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Friends of Mammoth: Vox Populi or Judicial Social Engineering

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Friends of Mammoth: Vox Populi or Judicial Social Engineering

On September 21, 1972 the Supreme Court of California sitting en banc handed down a historic decision in the case of *Friends of Mammoth, et al. v. Board of Supervisors of Mono County, et al.*[1] As Justice Mosk states in the opening sentence of his majority opinion, "(t)his case affords us the first opportunity to construe provisions of the California Environmental Quality Act of 1970 (EQA)."[2]

The protagonists in this judicial struggle represent the interests one might expect to find in an environmental decision of this magnitude. The Attorney General of California and the Sierra Club both appeared as amici curiae. Also involved were defendant Mono County Planning Commission (Planning Commission) and the real party in interest and defendant, International Recreation, Ltd. (International).

International, a private developer, filed an application for a conditional use permit on April 20, 1971 with the Planning Commission which approved it. The proposal was for the construction of a facility in the mountain community of Mammoth involving some six buildings ranging from six to eight stories in height. This complex was to house condominiums together with specialty shops, a restaurant, parking, recreational and service facilities. All of this was to be placed on a plot of ground 135 feet by 1,775 feet resulting in "a long and relatively narrow . . . series of structures in close proximity. . . ."[3]

Several individuals on the local scene became concerned about the effect this facility might have on the environment. They envisioned water and sewage problems, traffic pollution, and certainly a diminution of open space. To understand their concern one must appreciate the area which was to be affected. California's Mono County lies along the eastern escarpment of the Sierra

1. 8 Cal. 3d 1, 500 P.2d 1361, 104 Cal. Rptr. 16 (1972).
2. *Id.* at 5, 500 P.2d 1361, 1363, 104 Cal. Rptr. 16, 19; parenthetically Justice Mosk describes the citation for EQA as PUBLIC RESOURCES CODE §§ 21000-21151.
3. *Id.* at 6, 500 P.2d 1361, 1363, 104 Cal. Rptr. 16, 19.

in the Inyo National Forest. It is a region of solitude and exquisite beauty. "(N)ature's bountiful gifts of majestic mountains, lakes, streams, trees and wildlife have produced in the area one of the nation's most spectacularly beautiful and comparatively unspoiled treasures."[4] This is a heritage to be jealously protected. These concerned citizens appealed the Planning Commission's decision to defendant Mono County Board of Supervisors (Board) who affirmed the issuance of the use permit on June 14, 1971.

On July 12, plaintiff Friends of Mammoth[5] together with plaintiff Charles E. Griffin II[6] filed a petition for a writ of administrative mandamus[7] with the Court of Appeals attacking the validity of the permit. The court denied the writ without prejudice to the filing of proceedings in the Mono County Superior Court. It was thus filed, denied and appealed to the California Supreme Court which reversed the lower decisions.

The thrust of this Supreme Court decision is that under the EQA the planning commission is required to consider whether the proposed construction might have a significant effect on the environment and if so to prepare an environmental impact report prior to its decision to grant the use permit.

At this point one might query, "What's all the shouting about?" If the legislature passed a statute requiring an environmental impact report under these circumstances, why wasn't it done? Why did it take from April 20, 1971, to September 21, 1972, and involve two administrative units, three levels of judicial activity, together with some dozen and a half attorneys to arrive at what should have been an almost simplistic decision? What obscurity in the law should dictate such activity? The answer is that the EQA was drafted with a flaw that took some rather tortured logic to straighten out.

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4. *Id.* at 7, 500 P.2d 1361, 1364, 104 Cal. Rptr. 16, 20.

5. *Id.* at 6, 500 P.2d 1361, 1363, 104 Cal. Rptr. 16, 19. Friends of Mammoth is described in footnote 2 of the case as "an unincorporated association of hundreds of resident and non-resident owners of lots or mountain residences at Mammoth Lakes, Mono County, California."

6. Charles E. Griffin II is a member of the class which includes Frederick Schaeffer and Richard Young who along with two others, not a party to this case, appealed the Commission's decision to the Board on May 21, 1971.

7. Black's Law Dictionary, 4th ed., 1113 (West Pub. Co., 1968): Administrative Mandamus. ". . . the name of a writ . . . which issues from a court of superior jurisdiction and is directed to . . . an administrative . . . officer . . . commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived. Lahiff v. St. Joseph, etc., Soc., 76 Conn. 648, 57 A. 692, 65 L.R.A. 92, 100 Am. St. Rep. 1012."

Some, including Justice Sullivan who wrote a most coherent dissent, state that there was no flaw at all. He says that the majority is reading something into the EQA which is not there. He admonishes the majority that in construing the meaning of a statute,

> . . . the court turns first to the words themselves for the answer. It may also properly rely on extrinsic aids. . . . Primarily, however, the words, in arrangement that superimposes the purpose of the Legislature upon their dictionary meaning, stand in immobilized sentry, reminders that whether their arrangement was wisdom or folly, it was wittingly undertaken and not to be disregarded.
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> . . . If the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. (citations.) Certainly the court is not at liberty to seek hidden meanings not suggested by the statute or by the available intrinsic aids. (citation.)[8]

The hidden meaning, or flaw to be corrected, in the EQA is that its operative provisions seem to apply only to public "projects" by government entities and not to private endeavors as found by the majority. In finding this construction, the majority first addressed itself to the legislative intent as it is superimposed over the words of the operative sections of the EQA. Section 21151 requires that ". . . local governmental agencies shall make an environmental impact report on any *project* they intend to carry out which may have a significant effect on the environment and shall submit it to the appropriate local planning agency as part of the report required by Section 65402 of the Government Code."[9] (Italics added.) The key, according to the majority, is the meaning of the word "projects" and whether that meaning includes a private activity for which a government permit is necessary. As pointed out by Justice Sullivan the plain meaning of these words seems to indicate only "projects carried out by public entities" especially in light of the allusion to Section 65402 of the Government Code which is legislation addressed only to the permit requirements for public works and projects by municipal, county and state governments.[10]

8. 8 Cal. 3d 1, 26, 500 P.2d 1361, 1377, 104 Cal. Rptr. 16, 33 (1972); People v. Knowles, 35 Cal. 2d 175, 182-83, 217 P.2d 1, 5 (1950); *see also In re* Miller, 31 Cal. 2d 191, 198-99, 187 P.2d 722 (1947); CAL. CODE CIV. PROC. § 1858 (West 1955).

9. CAL. PUB. RES. CODE § 21151 (West Supp. 1972).

10. 8 Cal. 3d 1, 26-27, 500 P.2d 1361, 1378-79, 104 Cal. Rptr. 16, 34-35 (1972); CAL. GOV. CODE § 65402 (West 1955).

In finding that the word "project" includes private activities as well as public activities the majority observes "that nowhere in the act is the word 'projects' defined."[11] This then gives them license to "rely on a cardinal principle of statutory construction: that absent 'a single meaning of the statute apparent on its face, we are required to give it an interpretation based upon the legislative intent with which it was passed.' "[12]

In searching for this intent the court turns to sections 21000 and 21001 of the EQA, on "Legislative Intent" and "Additional Legislative Intent." In these pre-amble sections the majority finds, "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 effect the quality of the environment, shall *regulate* such activities so that major consideration is given to prevent environmental damage."[13] (Italics added.) The majority finds the use of the term *regulate* commandingly significant. Its use shows that the Legislature "desired to ensure that the governmental entities in their regulatory function would determine that private individuals were not forsaking ecological cognizance in pursuit of economic advantage."[14] Another section states: "The interrelation of policies and practices in the management of natural resources and waste disposal requires systematic and concerted efforts by *public and private* interests to enhance environmental quality and to control environmental pollution."[15] (Italics added.) Finally, the majority adds the clincher showing that the EQA is to "ensure that the long-term protection of the environment shall be the guiding criterion in *public decisions*."[16] (Italics added.) In effect the majority distills these sections on general intent into the guiding purpose of the Legislature in enacting the EQA. The majority says that the word "projects" is

11. *Id.* at 9, 500 P.2d 1361, 1366, 104 Cal. Rptr. 16, 22.

12. *Id.* at 9, 500 P.2d 1361, 1366, 104 Cal. Rptr. 16, 22; *see also* Benor v. Board of Medical Examiners, 8 Cal. App. 3d 542, 546-47, 87 Cal. Rptr. 415, 419 (1970).

13. CAL. PUB. RES. CODE § 21000(g) (West Supp. 1972).

14. 8 Cal. 3d 1, 10, 500 P.2d 1361, 1366, 104 Cal. Rptr. 16, 22 (1972). For a study of the cost factors both social and economic see Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 STAN. L. REV. 1 (1968); Note, *An Economic Analysis of Land Use Conflicts*, 21 STAN. L. REV. 293 (1968); Note, *The Cost-Internationalization Case for Class Actions*, 21 STAN. L. REV. 383 (1968); Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); Delogu, *Effluent Charges: A Method of Enforcing Stream Standards*, 19 ME. L. REV. 29 (1967); Hagevik, *Legislating for Air Quality Management: Reducing Theory to Practice*, 33 LAW & CONTEMP. PROB. 369 (1968); Krier, *The Pollution Problem and Legal Institutions: A Conceptual Overview*, 18 U.C.L.A. L. REV. 429 (1971).

15. CAL. PUB. RES. CODE § 21000(f) (West Supp. 1972).

16. CAL. PUB. RES. CODE § 21001(d) (West Supp. 1972).

not to be read in context. It is to be read as modified by the directive that it is the intent of the Legislature that the EQA regulates public and private interests through public decisions concerning activities which have a significant effect on the environment. In justifying this adumbrated effect the majority relies on the mandate of a prior decision: "The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intentions of the Legislature apparent by the statute, and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the Spirit of the Act."[17]

Feeling the need to flesh out the word "projects" more fully Justice Mosk then turned to the National Environmental Policy Act of 1969 (NEPA).[18] This act was signed into law January 1, 1970. He found it significant that the EQA became law some nine months later on September 18, 1970. "Not only does the timing and the titles [sic] of the two acts tend to indicate that the EQA was patterned on the federal act, the key provision of the two acts, the environmental impact report, is the same. . . . Indeed, much of the phraseology of the EQA is either adopted verbatim from or is clearly patterned upon the federal act."[19] The Interim Guidelines[20] written by the President's Council on Environmental Quality pursuant to the passage of NEPA were available and, in the majority's

17. *In re* Haines, 195 Cal. 605, 613, 234 P. 883, 886 (1925); *see also* Dickey v. Raisen Proration Zone No. 1, 24 Cal. 2d 796, 802, 151 P.2d 505, 508 (1944); People *ex rel.* San Francisco Bay, etc., Comm. v. Town of Emeryville, 69 Cal. 2d 533, 543-44, 446 P.2d 790, 796 (1968).

18. 42 U.S.C. § 4321 *et seq.* For a review of NEPA in depth see Donovan, *The Federal Government and Environmental Control: Administrative Reform on the Executive Level*, 1 ENVIR. AFF. 299 (1971); Comment, *The National Environmental Policy Act of 1969 Saved from "Crabbed Interpretation"*, 52 BOSTON U.L. REV. 425 (1972); Calvert Cliff's Coordinating Comm'n, Inc. v. Atom. Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971). For other state laws patterned on NEPA *see* Note, *The Minnesota Environmental Protection Act*, 56 MINN. L. REV. 575 (1972); Note, *Environmental Law—Primary Jurisdiction—Role of Courts and Administrative Agencies*, 1972 WISC. L. REV. 934.

19. 8 Cal. 3d 1, 4, 500 P.2d 1361, 1369, 104 Cal. Rptr. 16, 25 (1972); *see also* note 4 of the case for a section by section comparison of the EQA and NEPA. For a further comment on the similarity between the two acts see Powell, *The Courts as Protectors of the Environment*, 47 L.A. BAR BULL. 215 (1972).

20. 35 FED. REG. 7390 (1970) superseded by 36 FED. REG. 7724 (1971).

opinion, guided the Legislature in the meaning which it gave to the word "projects." Under the federal guidelines, the word "projects" is defined as a subclass of "actions" and includes within its meaning activities for which "lease, permit, license, certificate, or other entitlement for use" is required.[21]

The court summed up its decision.

> In view of the relationship between the two acts and the fact that both are subject to a broad judicial interpretation, it is manifest that the word "projects" as used in section 21151 and other provisions of the EQA includes the issuance of permits, leases and other entitlements. Accordingly, we hold that in the case at bar defendants were required to consider whether the proposed condominium construction "may have a significant effect on the environment" (citation) and, if so, to prepare an environmental impact report prior to the decision to grant the conditional use and building permits.[22]

The court then addressed itself to several sub issues: the exhaustion of administrative remedies;[23] standing by members of a class;[24] the statute of limitations within which to appeal an administrative decision;[25] and the construction of certain local ordinances involved in the issuance of use permits.[26] The majority's findings on these sub issues were consistent with the decision on the major issue and favorable to the plaintiffs.

II

It is of interest to note that environmental lawsuits are often re-

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21. 35 FED. REG. 7390, 7391; 36 FED. REG. 7724, 7725, 5.(a) (ii).

22. 8 Cal. 3d 1, 16, 500 P.2d 1361, 1370, 104 Cal. Rptr. 16, 26 (1972).

23. *Id.* at 20, 500 P.2d 1361, 1373, 104 Cal. Rptr. 1, 29. *See also* Note, *Environmental Law—Primary Jurisdiction—Role of Courts and Administrative Agencies*, 1972 WISC. L. REV. 934; Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970).

24. 8 Cal. 3d 1, 21, 500 P.2d 1361, 1374, 104 Cal. Rptr. 16, 30 (1972). On the issue of standing to sue *see* Davis, *The Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Grad & Rockett, *Environmental Legislation—Where the Action Is?*, 10 NAT'L RES. J. 742 (1970); Hanks and Hanks, *An Environmental Bill of Rights: The Citizen Suit and the National Environment Policy Act of 1969*, 24 RUTGERS L. REV. 230 (1970); Porter, *The Role of Private Nuisance Law in the Control of Air Pollution*, 10 ARIZ. L. REV. 107 (1968); Sax, *Public Rights in Public Resources: The Citizen's Role in Conservation and Development*, in CONTEMPORARY DEVELOPMENTS IN WATER LAW 136 (C. Johnson & S. Lewis, eds. 1970); Comment, *Environment Law—Standing to Sue*, 6 LAND & WATER L. REV. 527 (1971); Comment, *The Role of the Judiciary in the Confrontation with Problems of Environmental Quality*, 17 U.C.L.A. L. REV. 1070 (1970); Sierra Club v. Hickel, 433 F.2d 24 (9th Cir. 1970), *cert. granted*, 401 U.S. 907, 404 U.S. 814; 404 U.S. 908, 404 U.S. 964 (1971); Burlow v. Collins, 397 U.S. 159 (1970).

25. 8 Cal. 3d 1, 22, 500 P.2d 1361, 1374, 104 Cal. Rptr. 16, 30 (1972).

26. *Id.* at 23-24, 500 P.2d 1361, 1375-76, 104 Cal. Rptr. 16, 31-32.

solved on the basis of statutory interpretation and not on the environmental merits.[27] The strained logic of the instant case is an excellent example of the mental gyrations that occasionally occur if a wrong is to be remedied under a statute. If courts were willing to abandon the restriction of statutory language and boldly sally into the common law area of judicial precedent, the tools to construct a balanced healthful productive environment could be more easily wielded. Recognition of environmental rights and the evolution of judge-made doctrines of environmental law would be useful, not only to supplement statutory guidelines but, where no statute directly applies, the acceptance of environmental rights as a legal precept would mean a significant change of direction for environmental law generally.[28]

Is this such a revolutionary concept? Consider the common law remedies of negligence, nuisance, trespass and strict liability.[29] Only the slightest extension of these common law causes of action could do for environmental law what this court did for products liability law under Chief Justice Traynor. In *Greenman v. Yuba Power Products, Inc.*[30] this court saw a defect in the law which allowed an injury to be without remedy. It ripped off the restrictions of convention by removing products liability from the confines, and frequently strained interpretations, of contract law

27. Montgomery, *The Public Trust Doctrine in Public Land Law: Its Application in the Judicial Review of Land Classification Decisions*, 8 WILLAMETTE L.J. 135, 177-178 (1972); *see also* Citizen's Committee for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970); Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F. Supp. 1189 (W.D. Tenn. 1970).

28. Montgomery, *supra* note 27, at 178; *see also* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); Note, *Toward a Constitutionally Protected Environment*, 56 VA. L. REV. 458 (1970).

29. On the issue of private remedies for environmental pollution a plethora of material exists. Consider the following: Baxter, *supra* note 14; Bellis, Kolsby & Wolf, *Legal Approach to Industrial Pollution*, Trial, June/July 1968 at 29; Bryson and McBeth, *Public Nuisance, The Restatement (Second) of Torts and Environmental Law*, 2 ECO. L.Q. 241 (1972); Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126; Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587 (1969); Miller & Borchers, *Private Lawsuits and Air Pollution Control*, 56 A.B.A.J. 465 (1970); Schuck, *Air Pollution as a Private Nuisance*, 3 NAT. RES. LAWYER 475 (1970); Seamans, *Tort Liability for Pollution of Air and Water*, 3 NAT. RES. LAWYER 146 (1970); Comment, *Equity and the Eco-System: Can Injunctions Clear the Air?*, 68 MICH. L. REV. 1254 (1970).

30. 59 Cal. 2d 57, 377 P.2d 897 (1963), 13 A.L.R.3d 1049.

and made it a viable remedy under the law of negligence. What justice today will be bold enough to open this door to save our abused environment?

"This is widely reputed to be an age of judicial activism. There has been an increasing tendency to turn to the courts for help whenever the legislature and executive branches of government have seemingly failed to respond to the necessities of the time."[31] When former Attorney General Thomas C. Lynch made this statement it was within the context of a plea to allow the legislature to set the standards for ecological control. We find that, although legislatures have made a halting response to the environmental "necessities of the time," they are subject to the invidious pressures of special interest groups. This results in compromise bills that frequently do too little too late or nothing at all. The courts are not subject to such pressures. "The principle function of courts in environmental matters is to restrain projects that have not been adequately planned to insist that they not go forward unless and until those who wish to promote them can demonstrate that they have considered, and adequately resolved, reasonable doubts about their consequences."[32]

In *Friends of Mammoth* the California Supreme Court was in consonance with this movement but, constrained to follow the more conservative path, it used the EQA as its vehicle of change. In this statute the legislature went part way in providing a tool to shape our environment but it was up to the court to hone the cutting edge that sliced away administrative inaction. When an agency is given direction by the legislature its failure to carry out that purpose can and should be corrected by the courts.[33] The courts then become the instrument of social change that magnifies the voice of the people. In being tuned to the "necessities of the time" the courts must be acutely aware of a peculiarity of lumbering bureaucracy.

> The administrative process tends to produce not the voice of the people but the voice of the bureaucrat—the administrative perspective posing as the public interest. Simply put, the fact is that the citizen does not need a bureaucratic middleman to identify, prosecute, and vindicate his interest in environmental quality. He is perfectly capable of fighting his own battles—if only he is given

31. Lynch & Stevens, *Environmental Law—The Uncertain Trumpet*, 5 U.S.F.L. REV. 10, 13 (1970).

32. Joseph L. Sax, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION 113 (Alfred A. Knopf, Inc. 1971).

33. Scenic Hudson Preservation Conf. v. Fed. Pwr. Comm'n, 354 F.2d 608 (2d Cir. 1965), *cert. denied* 384 U.S. 941; Citizen's Comm'n for the Hudson Valley v. Volpe, 425 F.2d 97 (2d Cir. 1970); Calvert Cliff's Coordinating Comm'n, Inc. v. Atom. Energy Comm'n, 449 F.2d 1109 (D.C. Cir. 1971).

> the tools with which to do the job. And battles are best fought out between those who have direct stakes in the outcome.[34]

How much simpler it would have been to have sought the remedy on precedent rather than strained statute.

III

EPILOGUE

The decision by the Supreme Court that a written environmental impact report must be filed before a permit will be issued for either public or private projects rattled the secure environs of the business community. Suddenly building projects began to grind to a halt. This gave rise to angry cries of "foul" by both pro and con. John C. McCarthy, the attorney for Friends of Mammoth charged that "construction activity throughout the state is being deliberately blocked as much as possible in order to distort the Supreme Court decision . . . so that legislation to gut or repeal the law can be passed quickly." He indicated further that the Secretary of Resources has authority to set the dollar value limit on which impact reports are required. This was confirmed by this ruling which said, "the majority of private projects will present no risk of environmental effect and therefore will not require impact reports."[35]

That legislation was not long in coming. Assemblyman John T. Knox, the principal author of the EQA, introduced AB 889[36] which was signed into law on December 5, 1972 by Lieutenant Governor Ed Reinecke before representatives of the building and banking industries. This amendment to the EQA which was made effective immediately imposes a 120-day[37] moratorium on the effect of the court ruling in *Friends of Mammoth,* giving time for state and local governments to work out guidelines for private projects. It directs the Secretary of the State Resources Agency to set up "categorical exemptions" from the environmental report requirement.[38]

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34. Sax, *supra* note 32, at 56.
35. 50 Los Angeles Metropolitan News, 207 (Nov. 15, 1972).
36. This Assembly bill amended CAL. PUB. RES. CODE § 21000 *et seq.* It was introduced March 13, 1972 and underwent 8 amendments before finally being signed into law. This bill was specifically enacted to clarify the legislative intent on issues subject to decision in *Friends of Mammoth.*
37. CAL. PUB. RES. CODE §§ 21171-21172.5 (West 1972) eff. 12-5-72.
38. *Id.* § 21084.

It has been estimated the exemptions would include 98 per cent of all private projects. The measure also establishes a 30 day statute of limitations for lawsuits to challenge a decision on the environmental impact report's adequacy after the end of the 120-day moratorium.[39]

Thus it is apparent that, as McCarthy predicted, the legislature has emasculated a decision that could have been a landmark in the effort to save the environment. It is now up to the court to be guided by its previous explorations into the frontiers of tort law and provide us with a common law remedy to right the wrong of ecological destruction.

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39. *Id.* § 21167(c).