

CEQA AND INFILL LEGAL UPDATE: *BERKELEY HILLSIDE* SB 226

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SD APA Presentation, April 24, 2012

Berkeley Hillside Preservation v. City of Berkeley (2012) 203 Cal.App. 4th 656

- Berkeley approved a 6500 sf home and 10-car garage using infill and Class 3 categorical exemptions
- Issue: What is proper interpretation of “significant effect” exception to categorical exemptions?
 - Exception: Is there a reasonable possibility that activity may have “significant effect” “due to unusual circumstances”
 - Is this a one-step test or a two step-test? Need to show both “significant effect” AND “unusual circumstances”?
 - Does fair argument or substantial evidence standard of review apply?

Berkeley, cont'd

Holding

- The exception is essentially a one-step test
 - When project has reasonable possibility of significant effect, that itself is the “unusual circumstance”
 - Don’t need to show that the specific project is ALSO “unusual” in the neighborhood or city for exception to apply
- The fair argument standard is used to determine whether there is a reasonable possibility of significant effect
 - Exception applied in this case because plaintiff expert wrote letter claiming there were geotechnical hazards, contradicting City’s expert

Berkeley, cont'd

- What Next?
 - May make exemptions harder to use
 - Some prior cases required the second step (“unusual circumstances”) and used deferential substantial evidence standard
 - Appeal to Supreme Court?
 - Another CEQA infill project horror story?



SB 226 Overview

- Written adopted in closing hours of 2011 legislative session
- Final draft had no committee review or public vetting
- Covers a wide variety of project types
- Patterned after PRC Sec. 21083.3 (projects consistent with General Plan or zoning)
 - SB 226 applies to General Plan and zoning amendments
 - But SB 226 creates streamlining process more complicated than Sec. 21083.3

Author's Press Release

The bill has “the immediate effect of expediting new urban housing and mixed-use projects in the Los Angeles, Sacramento, San Diego and San Francisco Bay Area regions, as well as some smaller communities. It will help create new, high-wage construction jobs and affordable housing in major urban areas.”

Sen. Joe Simitian (D-Palo Alto)





SB 226 Statute

- Pub. Res. Code 21094.5:
 - Establishes streamlining method for any defined “infill project” located:
 - in an “urban area”* in a city or county, and
 - on a previously developed site *or* a vacant site that is 75% contiguous to urban parcel, and
 - in area subject to a prior “planning level decision” (i.e., a general plan, community plan, specific plan, or zoning) for which an EIR was certified

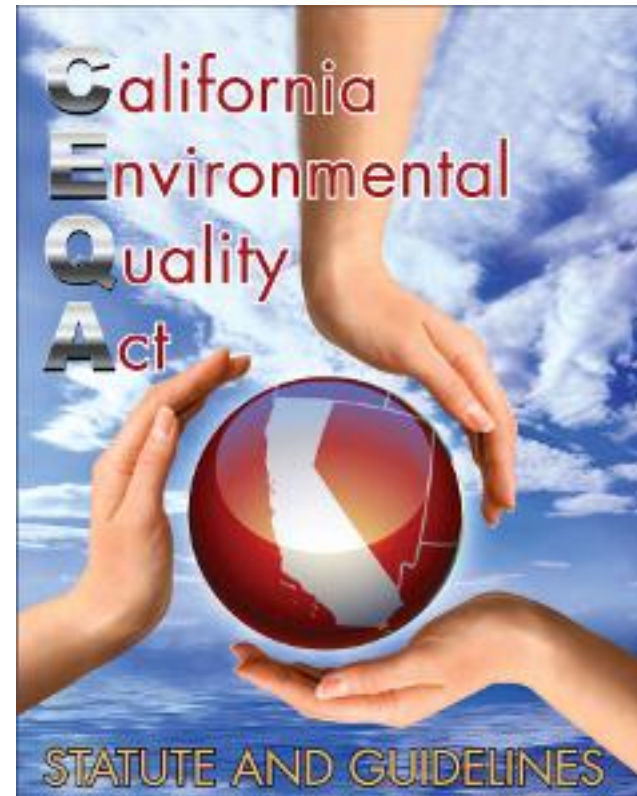
*Urban area=city or unincorporated area surrounded by cities meeting certain population and density criteria.

SB 226 Eligible Projects

- An eligible infill project must satisfy both of the following:
 - Any of these three conditions:
 - Be consistent with an adopted “sustainable communities strategy” (SCS) or an “alternative planning strategy” (APS)
 - Consist of a “small walkable community project” (as defined)
 - In a community without an adopted SCS or APS, have a residential density of more than 20 du/acre or a FAR of at least 75%
 - All applicable “statewide performance standards” adopted pursuant to Pub. Res. Code 21094.5.5
 - Draft due July 2012
 - Effective January 2012

CEQA Guidelines Amendments

- Preliminary draft of Guidelines amendments implementing SB 226 released in January, 2012.
Contents:
 - New Guidelines Section 15183.3
 - New Appendix M (Performance Standards)
 - New Appendix N (Infill Environmental Checklist Form)
- Draft for formal regulatory process is due by July 1, 2012



Performance Standard Topics

- Renewable energy
- Active transportation
- Station area plan
- Remediation
- Per capita VMT
- High-volume roads
- Regional location
- Household proximity
- Office building criteria
- Transit station eligibility
- School eligibility
- Small walkable community eligibility

SB 226 CEQA Streamlining

- No new CEQA document for qualifying infill project, unless there are effects:
 - That are *specific to the project* and were not addressed as significant effects in the prior EIR, or
 - For which substantial new information shows the effects will be more significant than described in the prior EIR
- However, even these effects would not trigger a CEQA document if:
 - “Uniformly applicable development policies or standards” previously adopted by the city, county, or lead agency apply to the project, and
 - The development policies or standards would “substantially mitigate” the effect

Streamlining, cont'd

- If infill project does not qualify for exemption:
 - Prepare ND, MND, or SCEA for TPP
 - Prepare infill project EIR, which need not evaluate alternatives or growth-inducing impacts



Implementation Issues

- Infill project eligibility
 - How do you determine whether a project is consistent with an SCS, when MPOs have not defined consistency?
 - Are proposed performance standards too complex? Many rely on project per capita VMT being less than regional per capita VMT
 - Is proposed Appendix N infill project checklist too detailed?
- Legal uncertainties
 - How do you determine whether project-specific effects were “addressed as significant effects” in the prior EIR? Is programmatic analysis and mitigation sufficient?
 - If relying on uniform policies/standards for exemption, does “substantially mitigate” mean to less than significant levels?