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Landmark CEQA/Climate Change Settlement

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On August 21, 2007, California's Attorney General Jerry Brown announced a settlement of the recent controversial CEQA lawsuit his office brought against San Bernardino County, involving the extent to which the County's EIR for its General Plan update should address impacts on climate change. The settlement is important because it requires a California agency for the first time to inventory historical (as of 1990), current, and projected greenhouse gas ("GHG") emissions, to set a target for reducing GHG emissions, and to develop measures to reduce such emissions.

This contentious case has been closely watched by environmental groups and project proponents alike, for guidance as to how climate change should be addressed in CEQA documents. This issue has become the hottest topic in CEQA. Particularly since the passage of AB 32, environmental groups have aggressively asserted that CEQA requires both an analysis of a project's impacts on climate change and the incorporation of mitigation measures to reduce such impacts. Project proponents have argued that such analysis cannot be done until thresholds of significance are established, that the issue should wait for regulations to be promulgated by the California Air Resources Board under AB 32, and that requiring climate change analysis now could significantly stall greatly needed housing and infrastructure projects around the state. Attorney General Brown's case has been so controversial that Republican state senators refused to pass the state budget without legislation protecting certain transportation and levee infrastructure projects from similar lawsuits.

While the settlement does not provide answers to how an EIR should address climate change, the mitigation measures agreed to in the settlement may foretell a trend of local agencies' mitigating the impacts of discretionary approvals on climate change. It likely also will embolden the AG to continue his campaign to make CEQA the primary vehicle by which California agencies address climate change.

The Lawsuit

San Bernardino County is one of the fastest-growing counties in California, anticipating a growth by over 500,000 people by 2030. The county approved an updated General Plan in March 2007 that set forth goals and policies that would direct the future of land use, growth, and transportation for the county through 2030. As a part of the Draft EIR, the county analyzed the increase in air pollution expected under the updated General Plan; however, it contained no analysis on the impact of the Plan on climate change and did not require mitigation measures to reduce greenhouse gas emissions.

The AG submitted comments on the Draft EIR, almost exclusively focusing on the climate change issue. The AG's comment letter stated:

- The General Plan envisioned significant population growth and a significant increase in GHG emissions, primarily from transportation sources;
- The California Legislature, by passing AB 32, has recognized California's vulnerability to climate change and that action must be taken to reduce GHG emissions;

- CEQA's obligation to identify significant impacts of a project on the environment, and to require feasible mitigation of such impacts, requires an examination of a project's impact on climate change and the adoption of all feasible mitigation measures to reduce such impacts; and
- Such analysis can – and must – be done today even absent established thresholds of significance or regulations under AB 32.

The Final EIR responded to some of these concerns, but it did not estimate the increase in GHG emissions or propose mitigation measures to reduce such emissions. The Attorney General filed suit on April 13, 2007, claiming that the county's EIR violated CEQA because it did not adequately analyze the impacts of GHG emissions on climate change and did not propose mitigations for such impacts.

The AG's lawsuit is significant as the first challenge to a CEQA environmental review document based on global warming claims. In addition, the lawsuit seeks to expand the debate about addressing climate change beyond reducing emissions from power plants, factories, automobiles and other such sources, to addressing how land use and transportation planning decisions have climate change impacts. As one commenter put it, Brown is seeking to shift the focus from cars to the roads underneath them.

The Settlement

The settlement requires the county to take the following steps:

- Prepare an inventory of all known or "reasonably discoverable" sources of greenhouse gases currently existing in the county;
- Prepare an inventory of greenhouse gas emissions in 1990 and 2007 and those projected for 2020; and
- Prepare a "Greenhouse Gas Emissions Reductions Plan" ("GHG Reduction Plan") that includes (1) a reduction target for emissions attributable to the county's discretionary land use decisions and its own internal government operations, and (2) feasible GHG emission reduction measures.

The settlement allows the updated General Plan to remain valid for the time being, but the county must take reasonable efforts to update the Plan and adopt the GHG Reduction Plan within 2-1/2 years. Significantly, the settlement does not set an emissions reduction target, identify what reduction measures are "feasible," or provide guidance on those key issues. Such issues will be addressed as the county develops its GHG Reduction Plan, surely under the AG's watchful eye. Although the settlement did not set forth what measures should be taken, a press release from Brown cited a host of possible emission reduction measures, including more high-density housing, electric vehicle charging stations, development impact fees to fund mass transit projects, and energy-efficient building requirements.

The county has its work cut out for itself over the next few years. Just the process of creating inventories of GHG emissions will be an arduous task, let alone creating and adopting policies to reduce emissions. The settlement may also present jurisdictional issues, as, according to the only County Supervisor who voted against the agreement, the county only has authority over 15 percent of the land within its borders, the rest being under the control of incorporated cities and the federal government. As with the lawsuit, the steps San Bernardino takes to meet its demands will be carefully watched.

The Way of the Future?

Like it or not, the San Bernardino settlement likely solidifies climate change as an impact to be addressed in CEQA environmental review documents. Although it does not create a legal requirement to do so, the settlement likely will embolden the AG and environmental groups to push for more climate change analysis in CEQA documents.

If the filing of the San Bernardino lawsuit put project proponents and agencies on notice that they may be sued by the state for failing to address and mitigate climate change impacts, the settlement may be used as a guide by agencies wishing to avoid the AG's close scrutiny and legal action. Attorney General Brown wants to see a detailed examination of existing emissions, the projected increase in emissions as a result of the project, and feasible, enforceable mitigation measures to

reduce emissions. The settlement may also portend local agencies' adopting GHG emissions reduction plans similar to that required in the settlement in an effort to forestall similar litigation in their jurisdiction.

However, the settlement fails to address one of the thorniest issues: at what point do a project's GHG emissions rise to a level of having a significant impact on the environment, such that the impacts must be analyzed and feasible mitigation measures adopted? The AG picked an easy test case involving long term planning decisions in a large county that will see a 500,000 person population increase. But the significance question becomes much more difficult on smaller projects with far fewer related emissions, such as a single housing development or mixed-use project. Is any increase in emissions significant? If so, will mitigated negative declarations become uncommon? How much mitigation is required before GHG emissions are reduced to a less than significant level? The settlement does not address any of these issues, so practitioners will continue to work in an uncertain realm and continue to face legal risks when addressing climate change in CEQA documents.

Attorney General Brown clearly views the settlement as a victory and has been encouraged by the result. CEQA practitioners, particularly those working on large programmatic level projects, such as general plans, specific plans, and transportation plans, should carefully consider how to address climate change in CEQA documents and should pay extra attention to comments received from the AG's office. While AB 32 may have been the landmark climate change legislation, the AG's legal maneuvers and this settlement may be a better indicator of how climate change will be addressed in California, at least in the near term while AB 32 regulations wind their way through the rulemaking process.