April 26, 2013
California Land Use & Development Law Report

CEQA Modernization? Not really.

Steve Kostka, Julie Jones and Barbara Schussman The eagerly-awaited amendments to SB 731, the "CEQA Modernization Bill" have surfaced. The initial iteration of this bill was a placeholder which outlined topics that would be included in later amendments. As amended on April 23, the bill addresses many of the issues presaged by the initial version, as well as various non-CEQA issues. Unfortunately, little if anything in the amended version would help to simplify the CEQA process. And several of its provisions would likely result in more procedural requirements than previously existed. **New requirement that draft findings be made available for comments**. The bill would add a new requirement that an agency's CEQA findings be made available in draft form for public review for at least 15 days before a proposed project is approved. The bill has detailed requirements for providing notice that the draft findings are available, including electronic posting, newspaper publication and individual notice by both electronic mail (if available) and regular mail to individuals, organizations, and responsible and trustee agencies that commented on the Draft EIR, the applicant, and any person who has filed a written request for notice. CEQA currently does not require agencies to provide notice of, and circulate draft or final findings. **New requirement for annual reporting on mitigation monitoring.** The bill would impose a new requirement that lead agencies prepare an annual report on each approved project's compliance with required mitigation measures. Such an annual report must be made available online. It is not clear whether the requirement to prepare and post the annual report would open up an annual opportunity to file a CEQA suit challenging such a report. **Preparation of record for litigation as project is being processed**. It's often obvious before the lead agency even starts work on the CEQA document that opponents will file a CEQA lawsuit. In apparent recognition of this fact, the amendment would allow applicants to request that the agency start preparing its "record of proceedings" at the very beginning of the CEQA process and would require the lead agency to comply with that request for certain types of projects. The agency would be required to start posting documents included in the record on the web within only a few days of when they become available. In a further departure from existing law, the costs of preparing the record would be borne by the applicant and would not be recoverable from a petitioner who brings and loses a CEQA claim against the agency. The process of determining which documents are part of the record, and posting them on the web within tightly prescribed windows could be quite difficult for agencies to accomplish. This may create substantial risk of new causes of action for violations of these newly created procedural requirements, exposing project approvals to even more litigation uncertainty than exists now. **New restrictions on courts' remedial discretion**. The bill would add a new requirement that a court finding a CEQA document invalid on one ground enter a blanket order invalidating the entire document, unless the court makes specific findings that the invalid portion of the document is severable from the rest of it, and that the court has not found the rest of the document to be in noncompliance with CEQA. The bill would also add a new requirement that after a writ of mandate is issued, the respondent agency must file a report with the court describing the specific actions it will take to comply, its schedule for doing so, and the period for comment on the revised document. **Development of standardized thresholds of significance for certain projects**. The bill calls for the Office of Planning and Research to adopt revisions to the CEQA Guidelines that will contain thresholds of significance for noise, transportation and parking impacts for certain types of projects within "transit priority areas," defined as areas within one-half mile of a major transit stop. It also provides that the aesthetics of such projects shall not be considered significant impacts on the environment. However, the provision would not preclude public agencies from adopting more stringent thresholds of significance. In addition, the bill would re-introduce "parking" as a CEQA impact, at least in transit priority areas, years after the CEQA Guidelines were amended to eliminate reference to parking as a CEQA issue following a 2002 court decision holding that lack of parking is not an

environmental impact. **Information that is not substantial evidence is not "new information" for purposes of the exemption that applies to specific plan EIRs**. Under Government Code 65457 a residential project that is consistent with a specific plan can rely on the EIR for the specific plan, and is exempt from further CEQA review, unless one of the events specified in Public Resources Code section 21166 as triggers for a subsequent or supplemental EIR occurs. The bill would add a provision to section 65457 which essentially states that information which already would not qualify as substantial evidence under CEQA's existing definition of that term may be disregarded in determining whether such an event has occurred. **Acknowledgement that tolling agreements are appropriate**. Parties frequently enter into agreements allowing the statute of limitations for the filing of a lawsuit to be suspended while they engage in settlement negotiations. In *Salmon Protection and Watershed Networks* (see prior post) the court held that this long-standing practice applies in CEQA cases. The bill would acknowledge the holding of this case. **Applicants for renewable energy projects may comment on the benefits of their own proposals.** The bill provides that an applicant for a renewal energy project may present comments to the public agency considering its project explaining the environmental benefits of the project.

Blog series

California Land Use & Development Law Report

California Land Use & Development Law Report offers insights into legal issues relating to development and use of land and federal, state and local permitting and approval processes.

View the blog