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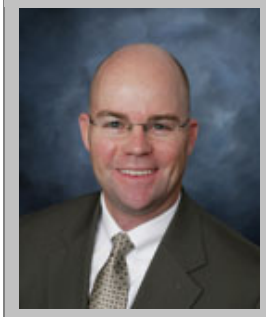

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A Sensible Proposal for CEQA Reform

There has been a lot of talk lately about reforming the California Environmental Quality Act ("CEQA"). It would be a rare legislative session if there was not some talk about CEQA reform. This time, however, the talk is coming from Democrats – notably Governor Brown and Senate President Pro Tem Steinberg. As the new legislative session gets underway, Senator Rubio (D. Bakersfield) will introduce a CEQA reform bill, SB 317. Whether the reform is meaningful, or whether it is political theatrics intended merely to appease the public, remains to be seen.

Principles for Successful Reform

Californians want a clean, healthy environment, and a sustainable, jobs-creating economy. While CEQA can play an important role in protecting the environment, it can be and is abused by those who want to delay and kill real estate development projects irrespective of environmental impacts. To succeed, the reform agenda should focus on curbing CEQA abuse, rather than rolling back substantive environmental protection. And it should resist becoming overly ambitious and complex. Many aspects of CEQA should be fixed, but two changes to CEQA would make a huge improvement by curbing the most abusive and unjust aspects of the law, without compromising environmental protection.

A Sensible Proposal

The two changes are:

1. Eliminate the "fair argument" standard.

Unless a real estate development project is exempt, CEQA requires review of the project's environmental impacts, either in the form of a Negative Declaration or an Environmental Impact Report ("EIR"). The Negative Declaration is a simpler, quicker, and cheaper process, and is appropriate when the project will *not* have a significant adverse impact on the environment. If the project *will* have a significant adverse impact on the environment, then a Negative Declaration is not sufficient, and an EIR is required. The EIR process typically adds a year or more, and tens or hundreds of thousands of dollars to the entitlement process.

The problem is that a project opponent can successfully challenge a Negative Declaration merely by making a "fair argument" that the project *might* have a significant impact on the environment. *See e.g., Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1602. Moreover, there is no objective standard for what constitutes a "fair argument," so in most cases neither the lead agency nor the applicant will know whether a project opponent has a fair argument until the judge tells them. There is no analogy in all of jurisprudence of which I am aware, in which a plaintiff can come into court and win its case with nothing more than an argument that something might be true.

The rationale articulated by the courts for this "fair argument" standard is that CEQA encourages full review of a project's environmental impacts. But the result has been to strip the law of clarity and reliability. In this way, even projects that do not have significant impacts on the environment can be subjected to the delay and expense of litigation, and ultimately have their entitlements thrown out merely because the project opponents had a "fair argument" that the project *might* have a significant impact on the environment.

Considering the substantial investment of time and money put into these projects, as well as the public benefits of the projects, and the determination of a majority of elected officials (in most cases) to permit the projects, it is not asking too much of project opponents to require that they produce *substantial evidence* that the projects *will* have a significant impact on the environment. "Substantial evidence" is a minimal evidentiary threshold, and if a project truly will have a significant impact on the environment, it should be no problem for a challenger to produce substantial evidence of that impact.

2. Require meaningful "exhaustion of administrative remedies."

CEQA currently requires project opponents to "exhaust administrative remedies" by raising their objections to the lead agency during the administrative process. This is supposed to mean that the project opponent has availed itself of every opportunity to bring its objections to the lead agency's attention at the administrative level, to give the lead agency a fair opportunity to consider and address the objections before being hauled into court to litigate them. But the courts have watered down the requirement so severely that last moment ambushes have become a common tactic.

Under some courts' interpretation of the law, a project opponent can lie in the weeds while a project moves through the administrative process – from scoping meetings, to notice and comment on the draft EIR, to planning commission hearings, to city council hearings. But so long as the project opponent shows up at the last minute and reads his objections into the record before the public hearing closes, he is deemed to have satisfied the requirement. *See e.g., Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199-1201. This disruptive tactic is obviously calculated to lay the foundation for a lawsuit, rather than persuade the lead agency to improve or change the project. Considering all of the opportunities for public participation afforded by CEQA, last-minute ambush tactics should not be permitted.

The legislature should amend CEQA's exhaustion requirement to permit lawsuits only by parties who participated at all levels of the administrative process (e.g., commenting in writing on the draft EIR, and testifying before the planning commission and city council), and only on those issues that were timely raised in response to the Notice of Intent to Adopt a Negative Declaration, or the Notice of Availability of the draft EIR. This would eliminate the sandbagging and other brinksmanship that is so common under CEQA, and give the lead agency and applicant a fair opportunity to consider and address the challenger's objections.

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