

Is CEQA "Fixed" - Do Infill CEQA Reforms Help or Handicap Your Project?

California's Legislature passed the California Environmental Quality Act in 1970 (Pub. Res. Code § 21000 *et seq.*) ("CEQA") to establish a process for lead agencies to analyze and mitigate potential environmental impacts resulting from planning and new development. In the more than four decades since its adoption, CEQA has been a magnet for controversy, in part because it fuses planning with public input with science. Because of its wide-sweeping range of substantive topics, project opponents frequently leverage CEQA litigation as a tool to obstruct, if not altogether halt, projects - and to negotiate non-environmental concessions in settlements. The result is a vast body of case law, now fraught with inconsistency and ambiguity, interpreting CEQA requirements and the Guidelines for CEQA (14 Cal. Code Regs. §§ 15000-15387). The CEQA litigation risk has created a morass of uncertainty in terms of costs, timing, and requirements for compliance for project applicants and lead agencies. Experienced representatives of the public and private sectors can cite countless examples of CEQA abuse, with lawsuits filed to derail projects or settle for non-environmental concessions (and fees).

The Legislature has periodically responded by attempting to create "streamlined" process for projects that are presumptively environmentally beneficial, such as infill projects. We invite you to review these reforms and test whether they help or handicap your project - or whether they are simply inapplicable, and thus irrelevant. Recent legislative efforts on CEQA infill include:

- **SB 1925 (Sher, 2002)**
SB 1925 created a statutory exemption for residential infill development. A project must satisfy over 20 pre-conditions to qualify for this exemption. Because of the exclusionary effect of all of the pre-conditions, to date there have been no confirmed instances of the use of this statutory exemption, although it remains in CEQA - prompting some to call it CEQA's "unicorn" - much discussed, never seen.
- **SB 375 (Steinberg, 2008)**
This bill, designed to limit greenhouse gas ("GHG") emissions from vehicles through thoughtful design of regional land development patterns, links transportation funding to "Sustainable Communities Strategies," that will effectuate GHG emissions reduction targets. SB 375 also streamlines CEQA review for certain transit-oriented projects. To date, there have been no confirmed instances of the use of these streamlining provisions.
- **AB 900 (Buchanan and Gordon, 2011)**
AB 900 allows lawsuits brought against designated types of projects that have been accepted into the AB 900 process by the Governor and Legislature to bypass trial court review and proceed directly to the Court of Appeal. Judicial review for these projects skip the trial court, and go directly to the appellate court. The Planning and Conservation League recently challenged the constitutionality of AB 900. No projects have enrolled in the AB 900 process.

- **SB 226 (Simitian, 2011)**

SB 226 streamlines the CEQA process to facilitate development of certain urban infill development and renewable energy projects that meet qualifying criteria, including performance standards to be developed (after CEQA review) by the Office of Planning & Research. SB 226 cannot be used until these performance standards are developed, which is anticipated to occur by the end of 2013. Because AB 226 is not yet available for use, no projects have used the AB 226 process.

These infill project CEQA provisions have sparked controversy and concern from all stakeholders - environmental advocates, public and private sector project sponsors, NIMBYs, environmental and neighborhood activists, organized labor, and private sector competitors. Some stakeholders decry the CEQA reform efforts as virtually worthless and opine that they do not result in any meaningful reform - and actually increase litigation risk. Others claim that reform efforts have diluted CEQA's effectiveness and will lead to environmental harm.

We encourage you to draw your own conclusions by tracking your project's eligibility for these reforms in the attached flowcharts, and then to judge whether - if your project is eligible - the reforms would provide (or would have provided) meaningful relief from challengers using CEQA for non-environmental purposes.

Also please consider completing the attached questionnaire to share your results as the debate about CEQA reform continues.

For more information on CEQA reform and CEQA compliance practices, please contact:

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**Infill Residential Development
Does This CEQA Statutory Exemption
Apply to Your Project?**

STEP 1: Does Project Meet General Criteria for Housing Exemptions? ALL CRITERIA MUST BE MET

1. Project is consistent with any applicable general plan, specific plan, local coastal program and zoning
2. Community-level environmental review has been adopted or certified.
3. Project is served by adequate existing utilities OR pays or offers to pay all in-lieu and development impact fees
4. Project site has no wetlands or riparian areas, and has no significant value to wildlife habitat
5. Project will cause no "harm" to any plant or animal species protected under federal, state or local law
6. Project site is not on the "Cortese" list of contaminated and formerly contaminated/remediated sites
7. Concerns raised in a preliminary endangerment assessment due to either a release of a hazardous substance or effects of potential exposure to significant hazards from surrounding properties or activities has been either removed or mitigated to have no significant impact on or off-site in compliance with state and federal requirements
8. Project has no significant effect on any historic resource
9. Project has no significant fire or public health hazard risk
10. Project is not located in earthquake fault, seismic hazard zone, landslide hazard zone or flood plain zone unless the risks have been mitigations according to provisions in the applicable general plan or zoning ordinance.
11. Project is not located on "developed open space" consisting of open space that is publically owned or partly acquired with public funds, is open to and used by the public, and has only park and park-like structures (play equipment, benches, etc.)
12. Project site is not located within the boundaries of a state conservancy.

YES

STEP 2: Is Project Eligible for the Infill Exemption? ALL CRITERIA MUST BE MET

1. **Residential Project**
 - a. Residential units only OR
 - b. Residential units combined with less than 15% floor area of neighborhood-serving goods, services or retail uses
2. **Located on an infill site.**
 - a. Previously developed for qualified urban uses, including residential, commercial, public institutional transit or transportation passenger facility, or retail use, or mixed use OR
 - b. Currently undeveloped but:
 - i. The site is immediately adjacent to parcels that are developed with qualified urban uses, or at least 75 percent of the perimeter of the site adjoins parcels that are developed with qualified urban uses and the remaining 25 percent of the site adjoins parcels that have previously been developed for qualified urban uses.
 - ii. No parcel within the site has been created within the past 10 years unless the parcel was created as a result of the plan of a redevelopment agency.
3. **In an urbanized area. Either**
 - a. Within incorporated City limits, population of incorporated city or incorporated city and two contiguous cities is at least 100,000 OR
 - b. In unincorporated County island that is "completely surrounded by" incorporated Cities, with a combined population of at least 100,000 people, with existing densities in the island equivalent to densities in the surrounding communities
4. **Community-level environmental impact review performed within 5 years of Project application is deemed complete**
5. **Project site is not more than 4 acres**
6. **Project contains a maximum of 100 residential units**
7. **Includes one of these affordable housing components**
 - a. Project includes 10% for sale units to moderate income, OR 10% low rental units OR 5% very low rental units AND provides sufficient legal commitments to ensure the continued availability the affordable housing OR
 - b. Developer has paid or will pay in-lieu fees to local government to assure that outcome in (a) above is achieved
8. **Located within 1/2 mile of a major transit stop.**
9. **All single level buildings within Project are less than 100,000 SF**
10. **Project promotes higher density housing by either having:**
 - a. density of at least 20 units per acre OR
 - b. density of at least 10 units per acre and a density greater than the average density of the residential properties within 1,500 feet

NO

STOP
CEQA Infill Exemption Does Not Apply

NO

YES

STEP 3A: Is there is a reasonable possibility that the project will have a project-specific, significant effect on the environment due to unusual circumstances?

NO

YES

STEP 3B: Have substantial changes occurred since community-level environmental review was certified or adopted?

NO

YES

STEP 3C: Has new information become available regarding the project or project circumstances that was not known, and could not have been known, at the time that community-level environmental review was certified or adopted?

NO

YES

Statutory Infill Exemption Applies

LIMITED CEQA REVIEW: EIR or negative declaration shall be limited to an analysis of the project-specific effects (i.e. all direct and indirect effects other than cumulative and growth-inducing effects) and any effects identified Step 3B and/or Step 3C.

SB 375 (Steinberg, 2008) "CEQA Streamlining" Will This CEQA Reform Help Your Infill Project?

STEP 1: Is Project in an "infill" location? EITHER:

A. Previously developed for qualified urban uses, including residential, commercial, public institutional transit or transportation passenger facility, or retail use, or mixed use OR

B. Currently undeveloped but:

1. either completely surrounded by existing qualified urban uses or 75% surrounded by existing qualified urban uses and 25% previously developed with qualified urban uses; AND
2. no new parcels were created on site within past 10

STEP 2: Is Project a Transit Priority Project ("TPP")? ALL CRITERIA MUST BE MET:

A. Site location and transit access eligibility criteria: Is Project located within 1/2 mile of a "major transit stop or a high quality transit corridor ("HQTC") as designated in a regional transit plan? *[Note: a HQTC must have fixed bus service at no less than 15 minute intervals during peak periods; and if the project site is partly outside the 1/2 mile area then effectively no more than 10% of the project is more than 1/2 mile from the HQTC.]*

B. Site size and use type eligibility criteria: Is the Project either a residential or residential/mixed use project with:

- i. A minimum net density of 20 units per acre?
- ii. Has a minimum residential component of 50% of total building square footage, and if it has between 25-50% non-residential uses the project has a minimum floor area ratio of 0.75?

C. SB 375 Plan consistency criteria: Is Project consistent with the "general use designation, density, building intensity, and applicable policies for the project area" in an SB 375 plan (Sustainable Communities Strategy or Alternative Plan Strategy) adopted by the regional metropolitan planning organization (e.g., SCAG)?

STEP 3: Is the TPP a "Sustainable Communities Project"? ALL CRITERIA MUST BE MET:

1. Project is served by adequate existing utilities
2. Project pays or offers to pay all in lieu and development impact fees?
3. Project site has no wetlands or riparian areas, and has no significant value to wildlife habitat
4. Project will cause no "harm" to any plant or animal species protected under federal, state or local law
5. Project site is not on the "Cortese" list of contaminated and formerly contaminated/remediated sites?
6. If contaminated but not on "Cortese" list, project has a completed contamination assessment and contamination will either be removed or mitigated to have no significant impact on or off-site
7. Project has no significant effect on any historic resource
8. Project has no significant fire or public health hazard risk
9. Project is not located in earthquake fault or seismic hazard zone
10. Project is not located on "developed open space" consisting of open space that is publically owned or partly acquired with public funds, is open to and used by the public, and has only park and park-like structures (play equipment, benches, etc.)
11. Project is 15% more energy efficient than required by California Code
12. Project uses 25% less water than average households
13. Project is a maximum of 8 acres
14. Project has a maximum of 200 dwelling units
15. Project will cause no net loss in affordable housing
16. Project has no single level building larger than 75,000 square feet
17. Project complies with all applicable mitigation measures and performance standards from prior EIR
18. Project causes no significant conflicts with nearby industrial uses
19. Located closer to transit service than TPP (1/2 mile from rail or ferry station, or 1/4 mile from HQTA, as identified in regional transit plan
20. Includes one of these affordable housing components:
 - a. Project includes 20% for sale units, or 10% low and 5% very low rental units
 - b. Developer gives enough money to local government to assure that outcome in (a) above is achieved
 - c. Project includes open space equivalent to 5 acres of parks per 1,000 residents of project

YES

After a public hearing before legislative body of the lead agency (e.g., City Council or Board of Supervisors), the TPP may be declared a "Sustainable Communities Project" which is statutorily exempt from CEQA.

NO

Step 1A: TPP may go through normal CEQA process, but if it has NO significant impacts it is "eligible for" an alternative "Sustainable Communities Environmental Assessment" (SCEA) CEQA process. SCEA requires:

1. Initial study identifying all significant or potentially significant TPP impacts, and any cumulative impacts that have been "adequately addressed" in a prior EIR (e.g., a General or Specific Plan EIR).
2. Mitigation of all TPP impacts to less than significant level
3. Mitigation of all cumulative impacts to less than significant level (except those within other agency's jurisdiction).
4. 30-day public review period, hearing, and legislative body decision or appeal right required.

Step 1B: If TPP is not eligible for SCEA (e.g., project-level or cumulative significant adverse impacts remain), then TPP EIR is required, and EIR may focus on significant impacts and need not consider off-site alternatives.

Normal CEQA Litigation Process Applies:

- Abuse of discretion for Infill EIR and exemption determination: Substantial evidence
- Abuse of discretion for Mitigated Negative Declaration: Fair argument

YES

NO

YES

YES

NO

STOP
SB 375 CEQA Streamlining Does Not Apply

**AB 900 (Buchanan & Gordon, 2011)
"CEQA Streamlining"
Will This CEQA Reform Help Your Infill
Project?**

STEP 1: Is Project an Environmental Leadership Project?

A. **Process and Timing Criteria:** Is EIR required but Draft EIR has been released?

B. **Eligibility Criteria by Investment Amount:** Do capital costs for Project exceed \$100 million?

C. **Prevailing Wage Criteria:** Will Project create "high-wage, highly skilled job" that pay prevailing wages and living wages and provide construction jobs and permanent jobs for Californians?

D. **Climate Change/Greenhouse Gas Criteria:** Will Project result in no net increase in greenhouse gas emissions from employee transportation, as determined by the California Air Resources Board?

E. **Eligibility Criteria by Project Type:**

a. Residential, retail, commercial, sports, cultural, entertainment or recreational use projects

i. LEED silver or better?

ii. 10% greater standard for transportation efficiency than other comparable projects [Note: "transportation efficiency" is defined by statute as the number of vehicle trips by employees, visitors, or customers divided by the number of employees, visitors and customers.]

iii. Infill location?

iv. Consistent with general use designation, density, building intensity and applicable policies of SB 375 Sustainable Communities Strategy or Alternative Planning Strategy that the California Air Resources Board agrees meets regional target for greenhouse gas emission reductions?

b. "Clean renewable energy project" that generates electricity through wind or solar, but not waste generation or conversion

c. "Clean energy manufacturing project" that manufactures equipment for production of renewable energy or clean alternative fuel vehicles

F. **Additional Applicant Commitment Criteria:**

a. Executed written agreement to comply with mitigation measures?

b. Agreed to pay for cost of preparing administrative record for judicial review?

G. **Timing Criteria:** Has Final EIR been certified on or before June 1, 2014?

YES

STEP 2: Have the procedural requirements for Environmental Leadership Product (ELP) status been met?

A. **Agency Notification Procedure.** Has the applicant notified the lead agency of its intent to seek ELP status? If not, has the lead agency notified the Secretary of the Resources Agency of the ELP?

B. **Governor Notification Procedure.** Has the applicant applied to the Governor for "certification" that the ELP project is eligible for streamlining provided by this chapter?

C. **Governor Review Procedure.** Has the applicant supplied evidence and materials that the Governor deems necessary to make a decision on the application for ELP certification?

D. **Public Review Procedure.** Were all materials and evidence on the ELP been provided to the public at least 15 days before the Governor decided on the application for ELP certification?

E. **Mandatory Governor Findings for Eligible Projects.** Has the Governor made a determination that all of the conditions identified in Step 1 have been met?

F. **Legislative Review Process.** Has Governor submitted his determination, along with supporting information, to the Joint Legislative Budget Committee?

G. **Legislative Review Process.** Has the Joint Legislative Budget Committee objected to, or failed to concur with, the Governor's determination?

H. **Legislative Decision Process.** Have 30 days passed since the Governor submitted his determination, with supporting information, to the Joint Legislative Budget Committee and has the Committee either concurred or failed to object?

YES

Litigation Streamlining Applies

- Lead Agency to prepare administrative record within five days of approving the project (record preparation costs funded by applicant). [Note: Since Petitioners cannot elect to prepare the lead agency's record, a multi-month record preparation negotiation period is avoided.]
- Content of required elements of administrative record specified.
- All claims (CEQA and non-CEQA claims) must be raised by Petitioners within the CEQA statute of limitations.
- Original jurisdiction lies with Court of Appeal (skips Superior Court "Trial" step).
- Court of Appeal to establish briefing and hearing schedule so judicial opinion is issued 175 days after lawsuit is filed.
- Court of Appeal may appoint a special master to assist the court in managing and processing the case.
- Extensions of time may be granted in the interests of justice.

NO

NO

STOP
AB 900 CEQA Streamlining Does Not Apply

Normal EIR Process Applies.
No Content or Analytical Streamlining, and no Lead Agency Streamlining.

New Electronic Records Requirement: EIR and documents produced/submitted to agency must be made promptly available in electronic form for public review

SB 226 (Simitian, 2011) "CEQA Streamlining" Will This CEQA Reform Help Your Infill Project?

STEP 1: Is Project site in an "Urbanized Area" EITHER:
A. Within incorporated City limits? OR
B. In unincorporated County island that is "completely surrounded by" incorporated Cities, with a combined population of at least 100,000 people, with existing densities in the island equivalent to densities in the surrounding communities?

YES

YES

STEP 2: Is Project itself eligible - ALL CRITERIA MUST BE MET:

A. Site development status eligibility criteria: Is Project on a previously developed location site or if Greenfield location, does Project have minimum 0.75 FAR?

B. Site use type eligibility criteria: Is Project either:
 i. A residential, transit station, school, public office, or mix of such uses?
 ii. A commercial or retail use (or mix of this use and the above uses), and no more than half of the project site is used for parking?

C. SB 375 Plan consistency criteria: Is Project either:
 i. Consistent with the "general use designation, density, building intensity, and applicable policies for the project area" in an SB 375 plan (Sustainable Communities Strategy or Alternative Plan Strategy) adopted by the regional metropolitan planning organization (e.g., SCAG)?
 ii. If an SB 375 plan has not yet been adopted, does Project have a residential density of at least 20 units/acre or a floor area ratio of at least 0.75?
 iii. In a "small walkable community" area designated by and within a City which is not located within the boundary of a metropolitan planning organization, AND (a) has a project area of approximately one-quarter mile diameter and includes a residential area adjacent to a retail downtown, and (b) has a density of at least 8 DU/acre for a residential project or a floor area ratio of at least 0.50 for a retail/commercial project?

D. Statewide Performance Standard consistency criteria: Projects must meet criteria. [Note: criteria are not scheduled for adoption until 12/12 - so no projects are currently eligible for SB 226.]

NO

NO

STOP
 SB 226 CEQA Streamlining Does Not Apply

STEP 3A: Were all environmental effects specific to the Project or Project Site considered in the Plan-level EIR (e.g., considered in GP/SP/CP EIR)?
 [Note: the 89 topics currently identified in CEQA Appendix G all must have been considered at Plan-level EIR for Project or Project site.]

YES

Lead agency to prepare "substantial evidence" in support of the finding that the project has already been covered in the earlier EIR (e.g., Narrative Initial Study), adopt findings, and file Notice of Exemption (statutory exemption - under SB 226, CEQA does not apply to these projects).

NO

STEP 3B-1: Is there any "substantial new information" showing that previously studied effects are actually more significant than considered in the Plan-level EIR? [Note: this situation could arise if, for example, more stringent stormwater or other standards were adopted after completion of the Plan-level EIR.]

NO

Lead agency to prepare narrative Infill CEQA Checklist (e.g., the form proposed in new Appendix N) to present "substantial evidence" of the absence of impacts not considered in Plan EIR and the presence of adequate mitigation for Project-level impacts, and process Mitigated Negative Declaration for Project.

YES

STEP 3B-2: Are there "uniformly-applicable development standards" that have been "adopted" by the lead agency that, when applied to the project, provide substantial evidence that any new Project-level effects will be "substantially mitigated"? [Note: these standards would need to address any "new" Project-level impact in all EIR topical areas, e.g., the 89 impact thresholds in Appendix G.]

YES

Lead agency to prepare narrative Infill CEQA Checklist (e.g., the proposed new Appendix N) with "substantial evidence" of the absence of impacts not considered in Plan EIR and a focused Infill EIR to consider new/worse Project impacts, all feasible mitigation and/or alternatives to reduce such impacts, and significant unavoidable impacts. The Infill EIR "need not" consider growth inducing impacts or alternatives that reduce impacts by moving locations, or reducing densities or building intensities

NO

STEP 3B-3: Will the project result in significant effects that are specific to the project or project site? OR does the project result in more significant effects than what was analyzed in the prior EIR?

The Office of Planning & Research has proposed Statewide Performance Standards and CEQA Guidelines under AB 226.

Normal CEQA Litigation Process Applies:

- Abuse of discretion for Infill EIR and exemption determination: Substantial evidence
- Abuse of discretion for Mitigated Negative Declaration: Fair argument

Infill Development CEQA Case Study Questionnaire

1. Project Description (e.g., 97-unit market-based rental project, with 5,000 square feet of ground floor retail, podium parking, in West Hollywood):

2. Project Benefits to community (e.g., number of construction/permanent jobs, amount of affordable or workforce housing units, public amenities like park or community meeting space, fiscal contribution to schools etc.):

3. Years to obtain project approval (from initial application to final approvals/litigation outcome): _____

4. Form of CEQA compliance you began with: ___ EIR ___ MND ___ CatEx ___ StatEx
Form of CEQA compliance document you ended up with, if different from above: _____

5. Were you threatened with CEQA litigation during the review/approval process? If so, over what issues?

___ Aesthetics ___ Parking ___ Traffic ___ Affordable Housing ___ Schools
___ Cultural ___ Hazmat ___ Water Other: _____

6. Did your project generally conform to a previously-adopted General Plan, Specific Plan, Community Plan, or Transit-Oriented Development Plan for which an EIR had been prepared within the last 10 years?

7. Were you sued? Yes/No. If so, did you settle? Yes/No. If so, did the settlement include any environmental improvements (e.g., mitigation measures?) _____

8. Do you believe the lawsuit was brought for non-environmental purposes? If so, by:
 NIMBY Labor Competitor Social Equity/Affordable Housing Advocates?
 Other (Please describe _____)

9. Please describe the top environmental improvements to the project design and configuration that emerged from the CEQA process that went above/beyond compliance with applicable codes/laws/etc: _____

10. Would your project have qualified for "CEQA Streamlining" based on SB 1925, SB 375, AB 900, or SB 226 (see attached flowcharts). If not, why would your project not have qualified?

SB 1925 - Statutory Exemption For Residential Infill:

SB 375 - Transit Priority Project/Sustainable Communities Project:

AB 900 - Environmental Leadership Project:

SB 226 - Infill Project:

Project Contact: _____ Email/phone number: _____

Lead Agency Contact (Optional): _____

Are you willing to discuss the project identified in this questionnaire with:

CEQA Working Group Representative (confidential) Public officials or media (not confidential)