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A Sensible Proposal for CEQA Reform

by Sean M. Sherlock, Partner, Snell & Wilmer

Reforming the California Environmental Quality Act (CEQA) has become a perennial legislative topic. But little in the way of meaningful reform is ever achieved, primarily because the opponents of CEQA reform assail any proposal as gutting the state's core environmental protection law. The California Supreme Court and intermediate appellate courts have repeatedly held that CEQA must be interpreted in a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. *See e.g., Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553. Yet ask anyone in the real estate development, infrastructure, and construction businesses – you know, the folks who actually build things and make things work – and they will tell you that CEQA is often abused by those who want to use this environmental law to delay and kill projects, or by those who have discovered they can use CEQA to shake monetary settlements out of these projects, irrespective of environmental issues.

Most recently, the theme advanced by CEQA reformers has been that CEQA must not be allowed to frustrate "good" projects. In recent years the government has been promoting infill, transit-related, mixed use, and alternative energy projects to implement its vision of climate-friendly, sustainable communities. Yet even these projects, which have the support of the government, politicians, and many environmentalists, get snared by CEQA. So at this point it seems that everyone is in agreement on at least one thing: despite its intended purpose, CEQA can be and is used as a tool for frustrating development projects irrespective of the projects' environmental impacts. The current debate merely focuses on which projects should be immune from this process, rather than how to reform the law to reduce its abusive uses.

Principles for Successful Reform

Californians want a clean, healthy environment, and a sustainable, jobs-creating economy. 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 can be improved, 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 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 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 many cases the lead agency and the applicant will not 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 policy behind 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 at least *substantial evidence* that the projects *will* have a significant impact on the environment. "Substantial evidence" is a reasonable evidentiary threshold, and if a project truly will have a significant impact on the environment it would 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 persuade the lead agency at the administrative level, and 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.

Conclusion

While CEQA's goals are well intended, it is often used in furtherance of other, less well-intended goals. CEQA reform should focus on curbing CEQA abuse, rather than merely exempting projects favored by the government.

Sean Sherlock

Sean Sherlock is a partner in Snell & Wilmer's Orange County office representing real estate developers in matters arising under the California Environmental Quality Act (CEQA). He advises clients preparing Environmental Impact Reports (EIRs) and other CEQA documents needed to obtain project approvals, and defends clients against CEQA litigation. Reach Sean at ssherlock@swlaw.com or 714.427.7036.