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Proposed S.B. 226 CEQA Guidelines Seek to Expedite Environmental Review for Infill Development

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Senate Bill 226 was enacted in 2011 to streamline review of infill development projects under the California Environmental Quality Act (CEQA), directing the Natural Resources Agency to adopt standards for eligible projects by January 1, 2013. On July 27, 2012, the agency issued proposed S.B. 226 guidelines for public comment, due September 10, 2012. If adopted, the proposed guidelines promise substantially faster and simpler approval of infill projects, eliminating repetitive review of issues already addressed in planning-level evaluations. However, it remains to be seen whether local governments will conduct the detailed planning-level reviews and adopt "uniformly applicable development policies or standards" as needed to realize the benefits of streamlining.

CEQA is a cornerstone of environmental protection in California, requiring public agencies to evaluate the impacts of projects they undertake or approve, consider alternatives, and adopt mitigation measures if feasible. However, developers and local governments have long complained that the CEQA process is expensive, time-consuming, and allows NIMBY opponents to wield environmental issues as a weapon, even against environmentally desirable infill development projects. In response to such concerns and to promote construction jobs in a struggling economy, the Legislature enacted S.B. 226.[1]

The bill's CEQA streamlining provisions apply to eligible infill projects that fall within the scope of a prior planning-level decision (such as a General Plan or Specific Plan) for which a city or county previously prepared an Environmental Impact Report (EIR). For such projects, S.B. 226 limits CEQA review to project-specific impacts not addressed in the prior EIR, or adverse impacts shown by substantial new information to be "more significant" than described in the prior EIR. If no such impacts exist, S.B. 226 constitutes a *de facto* exemption from further CEQA review. Moreover, if a city, county or CEQA lead

[1] S.B. 226 (Simitian), Stats. 2011, Ch. 469, codified at Pub. Res. Code §§ 21094.5 and 21094.5.5. Additional discussion of S.B. 226, including its exemption of certain solar energy facilities from CEQA and clarification on climate change analysis for otherwise exempt projects, is available here.

agency has adopted uniformly applicable development policies or standards (referred to herein as "local policies") and finds that those policies will "substantially mitigate" a project-specific or more significant impact, that impact does not trigger further CEQA review. Conversely, where project-specific or more significant adverse impacts do exist, the EIR need not consider alternative locations, densities or building intensities or growth inducing impacts, thus substantially speeding the review process.

S.B. 226 streamlining applies to infill projects, defined as residential, retail, commercial or mixed-use development, transit stations, schools and public office buildings, on previously developed urban sites or vacant land at least 75% surrounded by urban uses. The project must be consistent with the regional strategy for land use and transportation planning developed pursuant to S.B. 375.[2] In addition, the project must satisfy statewide performance standards, as contained in the proposed guidelines.[3]

Proposed CEQA Guidelines for Streamlined Review of Infill Projects

Proposed CEQA Guidelines section 15183.3, "Streamlining for Infill Projects," incorporates the definitions and eligibility criteria of S.B. 226. For eligible projects, the lead agency should complete a checklist to identify impacts that were addressed in a prior planning-level EIR; are project-specific or more significant than previously analyzed; and/or are substantially mitigated by local policies.[4] "Substantially mitigate" means that the local policy will substantially lessen the effect, but *not* necessarily below the traditional CEQA threshold to "less-than-significant." These determinations are questions of fact to be decided by the lead agency, subject to judicial review under the deferential "substantial evidence" standard (rather than the plaintiff-favoring "fair argument" standard that applies in some CEQA contexts). A sample checklist, analogous to existing CEQA Guidelines Appendix G, is provided in proposed Appendix N, "Infill Environmental Checklist." However, lead agencies are free to utilize their own checklists or similar devices to document their evaluations.

No further CEQA review is required for impacts analyzed in a planning-level EIR, or for project-specific or more significant impacts that are substantially mitigated by local policies. If all impacts have been so addressed, the lead agency simply files a Notice of Determination (NOD) to that effect. Even if an impact was found to be severe in the prior EIR, so long as it is not *more* severe in the project-specific analysis, the checklist review and NOD are sufficient. On the other hand, if there are project-specific or more significant impacts not substantially mitigated by local policies, a limited negative declaration or "infill EIR" is prepared, which addresses only those specific impacts and excludes alternative locations, densities or building intensities and growth-inducing impacts. The guidelines note that a prior planning-level EIR will be most helpful in qualifying later infill projects for streamlined review if the EIR deals with effects of infill development as specifically and comprehensively as possible.

The same is true of the local policies. The proposed guidelines give examples of such local policies including noise, dust control and stormwater regulations, provisions for discovery of archaeological and paleontological resources; local building, grading and stormwater codes; design guidelines; greenhouse

[2] S.B. 375 (Steinberg), Stats. 2008, Ch. 728. In regions where the regional strategy required by S.B. 375 is not yet adopted, residential projects of at least 20 units per acre or floor area ratio of 0.75 can qualify for S.B. 226 streamlining. In addition, outside regions subject to S.B. 375 strategies, "small walkable community projects" (as defined in S.B. 226), qualify for streamlined review.

[3] Proposed 14 Cal. Code Regs. (CEQA Guidelines) § 15183.3, together with proposed CEQA Guidelines Appendices M and N, at http://ceres.ca.gov/ceqa/. The July 27, 2012 proposal is substantially revised from the initial draft released by the Governor's Office of Planning and Research in January 2012.

[4] Proposed guideline section 15183.3(d)(1)(D) provides that an impact may be "more significant" than described in a planning-level EIR because the impact itself has changed *or* because new mitigation measures, or measures previously considered infeasible, are now feasible. However, S.B. 226 refers only to an impact itself becoming "more significant," not to new mitigation for an unchanged impact. Excluding projects from streamlined review solely due to new mitigation seems broader than the Legislature's intent and potentially controversial.

gas reduction requirements; urban tree and historic resource protection ordinances; and traffic and public service impact fee programs. A casual perusal of EIRs for many development projects will reveal largely similar impacts and mitigation measures in these areas, with very little that is project-specific. Although cash-strapped local governments may be reluctant to invest the resources to develop well-crafted local policies, which are purely voluntary under S.B. 226 and the proposed guidelines, they would be well advised to seize this opportunity to obviate the need for repetitive project-level reviews.

Statewide Performance Standards for Eligible Projects

To be eligible for streamlined review as described above, projects must meet the criteria for infill projects as set forth in S.B. 226 and comply with the "statewide performance standards" in proposed CEQA Guidelines Appendix M, "Performance Standards for Infill Projects Eligible for Streamlined Review." As directed by S.B. 226, the performance standards must promote a miscellany of objectives which include implementing S.B. 375 strategies, encouraging transit villages, reducing greenhouse gas emissions, improving energy efficiency, reducing per capita water use, protecting public health, and promoting state planning priorities which, in turn, comprise another miscellany of improvements to equity, the economy, environmental protection, and public health and safety in urban, suburban and rural communities. At first it may seem that few projects could pass through the eye of this needle and earn the benefits of expedited CEQA review. However, the proposed Appendix M standards innovatively cut to the core of the S.B. 226 objectives by largely utilizing reduced Vehicle-Miles-Traveled (VMT) – a measure of the total number of miles traveled by motor vehicles on trips attributable to the project – as a proxy for the diverse benefits sought by the Legislature. The rationale is that offering streamlined CEQA review as an incentive, in areas where VMT is below the regional average, will help increase development density and so promote all of the density-related statutory objectives.

Appendix M, Section IV provides performance standards which specific types of development (or, for mixed-use projects, the predominant land use) must satisfy to be eligible for streamlined review. Eligible residential projects must be located in areas of below-average VMT; within ½ mile of an existing major transit stop or high quality transit corridor; or consist of 100 or fewer affordable units, if the developer commits to ensuring affordability to low income households for at least 30 years. Commercial/retail projects must be located in below-average VMT areas or within ½ mile of 1,800 households, and no single building floor-plate may exceed 50,000 square feet. Office buildings must be located in below-average VMT areas or within ¼ mile of an existing major transit stop. Schools must be within specified proximity to student populations and provide storage for bicycles and scooters. All transit stations and small walkable community projects (as defined in S.B. 226) are eligible.

To address public health and renewable energy goals not captured by the below-average VMT proxy standard, proposed Appendix M, section III includes additional performance standards applicable to all project types. These include on-site generation of renewable energy (required of non-residential projects and encouraged for residential projects); soil and water remediation if the site is contaminated; and, if within 500 feet of a high volume roadway or a significant stationary source of air pollutants, compliance with public health policies and standards identified in the local general plan, zoning code, ordinance or community risk reduction plan. If no such health policies or standards exist, the project must incorporate design features or measures such as enhanced air filtration to protect public health.

In some cases, the performance standards in Appendix M may have the effect of taking away what the guidelines otherwise give. For example, the 50,000-square-foot cap on eligible commercial/retail projects is intended to screen out region-serving operations reached primarily by driving, but would also screen out large downtown developments. Moreover, the requirement for potentially costly protective design features

for projects near roadways may effectively preclude streamlining for development in the very transportation corridors where the guidelines seek to encourage increased density.

Conclusion

In summary, for eligible infill projects meeting the statewide performance standards in proposed Appendix M, the proposed S.B. 226 guidelines offer an expedited CEQA process with two off-ramps, for impacts addressed in prior planning-level EIRs and for impacts not previously analyzed, or more significant than previously analyzed, but substantially mitigated by locally adopted, uniformly applicable development policies or standards. If an infill project satisfies the performance standards but qualifies for neither off-ramp, it is subject to limited CEQA review in an "infill EIR" or similar document, together with an abbreviated checklist. These provisions would greatly speed the approval of eligible projects, but their effectiveness will depend on the efforts of local governments in preparing detailed and defensible planning-level EIRs and local policies. In difficult economic times, even the promise of an expedited CEQA process may not motivate many municipalities to undertake this investment. Accordingly, while the S.B. 226 guidelines as currently proposed seem a most promising step toward CEQA reform, what they ultimately will deliver remains to be seen.

Meanwhile, the Natural Resources Agency is soliciting comments on the proposal guidelines, at public hearings on September 7 and 10, 2012 or by written comments which are due September 10. Instructions for commenting may be found at: http://ceres.ca.gov/ceqa/docs/SB226_Guideline_Updates_Notice.pdf.

If you have any questions, please contact the Pillsbury attorney with whom you regularly work or one of the following members of the Environment, Land Use & Natural Resources practice section:

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