Client Alert

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Update on CEQA Reform: Steinberg's Quest for the "Elusive Middle Ground"

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The last year witnessed what once appeared to be a groundswell of support for the "modernization" of the California Environmental Quality Act ("CEQA"), loosely meaning easing the burden of the process itself and minimizing its abuse by project opponents to stall or kill what are often environmentally beneficial projects. Governor Brown is a supporter, calling CEQA reform the "Lord's work," and Senate President *pro Tem* Darrell Steinberg professed his commitment to carry through meaningful reform this year.

In February, Steinberg introduced SB 731, a "spot" bill long on aspirational CEQA reform goals, but without statutory language. On April 24, Steinberg amended SB 731 to include actual language. Steinberg described SB 731 as seeking that "elusive middle ground between those who support fundamentally undermining the statute and those who support the status quo."

The bill proposes a handful of concepts that will minimize CEQA risk and reduce the procedural burdens for a subset of projects, but includes other ideas that will increase the burden. As a result, there is little in the bill that would meaningfully improve the CEQA process, with some provisions actually further complicating the already-byzantine process.

The following provides an analysis of SB 731, broken down into those provisions that most significantly streamline the CEQA process and related litigation, and those that potentially impose new burdens.

ELEMENTS THAT MAY HELP TO MINIMIZE CEQA ABUSE:

Concurrent Record Preparation. Project opponents are often able to stop a project simply by causing delay until a project misses the market cycle, even if their challenge ultimately lacks merit. SB 731 would speed up the litigation process by requiring that lead agencies for certain (mostly large) projects prepare the administrative record concurrent with the administrative proceedings and certify the record within 30 days of the filing a Notice of Determination. Concurrent record preparation would be mandatory for most large projects, but applicants for smaller projects could request this process, subject to the discretion of the lead agency.

While this would certainly speed up litigation at the trial court level, it creates new burdens. The record must be assembled, organized, and posted to a website *prior to the release of the Draft EIR*. Further, as comment letters come in, they must be uploaded to the website. Particularly for large projects, this adds a significant new burden to the lead agency during the CEQA process. Assembling, organizing, and posting to the Internet thousands of pages can be a daunting task (particularly for smaller municipalities), made even more difficult by the proposed requirement that it must be accomplished before an EIR can be released. Given that most projects do not draw a lawsuit, in many cases this would be a considerable effort, expense (borne by the project proponent) and likely delay for no beneficial purpose. Furthermore,

posting comment letters concurrent with their receipt will present a one-sided story. Typically, comment letters are published for the first time in the Final EIR, at which point each comment is responded to, giving both sides of an issue at the same time. Overall, projects that will likely draw a lawsuit may benefit from this type of fast-track provision, but requiring it of all large projects may create an unnecessary burden that actually delays the consideration and approval of projects.

Directs Courts to Issue Narrow CEQA Remedies. SB 731 attempts to clarify the remedies provision of CEQA. Under SB 731, if a reviewing court finds a failure to comply with CEQA, the court must issue a writ describing what action—with specificity—the lead agency must take. The writ must be limited only to those mandates that are necessary to achieve compliance. This provision is intended to clarify that CEQA remedies are to be narrowly focused on fixing only what was found defective and that, in some circumstances, projects may proceed pending the CEQA fix, provided that compliance with CEQA is not prejudiced. This is already what is required under the law, but this provision ostensibly makes it even clearer.

Standardized Threshold for Traffic, Parking, Noise for Infill Projects. SB 731 directs the Office of Planning and Research ("OPR") to prepare thresholds of significance for noise, transportation, and parking for the following types of projects: residential, mixed use, or sufficiently dense (FAR > 0.75) commercial uses within ½ mile of an existing or planned major transit stop. While this appears aimed at creating consistency among jurisdictions, SB 731 allows lead agencies to establish more stringent transportation and parking standards (although not noise standards). Whether this provision ends up minimizing legal risks associated with these issues will depend on the specifics of the thresholds and whether local agencies decide to follow them or choose more stringent standards.

Removes Aesthetic Impacts for Infill Projects. SB 731 would also streamline the necessary analysis for infill projects, eliminating aesthetics as an impact. This provision recognizes that erecting buildings in an urban setting should generally not be considered an environmental impact, although SB 731 confirms that local agencies retain their design review authority.

Funding for SB 375 Related Planning. SB 731 provides that $30 million may be appropriated annually to the Strategic Growth Council to provide competitive grants to local agencies for planning activities to implement SB 375 (aimed at reducing greenhouse gas emissions resulting from land use patterns). Many claim that for SB 375 and the various sustainable communities strategies to be effective, a significant amount of planning needs to occur at the local level, but that effort is hampered by a chronic lack of funding. In theory, this money could make both SB 375 and its related CEQA streamlining provisions more successful.

Tolling Agreement. SB 731 would clarify that parties may enter into tolling agreements extend the statute of limitations period and allow parties to work out differences before going to court. The initial term of such an agreement would be capped at four years, although extensions would be authorized. Case law recently clarified the legality of tolling agreements so this provision does not provide much in the way of new law. (*See Salmon Protection and Watershed Network v. County of Marin*, 205 Cal.App.4th 195 (2012).)

"New Information" Clarified (Somewhat). An existing exemption applies to residential projects

consistent with a Specific Plan where an EIR has previously been adopted and where none of the conditions specified in Public Resources Code Section 21166 has occurred. (*See* Cal. Gov't Code § 65457.) SB 731 would clarify that for purposes of the exemption, the term "new information," as used in Section 21166, does not include information such as argument, speculation, unsubstantiated opinion, clearly erroneous/inaccurate information, or evidence of social/economic impacts. The effect and intent of this provision is unclear. First, CEQA case law requires that "significant new information" be supported by substantial evidence, and the definition of "substantial evidence" already excludes the items listed in SB 731, so this does not appear to change the law. Second, Section 21166 serves many purposes, such as whether an Addendum can be used, yet the clarification of what is meant by "new information" proposed by SB 731 is limited to the single exemption. One could argue that by limiting the definition of Section 21166 to the exemption, the definition is not so limited in other circumstances. Unless amended, this section could cause more problems than it appears intended to fix.

Support of Renewable Energy Projects. SB 731 would create the position of Advisor on Renewable Energy to be housed in the office of the Governor until Jan 1, 2017. After that date, the Department of Fish and Wildlife will establish an internal division "with the primary purpose of performing comprehensive planning and environmental compliance services with priority given to projects involving the building of eligible renewable energy resources." SB 731 also provides that applicants for renewable energy projects "may present to the public agency, orally or in writing, the benefits onsite or offsite of the project," including benefits such as mitigation of greenhouse gas emissions, measures to reduce traffic, improve air quality, etc. As promoting benefits of a project is commonly done and never precluded by CEQA, the intent of this provision is unclear.

ELEMENTS OF SB 731 THAT ADD NEW CEQA BURDENS:

Additional Layer of Public Review. Current law provides that for every significant and unavoidable impact, the lead agency must find that specific economic, legal, social, or other considerations make mitigation infeasible and adopt a statement of overriding considerations. No public review period is required for such findings. SB 731 would change this by requiring that draft findings be available for public review at least 15 days prior to project approval. This adds another procedure to follow and will give project opponents another opportunity to review and challenge the lead agency's view of a project. It will also further muddy the waters in terms of what are considered "late" comments on a project that are not subject to further response from the lead agency.

Mitigation Reporting. Current law requires preparation of a mitigation monitoring or reporting program designed to ensure compliance with mitigation measures. SB 731 would require that the lead agency prepare an annual report documenting compliance with mitigation measures and make that available to the public. Currently, neither annual nor public reporting of mitigation compliance is required. This will create an ongoing burden of documenting mitigation compliance—which for complex projects can include hundreds of measures—and it will better allow opponents the ability to monitor and potentially enforce mitigation measures. It should be noted that Senator Evans's bill, SB 754, goes further and would create a private right of action to enforce mitigation measures.

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