Real Estate, Land Use & Environmental Law Blog
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Presented By SheppardMullin

CEQA AMENDMENTS FROM THE 2011 LEGISLATIVE SESSION

December 14, 2011 by Judy Davidoff and Alex Merritt

In the 2011 session, the California Legislature and the Governor passed several bills to amend CEQA. As summarized below, these bills streamline the review process for green projects, environmental leadership projects, and a proposed football stadium; relax water supply assessment requirements for photovoltaic and wind energy projects; and clarify requirements for naming and serving real parties in interest in CEQA lawsuits.

1. SB 226 (Simitian)

SB 226 amends CEQA and other parts of the Public Resources Code to facilitate review of certain green projects.

Solar Energy Projects

SB 226 exempts from CEQA projects that propose to install a solar energy system on the roof of an existing building or at an existing parking lot.

An "existing parking lot" must have been used for parking vehicles at the time of application and for at least the previous two years.

A "solar energy system" includes all associated equipment. However, associated equipment:

- Excludes substations;
- Must be on the same parcel as the building, except that equipment necessary to connect the system to an electrical grid may be located immediately adjacent to the parcel or separated only by an improved right of way;
- Must not occupy more than 500 square feet of ground surface; and
- Must not be located on a site that contains plants protected by the Native Plant Protection Act.

The exemption does not apply if any associated equipment would otherwise require one of the following:

- Section 401 permit or Section 404 permit under the Clean Water Act;
- Waste discharge requirements under the Porter-Cologne Water Quality Control Act;
- Individual take permit under the Federal or California Endangered Species Act; or
- Streambed alteration permit under the Fish and Game Code.

The exemption does not apply if installation of the system at an existing parking lot would involve:

- Removal or a tree required pursuant to local, state, or federal requirements, unless the tree dies and there is no requirement to replace it; or
- Removal of a native tree over 25 years old.

The exemption does not apply to any transmission or distribution facility or connection.

General Plan Amendments and Scoping Meetings

Existing law requires an agency seeking to adopt or substantially amend a general plan to refer the proposed action to any city or county abutting the affected area or to any school district that may be affected.

Existing law also requires an agency to hold a scoping meeting for a project if it is of statewide, regional, or areawide significance, or if it may affect highways and Caltrans has requested a scoping meeting.

SB 226 authorizes an agency to concurrently refer a proposed action and hold a required scoping meeting.

Greenhouse Gas Emissions and Categorical Exemptions

SB 226 amends CEQA to provide that a project's greenhouse gas emissions cannot alone make a categorical exemption from CEQA inapplicable, so long as the project complies with applicable regulations and requirements relating to greenhouse gas emissions.

Infill Projects

SB 226 limits CEQA review for qualifying infill projects.

The bill defines "infill project" as a project that meets the following conditions:

- Consists of one or a combination of the following uses:
    - Residential
    - Retail or commercial, where parking is less than half the project area
    - Transit station
    - School
    - Public office building; and
- Is located within either:
    - An urban site that has previously been developed, or
    - A vacant site where at least 75 percent of the perimeter adjoins, or is separated by an improved right of way from, parcels that are developed with qualifying urban uses.

An infill project must satisfy both of the following conditions to qualify for limited CEQA review:

- The project must be:
    - Consistent with either a sustainable communities strategy or an alternative planning strategy which the State Air Resources Board has accepted as being capable of achieving greenhouse gas emission targets; or
    - A small walkable community project located in area designated by a city for that purpose; or
    - Located within the boundaries of a metropolitan planning organization that has not yet adopted a sustainable communities strategy or alternative planning strategy, and the project has a residential density of at least 20 units per acre or a floor area ratio of at least 0.75; and
- The project must satisfy applicable statewide performance standards contained in infill guidelines developed by the state. (*See below.*)

SB 226 limits the scope of CEQA review for qualifying infill projects as follows. If an agency has previously certified an EIR for adoption or amendment of a general plan, community plan,

specific plan, or zoning code, CEQA review for a qualifying infill project is limited to the following:

- Effects on the environment that are specific to the project or to the project site and that were not addressed as significant effects in the prior EIR; and
- Effects on the environment that will be more significant than described in the prior EIR, as shown by substantial new infomation.

An EIR prepared to analyze effects of a qualifying infill project need not consider the following:

- Alternative locations, densities, and building intensities; or
- Growth inducing impacts.

This new section on infill projects will not apply until the state has developed infill guidelines.

Guidelines for Infill Projects

SB 226 requires the state to adopt guidelines for implementing the new section on infill projects. The guidelines must include statewide standards for infill projects that promote recent environmental legislation and other environmental goals.

OPR must prepare and submit the guidelines to the Natural Resources Agency by July 1, 2012, and the Natural Resources Agency must certify and adopt them by January 1, 2013.

Solar Thermal Powerplants

Existing law establishes a certification program for thermal powerplants. This is a certified regulatory program that is exempt from certain CEQA requirements.

SB 226 makes it easier for a proposed solar thermal powerplant to change from solar thermal technology to photovoltaic technology. If a proposed solar thermal powerplant has already applied for certification under the regulatory program, it may petition to convert to photovoltaic technology without needing to file an entirely new application. To be eligible, the proposed powerplant must satisfy certain timing requirements, and must undergo supplemental environmental review, public notice and comment, and at least one public hearing.

2. AB 900 (Buchanan)

AB 900 is the Jobs and Economic Improvement Through Environmental Leadership Act of 2011. It adds Chapter 6.5 to the Public Resources Code.

The Act authorizes the governor to certify certain projects as "environmental leadership development projects" and it creates procedures for streamlining judicial review of these projects. The Act's purpose is to create jobs and encourage projects that will benefit the environment.

The Act defines "environmental leadership development projects" to include the following:

- A residential, retail, commercial, sports, cultural, entertainment, or recreational use project that satisfies the following criteria:
    - The project must achieve LEED certification of silver or better.
    - The project must be located on an infill site.
    - If applicable, the project must achieve a 10-percent greater standard for transportation efficiency than comparable projects
    - If applicable, the project must be consistent with a sustainable communities strategy or alternative planning strategy that the State Air Resources Board has accepted as being capable of achieving greenhouse gas emission targets
- A clean renewable energy project that exclusively uses wind or solar power, and does not include waste incineration or conversion.
- A clean energy manufacturing project that manufactures products, equipment, or components used for renewable energy generation, energy efficiency, or the production of clean alternative fuel vehicles.

The Act allows the developer of a leadership project to apply to the governor for streamlining benefits. The governor may certify a project for streamlining benefits if all the following conditions are met:

- The project will result in a minimum investment of $100,000,000 in California.
- The project creates high wage, highly skilled jobs and helps reduce unemployment.
- The project does not result in any net emission of greenhouse gases, including emissions from employee transportation.
- The applicant has entered into a binding and enforceable agreement that all mitigation measures are conditions of approval of the project.
- The applicant agrees to pay the costs of the Court of Appeal if there is a legal challenge.

- The applicant agrees to pay the costs of preparing the administrative record for the project.

The Act gives certified projects the following streamlining benefits:

- Any action or proceeding concerning the project must be filed in the Court of Appeal.
- Any party challenging the project must concurrently file all its other claims regarding land use approvals. The Court of Appeal will have original jurisdiction over these claims.
- The Court of Appeal must issue a decision within 175 days of the filing of the petition.
- The Court of Appeal may appoint a special master to assist in managing and processing the case.
- The Court of Appeal may grant extensions of time only for good cause and to promote the interests of justice.

The Act establishes the following requirements for preparing the administrative record for a certified project:

- The lead agency must prepare the record concurrently with the administrative process.
- The lead agency must place all administrative record materials on the agency's website, starting with the release of the DEIR.
- The lead agency must make the DEIR and documents used to prepare the DEIR electronically available to the public.
- The lead agency must encourage comments to be submitted electronically and must make electronic comments available to the public within five days.
- The lead agency must convert all other comments to an electronic format and make them available to the public within seven days.
- The lead agency must certify the final administrative record within five days of approving the project.
- The Court of Appeal must resolve any dispute regarding the administrative record.

The applicant must notify the lead agency prior to the release of the DEIR that it is electing to proceed as a leadership project.

The Act only becomes operative if SB 292 is enacted and takes effect by January 1, 2012.

The Act sunsets on January 1, 2015.

[Sheppard Mullin previously blogged on AB 900 at http://www.realestatelanduseandenvironmentallaw.com/new-rules-and-legislation-california-legislature-passes-bills-to-expedite-judicial-review-of-ceqa-challenges-for-selected-projects.html.]

3. SB 292 (Padilla)

SB 292 establishes alternative administrative and judicial review procedures for a proposed stadium and event center in Los Angeles. It adds Section 21168.6.5 to CEQA

Applicability

The bill only applies to the Convention Center Modernization and Farmers Field Project, which proposes to (i) replace the West Hall of the Los Angeles Convention Center with a new convention hall, and (ii) construct a new football stadium and event center.

Project Requirements

The bill requires the lead agency to impose certain conditions of approval on the project, including:

- Measures to minimize traffic congestion resulting from spectators driving to the stadium
- Measures to minimize air quality impacts resulting from spectators driving to the stadium

Administrative Procedures

The bill requires the lead agency to hold public workshops after releasing the DEIR and before holding a public hearing on the project.

The bill requires the lead agency to make the following documents electronically available to the public: the DEIR, documents relating to the DEIR, comments on the DEIR, and the record of the proceedings.

The bill allows any person who comments on the DEIR to submit a request for nonbinding mediation that identifies disputed issues. If during mediation the lead agency, the applicant, and any commenter agree on a measure to address a disputed issue, that measure becomes a condition of approval of the project. After a commenter agrees to a measure, that commenter may not raise the underlying issue in a challenge to the project.

The bill provides that the lead agency need not consider comments submitted after the public comment period closes, with certain exceptions.

Judicial Procedures

The bill requires electronic filing of briefs and notices.

The bill requires any challenge to the project approvals or the EIR to be filed in the Second District Court of Appeal, and it imposes an expedited schedule for filing, service, briefing, and issuance of a decision.

The bill imposes an expedited schedule for filing, serving, opposing, and deciding a petition for review in the California Supreme Court.

[Sheppard Mullin previously blogged on SB 292 at http://www.realestatelanduseandenvironmentallaw.com/new-rules-and-legislation-california-legislature-passes-bills-to-expedite-judicial-review-of-ceqa-challenges-for-selected-projects.html.]

4. SB 267 (Rubio)

SB 267 amends the Water Code to exempt cities and counties from preparing water supply assessments for proposed photovoltaic or wind energy projects that would require no more than 75 acre-feet of water per year.

The Water Code requires preparation of water supply assessments for certain defined projects that are subject to CEQA. When a city or county considers such a project, it must identify the public water systems that may supply water to the project and request that the public water systems prepare a water supply assessment. If the city or county does not identify a public water system, it must prepare the water supply assessment itself.

SB 267 revises the definition of covered projects to exclude any proposed photovoltaic or wind energy project that would require no more than 75 acre-feet of water per year. The bill went into effect immediately, so these projects no longer trigger the water supply assessment requirement.

SB 267 provides that the original language in the Water Code will be reinstated on January 1, 2017. After this date, the exemption from the water supply assessment requirement will no longer apply.

5. AB 320 (Hill)

AB 320 amends CEQA to clarify who a petitioner must name as a real party in interest in a CEQA action.

Before the amendment, CEQA required a petitioner to name the "recipient of an approval" as a real party in interest and to serve that party within 20 business days of serving the public agency.

But CEQA did not define "recipient of an approval" and this led to confusion about who petitioners should name and serve. In *Imperial v. Superior Court* (2007), it was ambiguous whether two parties were "recipients of an approval" and after petitioner failed to name them as real parties in interest and serve them, the court dismissed the action. AB 320 seeks to eliminate confusion and prevent such dismissals by striking "recipient of an approval" and replacing it with more definite guidance on who to name and serve.

Specifically, the amendment requires a public agency to identify in its notice of approval, notice of determination, or notice of exemption any person specified in CEQA's definition of a "project" in Sections 21065(b) and (c). This includes a person whose activity is "supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies" (21065(b)), and a person who is issued a "lease, permit, license, certificate, or other entitlement for use by one or more public agencies" (21065(c)). The petitioner must then name and serve as a real party in interest any person identified in the public agency's notice. If there is no notice, petitioner must name and serve any person specified in 21065(b) and (c), as reflected in the agency's record of proceedings.

The amendments are effective January 1, 2012.

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