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CEQA Streamlining Legislation: Some Small Steps Forward, but No Giant Leap

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The California Environmental Quality Act (CEQA) has been a cornerstone of California's environmental protection program since its enactment in 1970. CEQA requires public agencies to review and receive public comment on the potentially significant adverse impacts of private development and public infrastructure projects, to consider feasible alternatives, and to implement measures to mitigate significant impacts to the extent feasible. However, developers and local governments have long complained that the costly and time-consuming preparation and approval of environmental impact reports (EIRs) and the litigation that often follows can jeopardize even environmentally desirable projects, such as infill development and renewable energy.

In an effort to address these concerns, in the final days of the session the Legislature passed three CEQA "streamlining" bills which now have been signed by the Governor and become effective on January 1, 2012: S.B. 292, A.B. 900 and S.B. 226.[1] Hailed by some as promoting jobs, attacked by others as undercutting CEQA's environmental protections, the three bills in fact offer only limited benefits, under such restrictive conditions that few projects will qualify. As a result, the effect of these reform bills on CEQA practice and project development likely will be far less than their advocates claim and their critics fear, while the bills' effectiveness at expediting projects and generating jobs remains to be seen.

The first bill, S.B. 292, applies to only one project, the Farmers Field football stadium in Los Angeles proposed by Anschutz Entertainment Group (AEG). The 72,000 seat stadium would be constructed at the site of the Los Angeles Convention Center's West Hall, which would be replaced with a new hall nearby. The City of Los Angeles began preparing an EIR for Farmers Field in March 2011, and S.B. 292 will sunset if the EIR is not completed by June 2013. With opponents already raising objections to traffic congestion

[1] S.B. 292 (Padilla), Stats. 2011, Ch. 353; A.B. 900 (Buchanan), Stats. 2011, Ch. 354; and S.B. 226 (Simitian), Stats. 2011, Ch. 469.

and associated air pollution, the prospect of litigation must be a critical concern for the City and the developer.

S.B. 292 does not alter any of the burdens of EIR preparation – indeed, it imposes certain environmental standards more stringent than CEQA would require. However, S.B. 292 substantially reduces the time allowed for the courts to resolve any lawsuit challenging the stadium project EIR. CEQA already provides expedited judicial review, ordinarily leading to a trial court hearing within 240 days. After the trial court's decision, however, appeals to the Court of Appeal and the state Supreme Court can drag on for years. S.B. 292 requires a challenge to the Farmers Field EIR to be filed directly in the Court of Appeal, which must decide the case within 175 days. If that decision is appealed, the Supreme Court must reach a decision within another 45 days, i.e., 220 days from the initial filing. Limiting the entire judicial review process to just over seven months provides AEG and the City with a significant savings of money and time. S.B. 292 also addresses the "data dumping" problem: under current law, litigants can sue on issues raised for the first time at the final hearing to adopt a project, to which they may bring piles of documentation that the lead agency has no real opportunity to evaluate. The bill allows the City to disregard most comments made after the close of the written comment period on the Draft EIR.

In exchange for these benefits, the bill adds mandatory mediation, available at any commenter's request, and requires prompt electronic posting of administrative record materials. In addition, the project must achieve zero net emissions of greenhouse gases (GHG) from automobile trips to the stadium (giving priority to GHG offsets obtained locally or in the region, but also allowing offsets elsewhere), and achieve a "trip ratio" (i.e., number of automobiles driven to the stadium divided by number of spectators) that is no more than 90% of the trip ratio of any other National Football League stadium.

The highly accelerated litigation schedule and avoidance of last-minute data dumps certainly provide considerable benefits to the stadium project. Nevertheless, S.B. 292 does not affect the EIR process, the environmental protections of CEQA (except to the extent that it adds **more stringent** GHG and trip ratio requirements), nor even the standard of judicial review – only its speed. Accordingly, the outcry from those who perceive the bill as an attack on CEQA seems excessive, unless one views last-minute data dumps and the use of protracted litigation to exhaust the patience and resources of project proponents and their financial backers as a fundamental feature of CEQA, which was hardly the Legislature's original intent. (Nor would AEG, in this case, be so easily exhausted.)

The second bill, A.B. 900, was introduced just one day before the end of the legislative session, responding to the clamor to extend CEQA streamlining beyond the single stadium project in Los Angeles. Again, however, environmentalists' concerns and developers' enthusiasm both seem overstated, given the bill's limited benefits and limited applicability.

Under A.B. 900, challenges to an EIR for an "environmental leadership development project" must be filed directly in the Court of Appeal, together with any other challenges to land use approvals for the project. The court must decide the case within 175 days of filing. However, this is the only streamlining that the bill provides. S.B. 292's deadline for Supreme Court appeal and anti-data dumping provision are absent from A.B. 900 (although the requirement for prompt posting of electronic documents is included). To receive the sole benefit of expedited review in the Court of Appeal, the project must apply for and receive the Governor's certification as an "environmental leadership development project," with concurrence from the Joint Legislative Budget Committee. The qualifications for certification are extensive:

A. The project must be in one of three categories:

   i. a residential, retail, commercial, sports, cultural, entertainment, or recreational use project which is all of the following:

      a. located on an infill site;

      b. certified in the "Leadership in Energy and Environmental Design" (LEED) Silver category or better by the U.S. Green Building Council;

      c. achieves 10% greater transportation efficiency (i.e., number of vehicle trips generated by employees, visitors or customers divided by number of employees, visitors and customers) than comparable projects (note: trips by residents are not included in this measure);

      d. consistent with a Sustainable Communities Strategy (SCS) or Alternative Planning Strategy (APS) for coordinated land use and transportation planning under S.B. 375, if an SCS or APS has been adopted by the regional Metropolitan Planning Organization (MPO) and approved by the State Air Resources Board (note: no MPO has yet adopted an SCS or APS);

   ii. a clean energy project for wind or solar electricity generation; or

   iii. a clean energy manufacturing project, manufacturing products, equipment or components for renewable energy generation, energy efficiency or clean alternative fuel vehicles.

B. In addition, the project must accomplish all of the following:

   i. result in a minimum investment of at least $100 million within the state on completion of construction;

   ii. create highly-skilled construction and permanent jobs that pay high, prevailing and living wages and help reduce unemployment;

   iii. achieve zero net additional GHG emissions, including emissions from employee transportation; and

   iv. the project applicant must enter into a binding agreement with appropriate agencies for monitoring and enforcement of all environmental mitigation measures; and pay for administrative record preparation and judicial review, including costs for a special master if appointed by the court.

Once certified, projects must notify the lead agency that they intend to rely on this bill (otherwise it does not apply), complete their EIRs, and the statute of limitations must run before A.B. 900 sunsets in June 2014. That timing does not allow much time for certification. Projects that succeed in meeting the deadline will enjoy expedited judicial review, which certainly is a significant benefit. Even so, as with S.B. 292, the actual environmental protections of CEQA review – the EIR process, the range of environmental impacts and alternatives considered, the obligation to provide feasible mitigation, and the standards applied by the courts during the expedited judicial review – remain unaffected, while additional environmental and economic standards are imposed.

The third bill, S.B. 226, contains a grab bag of unrelated CEQA streamlining provisions intended to expedite certain infill development and renewable energy projects. In the renewable energy category, S.B. 226 includes an outright exemption from CEQA review for solar energy systems generating electricity or heated water that are installed on the roofs of existing buildings or in existing parking lots. Exempt installations include associated grid connection equipment on the same parcel or an adjacent parcel, so long as such equipment does not occupy more than 500 square feet or affect various sensitive environmental resources. In addition, until June 30, 2012 (just six months after the bill becomes effective), the bill allows developers of solar thermal power plant projects which have received California Energy Commission (CEC) certification to petition the CEC to convert the project to photovoltaic technology. These projects otherwise would not qualify for the streamlined CEC procedure provided for solar thermal technology, including a "one-stop shopping" environmental review and permitting process.[2]

For qualifying infill projects, S.B. 226 limits EIR analyses to only impacts that are project-specific or are new or more severe than those addressed in a prior EIR for a general plan or similar planning-level action. An impact is not new or more severe if the lead agency finds that the impact will be substantially mitigated by "uniformly applicable development policies or standards" adopted by the lead agency, city or county. Moreover, the project-specific EIR need not consider growth-inducing impacts or alternative locations, densities and building intensities. These provisions would genuinely streamline the time and effort of the EIR review process itself, avoiding duplicative reassessment of issues already addressed in the CEQA review of the prior planning-level decisions. However, the streamlining benefits are available only for projects meeting a long list of qualifications:

A. "Infill projects" are:

   i. residential, retail or commercial, transit station, school or public office building projects;

   ii. if retail or commercial, use no more than half the project area for parking;

   iii. located either in an incorporated city or in an unincorporated area surrounded by incorporated cities, whose population density is no greater than that of the unincorporated area, with a combined population of at least 100,000; and

   iv. located on sites that have been previously developed or are vacant but share 75% of their perimeter with a residential, commercial, public institution, passenger transit or transportation, or retail use.

B. To qualify for the streamlining benefits, an infill project must:

   i. if in a location where the MPO has adopted an SCS or APS pursuant to S.B. 375, be consistent with the SCS or APS; or,

   ii. if in a location where the MPO has not yet adopted an SCS or APS, have a residential density of at least 20 units/acre or floor area ratio (FAR) of 0.75; or

   iii. if in an incorporated city that is outside any MPO, are "small walkable community projects" of approximately ¼ mile diameter, within a city-designated area, which provide residential

[2] The Governor's signing message for S.B. 262 suggests that this provision was a key reason for his signing the bill.

development adjacent to a retail downtown area, and include at least 8 dwelling units per acre or FAR for retail or commercial uses of at least 5.0.

C. Finally, infill projects must also satisfy "statewide standards for infill projects" to be adopted by the Natural Resources Agency by January 1, 2013 and updated thereafter as frequently as necessary to protect the environment. The standards to be developed must promote:

   i. implementation of land use and transportation policies under S.B. 375;

   ii. attainment of GHG reductions under A.B. 32;

   iii. reductions in per capita urban water use of 10% by 2015 and 20% by 2020;

   iv. proximity of housing, retail and employment to transit stations in transit village development districts;

   v. substantial improvements in energy efficiency;

   vi. protection of public health (including the health of vulnerable populations) from pollution of air, water and soil; and

   vii. the state's planning priorities as specified in Government Code section 65041.1, to promote equity, strengthen the economy, protect the environment, and promote public health and safety in urban, suburban, and rural communities, and in the 185 page Governor's Environmental Goals and Policy Report (November 2003).

Not many projects will pass through the eye of this needle.

Finally, for all projects (not limited to infill development or renewable energy), S.B. 226 provides that the project's GHG emissions shall not in themselves preclude reliance on a categorical exemption from CEQA, if the project complies with applicable requirements implementing statewide, regional or local GHG mitigation plans. This provision remedies a specific but largely theoretical problem: the categorical exemptions specified in the State CEQA Guidelines cannot be used when an otherwise exempt project has a significant impact due to "unusual circumstances" or when the cumulative impact of projects of the same type in the same place over time is significant. In theory, in the GHG context, the inherently cumulative nature of climate change could be interpreted to effectively eliminate the ability to qualify for categorical exemptions from CEQA for all projects with non-zero GHG emissions. In practice, however, lead agencies generally rely on categorical exemptions without treating GHG emissions as "unusual" or cumulatively significant in this sense. This provision would confirm the correctness of that practice.

In sum, S.B. 292, A.B. 900 and S.B. 226 represent an assortment of small steps forward, but no giant leap for CEQA reform. Lead agencies and project proponents remain understandably frustrated by NIMBY opponents who profess support for infill and clean energy projects, but not here – where "not here" sometimes seems to mean virtually "not anywhere." However, environmental advocates, equally understandably, are highly skeptical of anything that in their view dilutes the environmental and procedural protections provided by CEQA. With these three bills, the first round of CEQA reform under Governor Brown has gone to those seeking only limited streamlining for very few projects. Notwithstanding the objections of CEQA's steadfast defenders, many are no doubt quietly pleased that the bills did not go further. Meanwhile, pressure to expedite projects, promote job creation and encourage environmentally beneficial infill develop-

ment and renewable energy will not go away. More CEQA reform efforts, and more debate over the wisdom or necessity of meddling with CEQA, can be expected in the next session.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors of this alert.

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