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Refocusing CEQA Into A Lean, Green Review Machine

Law360, New York (June 07, 2012, 1:12 PM ET) -- The California Environmental Quality Act (CEQA) was originally adopted with the goal of disclosing and weighing the environmental impacts of discretionary actions by state agencies and local governments.

While CEQA has certainly resulted in greater consideration of the environmental impacts of development, a common complaint is that CEQA has become a powerful tool for NIMBYism ("Not in my backyard!"), slowing down projects with substantial environmental benefits, such as dense urban development, based on concerns only tangentially related to the environment.

Recent legislation has resulted in modest efforts to refocus CEQA. Senate Bill (SB) 375, passed in 2008, promotes greater coordination of regional transportation plans with regional greenhouse gas reduction goals.

It also provides targeted CEQA relief for transit-oriented development, as well as relief from considering growth inducing or traffic impacts for certain residential or mixed-use projects consistent with local transportation plans.

SB 226, passed in fall 2011, builds on SB 375 by providing CEQA exemptions for rooftop and parking lot solar, and CEQA streamlining for infill development.

Assembly Bill (AB) 900, also passed last fall, provides streamlined judicial review for large renewable and infill projects that meet certain environmental performance standards.

SB 226: Exemptions for Rooftop and Parking Lot Solar, and Streamlining for Infill Development

SB 226 exempts from CEQA review most solar energy installations and associated equipment on the roof of an existing building or on an existing parking lot. The exemptions apply to both solar electricity and solar hot water, though some restrictions apply.

For example, a parking lot solar system must not involve the removal of a tree required to be planted or maintained by local, state or federal law. This CEQA exemption for solar is a good — but limited — step in support of Governor Jerry Brown's goal of 12,000 megawatts of local renewable energy by 2020.

While a welcome step, the practical benefits of this CEQA exemption may be limited, as most rooftop and parking lot solar installations would not require a discretionary governmental approval, such as a use permit, which would trigger CEQA review.

SB 226 also streamlines review for certain infill projects so that environmental effects

considered at a more general level in the planning process do not need to be revisited for the infill project:

“If an environmental impact report was certified for a planning-level decision of a city or county, the application of this division to the approval of an infill project shall be limited to the effects on the environment that (A) are specific to the project or to the project site and were not addressed as significant effects in the prior environmental impact report or (B) substantial new information shows the effects will be more significant than described in the prior environmental impact report.”

To receive the benefits of streamlined review, the infill project must satisfy the performance standards to be adopted pursuant to SB 226, and must be:

1. Consistent with a sustainable communities strategy or alternative planning strategy under SB 375;
2. A “small walkable community project;” or
3. A project with a residential density of at least 20 units per acre and a floor area ratio of at least 0.75 if located in a jurisdiction that has yet to adopt a sustainable communities or alternative planning strategy.

The bill also directs the state Office of Planning and Research (OPR) to prepare draft CEQA guidelines containing the required performance standards for infill projects by July 1, 2012. The current draft regulations are posted on OPR’s website and were open for comment until June 1, 2012.

SB 226 requires that the performance standards to be codified in the CEQA guidelines support several green building goals, including implementation of SB 375, reduction of greenhouse gas emissions, reduced water use and greater energy efficiency.

AB 900: Streamlined Judicial Review of CEQA Challenges to Infill, Renewable Energy Production and Manufacturing

AB 900, passed September 2011, took inspiration from SB 292, which created a special review process for CEQA challenges to Anschutz Entertainment Group Inc.’s Los Angeles football stadium project.

AB 900 provides streamlined judicial review of CEQA challenges for a broader class of “leadership projects,” including:

- Infill projects certified as Leadership in Energy and Environmental Design (LEED) Silver or better by the U.S. Green Building Counsel that achieve “a 10 percent greater standard for transportation efficiency than comparable projects.” These

projects may be "residential, retail, commercial, sports, cultural, entertainment or recreational."

- Wind and solar renewable energy generation.
- Clean energy manufacturing projects that manufacture "products, equipment or components used for renewable energy generation, energy efficiency or for the production of clean alternative fuel vehicles."
- Application must be made to the governor for certification of the leadership project, and the governor must confirm that certain requirements are satisfied before certifying a proposed project, most importantly:
 - That the project will result in at least one hundred million dollars in investment in California;
 - That there will be no net additional emission of greenhouse gases; and
 - That the project "creates high-wage, highly skilled jobs that pay prevailing wages and living wages and provide construction jobs and permanent jobs for Californians, and helps reduce unemployment."

A "leadership project" which is certified by the governor and is not disapproved by the California Joint Legislative Budget Committee receives streamlined judicial review of CEQA challenges.

A judicial challenge to a project on CEQA grounds would ordinarily be heard in the local superior court, whose decision could be subject to further appeals. Challenges to leadership projects are instead heard by the Court of Appeals, which is required to issue a decision within 175 days of an action being filed.

The benefits from AB 900 are temporary. The legislation only applies to projects with a certified environmental impact report dated June 1, 2014, or sooner, and the law expires on Jan. 1, 2015.

AB 900 also faces an uncertain future. The Planning and Conservation League, an environmental nonprofit, and its executive director, Bruce Reznik, recently sued the State of California and Controller John Chiang to have AB 900 declared unconstitutional, and to enjoin California and its controller from spending state money to implement it.

The group claims the law is unconstitutional because it shifts CEQA challenges from the state trial courts to the Court of Appeals, and the group also argues that AB 900 makes it more difficult to challenge approvals on CEQA grounds.

The Judicial Council of California, the policymaking body of California courts, has also objected to AB 900.

Bellwether for Future CEQA Reforms?

SB 375, SB 226 and AB 900 evidence a clear and welcome trend in favor of reducing the CEQA review burden for infill and transit-oriented development, as well as renewable energy projects. Hopefully this legislation will be a bellwether for future reform, as ample opportunities remain for refocusing CEQA.

Aside from the straightforward exemptions under SB 226 for rooftop and parking lot solar, the CEQA streamlining set forth in SB 375, SB 226, and AB 900 is targeted, limited in scope and complex.

As an example, even if the 100-million-dollar investment standard did not apply to leadership projects under AB 900, only the largest developers would have the resources and political savvy to navigate an application to the governor for certification.

Consequently, recent CEQA reform legislation will likely benefit only large projects that can bear considerable investment in attorneys and consultants. More can and should be done to lighten the CEQA burden on smaller- and medium-sized projects that deploy renewable energy, reduce vehicle miles travelled, are energy efficient or add density to urban areas.

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