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California's Latest Attempt to Streamline the California Environmental Quality Act

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Senate Bill ("SB") 1456, authored by Senator Joe Simitian (D–Palo Alto), and Assembly Bill ("AB") 231, authored by Assembly Member Alyson Huber (D–El Dorado Hills), were signed by Governor Schwarzenegger on September 29, 2010. As urgency statutes, both bills became effective immediately, and both will sunset as of January 1, 2016. SB 1456, the broader of the two bills, includes several amendments to the California Environmental Quality Act ("CEQA") intended to discourage frivolous lawsuits and encourage mediation as a method of settling CEQA disputes prior to the filing of a lawsuit. As discussed, below, both SB 1456 and AB 231 also ease the requirements governing cumulative impacts analyses in certain subsequent environmental impact reports (EIRs), mitigated negative declarations and negative declarations. The stated intent of these bills is to reduce the burdens of the CEQA review process and the abuses of CEQA through litigation, and lessen delays in getting worthy development projects approved and built. When signing the bills, however, the Governor took a less optimistic view.

New and Amended CEQA Provisions

Frivolous Actions – Public Resources Code § 21167.11

Perhaps the most welcome amendment to local agencies and project proponents is the creation of a right to seek monetary sanctions against "attorneys, law firms or parties" responsible for bringing frivolous CEQA claims. This new section allows a motion to be brought any time after a CEQA petition has been filed, but no later than thirty days prior to the hearing on the merits, asking the court to determine that "a claim is frivolous." Under this section, "frivolous" is defined as "totally and completely without merit." If a court determines that a claim is frivolous, it can impose a sanction of up to $10,000 upon the attorneys, law firms, or parties responsible for the violation. Notably, this section allows the sanction to be imposed for "*a* frivolous claim," leaving open the possibility that the sanction could be imposed separately for each frivolous claim in a multi-claim petition or complaint.

Given the strong public policy supporting CEQA claims and the right of members of the public to have their concerns litigated, courts may be reluctant to find many CEQA challenges frivolous under this "totally and completely without merit" standard. At the same time, however, courts have recognized the abuse of CEQA by anti-development interests, and may find this relatively small monetary sanction useful for curbing the worst of these claims. Frivolous CEQA suits brought by business competitors are another matter, and such a small sanction is unlikely to curb these CEQA abuses.

Mediation – Public Resources Code §§ 21167.10, 21167.8

Existing CEQA law requires the parties in litigation to engage in informal settlement negotiations during the litigation (CEQA § 21167.8). Existing Government Code §§ 66030 *et seq*. allows a court hearing certain land use claims (including under CEQA) to invite the parties to engage in mediation. SB 1456's amendments combine these provisions and clarify their use in CEQA cases.

Under new CEQA section 21167.10, a person intending to file an action alleging a violation of CEQA may serve a notice requesting mediation on the lead agency and the real party in interest within five business days of the filing of the notice of determination ("NOD"). If the lead agency fails to accept the request within five business days of receiving it, the request is deemed to have been denied. If the lead agency accepts the request, then the mediation proceeds concurrently with the judicial proceedings, in accordance with sections 66030 et seq. of the Government Code (see amended CEQA § 21167.8(c)). However, subdivision (d) of section 21167.10 provides that all of the limitations periods contained in Chapter 6 of CEQA (§§ 21165 et seq.) are tolled until the mediation has been completed, even if the mediation is completed after January 1, 2016. Section 21167.10 only applies to NODs filed on or after July 1, 2011, and expressly does not apply in cases if the lead agency has not filed an NOD.

While section 21167.10 incorporates the existing formal mediation procedures provided in Government Code sections 66030 et seq., it makes two notable changes. First, it allows the party challenging the land use approval to initiate the request for mediation; by contrast, under Government Code section 66031(b), it is the court that invites the parties to mediate. Second, the request to mediate can be filed prior to the initiation of litigation; in that event, all limitations periods are tolled until the mediation has been completed. Although similar, existing Government Code section 66032(d) provides that the action is automatically "reactivated" ninety days after the commencement of mediation unless the parties either reach and implement a settlement, or agree in writing to extend the mediation for another ninety-day period.

It is unlikely that this new CEQA section will result in fewer lawsuits or more settlements, particularly where the goal of the lawsuit is to delay development. Moreover, it could frustrate CEQA's goals to expedite litigation and promote the certainty of land use approvals—should a lead agency agree to mediation before the CEQA lawsuit has been filed, the party challenging the entitlements can gain a ninety-day or longer extension of the CEQA filing deadline. Since no penalty is imposed for refusing a request to mediate, it appears that the lead agency would be better served by refusing the request and relying instead on the existing CEQA settlement procedures, or even the existing Government Code mediation procedures, during the litigation.

Exhaustion of Administrative Remedies – Public Resources Code § 21177

Subdivision (a) of CEQA section 21177 provides that no action can be brought on any issue that was not presented to the public agency either orally or in writing during the public comment period or prior to the close of the public hearing on the project and before the issuance of the NOD. Subdivision (b) further provides that no person can maintain a CEQA action unless that person objected to approval of the project in the underlying administrative process. Subdivision (c) provides an exception to subdivision (b)'s exhaustion requirement, allowing organizations formed after the approval of a project to maintain an action so long as a member of that organization participated in the underlying administrative proceedings.

SB 1456 narrows subdivision (c)'s exception by strengthening the requirements on organizations formed after project approval. Such organizations may still maintain an action, but only if "a member" of the organization has complied with the requirements of *both* subdivision (a) *and* subdivision (b) of

section 21177. That is, the organization must prove that *one* of its members both participated in the administrative proceedings prior to the filing of the NOD, and either directly raised the issue being litigated or agreed with or supported the comments of another person who raised the issue.

This additional requirement on organizations formed after project approval may help discourage some opportunistic CEQA challenges. For example, it may make it more difficult for business competitors to form sham "environmental" organizations after project approval in the hope of skirting the more rigorous standing requirements on corporate entities asserting CEQA claims to promote their commercial interests.

Cumulative Impacts Analyses in a Tiered CEQA Document – Public Resources Code § 21094

CEQA currently allows a lead agency to use a tiered EIR to analyze a project's significant impacts where a prior EIR has been certified for a program/plan/policy/ordinance and the later project meets certain consistency requirements. In such circumstances, the lead agency's tiered EIR need not examine effects that were either (1) mitigated or avoided in the prior EIR, or (2) examined in sufficient detail to enable them to be mitigated or avoided in the tiered EIR.

SB 1456 adds a new subdivision (e) to section 21094 that affords the lead agency greater latitude in its choice of subsequent CEQA analysis. Now under SB 1456, where a cumulative effect has been adequately analyzed in the prior EIR, the lead agency can use either a tiered EIR, or a mitigated negative declaration or a negative declaration for the later project. This option is available even to impose mitigation measures to lessen or avoid the impact in the later project. Under the new subdivision (e), a cumulative effect is deemed to have been adequately analyzed in the prior EIR where either (1) the prior EIR mitigated or avoided the cumulative effect and findings were adopted for that effect under subdivision (a)(1) of CEQA section 21081, or (2) the cumulative effect was analyzed in sufficient detail to enable it to be mitigated or avoided in the tiered EIR. Subdivision (e) also includes provisions for addressing a new significant impact: even where the lead agency determines that the incremental effects of the new project are cumulatively considerable, those effects can be examined in the tiered EIR, or in a mitigated negative declaration or negative declaration.

AB 231 adds a new subdivision (a)(2) to section 21094 to allow a lead agency preparing a tiered EIR to incorporate by reference a previous finding of overriding considerations for the later project if all of the following conditions are met:

- The lead agency for the later project uses a tiered EIR from that program/plan/policy/ordinance;
- The lead agency determines that the project's significant impacts on the environment are not greater than or different from those identified in the prior EIR;
- The lead agency incorporates into the later project all applicable mitigation measures identified by the prior EIR;
- The prior finding of overriding considerations was not based on a determination that mitigation measures should be identified and approved in a subsequent environmental review;
- The prior EIR was certified no more than 3 years prior to the date the findings are made for the later project; and
- The lead agency determines that certain alternatives or mitigation measures found to be infeasible in the prior EIR remain infeasible.

Conclusion

These amendments are unlikely to affect the majority of CEQA lawsuits or the majority of cumulative impacts analyses. These bills are part of the ongoing discussions of CEQA and its processes among various interested parties. There are strong views on all sides. For his part, the Governor took the unusual step of issuing a signing message to the California Legislature that addresses both bills. In his message, he stated that while he finds "some merit" in allowing "public entities some relief from the unfair political backlash that often occurs because they are required to override the same potential impact over and over again" and in requiring "project opponents to base CEQA claims on specific objections made during their participation in the public process," overall he views these bills as "99% garbage." In addition, he expressed his disappointment that more substantive amendments "designed to reduce widespread and rampant abuses plaguing the CEQA process – abuses which are made possible by complex and overly bureaucratic requirements in the present law" were not presented to him. The course of these discussions will continue to be the subject of political debate.

The Governor's signing message can be found on his website here.

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