

Climate Change Impacts of Development Projects

Under state environmental impact assessment laws

By ARTHUR F. COON AND KRISTINA D. LAWSON

Throughout the West, and indeed throughout the country, the building and development industry is facing a new challenge: the emergence of climate change as an issue raised by development opponents. In California, for example, several lawsuits have already been filed alleging that agencies charged with performing environmental review of proposed land development projects have failed to consider those projects' climate impacts. California's attorney general has submitted

tal impact statements is required; and the standards governing sufficiency of the required environmental documents.

CALIFORNIA AND WASHINGTON ENVIRONMENTAL ACTS

Some of these laws, like the California Environmental Quality Act ("CEQA") and Washington's State Environmental Policy Act, broadly apply to almost all discretionary development approvals and associated projects, including general plan amendments, specific plans, rezonings, subdivision maps, site review approvals, conditional use permits, and virtually any other discretionary land use approval, permit or entitlement. Such laws not only require government decision-makers at all levels to be fully informed about the environmental consequences of their proposed actions—generally by means of a detailed environmental impact statement (or under CEQA, an environmental impact report)—but they also compel the adoption of feasible mitigation measures or project alternatives to avoid or reduce environmental damage. Other Western states such as Hawaii, Montana, Nevada and Arizona have more limited environmental review requirements.

Where environmental review of a proposed project is integrated with the entitlement and permitting processes, federal, state and local agencies may soon be required to address the potential impacts of climate change on the proposed development project, as well as the project's contributions to the problems associated with rising global temperatures.

STATE-TO-STATE IMPLICATIONS

In all states with environmental review requirements, the key consideration is whether a proposed project may cause significant adverse impacts on the environment. Such analysis has typically required a comparison of the preproject physical environment—i.e., the environmental "baseline"—with the environment that will exist after the project is built out. Without an accurate baseline, adequate analysis of project impacts, mitigation measures and alternatives is not possible. Climate change raises the question of whether the proper baseline is always only present conditions, or whether it includes reasonably foreseeable future conditions that will occur even without the project. Climate change science suggests the baseline is changing and that a future baseline—taking into account rising temperatures, melting snowpacks, rising sea levels, decreased drinking water and hydropower supplies, increased fire hazards, altered growing seasons—may be appropriate for purposes of evaluating the potential impacts of a land development project.

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public comments during the environmental review periods of other local agency transportation and land use projects urging analysis and mitigation of greenhouse gas emissions impacts. Other attorneys general, state legislators and governors are beginning to fill the federal regulatory void by enacting or advocating for mandatory greenhouse gas emissions rules at the state level. The U.S. Supreme Court has also recently weighed in on the issue with a 5-4 decision in *Massachusetts v. EPA*. While only tangentially related to land development, the court held that the EPA has both the duty and the authority under the Federal Clean Air Act to regulate CO₂ and greenhouse gas emissions from new motor vehicles, and that the asserted uncertainty of climate change was not a valid basis for the EPA to decline to regulate.

SEPAs

While climate change gains momentum as another weapon in the arsenal of development opponents, developers and their legal and environmental consultants are searching for means to effectively deal with the issue. In states that require environmental considerations to intelligently inform local and state land development decisions, state mandated environmental impact assessment laws—also known as state environmental policy acts ("SEPAs")—provide an opportunity for disclosure and analysis of potential climate impacts. While many states have enacted SEPAs, these laws vary widely with respect to their general nature (i.e., primarily procedural versus compelling substantive action to protect the environment); the types of governmental entities they apply to; the types of actions and projects they apply to (and those they exempt); the standards of significance they employ to determine whether preparation of environmen-



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For obvious reasons, a proposed project's location is of prime importance in evaluating climate change-related impacts. Coastal states such as California, Oregon and Washington may experience rising sea levels that make certain proposed developments undesirable or even hazardous to their future occupants. These and other states may also be led to more closely scrutinize developments proposed near floodplains and tidal waterways for the same reasons. In areas particularly susceptible to the adverse impacts of climate change, it may be appropriate to take future environmental conditions into account when determining whether the natural and/or human environment will be adversely affected as a result of a proposed land development project.

CUMULATIVE IMPACTS

Also of concern is the potential for land development projects to have cumulative impacts on the environment. CEQA, for example, requires that an environmental impact report discuss the cumulative impacts of a project when those impacts are "cumulatively considerable" or "significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." It is well recognized that environmental damage often occurs incrementally from a variety of small sources, whose individual significance is not fully appreciated until considered together as a group. Many development projects' greenhouse gas emissions may contribute to climate change when considered in the context of other land development projects' effects. A prime example is air pollution impacts, where thousands of relatively small sources of pollutants may cumulatively cause a serious health problem. Recent developments indicate project level environmental impact analysis is moving toward requirements for quantification and analysis of a project's greenhouse gas emissions or contribution to climate impacts.

In states with generally applicable and substantive SEPA's, identification and disclosure of climate change impacts will not sufficiently address the issue from a legal standpoint. If adverse or significant impacts are identified, the developer may be required to incorporate feasible mitigation measures or pursue feasible project alternatives to avoid or reduce climate change impacts to relatively insignificant levels. Among other things, developers may be required to redesign projects to reduce traffic and vehicle miles traveled, contribute "fair share" fees to regional transportation projects, and implement energy conservation measures and Green development standards, such as Energy Star or LEED certification. In fact, CEQA already requires that energy conservation measures be implemented where appropriate to mitigate significant environmental impacts. Many other Western states are providing significant incentives for implementing energy conservation and/or renewable energy measures, which indirectly reduce greenhouse gas emissions by reducing demand for "dirty" energy, which is often generated by coal-fired power plants. For example, in Washington the City of Seattle is offering density bonuses for certain Green buildings, and Oregon, Arizona, and the federal government are offering tax credits, grants and rebates for certain environmentally friendly construction and renewable energy technologies.

Notably, while it is appropriate for local and state

agencies to consider whether projects they approve will significantly or incrementally contribute to climate change, and whether climate change could adversely impact the project and its inhabitants through standardized environmental review processes, a disproportionate burden of addressing climate

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change may not be placed on an individual development project. Consistent with the constitutional requirements under the U.S. Supreme Court's Nollan/Dolan precedents prohibiting unconstitutional exactions and conditions, mitigation measures necessary to address climate impacts must be "roughly proportional" to a project's identified impacts.

FUTURE EFFECT ON HOMEBUILDING

There is little doubt that SEPA's will play an increasingly significant role in informing the public, public agencies and developers of the potential climate change impacts of land development projects. This trend will likely result in the alteration of land development projects to some extent to address and mitigate climate change impacts, and the expense of such environmental review may also increase as a result of addressing climate change issues. The building and development industry should prepare for these changes in the regulatory weather, and incorporate appropriate strategies into their budgets, forward planning, subdivision design and entitlement application processes. ☞

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