Client Alert

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2013 CEQA and Land Use Legislative Roundup: Baby Steps, Few Leaps as California Remains Committed to Sustainable Policies

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Although 2013 was not a banner year for the passage of new environmental legislation, Governor Brown did sign several bills that make modest changes to the California Environmental Quality Act (CEQA), revisit incentives for the environmental cleanup of redevelopment sites, and establish a new regulatory regime for hydraulic fracturing, or "fracking." Notable bills, all of which go into effect on January 1, 2014, are discussed below.

The legislation that made it past the Governor's desk underscores the state's commitment to addressing climate change and promoting healthy, sustainable communities. These goals fall squarely in line with the draft Governor's Environmental Goals and Policy Report (EGPR) released in September. The new EGPR, which can be found here, will be the first adopted since 1978. It calls for comprehensive policy approaches to implement these goals, including decarbonizing the state's energy and transportation systems and fostering sustainability on a regional level. By identifying key pathways forward, it lays the framework for state agencies to develop new programs and also informs state budgeting and infrastructure investment.

CEQA – SB 743 (STEINBERG)

After abandoning a beleaguered year-long effort to overhaul CEQA the day before a final vote on the legislation, Senator Darrell Steinberg instead pushed through Senate Bill 743. (Our alert on these earlier efforts at broader CEQA reform can be found here.) This CEQA bill salvages from his original legislation three streamlining provisions for infill projects and combines them in a single bill, which includes streamlining for the new Sacramento Kings arena. The final reform package, while certainly not sweeping, does send a message that transit-oriented development and "green" leadership projects are essential state priorities.

Infill Development

Senate Bill 743 reflects Steinberg's long-standing focus on CEQA streamlining for residential and mixed use infill projects. To qualify for the special infill rules, a project must be located in a "transit priority area," defined as any area within one-half mile of a major rail or bus stop.

- *New Traffic Methodologies*. The bill requires the Governor's Office of Planning and Research (OPR) to develop new criteria for calculating transportation impacts within transit priority areas and, at OPR's election, outside transit priority areas. Currently, a project's transportation impacts are quantified based on changes in the levels of service (i.e., automobile traffic delays) for nearby roadways and intersections. The levels of service metric can create disproportionately high hurdles for infill projects, which by definition are sited in urban areas where existing roadway capacity can be constrained. The bill directs OPR to explore alternative metrics and circulate draft revisions to the CEQA Guidelines by July 1, 2014.

Potential alternative metrics include the reduction of greenhouse gas emissions, the development of multimodal transportation networks, diversity of land uses, and vehicle miles traveled. Once the revisions are adopted, automobile delay as measured by levels of service will generally not be considered a significant impact under CEQA.

Alternatively, in regions where a sustainable communities strategy (SCS) has been adopted pursuant to SB 375, local governments may designate "infill opportunity zones" where level of service standards will not apply.

This change will potentially cause a radical shift in traffic analysis, particularly for infill projects. Whether that shift is helpful in practice by providing streamlining and certainty to the environmental review process remains to be seen. The draft guidelines proposed by OPR are sure to draw lots of attention.

- *Aesthetics and Parking Impacts*. The bill provides that aesthetics and parking impacts cannot be considered significant impacts under CEQA for residential and mixed use developments in transit priority areas. However, aesthetic impacts to historical and cultural resources are an exception, and aesthetic impacts may still be considered pursuant to local design review ordinances.
- *Local Standards*. With regard to transportation, parking and aesthetic impacts from infill development, the bill expressly allows local agencies to adopt thresholds of significance that are more protective of the environment. This provision potentially undermines the benefits to infill development described above.
- *Infill Exemption*. The bill expands an existing CEQA exemption for residential projects that are consistent with a Specific Plan for which an environmental impact report was certified to include mixed use projects as well. To qualify, a project must also be consistent with the applicable SCS – a criterion which could be difficult to meet given that not all regions have adopted an SCS and some of those that have are currently tied up in litigation.

Sacramento Kings Arena / AB 900 Fix

Following controversial precedent for other sports teams around the state, SB 743 fast-tracks environmental review for a new arena for the Sacramento Kings. The bill allows the City of Sacramento to acquire the arena property through eminent domain prior to completing CEQA review, creates a compressed timeline for public review, and provides for dispute resolution through non-binding mediation.

The bill also amended AB 900's jurisdictional and streamlining provisions in several respects. Notably, SB 743 repeals the provision that provided original jurisdiction to the Court of Appeal and required the court to issue a decision within 175 days of the filing of a petition. In its place, the new law requires the Judicial Council to adopt (by July 1, 2014) new rules of court mandating that lawsuits challenging Environmental Leadership Development Projects, including any appeals, must be resolved within 270 days of certification of the administrative record.

REDEVELOPMENT OF CONTAMINATED SITES – AB 440 (GATTO)

As the need for urban redevelopment increases, site contamination remains a significant obstacle. Assembly Bill 440 restores some of the contaminated site cleanup functions that were available to former redevelopment agencies pursuant to the Polanco Redevelopment Act. The bill vests these powers in cities, counties and housing

authorities, and specifically gives local agencies the right to obtain environmental information from property owners, the authority to compel cleanup on properties that an agency has found to be blighted by contamination, the right to recover the full costs of cleanup, and immunity for any releases addressed in an approved cleanup plan. Notably, the immunity runs with the land and extends to the local agency, the developer and its lenders, and subsequent purchasers and their lenders.

Unlike cleanup actions that were undertaken by redevelopment agencies, however, cleanup actions ordered by local agencies pursuant to AB 440 do not have the benefit of property tax increment financing or another dedicated funding source. Rather, the responsible party is liable to the local agency for the full cost of the cleanup. While AB 440 gives communities powerful tools to continue improving blighted areas in the wake of the dissolution of redevelopment agencies, it also exposes owners of contaminated land to another agency that can compel cleanup.

FRACKING – SB 4 (PAVLEY)

In response to growing national concern over the potential environmental and human health effects of hydraulic fracturing ("fracking"), the legislature established a framework for a comprehensive new regulatory regime in California that will have important consequences for the oil and gas industry. Senate Bill 4 requires fracking operators, for the first time, to obtain state fracking permits, provide notice of planned fracking activity to nearby property owners, disclose chemicals used during operations (with certain trade secret exceptions), and monitor air and groundwater quality near fracking wells. True to California's trendsetting nature, SB 4 is one of the country's first pieces of fracking legislation.

The bill represents a major shift from the status quo, as fracking is currently subject to minimal regulation in California. Under current law, well operators provide notice of intent to commence drilling operations to the State Department of Conservation's Division of Oil, Gas, and Geothermal Resources (DOGGR) and are deemed to have the agency's approval if it fails to provide a response within 10 working days. Since affirmative agency approval is not necessary, CEQA is often not triggered or the fracking activity is covered by an exemption or negative declaration, rather than a full environmental impact report (EIR).

Senate Bill 4 directs DOGGR to develop comprehensive new fracking regulations by January 1, 2015 based upon an independent, peer-reviewed scientific study conducted by the Secretary of the Natural Resources Agency evaluating the impacts of well stimulation treatments. DOGGR must also certify an EIR by July 1, 2015 on the impacts of well stimulation in the state, which creates uncertainty about the level of CEQA review required, if any, in the interim. It also remains to be seen whether, in the future, EIRs will be prepared for each fracking permit or set of permits or whether CEQA review will be conducted on a more programmatic level.

In the interim, fracking will continue to be allowed in California for well operators that certify compliance with the bill's disclosure and notification requirements.

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