive to consider whether certain limited existing environmental conditions might harm those who intend to occupy or use a project site.

Conclusion

Accordingly, as a general matter CEQA does not require that the effects of environmental conditions upon a project's future residents or users be considered. Two qualifications to this general rule apply where: (1) the legislature has specifically required consideration of the effects of the environment on future residents and users of a project, and (2) the project may exacerbate existing environmental hazards.

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