

Should CEQA Require Local Governments to Analyze the Impacts of Development Displaced by Restrictive Land Use Planning?

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*In order to prevent the avoidable environmental degradation that often accompanies new development, the California Environmental Quality Act (CEQA) requires state and local decision makers to consider the potential environmental impacts of their discretionary approvals, even when they are voting on entitlements for purely private development projects. Virtually any proposed development in most California cities can add to local traffic congestion and air pollution, and for this reason, can be rejected under CEQA. Because of California's staggering population growth, projects rejected at one location are likely to find their way to another site. Does CEQA demand that before voting to approve, reject, or reduce the density of a project, a local government entity consider the environmental impacts at the site where the displaced development is likely to arise? Two recently decided appellate court cases reached opposite answers to this question. After examining *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* and *Wal-Mart Stores, Inc. v. City of Turlock*, this Article concludes that local governments should evaluate the environmental consequences of a project at both the proposed project location and at the likely displaced location (if the project is denied). Regrettably, this added requirement joins an already extensive list of topics covered in California's environmental review process, and could provide yet another basis for courts to set aside local government decisions. Yet, local government officials disregarding the consequences of displaced development risk*

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reducing the density or rejecting a proposed development that is more environmentally benign than the likely alternatives.

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INTRODUCTION

When a local government entity enacts land use controls, it often reduces the overall supply of available land by restricting the density of permissible development within its boundaries. Constricting the supply of land through regulation doesn’t directly reduce the demand for new commercial and residential development within the market area.¹ Development zoned out of one site, and subsequently built at another location in the same market area, is known as “displaced development.” Displaced development merits environmental assessment because without proper analysis it could occur in an area even more environmentally sensitive than the site originally proposed. The California Environmental Quality Act (CEQA)² requires an

1. Stringent zoning throughout a state or region can lead to increased housing prices, reducing demand. Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* (Nat’l Bureau of Econ. Research, Working Paper No. 8835, 2002), available at <http://www.nber.org/papers/w8835>.

2. CAL. PUB. RES. CODE §§ 21000–21177 (West 2006). See generally John D. Landis et al., *Fixing CEQA: Options and Opportunities for Reforming the California Environmental Quality Act*, at 1 (Cal. Policy Seminar, 1995), available at <http://www.ucop.edu/cprc/ceqa.html> (“The California Environmental Quality Act is one of California’s most cherished institutions—as well as one of its most controversial. On its face, CEQA would seem to be a relatively unobtrusive law. It *does not* directly limit development (as does the California Coastal Act) or mandate environmental cleanup (as do the Federal Clean Air and Water Acts). It *does* require that a

Environmental Impact Report (EIR) to be completed for all discretionary public projects that might affect the physical environment. EIRs provide “public agencies and the public in general with detailed information about the effect that a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”³ This Article evaluates whether CEQA requires a local government entity to take into account the potential environmental impacts of displaced development at the time it decides whether to approve or reject the project proposed at the developer’s preferred site, or when it enacts land use policies that limit growth.

Two California appellate courts recently reached conflicting conclusions in *Muzzy Ranch Co. v. Solano County Airport Land Use Commission*⁴ (*Muzzy Ranch*) and *Wal-Mart Stores, Inc. v. City of Turlock*⁵ (*Turlock*). In both cases, private firms sued government entities for not complying with CEQA in the enactment of measures that frustrated the firms’ development aspirations. Both petitioners asserted that the agency needed to evaluate displaced development; the *Muzzy Ranch* court agreed and the *Turlock* court did not. The California Supreme Court granted review in *Muzzy Ranch* over a year ago⁶ and recently denied a petition for review in *Turlock*.⁷ This Article details CEQA’s key provisions, describes these two recent conflicting court opinions, and discusses considerations that should inform the ultimate resolution of the CEQA issues raised by these cases.

I. CEQA AND LOCAL LAND USE PLANNING DECISIONS

A. *Types of Decisions to Which CEQA Applies: The Ministerial/Discretionary Distinction*

Shortly after CEQA’s enactment, the California Supreme Court heard a landmark case, *Friends of Mammoth v. Board of Supervisors of Mono County*,⁸ in which the court held that although the statute at the

development proposal be accompanied by an analysis listing its environmental impacts and that, where feasible, those impacts be mitigated.”).

3. CAL. PUB. RES. CODE § 21061.

4. 23 Cal. Rptr. 3d 60 (Ct. App.), *as modified upon denial of reh’g*, No. A104955, 2005 Cal. App. LEXIS 189 (Ct. App. Feb. 4, 2005), *review granted and depublished by* 110 P.3d 289 (Cal. 2005).

5. 41 Cal. Rptr. 3d 420 (Ct. App.), *review denied*, No. S143488, 2006 Cal. LEXIS 8623 (July 12, 2006).

6. 110 P.3d 289 (Cal. 2005).

7. *Wal-Mart Stores, Inc. v. City of Turlock*, No. S143488, 2006 Cal. LEXIS 8623 (July 12, 2006).

8. 502 P.2d 1049 (Cal. 1972).

time did not define the term “project,” CEQA should be applied to government regulation of private activities, not just to public works.⁹ Prior to this case, confusion reigned about whether CEQA applied only to government-sponsored actions and projects, or to all discretionary government decisions, including the issuance of permits for private development.¹⁰

A California court described very well the rationale for requiring CEQA analysis for all discretionary decisions:

The touchstone is whether the approval process involved allows the government to shape the project in any way which could respond to any of the concerns which might be identified in an environmental impact report. And when is government foreclosed from influencing the shape of the project? Only when a private party can legally compel approval without any changes in the design of its project which might alleviate adverse environmental consequences.¹¹

Today, new development in California is subject to a variety of discretionary land use controls that would trigger an environmental assessment under CEQA, including zoning and the approval of new subdivision maps. California law requires each local government to enact a general plan.¹² To be approved, all zone changes¹³ or new subdivision maps¹⁴ must be consistent with that plan. A general plan must include segments or elements addressing certain topics, such as transportation, housing, and land use.¹⁵ The local government may include other elements in the local general plan as long as they relate to the physical development of the community.¹⁶ Local legislative bodies also approve redevelopment plans¹⁷ and all development agreements between local governments and private developers.¹⁸ Every one of these local land use

9. *Id.* at 1054–55. California Public Resources Code section 21000(g) provides:

It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage

10. Landis et al., *Fixing CEQA*, *supra* note 2, at xvi.

11. *Friends of Westwood, Inc. v. City of Los Angeles*, 235 Cal. Rptr. 788, 793 (Ct. App. 1987).

12. CAL. GOV'T CODE § 65300 (West 2006).

13. *Id.* § 65860; HARRY D. MILLER & ARTHUR F. COON, 9 CALIFORNIA REAL ESTATE § 25:179 (3d ed. 2001) (“A charter city is required to have a general plan, but the general plan/zoning consistency requirement does not apply to a charter city, except a charter city with a population in excess of two million, unless the city elects to require consistency by a charter provision or ordinance.”).

14. CAL. GOV'T CODE § 66473.5.

15. *Id.* § 65302.

16. *Id.* § 65303.

17. *See* CAL. PUB. RES. CODE §§ 21063, 21090 (West 2006).

18. A development agreement is a contract between a local government and a private developer assuring the developer of the vested right to complete its project subject to the rules in

decisions is potentially subject to the provisions of CEQA because government officials are empowered with broad discretion in making land use decisions.¹⁹

All government decisions can be characterized as being either discretionary or ministerial. CEQA categorically exempts ministerial decisions by local government entities from its purview.²⁰ For CEQA purposes, a ministerial decision is one that requires the decision maker to apply detailed prescriptive standards to particular cases, petitions, or permit applications with limited ability to change the outcome based on factors outside the scope of consideration. An example of a discretionary decision is a local entity's decision to approve a requested tentative subdivision tract map with conditions the applicant must satisfy before recording the map in the county land records. Whether the applicant has met those conditions and become entitled to record a final subdivision map, is a ministerial decision, one usually delegated to a county or city administrative officer.²¹

When a proposed development is already consistent with all existing land use controls and requires no subdivision approval, the developer can begin work by obtaining a building permit.²² While the enactment of a building code could affect the physical environment, for instance by allowing or prohibiting the use of energy efficient materials, CEQA applies to the issuance of a particular building permit only if the local building code ordinance delegates meaningful discretion to building permit officials. Many building codes don't provide leeway for building code officials to do more than match proposed architectural drawings against the specific health and safety standards embodied in the building

effect on the effective date of the agreement. Development agreements are "projects" subject to CEQA. *See* *Citizens for Responsible Gov't v. City of Albany*, 66 Cal. Rptr. 2d 102, 110 (Ct. App. 1997).

19. *See* CAL. CODE REGS. tit. 14, § 15040 (2006) ("(a) CEQA is intended to be used in conjunction with discretionary powers granted to public agencies by other laws. (b) CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws."); *id.* § 15125(d) ("The EIR shall discuss any inconsistencies between the proposed project and applicable general plans and regional plans.").

20. CAL. PUB. RES. CODE § 21080(b) ("This division does not apply to . . . [m]inisterial projects proposed to be carried out or approved by public agencies . . .").

21. *See* CAL. CODE REGS. tit. 14, § 15268(a).

22. *See, e.g., Banker's Hill, Hillcrest, Park West Cmty. Pres. Group v. City of San Diego*, 42 Cal. Rptr. 3d 537 (Ct. App. 2006). This fourteen-story infill project, a fourteen-unit apartment house, would have qualified for the ministerial exemption because it was consistent with zoning and the general plan. But local officials weren't sure whether the developer planned to sell the units as condominiums or hold them as rental units. To market ownership of individual units, the developer would have needed an approved subdivision map, and the act of granting or denying subdivision maps is discretionary. *Id.* at 541 n.5.

code, and therefore, the approval of building permits often does not trigger CEQA.²³

B. Which “Projects” Require EIRs?

The first step in a local government’s environmental assessment is to make an administrative determination of whether a project is subject to CEQA at all.²⁴ An EIR is not mandated for every project. “Project” is a statutory term of art. By definition, an activity is a project if it has any potential to cause a “significant effect on the environment,”²⁵ either direct or indirect. For example, the enactment of a city or county zoning ordinance is a discretionary action that may be considered a project under CEQA.²⁶

Some projects are exempt under either specific statutes, or as categorical exemptions under the CEQA guidelines, which are administrative regulations promulgated to fulfill the objectives of the statute.²⁷ Three categorical exemptions are important for the purposes of this Article. A project is exempt from CEQA “[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.”²⁸ This is sometimes referred to as “the common sense exemption.” Its application is rigorously circumscribed. If a reasonable argument can be made to suggest a possibility that a project will cause a significant environmental impact, “the agency must refute that claim *to a certainty* before finding that the [common sense] exemption applies.”²⁹

A third exemption, at issue in *Turlock*, allows streamlined environmental review for projects that “are consistent with the development density established by existing . . . general plan policies for which an EIR was certified.”³⁰ The environmental review for the project is “tiered” to the EIR produced for the general plan. Under this

23. See, e.g., *Friends of Westwood, Inc. v. City of Los Angeles*, 235 Cal. Rptr. 788, 800 (Ct. App. 1987).

24. Landis et al., *Fixing CEQA*, *supra* note 2, at xvi (“Fearing legal challenge, most localities exclude only those types of projects specifically identified in the statutes as being exempt from CEQA review.”).

25. See CAL. CODE REGS. tit. 14, § 15061(b)(3) (2006) (defining “project”).

26. See CAL. PUB. RES. CODE § 21080(a) (West 2006) (“Except as otherwise provided in this division, this division shall apply to discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances . . .”).

27. CAL. CODE REGS. tit. 14, § 15061. For a list of categorical exemptions, see 12 WITKIN, SUMMARY OF CALIFORNIA LAW § 837, at 1001 (10th ed. 2006).

28. CAL. CODE REGS. tit. 14, § 15061(b)(3).

29. *Davidon Homes v. City of San Jose*, 62 Cal. Rptr. 2d 612, 619 (Ct. App. 1997).

30. CAL. CODE REGS. tit. 14, § 15183.

streamlined review, only “project-specific significant effects which are peculiar to the project or its site” must be evaluated.³¹

Another exemption applies to projects “that will be rejected or disapproved by a public agency.”³² Without such an exemption, local governments would have to incur the costs of performing an environmental assessment for every discretionary project, even those with no chance whatsoever of being approved. This exemption is intended to prevent local governments from squandering resources on CEQA analyses of projects certain not to occur. An unintended consequence is that it implicitly ratifies the misconception that the rejection of a development proposal never has adverse environmental effects. This exemption furthers CEQA’s no-growth bias, as discussed in more detail in Part III.

For activities that are not exempt, an initial study is needed to assess whether an EIR should be prepared.³³ An EIR is needed if substantial evidence supports a claim that “any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment”—even if, overall, the project is environmentally benign.³⁴ Notably, the legal standard for determining whether a project’s potential impacts justify requiring the proponent to prepare a full EIR is not that the project “would” or “would probably” cause a significant effect, only that it “may” cause that effect. Anyone seriously considering a lawsuit to halt a project that the local government has approved without the benefit of a full EIR will take comfort from this challenger-friendly standard.

Local governments enjoy considerable discretion in how they conduct initial studies of impacts a proposed project could unleash. This involves formulating a list of the types of impacts that merit evaluation and setting standards for judging threshold levels of environmental significance for each type of impact. With so much local discretion, standards vary from one jurisdiction to the next, and even within the same jurisdiction from one project to the next.³⁵

Ultimately, though, all local governments are bound by CEQA’s mandates, and subject to legal challenge for attempting to shirk them. California courts have interpreted CEQA in a way that denies local governments that decide not to prepare an EIR the benefit of the doubt

31. *Id.*

32. *Id.* § 15061(b)(4).

33. CAL. PUB. RES. CODE § 21080.1(a) (West 2006) (“The lead agency shall be responsible for determining whether an environmental impact report, a negative declaration, or a mitigated negative declaration shall be required for any project which is subject to this division.”).

34. CAL. CODE REGS. tit. 14, §§ 15002(k), 15063(b)(2).

35. *See, e.g.,* Elisa Barbour & Michael Teitz, *CEQA Reform: Issues and Options*, at 15 (Public Policy Institute of California, April 6, 2005) (“Project applicants face inconsistent requirements not just across jurisdictions but also for different projects within the same jurisdiction.”).

usually accorded to legislative acts challenged in mandamus actions. Challengers will succeed in compelling the lead agency to prepare an EIR if they can advance a “fair argument” based on substantial evidence that a project may cause a significant environmental effect.³⁶

Once a draft EIR is ready, has been circulated for public comment, and the lead agency³⁷ has responded to the comments,³⁸ the legislative body certifies the EIR as complete.³⁹ If the lead agency determines that the project will not cause significant environmental effects, it issues a negative declaration or mitigated negative declaration.⁴⁰ A negative declaration (commonly referred to as a “neg dec”) states that a project threatens no significant environmental effects. Initial studies are twenty times more likely to lead to negative declarations or mitigated negative declarations than to the preparation of full EIRs.⁴¹ Most developers

36. *Sierra Club v. County of Sonoma*, 8 Cal. Rptr. 2d 473, 478 (Ct. App. 1992). The court explained:

The “fair argument” test is derived from section 21151 [Cal. Pub. Res. Code], which requires an EIR on any project which “may have a significant effect on the environment.” That section mandates preparation of an EIR in the first instance “whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.” If there is substantial evidence of such impact, contrary evidence is not adequate to support a decision to dispense with an EIR. Section 21151 creates a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted. For example, if there is a disagreement among experts over the significance of an effect, the agency is to treat the effect as significant and prepare an EIR.

(internal citations omitted).

37. CAL. PUB. RES. CODE § 21067 (West 2006) (“Lead agency’ means the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment.”); CAL. CODE REGS. tit. 14, § 15051(b) (“If the project is to be carried out by a nongovernmental person or entity, the lead agency shall be the public agency with the greatest responsibility for supervising or approving the project as a whole.”). For zoning, planning and subdivision map act approvals, the lead agency is the local government vested under state law with the authority to grant or deny such actions.

38. CAL. CODE REGS. tit. 14, § 15088(a) (“The lead agency shall evaluate comments on environmental issues received from persons who reviewed the draft EIR and shall prepare a written response. The lead agency shall respond to comments received during the noticed comment period and any extensions and may respond to late comments.”).

39. CAL. PUB. RES. CODE § 21151.

40. *Id.* § 21064; *see also* 50 CAL. JUR. 3D *Pollution and Conservation Laws* § 507 (2006) defining:

[a] negative declaration [as] a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report. A ‘mitigated negative declaration’ is one that includes mitigation measures to avoid potentially significant environmental effects.

41. Landis et al., *Fixing CEQA*, *supra* note 2, at 6 (“The ratio of negative declarations to EIRs among California local governments in 1990 was about 20 to 1.”). Accord Legislative Analyst’s Office, *CEQA: Making It Work Better*, Mar. 20, 1997, at 7, available at http://www.lao.ca.gov/1997/032097_ceqa/ceqa_397.html (“Recent research surveys show that of the 35,000 to 40,000 projects that are subject to the CEQA process annually, up to 2,000 require

prefer negative declarations for their speed and modest cost. EIRs can cost tens and even hundreds of thousands of dollars, with preparation times running from six months to several years, depending on the complexity of the project and the determination and resources of the project's opponents.⁴²

Government officials can approve projects with significant negative impacts so long as they impose conditions on the project to mitigate adverse impacts to the extent feasible.⁴³ Additionally, CEQA allows the lead agency to approve a project despite unmitigated impacts by adopting a Statement of Overriding Considerations, which is a declaration identifying specific social or economic factors that justify the failure to mitigate the negative environmental consequences.⁴⁴

CEQA compliance is enforced through citizen-initiated lawsuits; there is no state administrative oversight.⁴⁵ If a litigant succeeds in convincing a court that a local government approved a project without proper CEQA compliance, the opponent has not necessarily succeeded in blocking the project permanently. Generally, courts remand such cases back to the local government for a new environmental assessment. Unless political conditions have changed, the project may well be approved following an adequate CEQA analysis, though the project might be modified with feasible mitigation measures. Challengers hope that delaying a project will ultimately lead to its being abandoned or substantially revised. They anticipate that even developers well capitalized enough to absorb the costs of litigation and the added burdens

an EIR."); Barbour & Teitz, *supra* note 35, at 13 (comparing 1990 with 1998 data and finding that the ratio of negative declarations to EIRs had fallen in those eight years among cities from 17:1 to 15:1, and among counties from 21:1 to 17:1).

42. The most recent reported study of the cost of EIRs, released in 1990, revealed that ten percent of EIRs cost more than \$125,000. Barbour & Teitz, *supra* note 35, at 12.

43. CAL. PUB. RES. CODE § 21002 (West 2006) provides guidance for agencies:

The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. The Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof.

44. *Id.* § 21081(b) ("With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.").

45. Barbour & Teitz, *supra* note 35, at 14.

of holding the land pending the outcome of the lawsuit may find that the project is no longer feasible due to changed market conditions.

II. THREE KEY FEATURES OF AN EIR

By statute, EIRs incorporate certain features against which the *Muzzy Ranch* and *Turlock* cases play out: (1) Alternatives Analysis, (2) Cumulative Impacts, and (3) Growth-Inducing Impacts.

A. Alternatives Analysis

CEQA requires the lead agency to consider a range of alternatives to the proposed project in search of environmentally superior choices that are feasible in the sense that they would fulfill most of the proposed project's objectives.⁴⁶ Among the alternatives is the possibility of the project not being built at all, or the contemplated ordinance not being passed. This is called the no-project alternative.⁴⁷ Potentially, the no-project alternative embodies a no-growth bias that could benefit project opponents. But the CEQA Guidelines caution EIR preparers to resist the assumption that a presently undeveloped site is likely to remain forever unbuilt and in pristine condition. Rather, they are expected to describe the reasonably foreseeable future of the project site, and not hypothesize "a set of artificial assumptions that would be required to preserve the existing physical environment."⁴⁸

As this guideline is worded, though, the focus is on the site directly affected by the policy or proposal under review, and not on the sites to which such activity might migrate if blocked at the subject property.

46. CAL. CODE REGS. tit. 14, § 15126.6(a) (2006) entitled "Consideration and Discussion of Alternatives to the Proposed Project: Alternatives to the Proposed Project" states that:

An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason. (internal citations omitted).

47. *Id.* § 15126.6(e)(1) ("The specific alternative of 'no project' shall also be evaluated along with its impact. The purpose of describing and analyzing a no project alternative is to allow decisionmakers to compare the impacts of approving the proposed project with the impacts of not approving the proposed project.").

48. *Id.* § 15126.6(e)(3)(B).

B. *Cumulative Impacts of an Approved Project*

CEQA guidelines clearly require an assessment of the cumulative impacts of a project, and those impacts include “all related past, present, and reasonably foreseeable future projects” that the project under review is likely to spawn.⁴⁹ The rationale for studying cumulative impacts has been well formulated:

One of the most important environmental lessons evident from past experience is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant, assuming threatening dimensions only when considered in light of the other sources with which they interact. Perhaps the best example is air pollution, where thousands of relatively small sources of pollution cause a serious environmental health problem.

CEQA has responded to this problem of incremental environmental degradation by requiring analysis of cumulative impacts.⁵⁰

CEQA sets no geographic limits or jurisdictional boundaries upon the environmental impacts that decision makers are to consider.⁵¹ For this reason, CEQA is sometimes the best remedy available to a local government to temporarily block rival towns from approving projects without considering their noxious impacts outside the town’s boundaries.⁵² For instance, an appellate court rebuked the city of Hanford for approving a coal-fired cogeneration plant without adequately assessing the air and water quality implications of transporting and processing coal.⁵³ To fulfill this obligation, the city would need to consider the air quality impacts within the entire Kings County Air Pollution Control District, and the potential of the plant to use far more than its fair share of the limited supply of groundwater drawn from the 700 square mile Tulare Lake Basin, only ten square miles of which are located within the boundaries of the city of Hanford.⁵⁴

49. See Legislative Analyst’s Office, *CEQA: Making It Work Better*, *supra* note 41, at 10.

50. Daniel P. Selmi, *The Judicial Development of the California Environmental Quality Act*, 18 U.C. DAVIS L. REV. 197, 244 (1984–1985).

51. The notion that an environmental assessment is not limited to the jurisdiction’s or agency’s boundaries was established by case law early in the history of the National Environmental Policy Act. See, e.g., *Sierra Club v. Lynn*, 502 F.2d 43 (5th Cir. 1974).

52. See Shelley Ross Saxer, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659, 668–69 (1997) (describing use of CEQA by cities to halt unwanted development approved in neighboring towns).

53. *Kings County Farm Bureau v. City of Hanford*, 270 Cal. Rptr. 650, 654, 665 (Cal. Ct. App. 1990).

54. *Id.*

C. Growth-Inducing Impacts

CEQA requires EIRs to address the growth-inducing impacts likely to follow in the wake of an approved project.⁵⁵ To glimpse what it means for a lead agency to take account of growth-inducing impacts, consider *City of Antioch v. City Council*.⁵⁶ In that case, a private developer sought approval from the city of Pittsburg, California to permit construction of a roadway 6,400 feet long, and eighty-four feet wide (enough space for up to eight lanes of traffic), and to certify establishment of a community facilities district to finance the work.⁵⁷ It wasn't enough under CEQA for the city to study only the direct consequences of building the road. The court required the city to assess the environmental impacts of the development that could be anticipated to follow upon completion of the roadway, admonishing that “[c]onstruction of the roadway and utilities cannot be considered in isolation from the development it presages.”⁵⁸

The city of Pittsburg contended that such an inquiry involved pure speculation and should be deferred, in the interest of efficiency, until after the city had received a completed application for a specific development.⁵⁹ The court disagreed because it concluded that “the sole reason to construct the road and sewer project is to provide a catalyst for further development in the immediate area.”⁶⁰ A private developer wouldn't normally incur the costs of building a new road unless it was confident of the development potential of the adjacent area. CEQA calls for conducting environmental assessments “at the earliest possible time,” to identify the potential significant effects of a project before it becomes too late to evaluate alternatives and fashion mitigation measures that would reduce any adverse effects.⁶¹

55. CAL. CODE REGS. tit. 14, § 15126.2(d) (2006) entitled “Growth-Inducing Impact of the Proposed Project” requires that the EIR:

Discuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. Included in this are projects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects. Also discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment.

56. 232 Cal. Rptr. 507 (Ct. App. 1986).

57. *Id.* at 508.

58. *Id.* at 513.

59. *Id.* at 511.

60. *Id.* at 514.

61. CAL. PUB. RES. CODE §§ 21002, 21003.1 (West 2006).

Pittsburg officials welcomed the prospect of new development. But if they had not, and had opposed further growth, it would have illustrated an important anomaly of CEQA. In implementing a no-growth agenda, the city's obligations under CEQA would depend on whether it voted simply to deny the developer a permit to build the road, or changed the zoning to lower permissible densities. The city would not have had to perform a CEQA analysis just to vote "no" on the road permit because CEQA is inapplicable to "[p]rojects which a public agency rejects or disapproves."⁶² Alternately, had the city amended its zoning code to reduce the allowable densities on the properties abutting the proposed road in a preemptive strike against intensive development along the roadway, that down-zoning ordinance would have been subject to CEQA.⁶³

In conclusion, EIRs must address three particular aspects of a project: alternatives, cumulative impacts, and growth-inducing impacts. As discussed below, *Muzzy Ranch* suggests that EIRs must also consider a fourth factor: the impact of development displaced by rejection of a proposed project or by enactment of growth-restrictive policies. Because the California Supreme Court has granted review in *Muzzy Ranch*, the policy implications of requiring displaced development analysis in EIRs merit a closer look.

III. THE CASE FOR AND AGAINST INCLUDING DISPLACED DEVELOPMENT IN EIRS

Adding "displaced development" to the list of factors an EIR should cover could certainly increase the costs of preparing an EIR. Homebuilders and developers usually end up paying the bill for EIRs. To them, the costs of evaluating displaced development may be justified as a counterweight to many other features of an ideal EIR—review of alternatives to the proposed project, cumulative impacts, and growth-inducing consequences—which often yield an exhaustive list of reasons *not* to build a project at a particular location. These analyses fall short of pinpointing or prioritizing where development should be located to accommodate California's rapidly growing population. In contrast, displaced development analysis might show that the development site is more environmentally benign when matched against the locations to which displaced development might migrate.

Disapproving a development project or reducing its density always appears, superficially, to be good for the environment. In the language of the California Building Industry Association, a trade group representing

62. *Id.* § 21080(b)(5).

63. This point was made in the California Building Industry Association's Amicus Curiae Brief in Support of Muzzy Ranch Company at 2–3, *Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n*, 23 Cal. Rptr. 3d 60 (Cal. Ct. App. 2005) (No. S131484).

California homebuilders and subdividers, “decisions designed to restrict or prevent housing development are commonly exempted from CEQA review, on the mistaken and unstudied assumption that such decisions are necessarily environmentally beneficial.”⁶⁴ Researchers at the Public Policy Institute of California faulted the common practice of local officials to mitigate a project’s possible environmental impacts by reducing its density.⁶⁵ Viewed locally, the lowered density might mitigate traffic congestion or loss of open space. But viewed regionally, pushing development to outlying areas might only worsen these problems. Alternatively, the units are simply never built and the mitigation could serve to exacerbate housing shortages.⁶⁶

In its review of *Muzzy Ranch*, the California Supreme Court has an opportunity to reduce the no-growth bias implicit in CEQA. By affirming *Muzzy Ranch* and requiring EIRs to explore the environmental consequences of displaced development, the California Supreme Court could advance CEQA’s essential mission of encouraging legislators to direct development away from environmentally sensitive locations, and encourage mitigation of negative impacts that are feasibly avoidable.

Some observers who see nothing wrong with requiring developers to pay the costs of a displaced development assessment might balk at forcing local governments to absorb the costs of those studies. Usually, the cost of a CEQA analysis is covered by fees the local government levies against private developers as part of the price for filing petitions for zone changes, general plan amendments, subdivision map approvals, conditional use permits, or development agreements.⁶⁷ When environmental review is required for government-initiated zoning or planning changes, such as Turlock’s superstore ban or the Solano County airport land use plan at issue in *Muzzy Ranch*, the local government must cover from its own resources the often daunting costs of an EIR. To save money and conserve staff resources, it is tempting for public agencies to

64. *Id.*

65. Barbour & Teitz, *supra* note 35, at 18.

66. *Id.* at iv. The report provides as an example that:

lowering a residential project’s density might help mitigate traffic congestion or open space problems at the local scale, but when viewed regionally might only compound the problems if development is pushed to outlying areas. If, instead of being displaced, the development fails to occur, then the so-called mitigation may compound housing shortages.

67. CAL. CODE REGS. tit. 14, § 15045(a) (2006) provides:

For a project to be carried out by any person or entity other than the lead agency, the lead agency may charge and collect a reasonable fee from the person or entity proposing the project in order to recover the estimated costs incurred in preparing environmental documents and for procedures necessary to comply with CEQA on the project. Litigation expenses, costs and fees incurred in actions alleging noncompliance with CEQA are not recoverable under this section.

hold themselves to a lower standard of environmental assessment than they impose upon private developers. State law admonishes cities not to do this. The state legislature has mandated that projects initiated by public agencies receive “the same level of review and consideration” as those the local government requires of private projects.⁶⁸

In the language of CEQA, displaced development would be described as an *indirect* physical impact of the rejected project, to be analyzed only if “reasonably foreseeable” and not “speculative or unlikely to occur.”⁶⁹ Lead agencies are free to terminate discussion of improbable or unforeseeable indirect impacts, though only after a “thorough investigation.”⁷⁰ To see where courts have drawn the line between pure speculation and responsible forecasting, we can compare two cases involving the application of CEQA to annexations. Annexations of unincorporated territory to a city require approval by a Local Agency Formation Commission.

In the first of the two cases, the venerable *Bozung v. Local Agency Formation Commission of Ventura County*,⁷¹ the Local Agency Formation Commission approved annexation of 677 acres of agriculturally zoned land from unincorporated Ventura County to the City of Camarillo.⁷² The landowner had pushed for the annexation so that it could develop the property because Ventura County had a strict policy against re-zoning land from agricultural to urban uses.⁷³ The county’s view was that development should only take place within the boundaries of incorporated cities and the City of Camarillo had indicated it would be receptive to the development if the annexation were approved.⁷⁴ The Local Agency Formation Commission did not prepare an EIR since the annexation itself wouldn’t have a direct physical impact on the environment. But given the realities of development politics in Ventura County and Camarillo, and the manifest desire of the property owner to develop, the California Supreme Court envisioned indirect physical impacts flowing from the annexation.⁷⁵ The court sent the case back to the Local Agency Formation Commission for a CEQA analysis with this explanation: “Vital to our disposition of this case is that [the] application stated the land was presently used for agriculture and would be used ‘for

68. CAL. PUB. RES. CODE § 21001.1 (West 2006).

69. CAL. CODE REGS. tit. 14, § 15064(d)(3) (“An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable.”).

70. *Id.* § 15145.

71. 529 P.2d 1017 (Cal. 1975).

72. *Id.* at 1020.

73. *Id.* at 1020–21 & n.3.

74. *Id.* at 1029–30.

75. *Id.*

residential, commercial and recreational uses . . . anticipated . . . in the near future.”⁷⁶

Conversely, in *Simi Valley Recreation & Park District v. Local Agency Formation Commission of Ventura County*, the Ventura County Board of Supervisors did not conduct any CEQA analysis when it ordered the detachment of 10,000 acres of open space (4,200 acres of it located within a state park) from the Simi Valley Recreation and Park District to the county.⁷⁷ The county Board of Supervisors believed that the site could be administered more efficiently by the county than by the Recreation and Park District.⁷⁸ The detached site was near the then-unincorporated community of Moorpark and separated from the balance of the park district’s turf by a mountain range. Despite the transfer, the land would remain open space since Ventura County had a firm policy against the urbanization of agricultural land located within the unincorporated area.⁷⁹ In contrast to the openly anticipated development in *Bozung*, the county’s resolution approving the detachment of acreage from the Simi Valley Recreation and Park District asserted: “[t]here is no present development planned for the detached area.”⁸⁰ Subsequent appellate court decisions have highlighted the distinction between *Bozung* and *Simi Valley* as the difference between “an essential step culminating in action which may affect the environment (*Bozung*) and approval of a reorganization which portends no particular action affecting the environment (*Simi Valley*).”⁸¹

IV. DISPLACED DEVELOPMENT: TWO CONFLICTING CASES

The implications of including displaced development in an EIR are evident in both *Muzzy Ranch* and *Turlock*, as this section describes.

A. *The Muzzy Ranch Case*

This pending California Supreme Court case involves the local government’s power to limit residential density in the Muzzy Ranch community near the Travis Air Force Base, a major economic hub in Solano County.⁸² In California, government entities in each county known as Airport Land Use Commissions are empowered to forecast future operations at each airport in the state, identify the areas near the airport

76. *Id.* at 1021.

77. 124 Cal. Rptr. 635 (Ct. App. 1975).

78. *Id.* at 650.

79. *Id.* at 647.

80. *Id.* at 644 (quoting the county resolution).

81. Fullerton Joint Union High School Dist. v. Bd. of Educ., 654 P.2d 168, 180 (Cal. 1982).

82. *Muzzy Ranch Co. v. Solano County Airport Land Use Comm’n*, 23 Cal. Rptr. 3d 60 (Ct. App. 2005).

that could be subject to disturbing noise levels and low-flying aircraft, and enact a land use compatibility plan to assist local governments in their zoning and planning for areas that are potentially affected by airport operations.⁸³ In order to fulfill this state mandate, the Solano County Airport Land Use Commission (the Commission) adopted a compatibility plan known as the Travis Air Force Base Land Use Plan (the Plan). To protect residents from being exposed to loud overflight noise, the Plan sought to hold housing densities within the “compatibility area” to those levels already permitted under the zoning ordinances and general plans of the affected cities and the county. The Plan would have frozen housing densities for “‘hundreds of thousands of acres of private property in a wide swath [of] more than 600 square miles extending more than 35 miles through Solano County.’”⁸⁴

Muzzy Ranch brought suit against the Commission because the ranch was located directly within the Plan’s recommended no-change zone. Under the Plan, the ranch owner had to seek modifications of the local zoning and general plan in order to increase allowable housing densities. Any modification required Commission approval, and since the Commission could not approve a requested modification inconsistent with the Plan, such approval would be unlikely. If the Commission rejected the ranch owner’s proposed development plan, the county board of supervisors could still amend the general plan and accompanying zoning ordinance by overruling the Commission’s decisions by a two-thirds majority vote.⁸⁵

In its lawsuit, Muzzy Ranch sought to set aside the Plan, claiming it violated CEQA by failing to address the critical needs of a fast-growing community for new development, especially housing. Significantly, Muzzy Ranch claimed that the Plan did not adequately address the environmental “impacts of forcing that inevitable growth into other areas.”⁸⁶

The Commission thought its plan was not a “project” under CEQA⁸⁷ and that even if it were, it would qualify for the common sense regulatory exemption. Both claims were based on the assumption that enactment of the Plan effected no change in the physical environment.⁸⁸ Commission attorneys contended that Muzzy Ranch’s arguments about displaced

83. State Aeronautics Act, CAL. PUB. UTIL. CODE §§ 21001–21707 (West 2006).

84. *Muzzy Ranch*, 23 Cal. Rptr. 3d at 62 (quoting appellant’s assertion not contradicted by the Commission).

85. CAL. GOV’T CODE § 65302.3 (West 2006) (citing CAL. PUB. UTIL. CODE § 21676).

86. Appellant’s Reply Brief at 12–13, *Muzzy Ranch*, 23 Cal. Rptr. 3d 60 (No. A104955).

87. Respondent’s Brief at 20, *Muzzy Ranch*, 23 Cal. Rptr. 3d 60 (No. A104955).

88. The Commission had relied on the advice of outside counsel—a leading CEQA expert, the late Michael Remy—that the Plan was not a “project” because it had recommended no changes to the status quo of any zoning or general plan designations, and so in itself could not possibly impact the environment directly or indirectly. *Id.* at 13–14.

development stretched the notion of proximate causation beyond reason⁸⁹ and that such an analysis would call for pure speculation to hold their client accountable for displaced housing.⁹⁰ To the Commission, as a matter of law it would be impossible to know for sure “that even a single-dwelling unit will be ‘displaced’ or redirected from within Compatibility Zone C to outside of that Zone due to the Commission’s adoption of the [Plan].”⁹¹ The Commission argued that housing developers would have to propose new subdivisions, general plans and zoning would have to be changed, and other constraints to development would have to be lifted. The quantity of new housing that could be built outside the compatibility zone without any zone changes would need to be measured against potential housing demand. As far as the Commission was concerned, Muzzy Ranch had proved neither the demand nor the supply side of the equation. The Commission figured that the best time to assess the environmental impacts of possible housing developments would be when such developments were proposed by subdividers, and then actually approved by receptive local governments by revising their zoning and general plans.⁹²

The court disagreed with the Commission on both points, declaring the Plan to be a project as defined by CEQA and finding that the Plan did not fall within the common sense exemption for environmentally inconsequential government decisions.⁹³ The Commission had previously conceded that Solano County was likely to experience significant population growth with pressures mounting to urbanize undeveloped land throughout the county, including the vacant sites near the airport.⁹⁴ This concession prompted the court to note: “Although it is presently unclear precisely how adoption of the [Plan] will affect the environment, it is undeniable that placing a vast area of land largely off-limits to future residential development will have long term impacts on the use of land and population distribution in the region.”⁹⁵ The court identified the physical change that the Commission had overlooked as increased housing development outside the project area.⁹⁶

The court rejected the Commission’s claim that attempting to analyze displaced housing would be unduly speculative by distinguishing

89. See Opening Brief on the Merits at 17, *Muzzy Ranch Co. v. Solano County Airport Land Use Comm’n*, No. S131484 (Cal. May 13, 2005).

90. *Id.* at 29.

91. Respondent’s Petition for Rehearing at 7–8, *Muzzy Ranch*, 23 Cal. Rptr. 3d 60 (Ct. App. 2005) (No. A104955).

92. See Opening Brief on the Merits, *supra* note 89, at 38.

93. *Muzzy Ranch Co. v. Solano County Airport Land Use Comm’n*, 23 Cal. Rptr. 3d 60, 64–67 (Ct. App. 2005).

94. *Id.* at 67.

95. *Id.* at 72.

96. *Id.* at 69.

rank speculation from informed forecasting.⁹⁷ In its briefing to the California Supreme Court, Muzzy Ranch defends the court's holding on grounds that:

[I]t is not speculation for experts preparing CEQA analyses to calculate or predict growth patterns and/or resulting changes in land use regulations in the future in Solano County and elsewhere to accommodate housing for the growth that is now prohibited by the Plan. These calculations are undertaken in virtually every [Environmental Impact Report] pursuant to CEQA's directive that public agencies evaluate the "growth-inducing" impacts of their actions.⁹⁸

Indeed, most local governments already possess information about how they plan to accommodate housing needs for all income groups within their boundaries since these data are required for compliance with state housing element guidelines, and housing elements are a mandatory element of the general plans that local governments must put in place as a condition to exercising land use controls.⁹⁹

Although the county sought to saddle the environmental challenger, Muzzy Ranch, with the burden of proving the impacts of displaced development, the court put that obligation firmly upon the public entity, the Commission, as a pre-condition to its successfully claiming the common sense exemption. Following the appellate court's decision, the county will have to demonstrate with substantial evidence that its proposed land use plan could not possibly have a discernibly significant environmental effect. The court's rationale was that under CEQA procedures, the lead agency must assess whether the proposed activity has a potential to cause any physical changes in the environment (whether benign or harmful) before going public with its initial environmental analysis. In other words, the agency determines whether the common sense exemption applies before providing notice to the public about the project, so it would be virtually impossible for anyone outside the lead agency to offer unsolicited proof concerning the potential impacts of the Commission's action. Once it identifies even the mere possibility of an impact, the agency is barred from concluding with certainty that the project is entitled to the common sense exemption.¹⁰⁰ Later, when the agency releases the results of its analysis, a successful

97. CEQA Guidelines sections 15144 and 15145 contrast "forecasting" (agency must use best efforts to find out and disclose all it reasonably can) with "speculation" (impacts too speculative for evaluation justify the lead agency noting its conclusion and terminating further discussion).

98. Appellant Muzzy Ranch Co.'s Answer Brief on the Merits at 29, *Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n*, No. S131484 (Cal. July 13, 2005).

99. CAL. GOV'T CODE § 65301(c) (West 2006).

100. See *Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n*, 23 Cal. Rptr. 3d 60, 65 (Ct. App. 2005).

challenger could force the agency to start its decision process all over again for having overlooked significant potential impacts in its preliminary environmental assessment.

Imagine the consequences if the California Supreme Court endorses the lower court's opinion in *Muzzy Ranch*. The court would remand the airport land use plan to the Commission for a closer look at the environmental impacts of limiting development in a large swath of land surrounding the airport. Instead of accepting existing zoning and planning limits on housing development in the airport area as optimal, the Commission would need to gather information enabling it to balance overflight considerations against other environmental impacts flowing from the development pattern it ultimately prescribes.

B. *The Turlock Case*

The second of the two cases could be characterized as the anti-*Muzzy*. Wal-Mart desired to build a 225,000 square foot superstore—including a full-service grocery—at the intersection of State Route 99 and Tuolumne Road in the city of Turlock.¹⁰¹ At first, Wal-Mart officials felt quite welcome,¹⁰² which was not especially surprising because the city was eager to receive the point-of-origin sales tax that a new Wal-Mart would yield. City officials were cognizant of how abundant such revenues could be since they were already booking substantial tax revenues from a Wal-Mart that had been ringing up sales within the city for over a decade.¹⁰³

The mood among city officials regarding the superstore darkened abruptly after Wal-Mart superstore opponents—union and local supermarket representatives—conferred successively with each of the five city council members and convinced them to vote for a city-wide ban on big box discounters selling groceries.¹⁰⁴ The ban applied to “discount superstores,”¹⁰⁵ defined as “a discount store that exceeds 100,000 square feet of gross floor area and devotes at least 5 percent of the total sales

101. See *Wal-Mart Stores, Inc. v. City of Turlock*, 41 Cal. Rptr. 3d 420, 422 (Ct. App.), review denied, No. S143488, 2006 Cal. LEXIS 8623 (July 12, 2006); *Wal-Mart Plan is Confirmed*, MODESTO BEE, May 4, 2005, at B1.

102. *Turlock*, 41 Cal. Rptr. 3d at 422.

103. The Land Use Element of the Turlock General Plan credits increased sales tax revenues flowing to the town from general merchandise sold at a Wal-Mart outlet in Turlock that opened in May 1993. See CITY OF TURLOCK PLANNING COMM'N, TURLOCK GENERAL PLAN—LAND USE ELEMENT, at 2-17, available at <http://www.turlock.ca.us/citydepartments/communityplanning/generalplan/> (follow “Land Use Element” link in sidebar) (last visited Oct. 10, 2006).

104. About twenty-two percent of grocery workers nationwide are union members; Wal-Mart's implacable stance against unionization is well known. See George Lefcoe, *The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-Mart and the United Food and Commercial Workers Union*, 58 ARK. L. REV. 833, 834 n.4, 835 n.8 (2006).

105. *Wal-Mart Stores, Inc. v. City of Turlock*, 41 Cal. Rptr. 3d 420, 423 (Ct. App. 2006).

floor area to the sale of nontaxable merchandise, often in the form of a full-service grocery department.”¹⁰⁶

Wal-Mart sued the city, challenging the ban as beyond the city’s legitimate land use powers and contending that the city had failed to comply with CEQA by evaluating the environmental impacts of banning grocery sales by big box discounters within the city limits.¹⁰⁷ Specifically, Wal-Mart argued that because the ordinance presented site-specific impacts not contemplated in the EIR certified for the city’s general plan, the ordinance was not exempt from further environmental review.¹⁰⁸ The court upheld the ordinance against both these claims.

1. *Legitimate Exercise of Police Power*

In its briefs, Wal-Mart assailed the ban as an abuse of local zoning powers, alleging that it had been enacted not for legitimate land use reasons but rather to restrain Wal-Mart from competing with unionized supermarkets; and faulted as unjustifiable the distinctions drawn in the ordinance among discount superstores, discount clubs, discount stores, and freestanding supermarkets.¹⁰⁹ The city countered by advancing a plausible planning justification for the ban. In an agenda report to the city council dated December 9, 2003, the City Planning Manager explained:

Discount superstores compete directly with existing grocery stores, many of which anchor neighborhood-serving commercial centers. Many smaller stores within a neighborhood center rely upon the foot traffic generated by the grocery store for their existence. In neighborhood centers where the primary grocery store closes, vacancy rates typically increase and deterioration takes place in the remaining center. For instance, the tenants in the Turlock Town Center have been adversely impacted by the closure of Albertson’s and the entire center lacks its former vitality. For the residents surrounding Turlock Town Center, longer trips are now necessary to acquire day-to-day consumer goods.

106. *Id.* at 424.

107. *Id.* at 421.

108. *Id.* at 422.

109. *Id.* at 439–40 & n.25 (citing *Hernandez v. City of Hanford*, 40 Cal. Rptr 3d 905 (Ct. App. 2006) (striking down a ban on furniture sales outside the downtown area because it excepted furniture sales by department stores)); *cf.* *Friends of Davis v. City of Davis*, 100 Cal. Rptr. 2d 413, 420 (Cal. Ct. App. 2000) (“Where certain uses are permitted, a city cannot arbitrarily exclude others who would employ a similar use”); *Roman Catholic Welfare Corp. v. City of Piedmont*, 289 P.2d 438, 442–43 (Cal. 1955) (ruling that an ordinance prohibiting the construction of private schools within a certain zone district, while allowing the construction of public schools, should be invalidated). See generally R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The “Base Plus Six” Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225 (2002).

The proposed zoning ordinance amendment is intended to preserve the city's existing neighborhood-serving shopping centers that are centrally located within the [neighborhood]. . . . This distribution of shopping and employment creates a land use pattern that reduces the need for vehicle trips and encourages walking and biking for shopping, services, and employment.

In short, the proposed amendments are intended to protect grocery stores in existing neighborhood centers to prevent a significant change in land use, employment and traffic patterns throughout the city. . . .

A significant concern with discount superstores is that they combine neighborhood-serving retail [grocery] in a more remote, regional-serving retail center, such as along State Highway 99. This means that local residents are forced to drive further for basic services for groceries, causing a shift in traffic patterns, and potentially overburdening streets that were not designed to accommodate such traffic.¹¹⁰

The court rejected Wal-Mart's challenge to the ordinance, determining that "the police power empowers cities to control and organize development within their boundaries as a means of serving the general welfare," and that Turlock's decision to favor neighborhood shopping centers over superstores was reasonably related to furthering their development and quality of life objectives.¹¹¹

2. *Wal-Mart's CEQA Challenge*

When it passed the ordinance, the Turlock city council simultaneously adopted findings that the ordinance was consistent with the general plan, posed no previously unconsidered environmental effects, and was therefore entitled to the CEQA Guidelines section 15138 exemption.¹¹² Wal-Mart argued that the city could not "piggy-back," in the words of the *Turlock* court,¹¹³ on the EIR for its general plan, because there were "significant environmental effects peculiar to the Ordinance,"

110. *Wal-Mart Stores, Inc. v. City of Turlock*, 41 Cal. Rptr. 3d 420, 423 (Ct. App. 2006), review denied, No. S143488, 2006 Cal. LEXIS 8623 (July 12, 2006). For a similar justification, see *Citizen Advocates For A Livable Missoula, Inc. v. City Council of City of Missoula*, 2006 MT 47, 130 P.3d 1259. The city council voted to allow a big box Safeway grocery store even though some residents opposed it, and contended that it contradicted certain city Growth Policy goals for making neighborhood centers pedestrian friendly. The Safeway was allowed nonetheless because it was the retail anchor, the economic heart of that neighborhood's retail core. 130 P.3d at 1261.

111. *Turlock*, 41 Cal. Rptr. at 441.

112. *Id.* at 428. The ordinance stated that "any potential indirect secondary impacts of the proposed amendments on the physical environment are speculative and are not reasonably foreseeable, and are, therefore, not subject to review under CEQA." *Id.*

113. *Id.* at 428-29.

namely that it would “inevitably lead either to the development of a multi-tenant shopping center in the place of the proposed Wal-Mart Supercenter, or to the development of a Wal-Mart Supercenter outside the City limits, either of which will have negative impacts on traffic and air quality.”¹¹⁴ However, the *Turlock* court didn’t see the need for such a site-specific analysis because Wal-Mart failed to demonstrate that any site-specific affects particular to the ban would follow from the ordinance.

As a preliminary matter, the legitimacy of the limited environmental review that the Turlock city staff deemed sufficient in this situation depended on the superstore ban being consistent with the city’s previously adopted general plan.¹¹⁵ However, the superstore ban was in fact inconsistent with the Turlock general plan and EIR in several respects. At the time the city of Turlock prepared the EIR accompanying the general plan, it hadn’t contemplated distinguishing discount superstores from discount clubs, freestanding supermarkets, and discount retailers without grocery stores. Nothing in the land use element of the Turlock General Plan designated grocery stores as only belonging within the community/neighborhood commercial areas and not within the region-serving commercial zones.¹¹⁶ The plan listed “food and drug” sales as appropriate within both types of zones.¹¹⁷

The land use element of the general plan envisioned no problem regarding potential demand for supermarkets—contrary to the dire prediction in the staff report that a superstore would likely result in one or more neighborhood grocery store closures. The plan projected the city’s population growth at just over three percent annually,¹¹⁸ adding 10,000 residents between 2006 and 2010, approximately the population needed to support each grocery store.¹¹⁹ The plan also noted that Turlock attracted food shoppers from outside its boundaries, another fact not taken into account in the staff report supporting the superstore ban.¹²⁰

Wal-Mart also alleged that the city’s claim that the superstore would lead to increased traffic congestion was not consistent with the plan. The plan’s transportation element explained: “Traffic conditions within the city are generally good. Residents can travel across town by automobile in less than ten minutes. Delays, when they happen, are isolated and of

114. *Id.* at 429 (quoting Petitioner’s brief).

115. *See* CAL. CODE REGS. tit. 14, § 15183 (2006).

116. *See* TURLOCK GENERAL PLAN—LAND USE ELEMENT, *supra* note 103, at 2-6 to -7.

117. *Id.*

118. *See* CITY OF TURLOCK PLANNING COMM’N, TURLOCK GENERAL PLAN—HOUSING ELEMENT (Oct. 2003), at chart 1, *available at* <http://www.turlock.ca.us/citydepartments/communityplanning/generalplan/> (follow “Housing Element” link in sidebar).

119. *See* TURLOCK GENERAL PLAN—LAND USE ELEMENT, *supra* note 103, at 2-21.

120. *Id.* at 2-16

short durations.”¹²¹ Further, the transportation element anticipated that the area including the intersection of Tuolumne Road with State Route 99 would experience some congestion if developed to its full potential, but nothing in the record indicated that a superstore would push traffic congestion beyond this limit.¹²²

Turning to the sufficiency of the environmental analysis for the ordinance itself, Wal-Mart contended that with a particular site in mind, the city could have meaningfully studied the previously unexamined implications of the distinction between a superstore on the one hand, and a free-standing discount club or multi-tenant shopping center on the other.¹²³ Wal-Mart protested that the ordinance illogically banned superstores while permitting uses that would generate even more traffic and air pollution, including discount stores¹²⁴ and discount clubs.¹²⁵ Wal-Mart’s experts concluded that these uses would draw more combined traffic, more congestion, more vehicle miles traveled, and more air pollution than Wal-Mart because superstore shoppers satisfy more of their retail needs under one roof.¹²⁶

As in *Muzzy Ranch*, the *Turlock* court assumed for purposes of its opinion that the superstore ban was a “project” under CEQA¹²⁷ However, the *Turlock* court held that CEQA Guideline section 15183 applied, exempting the superstore ban as a project with development densities consistent with general plan policies. In alighting on this exemption,¹²⁸

121. CITY OF TURLOCK PLANNING COMM’N, TURLOCK GENERAL PLAN – TRANSPORTATION ELEMENT, at 5-1, available at <http://www.turlock.ca.us/citydepartments/communityplanning/generalplan/> (follow “Transportation” link on sidebar) (last visited Oct. 11, 2006).

122. *Id.* at 5-4 (sanctioning a Level of Service D for the intersection at buildout).

123. *Id.* at 5-4 to -5.

124. *Wal-Mart Stores, Inc. v. City of Turlock*, 41 Cal. Rptr. 3d 420, 424 (Ct. App. 2006). The ordinance defines discount stores as those

with off-street parking that usually offer a variety of customer services, centralized cashing, and a wide range of products. They usually maintain long store hours seven (7) days a week. The stores are often the only ones on the site, but they can also be found in mutual operation with a related or unrelated garden center or service station. Discount stores are also sometimes found as separate parcels within a retail complex with their own dedicated parking.

125. The ordinance defines a “discount club” as “a discount store or warehouse where shoppers pay a membership fee in order to take advantage of discounted prices on a wide variety of items, such as food, clothing, tires, and appliances; many items are sold in large quantities or bulk.” *Id.*

126. *Id.* at 423–24.

127. *Id.* at 427.

128. The city had added this basis for exemption at the request of the attorney representing Safeway and the union. The Turlock city attorney concluded this was a good idea “but is somewhat inconsistent with some of our earlier CEQA exemption determinations.” Petition for Review at 8 n.1, *Wal-Mart Stores, Inc. v. City of Turlock*, 41 Cal. Rptr. 3d 420 (Cal. July 12, 2006) (No. S143488) (quoting from the administrative record).

never before utilized by any reported California court opinion,¹²⁹ the court was fulfilling a legislative preference for the use of staged program or tiered EIRs. The idea behind tiered EIRs is that general environmental effects should be described in a master EIR for projects consisting of a “policy, plan, program, or ordinance.”¹³⁰ Later, if there are project-specific effects peculiar to the project or its site,¹³¹ a site-specific EIR concentrates on those, to the extent that they were not analyzed as part of the prior EIR.¹³² The court held that the ordinance did not present reasonably foreseeable site-specific impacts, such as the prospect of a Wal-Mart supercenter being built outside the Turlock city limits, concluding:

As a matter of logic, we recognize that Wal-Mart’s possible reactions can be divided into two categories—either Wal-Mart will build a supercenter near City or it will not. Each category is foreseeable. Nevertheless, substantial evidence must exist in the administrative record before a foreseeable alternative is reasonably foreseeable. Here, Wal-Mart simply assumed it would build a supercenter near City and failed to present evidence that rendered this possibility reasonably foreseeable. The building of a supercenter near City is an essential link in the causal chain that leads to the impacts on traffic and air quality alleged by Wal-Mart. Without this essential link, the causal chain is broken and the alleged impacts to traffic and air quality cannot reach the level of probability necessary to be regarded as reasonably foreseeable.¹³³

The court also concluded that the development of the site into something other than a supercenter did not present previously unconsidered environmental impacts. Except for a discount superstore, all types of development that could have been constructed at the site before the enactment of the ban could still be built there afterward, and so could not be said to have resulted peculiarly from the superstore ban.¹³⁴ The site

129. *Wal-Mart Stores, Inc. v. City of Turlock*, 41 Cal. Rptr. 3d 420, 422 (Ct. App. 2006) (“We publish this opinion because no other published opinion has upheld the approval of a project based on the application of the provisions in Guidelines section 15183.”).

130. CAL. PUB. RES. CODE § 21093(a) (West 2006).

131. *Turlock*, 41 Cal. Rptr. 3d at 427. Section 15183 of the CEQA Guidelines provides in part:

CEQA mandates that projects which are consistent with the development density established by existing . . . general plan policies for which an EIR was certified shall not require additional environmental review, except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the project or its site. . . . [A]ny rezoning action consistent with the general plan . . . shall be treated as a project subject to this section.

132. CAL. PUB. RES. CODE § 21068.5.

133. *Turlock*, 41 Cal. Rptr. 3d at 437.

134. *Id.* at 431, 433–34.

was vacant before the enactment of the ban, and for all the court could know for sure, would remain so afterward.

The court contrasted the facts surrounding Wal-Mart's proposed development with the kind of evidence that certain sanitation districts had introduced in a case the same court had decided a year earlier involving a Kern County ordinance imposing stringent controls against the spreading of sewage sludge across agricultural lands.¹³⁵ Employees of the sanitation districts responsible for disposing of enormous quantities of treated sewage made the uncontradicted assumption that sewage sludge would continue to be produced, and if it couldn't be spread as before over agricultural lands in Kern County, the districts would almost certainly have to elect one of these disposal options: "(1) further treatment to convert Class B biosolids to EQ biosolids followed by land application, (2) land application of Class B biosolids somewhere other than Kern County, (3) incineration, or (4) disposal in a landfill."¹³⁶ The court agreed that Kern County needed to analyze the secondary physical consequences of these alternatives in an EIR before enacting a law that would disrupt existing sludge disposal practices.

As the court in *Turlock* noted, Wal-Mart had numerous options while the sanitation districts did not. Sanitation districts that had been spreading sewage sludge on farms in Kern County would have to find another place for the sludge. For them, pulling up stakes was not an option. They had to dispose of the sludge somewhere, so it was reasonably foreseeable to the county that the land disposal ban would lead to environmental impacts elsewhere. In contrast, Wal-Mart could abandon altogether the idea of building a superstore to serve the Turlock market area, or could opt to serve the Turlock market area by locating in another jurisdiction nearby. Admittedly, no one except Wal-Mart had proposed any development for the site at State Route 99 and Tuolumne Road, and no authorized Wal-Mart representative had identified an alternate site outside Turlock, but within the same market area, where it might locate a superstore. It is also true that the city would not be in as good a position as Wal-Mart to identify other potential superstore locations.

Based on the distinction between pure speculation and responsible forecasting drawn in *Simi Valley* and *Bozung*, the *Turlock* court was wrong to conclude that the city could enact its superstore ban without performing a thorough investigation of offsite impacts under CEQA. CEQA requires local governments relying on a general plan EIR "to analyze potentially significant offsite impacts and cumulative impacts of

135. County Sanitation Dist. No. 2 of L.A. County v. County of Kern, 27 Cal. Rptr. 3d 28, 35 (Ct. App. 2005).

136. *Id.* at 55.

the project not discussed in the prior environmental impact report with respect to the general plan.”¹³⁷ There was certainly one undeniable direct physical consequence of outlawing the proposed superstore that was not analyzed in Turlock’s general plan EIR: the consequences of Wal-Mart not being allowed to place a superstore in Turlock at its preferred location. Unless the consequences of keeping out the superstore were analyzed at the time of the superstore ban, they might never be assessed. The environmental analysis for a superstore outside of the city could not consider as an alternative a more centrally-located site that would require Turlock residents to drive less. Likewise, the superstore ban would excuse later applicants seeking to develop the site from having to compare the impacts of their projects with those of a discount superstore. An observation made a year earlier in *County Sanitation District No. 2 v. County of Kern* would also apply to *Turlock*: without considering all reasonably foreseeable environmental consequences “the environmental review contemplated by CEQA would contain a gap, and California’s environment would be deprived of the benefits that might result from [the] County’s consideration of feasible alternatives, cumulative impacts, and mitigation measures.”¹³⁸

The *Turlock* court placed the burden of proving the reasonable foreseeability of displaced development on Wal-Mart. This is a questionable allocation of the evidentiary burden. Every public agency is charged with making a responsible initial determination of whether an activity is a “project” as CEQA defines it.¹³⁹ The CEQA Guidelines specify that an agency’s claim of exemption should only be made “after thorough investigation” by the lead agency.¹⁴⁰ California courts have consistently ruled that environmental review of a project’s potential

137. CAL. PUB. RES. CODE § 21083.3(c) (West 2006).

138. *County Sanitation Dist.*, 27 Cal. Rptr. 3d at 70.

139. *Davidon Homes v. City of San Jose*, 62 Cal. Rptr. 2d 612, 617 (Cal. Ct. App. 1997) (“An agency abuses its discretion if there is no basis in the record for its determination that the project was exempt from CEQA.”).

140. CAL. CODE REGS. tit. 14, § 15145 (2006) (“If, after thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact.”). There is a practical reason for not placing this burden on the CEQA challenger. As one such challenger noted:

The party challenging an ordinance will often have a very short time to pull together its CEQA evidence, and *Turlock* has set the bar extremely high with respect to the quality and quantity of evidence that must be produced, essentially eliminating a challenger’s ability to rely on reasonable assumptions and interpreting “reasonably foreseeable” to effectively mean “highly probable.” This will make it extremely difficult and expensive to challenge ordinances based on the indirect environmental effects of bans on certain uses, meaning only the most wealthy and sophisticated challengers will be able to raise effective CEQA challenges to these types of ordinances.

E-mail from Gregory D. Brown, Gibson, Dunn & Crutcher, to author (Sept. 27, 2006).

physical impacts cannot be deferred until that development is actually proposed—even though the future development may never occur, could take various forms, and that the extent and location of that development cannot be determined with certainty.¹⁴¹ The difficulties of forecasting environmental effects may limit the scope of the environmental analysis required but do not excuse a “best efforts” CEQA study.¹⁴² The *Muzzy Ranch* court correctly explained that an agency need not produce an EIR if it concludes that a project falls within the scope of a categorical exemption or the common sense exemption. But if the agency doesn’t bear the burden of proof to justify a claimed exemption from CEQA after a disappointed project proponent makes a reasonable case for the possibility of displaced development, it could frustrate CEQA’s fundamental purpose of ensuring environmentally informed decision making.

Making a thorough assessment of displaced development can be challenging work for city planners unfamiliar with local market conditions. Suppose Turlock city planners weren’t sure where else in the region Wal-Mart might place a superstore or couldn’t ascertain the type of projects likely to be built at the intersection of State Route 99 and Tuolumne Road. They could have sought additional information from Wal-Mart or other big box developers. Presumably, a local government enacting a superstore ban for legitimate planning reasons would have wanted that information. At least the city would have shown good faith by trying to determine the existence of indirect physical impacts following the superstore ban. Also, Turlock planning officials might have had to consult real estate marketing experts about alternate superstore sites that could serve the Turlock market area. Ultimately, the city would have to draw its own conclusions about the reliability of the expert forecasts regarding alternate sites, but lead agencies regularly do this in formulating the alternatives analysis found in most EIRs.

To summarize the holdings of *Muzzy Ranch* and *Turlock*, the appellate court deciding *Muzzy Ranch* recognized the myopia of a local government rejecting growth at one location for environmental reasons

141. See, e.g., *Stanislaus Audubon Soc’y, Inc. v. County of Stanislaus*, 39 Cal. Rptr. 2d 54, 63 (Ct. App. 1995) (quoting *City of Antioch v. City Council*, 232 Cal. Rptr. 507, 514–15 (Ct. App. 1986)).

142. In *Napa Citizens for Honest Government v. Napa County Board of Supervisors*, 110 Cal. Rptr. 2d 579, 598 (Ct. App. 2001), the court stated that:

It does not follow, however, that an EIR is required to make a detailed analysis of the impacts of a project on housing and growth. Nothing in the Guidelines, or in the cases, requires more than a general analysis of projected growth. The detail required in any particular case necessarily depends on a multitude of factors, including, but not limited to, the nature of the project, the directness or indirectness of the contemplated impact and the ability to forecast the actual effects the project will have on the physical environment.

without considering the environmental consequences of shifting that development to other sites within the same burgeoning market area. It placed the burden of identifying those alternate sites on the local government enacting the no-growth policy. The *Turlock* court conceded the importance of local governments considering the environmental impacts of displaced development, but it placed the burden of establishing the reasonable foreseeability of displaced development on the target of the city's superstore ban. This was wrong. Since the city had initiated the zone change, the city should have been charged with assessing the environmental impacts of its action, including impacts arising from displaced development.

CONCLUSION

CEQA has become an elaborate paper filter for screening proposed development projects that involve discretionary local government approvals. CEQA requires local governments to prepare EIRs before voting on land use controls such as zoning, subdivision approvals, annexations, or general plans, if those controls would facilitate individual development projects that could alter the physical environment. An EIR brings together all the community's land use concerns in one document.

Until now, CEQA has tended to focus on the neighborhood impacts of proposed development. EIRs are particularly good at spotlighting all the imaginable harmful consequences of building at any particular location. But CEQA offers scant guidance on where it would be best to locate the 600,000 or so new residents expected to arrive or to be born in California each year between now and 2015.¹⁴³ Whenever a lead agency has elected not to prepare a formal EIR, neighbors opposed to new development can delay it by filing suit and introducing a fair argument supported by substantial evidence of possible environmental impacts.¹⁴⁴ This tactical use of CEQA has nothing to do with CEQA's primary purpose of preventing avoidable environmental degradation.¹⁴⁵ It can

143. Cal. Dep't of Housing & Cmty. Dev., *California's Deepening Housing Crises* (Feb. 15, 2006), <http://www.hcd.ca.gov/hpd/hc021506.pdf>.

144. Evidence contradicting the assertion that a project would have significant effects on the environment is not enough to warrant a "negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact." *Friends of "B" Street v. City of Hayward*, 165 Cal. Rptr. 514, 523 (Ct. App. 1980).

145. For example, in *Leonoff v. Monterey County Board of Supervisors*, 272 Cal. Rptr. 372 (Ct. App. 1990), neighboring owners opposed the establishment of a storage yard for construction equipment already being used by contractors located nearby. The court rejected petitioner's claim, observing that:

The question here is not whether heavy equipment will be entering and exiting Carmel Valley Road. It already does and will continue to do so, from one location or another. The question is whether there will be a significant environmental effect if it enters and exits at the same location instead of several. Objectors urge a myopic

even contribute to patterns of development that are destructive of the natural environment by tempting developers and local governments to take the politically expedient course of directing new development into previously unbuilt areas where they will find only minimal opposition because no one is living there, instead of into enclaves already surrounded by housing tracts populated by well-organized residents.

Given the state's underfunded roads and schools, and infamously poor air quality, most new development would only seem to worsen the quality of life for existing residents. Yet, growth in California appears inevitable and needs to be housed somewhere. CEQA should be a tool for assisting local officials to direct new development where it will do the least harm or the most good to the physical environment. As researchers at the Public Policy Institute of California concluded: "Currently CEQA does not effectively accommodate regional strategies that trade off increases in negative effects in one geographic area or for one environmental impact in exchange for corresponding reductions in another."¹⁴⁶ By insisting that EIRs take into account the possibility of displaced development, the California Supreme Court would be interpreting CEQA to minimize environmental damage while fulfilling the legislative aspiration of "providing a decent home and satisfying living environment for every Californian."¹⁴⁷

perspective, focusing on the increase in traffic at one segment of the road while ignoring the corresponding decrease in traffic at other segments.

Id. at 380.

146. Barbour & Teitz, *supra* note 35, at iv.

147. CAL. PUB. RES. CODE § 21000 (g) (West 2006).