CEQA AND INFILL LEGAL UPDATE: BERKELEY HILLSIDE SB 226

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SD APA Presentation, April 24, 2012

- 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 an 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

  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

http://www.opr.ca.gov/s_sb266.php
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?