MILLER & STARR
REAL ESTATE NEWSALERT

Reprinted in part from
Volume 23, Number 3, January 2013
(Article starting on page 187 in the actual issue)

ARTICLE

ARE COURTS ACTIVELY LIMITING CEQA'S SCOPE IN THE ABSENCE OF MEANINGFUL LEGISLATIVE REFORM?*

By Arthur F. Coon**

While no California Environmental Quality Act ("CEQA")[1] reform was achieved by the California Legislature in its last session, Senate President Pro-Tem Darrell Steinberg has indicated in a recently-issued statement that it will be a top priority in the next session.[2] Not long before, Governor Jerry Brown was quoted in a Capitol Alert piece as calling legislative reform of CEQA "the Lord's work."[3] Hopefully, he did not mean the quest for the Holy Grail. SB 317, the most significant effort at CEQA reform proposed last legislative session,[4] died in the session's waning days. While "hope springs eternal," meaningful legislative reform of CEQA has thus continued to prove elusive. To paraphrase Senator Steinberg: "Wait 'til next year!"[5]

Virtually since its enactment, CEQA has produced controversy and calls for reform. The 1972 Supreme Court decision in *Friends of Mammoth v. Board of Supervisors*[6] established the "EQA" (as it was then

* This article is based on a post in the author's blog, CEQA Developments. For additional analysis of CEQA cases and legislation, with an occasional dash of irreverence stemming from the author's 25-plus years of litigating CEQA cases, see http://www.ceqadevelopments.com/.

** Arthur F. Coon is a litigation shareholder and co-chair of the Land Use Practice Group in the Walnut Creek office of Miller Starr Regalia, where he concentrates his practice in the areas of land use and environmental law. Mr. Coon is also the author of Chapter 25, Subdivisions, Land Use Planning, and Approvals, and Chapter 25A, CEQA, Miller & Starr, California Real Estate 3d.

WEST®

oddly, and briefly, known) as California's preeminent environmental law, holding that it applied to approvals of private projects, and must be construed to provide "the fullest possible protection to the environment within the reasonable scope of the statutory language." CEQA's judicially-established "fair argument" test set a very low hurdle for requiring what have become (over the years) voluminous, expensive, and time-consuming environmental impact reports ("EIRs"), and has resulted in a correspondingly voluminous and complex body of case law—and continuing unsatisfied demands for meaningful legislative reform.

But the Legislature is not the only branch of government capable of "CEQA reform"—what the courts "giveth," they may also "taketh away." Indeed, it appears that a *judicial* trend toward cutting back on CEQA's scope in various respects has emerged in many published appellate decisions rendered in recent years, under the leadership of the California Supreme Court. While certainly not an exhaustive catalogue of cases supporting (or for that matter contradicting) this thesis, skeptical CEQA reform advocates should consider the following case examples:

1. The California Supreme Court has held that CEQA's exhaustion of administrative remedies requirement broadly applies, extending it (logically, but arguably even beyond the statute's literal language) by holding it applies to actions challenging a decision that a project is CEQA-exempt.[7]
2. The California Supreme Court has also established "bright line" rules that CEQA's short statutes of limitations for challenging project approvals (30-35 days)[8] are triggered by a public agency's filing of notices of its CEQA determination or exemption decision that are *minimally-sufficient* on their face.[9]
3. A recent court of appeal decision reaffirmed CEQA's fundamental boundaries, holding that CEQA only requires analyzing *physical* impacts on the environment, not *economic* impacts on government services (but stay tuned, as review has been granted in this case).[10]
4. Another recent appellate decision held that CEQA Guidelines §15162 is valid, and does not impermissibly broaden the limitation on subsequent environmental review contained in the relevant CEQA statute[11] by applying it to cases where the initial document was a negative declaration, rather than an EIR.[12]
5. In one of the most significant judicial trends in recent years, numerous appellate courts have now reaffirmed that CEQA does

not operate "in reverse": i.e., its proper scope is to analyze the effects of the proposed project on the existing environment, not the effects of the existing environment on the proposed project or its future occupants.[13] The Supreme Court has declined to review these decisions, which thus appear to be on solid footing.

6. A court of appeal decision recently upheld the use of pre-litigation agreements to suspend the statute of limitations (with all parties', including real parties' consent), in order to facilitate reasonable efforts to settle CEQA claims *before* expensive lawsuits are filed and pursued on CEQA's tight litigation timelines.[14]
7. Recent appellate decisions have confirmed that even highly-detailed preliminary, exploratory and tentative actions do not ripen into "projects" triggering the need for CEQA review as long as there is no commitment to a definite course of action regarding project approval.[15]
8. A recent court of appeal decision dealing with a Chevron refinery marine terminal lease held CEQA's environmental "baseline" for reviewing long-term lease renewals properly includes existing conditions and structures, the "impacts" of which therefore need not be analyzed anew (or mitigated) under CEQA even if they were never previously analyzed.[16]
9. A recent appellate decision held an EIR's *deferral* of formulation of precise details of CEQA-required mitigation measures is proper when such formulation is impractical, a commitment to mitigate has been made, and feasible options have been discussed.[17]
10. One recent appellate decision reaffirmed that errors in complying with CEQA procedures will not automatically require a court to void project approvals so long as CEQA's information gathering and presentation functions are not compromised.[18] Another emphasized the same point, and held on an issue of first impression that as a matter of law an EIR was not inadequate for concluding there were *no* potentially feasible alternatives to a proposed project to be analyzed in depth.[19]
11. A number of appellate decisions in recent years have underscored that *ministerial* project approvals or actions in various contexts are not subject to CEQA review because CEQA applies only to *discretionary* project approvals.[20]
12. Another recent appellate decision held CEQA's statutes of limitations run from the agency's initial project approval, and

that the period to bring suit is not re-opened by subsequent approvals that are simply steps to implement the already-approved project.[21]

13. The courts of appeal have now consistently held for several years that claims challenging a local agency's subdivision-related decisions on CEQA grounds are barred when plaintiffs fail to comply with *both* CEQA's *and* the Subdivision Map Act's statute of limitations requirements.[22]
14. A recent court of appeal decision applies a "common sense" reading to CEQA's remedies provision and concludes trial courts may issue a "limited writ," and thus need not decertify the entire EIR or void all project approvals, in appropriate cases.[23]

Other evidence exists that appellate courts are stepping up more and more to shrink and streamline CEQA in many respects, even while the Legislature has not. The Supreme Court has recently generally emphasized that "common sense" is relevant at *all* levels of CEQA review, and has observed in significant dicta that public interest standing to file lawsuits is not "automatic," but, rather, an *exception* to the normal beneficial interest standing requirement and subject to public policy limits.[24] It has also granted review of a case that effectively eviscerated CEQA's categorical exemptions, and will decide the all-important question of what standard of judicial review applies to such exemptions in the face of project opponents' arguments that the "unusual circumstances" exception applies to defeat them.[25]

As David Letterman used to ask, "Is this anything?" Are the recent court decisions indicative of a meaningful judicial trend? If so, does that trend signify a pendulum swing away from the California courts' early expansionist interpretations of CEQA, a necessary result of burgeoning and out-of-control CEQA litigation reaching its logical outer limits, or some combination of these or other factors? To be sure, CEQA compliance remains complicated, burdensome, and expensive; CEQA litigation is ubiquitous and still too often misused for non-environmental agendas;[26] and carefully-crafted legislative reform could be helpful in many respects.[27] Nonetheless, and in the continued absence of meaningful legislative reform, perhaps there is some hope (or solace) for CEQA reform advocates to be found in the Supreme Court's "common sense" holdings and pronouncements. They seem to have set a tone of judicial retrenchment reflected to some extent in much

of the recent CEQA case law. As Jerry Brown might observe, the Lord works in mysterious ways.

NOTES

1. Pub. Resources Code, §§21000 et seq.
2. http://sd06.senate.ca.gov/news/2012-09-13-steinberg-sets-ceqa-reform-agenda-priority.
3. The CapitalAlert is a blog focusing on California politics and government. See http://blogs.sacbee.com/capitolalertlatest/2012/08/jerry-brown-calls-ceqa-reform-lords-work-but-noncommittal-on-bill.html. When Governor Brown made the statement, he also admitted he had not yet read the bills then proposed to limit CEQA's scope.
4. The bill, which was tacked onto a bill that dealt with fisheries management on the Kings River, would have created an entirely new statutory scheme – The Sustainable Environmental Protection Act. See http://blogs.sacbee.com/capitolalertlatest/2012/08/ceqa-overhaul-amended-into-senate-bill.html.
5. This was also the unofficial slogan of long-suffering Brooklyn Dodgers fans whose team was repeatedly thwarted in its quest to win a World Series by the New York Yankees throughout the 1940s and early 1950s. http://en.wikipedia.org/wiki/History_of_the_Brooklyn_Dodgers#.22Wait_.E2.80.99til_next_year.21.22.
6. *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 104 Cal. Rptr. 761, 502 P.2d 1049 (1972).
7. *Tomlinson v. County of Alameda*, 54 Cal. 4th 281, 142 Cal. Rptr. 3d 539, 278 P.3d 803 (2012).
8. Pub. Resources Code, §21167.
9. *Stockton Citizens for Sensible Planning v. City of Stockton*, 48 Cal. 4th 481, 106 Cal. Rptr. 3d 858, 227 P.3d 416 (2010); *Committee For Green Foothills v. Santa Clara County Bd. of Supervisors*, 48 Cal. 4th 32, 105 Cal. Rptr. 3d 181, 224 P.3d 920 (2010). A more recent appellate decision clarifies that such notices must be filed after the project approval occurs to trigger the shortened limitations period, and that prematurely-filed notices are ineffective to do so. *Coalition for Clean Air v. City of Visalia (VWR International, LLC)*, 209 Cal. App. 4th 408, 147 Cal. Rptr. 3d 141 (5th Dist. 2012), as modified on denial of reh'g, (Oct. 4, 2012) and review filed, (Nov. 14, 2012). Improper or inadequate posting of such notices will have the same result. E.g., *Latinos Unidos de Napa v. City of Napa*, 196 Cal. App. 4th 1154, 127 Cal. Rptr. 3d 469 (1st Dist. 2011).
10. The Supreme Court granted review of the case, *City of Hayward v. Board of Trustees of California State University*, 143 Cal. Rptr. 3d 265, 281 Ed. Law Rep. 656 (Cal. App. 1st Dist. 2012), as modified, (July 11, 2012) and review granted and opinion superseded, 148 Cal. Rptr. 3d 500, 287 P.3d 71 (Cal. 2012), on October 17, 2012 (Case No. S203939), and it is currently (as this article goes to print) being held with briefing deferred pending the Supreme Court's decision in another matter.
11. Pub. Resources Code, §21166.
12. *Abatti v. Imperial Irr. Dist.*, 205 Cal. App. 4th 650, 140 Cal. Rptr. 3d 647 (4th Dist. 2012).
13. E.g., *Ballona Wetlands Land Trust v. City of Los Angeles*, 201 Cal. App. 4th 455, 134 Cal. Rptr. 3d 194 (2d Dist. 2011), review denied, (Mar. 21, 2012); *South Orange County Wastewater Authority v. City of Dana Point*, 196 Cal. App. 4th 1604, 127 Cal. Rptr. 3d 636 (4th Dist. 2011); see also *Baird v. County of Contra Costa*, 32 Cal. App. 4th 1464, 38 Cal. Rptr. 2d 93 (1st Dist. 1995), as modified, (Feb. 23, 1995).
14. *Salmon Protection and Watershed Network v. County of Marin*, 205 Cal. App. 4th 195, 140 Cal. Rptr. 3d 290 (1st Dist. 2012), as modified on denial of reh'g, (May 11, 2012) and review denied, (July 11, 2012).
15. E.g., *Cedar Fair, L.P. v. City of Santa Clara*, 194 Cal. App. 4th 1150, 123 Cal. Rptr. 3d 667 (6th Dist. 2011); *City of Santee v. County of San Diego*, 186 Cal. App. 4th 55, 111 Cal. Rptr. 3d 47 (4th Dist. 2010).

16. *Citizens for East Shore Parks v. California State Lands Com. (Wal-Mart Stores, Inc. RPI)*, 202 Cal. App. 4th 549, 136 Cal. Rptr. 3d 162 (1st Dist. 2011), as modified on denial of reh'g, (Jan. 27, 2012) and review denied, (Mar. 14, 2012).
17. *Oakland Heritage Alliance v. City of Oakland*, 195 Cal. App. 4th 884, 124 Cal. Rptr. 3d 755 (1st Dist. 2011).
18. *Schenck v. County of Sonoma*, 198 Cal. App. 4th 949, 130 Cal. Rptr. 3d 527 (1st Dist. 2011).
19. *Mount Shasta Bioregional Ecology Center v. County of Siskiyou*, 210 Cal. App. 4th 184, 148 Cal. Rptr. 3d 195 (3d Dist. 2012), review filed, (Nov. 28, 2012).
20. *Sierra Club v. Napa County Bd. of Sup'rs*, 205 Cal. App. 4th 162, 139 Cal. Rptr. 3d 897 (1st Dist. 2012) (holding Napa County's revised lot line adjustment ordinance properly classified lot line adjustment decisions consistent with the Map Act's exemption as ministerial in nature and exempt from CEQA); *Friends of Juana Briones House v. City of Palo Alto*, 190 Cal. App. 4th 286, 118 Cal. Rptr. 3d 324 (6th Dist. 2010), review denied, (Feb. 23, 2011) (demolition permit ordinance with only fixed, objective standards provided for ministerial residential demolition permit process exempt from CEQA); *San Diego Navy Broadway Complex Coalition v. City of San Diego*, 185 Cal. App. 4th 924, 110 Cal. Rptr. 3d 865 (4th Dist. 2010) (approval of construction plans for waterfront development project required only ministerial determination whether plans were consistent with earlier-approved redevelopment project, and did not give City meaningful discretion to respond to newly-raised GHG claims). It seems to me, however, that some courts have a strange conception of what constitutes *meaningful* discretion sufficient to trigger CEQA review. *See Tuolumne Jobs & Small Business Alliance v. Superior Court*, 210 Cal. App. 4th 1006, 148 Cal. Rptr. 3d 730 (5th Dist. 2012) (rejecting directly contrary authority "squarely on point"—*Native American Sacred Site and Environmental Protection Ass'n (NASSEPA) v. City of San Juan Capistrano*, 120 Cal. App. 4th 961, 16 Cal. Rptr. 3d 146 (4th Dist. 2004)—and holding a City exercised discretion requiring CEQA review if it exercised its statutory option under Elections Code §9214(a) to adopt as-is land use ordinance proposed by a qualified citizen-generated initiative petition rather than putting it on the ballot, despite the fact that the City lacked any discretion to *deny* or *modify* the project based on environmental concerns that might be disclosed by EIR). It appears likely the California Supreme Court will, if asked, either depublish or grant review of *Tuolumne Jobs* to resolve the conflict it creates among the Courts of Appeal.
21. *Van De Kamps Coalition v. Board of Trustees of Los Angeles Community College Dist.*, 206 Cal. App. 4th 1036, 142 Cal. Rptr. 3d 276, 280 Ed. Law Rep. 338 (2d Dist. 2012).
22. *Torrey Hills Community Coalition v. City of San Diego*, 186 Cal. App. 4th 429, 111 Cal. Rptr. 3d 578 (4th Dist. 2010), review denied, (Oct. 13, 2010); *Friends of Riverside's Hills v. City of Riverside*, 168 Cal. App. 4th 743, 85 Cal. Rptr. 3d 695 (4th Dist. 2008).
23. *Preserve Wild Santee v. City of Santee*, 210 Cal. App. 4th 260, 286-289, 148 Cal. Rptr. 3d 310 (4th Dist. 2012) (construing Pub. Resources Code, §21168.9, subd. (a)).
24. *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 52 Cal. 4th 155, 127 Cal. Rptr. 3d 710, 254 P.3d 1005 (2011) ("*Save the Plastic Bag*"). See also *Rialto Citizens for Responsible Growth v. City of Rialto*, 208 Cal. App. 4th 899, 146 Cal. Rptr. 3d 12 (4th Dist. 2012).
25. *Berkeley Hillside Preservation v. City of Berkeley (Kapor, et al, RPI)* (Supreme Ct. No. S201116). As this article goes to print, this case is just concluding the merits briefing stage, with the reply briefs being filed December 13, 2012, and has not yet been set for oral argument.
26. *Save the Plastic Bag, supra,* 52 Cal. 4th 155.
27. See, e.g., my December 12, 2012 blog post regarding potential legislature reform in the area of CEQA standing, http://www.ceqadevelopments.com/2012/12/12/ceqa-standing-reform-could-statutory-standing-requirements-feasibly-be-tightened-to-bar-anti-competitive-lawsuits-motivated-by-economic-rather-than-environmental-concerns/, and my June 7, 2012 blog post regarding the need for legislative CEQA reform in areas of administrative record/discovery disputes. http://www.ceqadevelopments.com/2012/06/07/how-recent-ceqa-cases-show-the-need-for-legislative-ceqa-reform/.

Miller & Starr Real Estate Newsalert

Managing Editor:	**Karl E. Geier**
Executive Editor:	**Karen Turk**
Editor Emeritus:	**Edmund L. Regalia**
Founding Editors:	**Harry D. Miller & Marvin B. Starr**
Attorney Editor:	**John Frey**
Production Assistant:	**Cortney Carter**
Design & Layout:	**Specialty Composition/Rochester DTP**

Miller & Starr Real Estate Newsalert (USPS # pending) is issued six times per year, published and copyrighted by Thomson Reuters, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526. Application to mail at periodic rate is pending as St. Paul, MN. POSTMASTER: Send address changes to: Miller & Starr Real Estate Newsalert, 610 Opperman Drive, P.O. Box 64526, St. Paul, MN 55164-0526.

The law firm of Miller Starr Regalia, founded by Edmund Regalia, Marvin Starr, and Harry Miller is headquartered in Walnut Creek. Members of the firm have been writing and editing the treatise, Miller & Starr, since shortly after the firm was founded in 1964. Karl E. Geier, a shareholder of the firm, is the current editor-in-chief of the treatise.

MILLER STARR
REGALIA