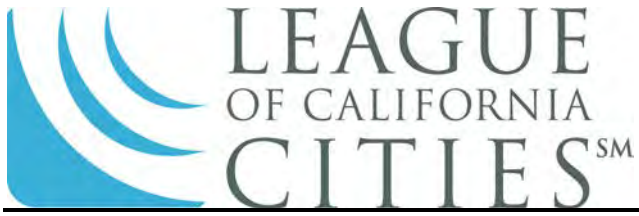

Save the Plastic Bag Coalition v. Manhattan Beach and *CREED v. Chula Vista* – Breathing New Life Into the Fair Argument Standard

Wednesday, May 2, 2012 Opening General Session; 1:00 – 2:45 p.m.

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SAVE THE PLASTIC BAG COALITION V. MANHATTAN BEACH AND *CREED V. CHULA VISTA* — BREATHING SOME LIFE INTO THE FAIR ARGUMENT STANDARD?

Presented By

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California courts have long admonished that the California Environmental Quality Act ("CEQA") be interpreted so as to afford the fullest possible protection to the environment.[2] With that governing principle in mind, decisions by public agencies to approve projects have received intense scrutiny from the courts. But nowhere is that scrutiny more intense than under the "fair argument" standard which governs the court's review whenever a public agency has decided to adopt a negative declaration rather than conduct complete environmental review. Administrative agencies are seldom given so little deference in making factual determinations.

When combined with the relative lack of success that agencies have had defending CEQA documents in court,[3] the low evidentiary threshold embodied in the fair argument standard has compelled lead agencies to prepare complete environmental impact reports, at considerable cost in time and money, even when such in-depth review may be unwarranted. Mitigated negative declarations—which were meant to serve as the environmental compliance documents for projects with impacts that could be mitigated to a less-than-significant level—are becoming less and less secure. At the first sign of organized opposition, seasoned practitioners will almost always counsel clients to prepare an EIR rather than rely on a negative declaration that is more vulnerable to challenge under the fair argument standard.

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[2] *Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 112.

[3] Project opponents have prevailed in more than forty -percent of reported CEQA cases. (E. Clement Shute, PowerPoint Presentation, *CEQA at 40: A Look Back, and Ahead*, U.C. Davis School of Law (Nov. 4, 2011).

The political will to legislatively correct this imbalance in the weight of the evidence does not currently exist. Absent a legislative fix, the question arises whether there is any other way to reverse this trend and restore some common sense, either through the administrative process or through litigation. Two CEQA decisions issued in 2011—one by the California Supreme Court and another by the Fourth Appellate District provide some hope. Each applied the fair argument standard in a manner that portends greater deference to lead agency determinations even where apparent conflicts in the evidence exist.[4]

Judicial realists might view with cynicism the notion that the fair argument standard could ever be applied more consistently to uphold agency decisions. Admittedly, recent case authority is no safe harbor. Nevertheless, this article is meant to show that there is reason for some optimism.[5] And if public agency advocates are more careful in building administrative records, evaluating the quality of the evidence (or lack thereof), and presenting evidentiary arguments in court, lead agencies and negative declarations might withstand judicial scrutiny more often in the future.

FAIR ARGUMENT

The "fair argument" standard was first articulated by the California Supreme Court in *No Oil, Inc. v. City of Los Angeles*.[6] There, the city had adopted an ordinance establishing three oil drilling districts in Pacific Palisades without first preparing an EIR. After the ordinance had passed, the city attempted to comply with CEQA through a negative declaration, adopted post hoc. On appeal, the lead agency argued that courts should apply greater deference to an agency's factual determinations as to whether a particular impact is "significant." A proposed project, the agency argued, must have an "important" or "momentous" effect on the environment of a "permanent or long enduring nature" before an agency should be compelled to prepare an EIR.[7] Recognizing that such a standard would set a very high bar for would-be petitioners, the supreme court rejected the city's proposed standard and held that "[CEQA] requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may

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[4] *See Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155; *Citizens For Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327 (key sections of mitigated negative declaration for remodel of Target store upheld); *see also South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604 (mitigated negative declaration for wastewater treatment plant upheld); *but see Consolidated Irrigation District v. City of Selma* (2012) 204 Cal.App.4th 187 (in the only published section of the opinion applying the fair argument standard, the court held that the credibility of evidence must have been addressed by the agency during the administrative process); *Center For Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156 (negative declaration for oak woodland management plan and fee program did not comply with CEQA where plan allowed oak woodlands to be cleared from a parcel in return for payment of a fee and the effectiveness of the program was deferred).

[5] This paper has not attempted to review the line of fair argument cases addressing the application of CEQA's exemptions rather than negative declarations. *See, e.g.*, *Berkeley Hillside Preservation v. City of Berkeley* (2012) 203 Cal.App.4th 656 (applying the fair argument standard to the city's exemption determination).

[6] *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75.

[7] *Id.*

have significant environmental impact."[8] The level of scrutiny applied to agency decisions involving negative declarations changed forever.

The fair argument standard has since been embellished and repeated in the statute, guidelines, and case decisions. Under the fair argument standard, "a public agency must prepare an EIR whenever substantial evidence supports a fair argument that a proposed project 'may have a significant effect on the environment.'"[9] "Substantial evidence," in turn, means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."[10] Substantial evidence "includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."[11] Whether a fair argument exists is a question of law reviewed by the courts without deference to the lead agency's determination, and doubts are resolved in favor of environmental review.[12] "[I]f substantial evidence supports the existence of a fair argument, the existence of contrary evidence does not excuse a lead agency from its duty to prepare an EIR."[13]

While honest conflicts in expert opinion are to be resolved in favor of environmental review, there are a number of important principles that apply to evaluating the weight and quality of that evidence:

- First, it is the petitioner who bears the burden of proof in the first instance to demonstrate, by citation to the record, the existence of substantial evidence supporting a fair argument of significant environmental impact.[14]

- Second, substantial evidence does not include argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous.[15]

- Third, substantial evidence does not include mere opinions or generalized concerns.[16]

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[8] *Id.*

[9] *Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1123 (citations omitted); *see also* Pub. Res. Code §§ 21080(d), 21082.2(d); *CEQA Guidelines* §§ 15064(a)(1), (f)(1). A project may have a significant effect on the environment whenever there is a reasonable possibility that a significant effect will occur. *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 172.

[10] *CEQA Guidelines* § 15384(a).

[11] Pub. Res. Code §§ 21080(e)(1), 21082.2(c); *CEQA Guidelines* § 15064(f)(5).

[12] *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928, 930 (citations omitted).

[13] *Id.*, at 930-931; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (if there is substantial evidence of a fair argument, contrary evidence is not sufficient to support a decision to dispense with an EIR).

[14] *League for Protection of Oakland's Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904; Pub. Res. Code § 21080(c)(2).

[15] Pub. Res. Code §§ 21080(e)(2), 21082.2(c); *CEQA Guidelines* § 15064(f)(5).

- Fourth, substantial evidence does not include "an expert's opinion which says nothing more than 'it is reasonable to assume' that something 'potentially . . . may occur.'"[17]

Further, the existence of "[c]onflicting assertions" does not "ipso facto give rise to substantial 'fair argument' evidence."[18] Indeed, there are a number of circumstances where it is appropriate for the lead agency to reject or disregard seemingly contradictory evidence:

- First, the lead agency may reject expert opinion if it amounts to conjecture or speculation.[19]

- Second, the lead agency may reject expert or lay opinion if the opinion "lacks credibility."[20]

- Third, the lead agency may reject certain evidence if other evidence in the record undermines its "evidentiary value."[21]

Lastly, apart from assessing the quality of the evidence, courts can also defer to lead agencies in identifying and applying an appropriate threshold of significance.[22] In adopting formal thresholds of significance under the state guidelines, lead agencies may consider thresholds "previously adopted or recommended by other public agencies or recommended experts. . . ."[23] Lead agencies are also "encouraged to develop and publish thresholds of significance," but they are not mandated to do so.[24]

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[16] *Lucas Valley Homeowners Ass'n v. County of Marin* (1991) 233 Cal.App.3d 130, 163-164.

[17] *Apartment Association of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1176.

[18] *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 755, 757 (speculation without "hard fact" is not evidence).

[19] *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 581-583.

[20] *Id.,* at 581-583; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 151; *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 282; *but see Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187 (credibility cannot be assessed pos hoc; questions of credibility must be legitimate and "actually addressed" by the agency during the administrative process).

[21] Kostka & Zischke, *Practice Under the California Environmental Quality Act* (2012 Update) § 6.76, at 381.

[22] *Citizens For Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 335-336 (applying lead agency's threshold for greenhouse gas emissions); *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492–493; *see also CEQA Guidelines* § 15064(b).

[23] *CEQA Guidelines* § 15064.7(c).

[24] *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 896-897.

A NEW CHAPTER

This past year has seen two important case decisions applying the fair argument standard in a manner that may prove useful in future cases.

Save the Plastic Bag Coalition v. City of Manhattan Beach

In its first critical review of evidence under the fair argument standard in forty years, the California Supreme Court last year ruled in favor of the City of Manhattan Beach and upheld a citywide ban on distribution of plastic grocery bags at the point of sale.[25] The city imposed the ban to limit the number of plastic bags making their way into the ocean and marine environment.

During the administrative process to consider the initial study and proposed ban, an industry coalition of plastic bag manufacturers and distributors objected, arguing that the ban would increase the use of paper bags and lead to adverse environmental consequences. The city in its initial study acknowledged that the shift from plastic to paper bags would have some adverse environmental consequences (e.g., increases in energy and wastewater in the manufacturing process). The study concluded, however, that the impacts of the ban would be less than significant due to the small size of the city, the limited retail sector, the relative capacity of paper bags, and the propensity of customers to shift to reusable grocery bags, among other factors.

The industry coalition submitted, and the city considered, a number of life cycle studies comparing the environmental consequences of the use of paper versus plastic bags. Several of the studies concluded that the life cycle of paper bags, including their manufacture, transport, and disposal, generally results in greater adverse environmental consequences than the life cycle of plastic bags. A comparative analysis of several life cycle studies prepared by the South African Department of Trade and Industry explained, however, that "varying assumptions were employed from study to study, and that 'differing results from the [studies] could be selectively used to lend support to proponents of either plastic or paper bags.'"[26]

The industry coalition contended, and the trial and appeals courts below agreed, that the life cycle studies presented a reasonable possibility—i.e., enough relevant information to create a reasonable inference—that the ban would increase environmental damage, requiring the preparation of a full EIR. Specifically, the courts below concluded that the plastic bag ban was likely to lead to increased use of paper bags and cause "relatively greater negative environmental effects including 'greater nonrenewable energy and water consumption, greenhouse gas emissions, solid waste production, and acid rain.'"[27]

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[25] *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155.

[26] *Id.*, at 162.

[27] *Id.*, at 171-172.

The California Supreme Court disagreed and, despite the apparent conflicts in the evidence, the Court evaluated the quality and scale of the evidence and found it lacking:

> While some increase in the use of paper bags is foreseeable, and the production and disposal of paper products is generally associated with a variety of negative environmental impacts, no evidence suggests that paper bag use *by Manhattan Beach consumers* in the wake of a plastic bag ban would contribute to those impacts in any significant way.[28]

While life cycle studies may provide a "useful guide" for decisionmakers, the court noted, those studies "must be kept in proper perspective and not allowed to swamp the evaluation of actual impacts attributable to the project at hand."[29] Instead, the court viewed the "actual scale" of the impacts arising form the Manhattan Beach ban, as well as the difficulty in predicting the ban's impact on areas outside of Manhattan Beach, as important factors in deflating the overall importance of the life cycle studies.[30]

Finally, the court made it clear that lead agencies need not abandon "common sense" in evaluating the significance of a particular project under the fair argument standard.[31]

Citizens for Responsible Equitable Environmental Development v. City of Chula Vista

In a decision issued just days before the California Supreme Court's decision in *Save the Plastic Bag Coalition*, the Fourth Appellate District upheld key elements of a mitigated negative declaration for a project to replace a Target retail store, smog check facility, and small market with a new, larger Target store.[32] During the administrative proceedings, Citizens for Responsible Equitable Environmental Development ("CREED") objected to the project and submitted a letter and thousands of pages of materials on climate changes and other issues. CREED thereafter filed a petition alleging numerous potentially significant impacts warranting treatment in a full EIR, including in the areas of hazards, air quality, and greenhouse gas emissions.

Based on inferences drawn from the negative declaration itself, CREED had argued that environmental contamination from a prior gas station use created environmental contamination beneath the site that had polluted both groundwater *and* soils. The city countered that an existing corrective action plan had been approved by the county health department and the regional water quality control board to ensure that the site was remediated before the new project commenced,

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[28] *Id.,* at 175 (emphasis added).

[29] *Id.*

[30] *Id.*, at 172-173.

[31] *Id.*, at 175.

[32] *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327.

and that the remediation activities involved contaminated groundwater—not soils—which would be unaffected by project grading activities. But while the city had asserted that the project was conditioned on compliance with the corrective action plan, it did not include the plan in the administrative record.

Had the corrective action plan been available, it could have served as evidence to show how CREED's assertions about contaminated soils were erroneous. Absent that evidence, however, the court felt compelled to conclude that the negative declaration's discussion of groundwater contamination presented "enough relevant information and reasonable inferences . . . to support a conclusion" that "pollutants leaking from underground storage tanks contaminated the soil underneath the Project site before reaching the groundwater."[33] But instead of ordering the city to prepare a full EIR, the appellate court took the unusual step of remanding the issue back to the trial court for a review of the corrective action plan.[34]

The remaining sections of the mitigated negative declaration survived review, and for differing reasons. CREED argued that the analysis of hazardous air contaminants failed to identify four schools within the vicinity of the project site—so-called "sensitive receptors"—and thus failed to show whether measures to address the impacts to those receptors would be effective. The court found that the Air Quality Assessment prepared for the project adequately addressed the project's potential health risks associated with hazardous air quality contaminants. Of note, CREED had failed to present any evidence in the record to the contrary.[35] Similarly, the court found that notwithstanding the fact that the region was in non-attainment of federal air quality standards for ozone and particulate matter, the Air Quality Assessment properly concluded that there would be no significant cumulative air quality impact. Again, CREED had failed to present any evidence to the contrary.[36]

Finally, the Air Quality Assessment prepared for the project had acknowledged that it would generate new greenhouse gas emissions from a variety of sources, and that such emissions would contribute incrementally to global climate change. Much like the circumstances in *Save the Plastic Bag Coalition*, CREED submitted voluminous materials and generic studies of climate change. Instead of producing evidence that the project's emissions might be greater than projected, however, CREED took issue with the threshold of significance applied by the city.

The city derived its significance threshold by asking whether the project would "[c]onflict with or obstruct the goals or strategies of the California Global Warming Solutions Act of 2006 (AB 32) or its governing regulation."[37] In so doing, the city applied what is commonly referred to as the "business as usual" approach, which compares the projected emissions of the proposed

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[33] *Id.,* at 332.

[34] *Id.*

[35] *Id.*, at 333.

[36] *Id.*

[37] *Id.*, at 335.

project against emissions levels anticipated if the project were to operate in accord with business as usual (e.g., without any energy or emissions savings technology). And if the project can achieve reductions in emissions that are anticipated to exceed the targets set by AB 32—1990 levels by 2020—then the project's emissions are presumed to be less than significant.

In its materials and in briefs, CREED presented several competing thresholds, claiming that the city's thresholds were unsubstantiated and that the project's emissions were potentially significant under the alternative thresholds presented. As a consequence, CREED argued, the court could infer that the project might present a significant impact necessitating a full EIR. Under the state guidelines governing greenhouse gas emissions, which were in draft form when the case was pending, a lead agency has the discretion to "select the model or methodology it considers most appropriate provided it supports its decision with substantial evidence."[38] And even though the city had approved the new Target store when the state guidelines were still in draft, the significance threshold applied by the city considered the project's emissions under the only statewide regulation of greenhouse gases at the time. It was therefore reasonable for the city to develop and apply numeric thresholds that it found would help achieve the goals set forth in AB 32. The court ultimately rejected the challenge, and its opinion withstood numerous requests to depublish and petitions to review to the California Supreme Court.

CONCLUSIONS

Save the Plastic Bag Coalition and *CREED* do not represent a sea change in how the courts will view the evidence under the fair argument standard. Nevertheless, these decisions do provide some hope that the relative and comparative qualities of the evidence presented in negative declaration cases will receive some added scrutiny. Certainly, these decisions echo some of the themes in earlier cases that may be useful to public lead agencies in the administrative process and in litigation:

- Generalized studies that identify environmental harms may not compel full environmental review. Instead, lead agencies can consider the setting and scale, as well as other evidence when putting those generalized studies into context.

- The initial study and negative declaration can serve to create unintended inferences. Ensure that the issues are adequately explained, and that clarifying evidence is included in the record.

- View the underpinnings of any supposed facts or opinion with skepticism. Where appropriate, add or point to evidence that can demonstrate a lack of foundation or other basis for the seemingly contradictory evidence.

- When certain evidence appears to lack credibility, address that lack of credibility during the administrative proceeding so as to preserve the issue for trial.

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[38] *CEQA Guidelines* § 15064.4.

- Prepare an EIR when the circumstances warrant the added level of review (and deference to the agency).

While there is no safe harbor protecting negative declarations from adverse rulings, practitioners have the opportunity to build a more complete record and present arguments at trial that will help restore some ability for public agency clients to rely on negative declarations without experiencing abject panic. And as the California Supreme Court recently emphasized, "[c]ommon sense . . . is an important consideration at all levels of CEQA review."[39]

[39] *Save the Plastic Bag Coalition*, supra, 52 Cal.4th at 175.

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