

ARENA DEVELOPMENT AND ENVIRONMENTAL REVIEW REFORM UNDER SB 743

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INTRODUCTION

On September 27, 2013, California passed Senate Bill (SB) 743, an act purporting to pursue “Judicial Review Streamlining for Environmental Leadership Projects.”¹ On its surface, the bill was mere special interest legislation intended to convince the National Basketball Association to block the relocation of the Sacramento Kings to Seattle, Washington. In truth, however, SB 743’s effects stretched far beyond expediting the construction of a new arena. For years, California had been considering steps to undercut its cumbersome environmental review regulations. In crafting SB 743, these dormant mechanisms—shortening litigation windows and limiting the subjects of review—were pulled off the shelf. The result is a commonly dismissed piece of legislation that quietly changes the course of state environmental review.

This Note begins by analyzing California’s complicated history with environmental review in the form of the California Environmental Quality Act, including its provisions’ need for reform, and past environmental review failures to untangle the snare of its regulations. It then proceeds to consider the context of SB 743, as well as its two major attempts at reform and empowerment of

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1. Judicial Review Streamlining for Environmental Leadership Development Projects, S.B. 743 (Cal. 2013), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB743.

municipal development in environmental litigation. While the bill is a first step toward needed reform, especially in its more nuanced understanding of environmental mitigation, its gerrymandered reduction of access to environmental litigation is a concerning restriction of complainants' right to seek court review.

I. FIRST ATTEMPTS AT REFORM

The California Environmental Quality Act (CEQA) was enacted in 1970 as one of many state legislative responses seeking to capitalize on the passage of the federal National Environmental Policy Act.² CEQA is undoubtedly the most important environmental protection law in California³ and “[one] of California’s most cherished institutions,”⁴ but it is also one of the state’s “most controversial”⁵ pieces of legislation. In the past few years, CEQA has come under sweeping scrutiny. Critics allege that CEQA has only exacerbated California’s dramatic recession, turning the battle for “jobs and economic growth . . . into an agonizing test”⁶ as businesses bypass California for states with less burdensome environmental regulations. In addition, CEQA has been employed superfluously and invidiously. For example, one lawsuit delayed San Francisco’s painting of new bike lanes by alleging that the lanes “could cause pollution,”⁷ while other CEQA challenges were brought to squeeze out competitors or undesirable projects based on reasons “unrelated to environmental impacts.”⁸

Against this backdrop, the California State Legislature has sought to trim back CEQA in hopes of modernizing the state environmental review system. The opening salvo came in the passage of AB 900 in 2011.⁹ The legislation, enacted in a furious last-minute legislative session with two accompanying re-

2. ELISA BARBOUR & MICHAEL TEITZ, PUB. POLICY INST. OF CAL., CEQA REFORM: ISSUES AND OPTIONS 3 (Apr. 6, 2005), available at http://www.pplic.org/content/pubs/op/OP_405EBOP.pdf.

3. See Robert B. Olshansky, *The California Environmental Quality Act and Local Planning*, 62 J. AM. PLAN. ASS'N 313, 313-30 (1996).

4. John D. Landis et al., *Fixing CEQA: Options and Opportunities for Reforming the California Environmental Quality Act*, California Policy Seminar, University of California Berkeley, California, 1995.

5. *Id.*

6. Ian Lovett, *Critics Say California Law Hurts Effort to Add Jobs*, N.Y. TIMES, Sept. 4, 2012, at A18; see also George Skelton, *Abuse Pollutes State Environmental Law*, L.A. TIMES (Mar. 11, 2013), <http://www.latimes.com/news/local/la-me-cap-environment-20130311,0,4420869.column>.

7. Lovett, *supra* note 6.

8. Todd Nelson, Note, *Save Tara and the Modern State of the California Environmental Quality Act*, 45 LOY. L.A. L. REV. 289, 292-93 (2011) (citation omitted).

9. See AB 900, OPENSTATES, <http://openstates.org/ca/bills/20112012/AB900/#billtext> (last visited May 1, 2014); see also Juliet H. Cho, *California Governor Signs AB 900 Streamlining CEQA Challenges*, CAL. ENVTL. LAW BLOG (Oct. 5, 2011), <http://www.californiaenvironmentallawblog.com/ceqa/california-governor-signs-ab-900-streamlining-ceqa-challenges>.

form bills, was explicitly designed to grant preferential review to environmentally sound, job-creating projects.¹⁰ The most famous of these construction endeavors—and the *raison d’être* for AB 900—is the new headquarters for Apple in Cupertino, notoriously dubbed the “Mothership.”¹¹

In particular, the legislation allowed certain projects to obtain (1) expedited binding review by the Governor and the California state legislature, and (2) expedited consideration of challenges by the judiciary. Specifically, the expedited judicial review provided that all CEQA claims challenging these large-scale projects would bypass California’s trial courts and instead need to be filed in the California Court of Appeals, which would be granted original jurisdiction to hear the controversy. The Court of Appeals would be required to issue its determination within 175 days of the petition’s filing. AB 900 was dealt a significant blow, however, when a state judge ruled the jurisdictional circumvention of the Superior Court was unconstitutional.¹²

II. IF AT FIRST YOU DON’T SUCCEED . . . TRY SB 743

Even with the jurisdictional component of AB 900 out of the picture, the legislation still provided a blueprint for methods of future attempts to shield major development projects from the exacting standards of CEQA. It was a model employed by California Senate President Pro Tem Darrell Steinberg later that year. Senator Steinberg hails from Sacramento, which found itself fending off an effort by an investment group from Seattle, Washington to purchase the Sacramento Kings NBA franchise and relocate them. The fight moved to the NBA Board of Governors, which focused primarily on the viability of each city’s plan to construct a new arena.

Accordingly, Senator Steinberg appeared before the Board to make a promise: that he would deliver legislation shielding the new Sacramento arena project—and other similar construction efforts—from CEQA.¹³ Steinberg had already been working on a bill to modernize environmental review in California for large-scale projects;¹⁴ it would be fairly easy, he determined, to modify the provisions of the legislation to encompass a new arena in downtown Sac-

10. Jobs and Economic Improvement Through Environmental Leadership Act of 2011, A.B. 900, § 1(d)-(g) (Cal. 2011).

11. See, e.g., APPLICATION FOR ENVIRONMENTAL LEADERSHIP DEVELOPMENT PROJECT, APPLE INC. (Apr. 18, 2012), <http://www.opr.ca.gov/docs/AppleCampus2App.pdf>.

12. Conservation League v. State of California, No. RG1262904 (Alameda Sup. Ct. 2013); see Laura Harris, *Judge Rules Portion of AB 900 Unconstitutional*, REMY, MOOSE, MANLEY (Apr. 4, 2013), <http://www.rmmenvirolaw.com/2013/04/judge-rules-portion-of-ab-900-unconstitutional>.

13. Laura Olson, *Sacramento Kings Arena Proposal Could Be Saved by Changes to California Environmental Law*, HUFFINGTON POST (Apr. 24, 2013), http://www.huffingtonpost.com/2013/04/25/sacramento-kings-arena_n_3151359.html.

14. California Environmental Quality Act, S.B. 731 (Cal. 2013), available at http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB731.

ramento.¹⁵ The Board took the Senator at his word and kept the franchise in Sacramento. Steinberg's end of the bargain, accomplished after more last minute horse-trading, would become SB 743.¹⁶

Though the legislation is replete with technical provisions,¹⁷ two major reforms stand out as particularly important. First, SB 743 seeks the same type of expedited environmental review and litigation as its predecessor, but avoids using controversial jurisdiction-stripping provisions as its mechanism. Rather, the bill simply caps the length of litigation: any challenge, *including any appeals*, must be decided within 270 days.¹⁸ In achieving that aim, SB 743 requires the Judicial Council of California to enact rules of court necessary to achieve the expedited review.

Second, the bill fundamentally changes the type of factors that may be considered in the environmental review process. Prior to SB 743, city planning departments were required to take into account aesthetic considerations and the development project's impact on parking. Would the project affect scenic vistas? Would it damage scenic resources or degrade the aesthetic character of its area? Would the construction make parking in the area infeasible and hazardous and discourage alternative means of non-vehicle transportation?¹⁹ The use of parking impacts for environmental review was a controversial topic, and cities' attempts to circumvent CEQA-mandated parking review have been thwarted by judicial review.²⁰ SB 743 assuages those concerns. In short: "aesthetics and parking impacts of a . . . project on an infill site within a transit priority area shall not be considered significant impacts on the environment."²¹ While parking and aesthetics will surely continue to be the topic of debates in develop-

15. Olson, *supra* note 13.

16. Judicial Review Streamlining for Environmental Leadership Development Projects, S.B. 743 (Cal. 2013), *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB743.

17. Of particular interest among the other provisions is authorization for increased municipal control over the eminent domain process in arena construction projects. Ryan Lillis & Tony Bizjak, *Sacramento Seeking to File Eminent Domain Suit for Arena Property*, SACRAMENTO BEE (Jan. 2, 2014), <http://www.sacbee.com/2014/01/02/6042163/sacramento-seeking-to-file-eminent.html>. *See generally* Steven Chen, *Keeping Public Use Relevant in Stadium Eminent Domain Takings: The Massachusetts Way*, 40 B.C. ENVTL. AFF. L. REV. 453 (2013).

18. S.B. 743 § 7(d).

19. For further information, see Memorandum from Viktoriya Wise, Deputy Env'tl. Review Officer, S.F. Planning Dep't, to the Planning Commission, CEQA Update: Senate Bill 743 Summary (Nov. 26, 2013), *available at* <http://sfmea.sfplanning.org/CEQA%20Update-SB%20743%20Summary.pdf>.

20. *See* Taxpayers for Accountable Sch. Bond Spending v. San Diego Unified Sch. Dist., 215 Cal. App. 4th 1013 (2013); San Franciscans Upholding the Downtown Plan v. City & Cnty. of San Francisco, 102 Cal. App. 4th 656 (2002). *See generally* Arthur F. Coon, *Is "Parking" Really a CEQA Impact? Same As it Ever Was!*, LEXOLOGY (June 25, 2013), <http://www.lexology.com/library/detail.aspx?g=cb27f330-b63a-4f76-90a8-7f6d8d605a90>.

21. S.B. 743 § 5(d)(1).

ment projects, those discussions are no longer the purview of environmental review.

III. POLICY CONSIDERATIONS AND CONCERNS

While SB 743 might have been catalyzed by the personal politics of Senator Steinberg, its passage is incredibly important beyond its impact on Sacramento. Two particular reasons come to mind. First, even if we limit the ripples of SB 743 to stadium projects, its potential to spark future legislative fights could be massive. In California, there are at least six new professional sports stadiums lined up to be constructed in the near future, possibly affecting Sacramento, Oakland, San Jose, San Francisco, Pasadena, Los Angeles, and San Diego.²² California's stringent environmental review proceedings²³ have already obstructed the construction of new homes for the Golden State Warriors—partly because of the effect of the arena on “aesthetic” views of the San Francisco Bay²⁴—a Los Angeles NFL franchise,²⁵ and the Oakland Athletics.²⁶ SB 743 provides a clear framework for these municipalities to seek CEQA exemptions in the face of onerous environmental review, especially when such stadium projects have been the target of similar legislative proposals.²⁷

Moreover, while SB 743 is targeted at Sacramento and stadium projects, it is by no means limited to those areas. In fact, the bill provides CEQA exemptions for any development project provided that it is located in a transit priority area, on an infill site, and is a “residential, mixed-use residential, or an employment center.”²⁸ If this sounds broad, that is because it is: The San Francis-

22. These stadiums would house the Sacramento Kings, Oakland Raiders and Athletics, the Golden State Warriors, a Los Angeles NFL franchise, and the San Diego Chargers, respectively.

23. For background on these proceedings, see Alex Porteshawver, *Under Review: Stadium Construction and State Environmental Policy Acts*, 21 MARQ. SPORTS L. REV. 340, 343 (2010).

24. Ann Killion, *Warriors Arena Would Block Beauty of Bay*, SFGATE (Jan. 16, 2014), <http://www.sfgate.com/warriors/article/Warriors-arena-would-block-beauty-of-bay-4280364.php>.

25. Lauren Gold, *Judge Rules for Pasadena in NFL Lawsuit Filed by Rose Bowl Neighbors*, PASADENA STAR-NEWS (Jan. 24, 2014), <http://www.pasadenastarnews.com/sports/20140124/judge-rules-for-pasadena-in-nfl-lawsuit-filed-by-rose-bowl-neighbors>; Sean Hecht, *California Legislature May Decide L.A. Football Stadium Can Go Forward*, LEGALPLANET (Sept. 11, 2009), <http://legal-planet.org/2009/09/11/california-legislature-may-decide-l-a-football-stadium-can-go-forward-despite-allegations-of-inadequate-environmental-review>.

26. Matthew Artz, *Oakland Business Leaders Press Ahead with Waterfront Ballpark Plan*, OAKLAND TRIB., Jan. 23, 2014, http://www.contracostatimes.com/news/ci_24971239/oakland-business-leaders-press-ahead-waterfront-ballpark-plan.

27. See *Farmers Field in Downtown Los Angeles*, S.B. 292, ch. 353, 2011 Cal. Stat. 3734 (loosening environmental standards on building of proposed NFL stadium at L.A. Live).

28. Wise, *supra* note 19, at 3-4.

co planning department has speculated that almost all major construction projects in the city would be able to meet all three criteria and could become subject to expedited and limited review.²⁹ What's more, the Apple Campus 2 in Cupertino has been folded in to the auspices of SB 743, as has a massive solar facility in Riverside County.³⁰

In total, over "100 specific plans throughout California" have been identified by the California Office of Planning and Research as being eligible for SB 743 exemptions.³¹ The bill may have begun as a Sacramento-centric piece of legislation, but it is by no means ending there. And the massive reach of SB 743 threatens to stretch its narrowly tailored reform provisions beyond their breaking point.

Given the stakes, a dispassionate assessment of SB 743 is imperative. There is little use in denying that its benefits are substantial. On a municipal front, the bill paves the way for a massive investment in the Sacramento downtown area that is estimated to produce billions of dollars in economic growth.³² Moreover, the bill represents the first major step toward needed reforms to the cumbersome California environmental review process, and its provisions are an improvement over the empty promises of alternative proposals for CEQA updates.³³

Perhaps the best aspect of SB 743 is its changed approach toward transportation and parking analysis. Under the old legislative regime, development projects could demonstrate traffic mitigation by increasing parking lot size and adding lanes to surrounding surface streets.³⁴ From an environmental perspective, these allowances provide little benefit, as congestion effects are offset but automobile use is encouraged. SB 743 allows for greater flexibility for projects while incentivizing public transit. For instance, projects receive expedited review if they are in close proximity to major transit stops or include the construction of mass-transit stations as evidence of traffic mitigation efforts.³⁵ To be sure, the bill does not remedy all of CEQA's antiquated provisions—there

29. *Id.* at 4.

30. Nicki Arnold, *Sacramento Kings' CEQA Bill Could Affect Cities Statewide*, CALIFORNIA CITY NEWS.ORG (Oct. 29, 2013), <http://www.californiacitynews.org/2013/10/sacramento-kings'-ceqa-bill-could-affect-cities-statewide.html>.

31. *Id.*

32. Dale Kasler, *New Sacramento Arena Would Bring Big Economic Benefits*, *Study Says*, SACRAMENTO BEE, July 1, 2011, <http://www.sacbee.com/2011/07/01/3740378/new-sacramento-arena-would-bring.html>.

33. *See California Bill Offers Straightforward but Limited CEQA Reforms*, LAND USE INTEGRITY PROJECT, <http://www.landuseintegrity.com/blog/california-bill-offers-straightforward-but-limited-ceqa-reforms.html> (last visited May 1, 2014).

34. *See* Arthur F. Coon & Matthew C. Henderson, *CEQA, Sausages, and the Art of the Possible: A Closer Look at SB 743's General CEQA Reform Provisions*, LEXOLOGY (Sept. 18, 2013), <http://www.lexology.com/library/detail.aspx?g=ae153774-3199-4af9-82a6-06c8ae9c5d00>.

35. *Id.*

are still major issues regarding duplication of review and standing to challenge development projects.³⁶ But if environmental review truly is about environmental benefits, then SB 743 is a helpful step forward.³⁷

The legislation is not perfect, however, and the primary source of concern should be the expedited litigation requirements. First, the expedited litigation review process is certainly going to put a strain on California's already over-worked state court system. Requiring that CEQA actions be completed in such a condensed timeframe will surely push other cases off the docket in a state with little judicial room to spare.³⁸

What's more, there were already procedures in place to expedite the CEQA review process: Pre-SB 743, the law required courts to grant these cases preference over "all other civil actions so that the action or proceeding shall be quickly heard and determined."³⁹ Granting even more expeditious review to cases that were already at the front of the line seems a duplicative exercise with real costs.

Moreover, the Judicial Council has rightly criticized the expedited review of a specific class of cases as arbitrarily denying equal access to justice to environmental litigants. Why, after all, should all litigants play by the same rules of civil procedure in California unless their grievance happens to be environmental in nature? The difference is by no means insubstantial: estimates argue that the new time limits will cut several months off of litigation and significantly cut down on the ninety days a petitioner has to request a hearing after filing a petition.⁴⁰

Here, then, is the rub: SB 743 is constructed broadly enough to cover almost all major development projects in California, assuming that they meet basic environmental mitigation standards. Plaintiffs challenging the environmental impacts of these development projects will face an incredibly abridged litigation cycle. And, even if they do file in time, many of the normal objections raised—such as aesthetic and traffic concerns—are shielded from challenge.

There is no doubt that CEQA is problematic. Its provisions hamper California's economic potential with requirements that do little to mitigate envi-

36. *Id.*

37. See Rebecca Berman, *When Environmental Laws Go Too Far: California's Effort to Reform CEQA*, 12 BERKELEY POL. REV. 6, 6 (2013).

38. SENATE COMM. ON ENVTL. QUALITY, SB 743 BILL ANALYSIS 14-15 (Sept. 12, 2013), available at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0701-0750/sb_743_cfa_20130912_205959_sen_comm.html.

39. *Id.* at 15 (citing P.R.C. § 21167.1). While no study has been conducted to demonstrate how often this provision is used, it is by no means arcane, and many California state courts include information about the provision in their local rules of court.

40. Jeffrey D. Dintzer & Matthew C. Wickersham, *Last Minute CEQA Bill Offers Quick Fixes to Procedural Rules*, L.A. DAILY JOURNAL (Sept. 17, 2013), <http://gibsondunn.com/publications/Documents/DintzerWickersham-LastMinuteCEQABill.pdf>.

ronmental concerns. And SB 743 could prove to limit extraneous governmental oversight of California's economic engine. But its litigation restrictions are unduly harsh and its scope disconcertingly broad, especially considering that it was passed under the simple auspices of keeping the Sacramento Kings in California. CEQA reform is still needed and almost certainly inevitable. Hopefully more systematic downstream revisions will take care to consider both the benefits and drawbacks of SB 743.