Saving CEQA

The Promise and Perils of Efforts at Reform

May 19, 2017

2017 AEP Conference
San Francisco, CA

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Panel Participants

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Objectives

1. Explore the necessity of CEQA reform, given divergent perspectives on CEQA’s effectiveness
2. Provide participants with a historical perspective on CEQA reform – and explore why there’s been limited success at driving reform efforts out of Sacramento
3. Orient participants to the types of streamlining efforts that are being employed on-the-ground and how applicable/scalable such approaches may be more broadly
2016 Presidential Election – presented very divergent implications for the environment
It could’ve gone one way…
But, instead went another.
The Aftermath…
California's environmental crusaders helped save our state. Now, they face down Trump (LA Times, April 2017)
Trump stumbled on healthcare and immigration, but he's been 'a wrecking ball' on the environment (LA Times, April 2017)
Trump aims at California in his first 100 days (Sacramento Bee, April 2017)
Analysis: Trump’s top environmental win is in cutting protections (SF Chronicle, April 2017)
Forging Ahead in California

- In the wake of these looming threats to California’s dominant policy agenda, it’s a good time to revisit what is and isn’t working in our approach to CEQA implementation:
  - How do we preserve our state’s environmental quality through enforcement of our flagship environmental law while accommodating the continued growth and development needed to best serve all of California’s residents?
CEQA’s Purpose

- Inform government decision makers and the public about the potential significant environmental impacts of proposed activities
- Identify ways that environmental impact(s) can be avoided or significantly reduced
- Prevent significant avoidable damage to the environment by requiring changes in the project through the use of alternatives and mitigation
If CEQA’s so great, why are we still fighting about it?
## Tensions Surrounding CEQA Reform

<table>
<thead>
<tr>
<th>Point</th>
<th>Counterpoint</th>
</tr>
</thead>
<tbody>
<tr>
<td>CEQA’s effectiveness sometimes depends on litigation by private parties acting in the public interest.</td>
<td>CEQA litigation can hinder development of “good” projects – e.g., higher density, TOD</td>
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<td>CEQA provides a process crucial for daylighting environmental concerns for the public and decision makers.</td>
<td>The CEQA process is frequently abused by litigants whose motives have no relation to environmental protection.</td>
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<td>CEQA can be a powerful tool for communities subjected to environmental injustices in that it helps ensure that public health is protected by evaluating and mitigating project impacts.</td>
<td>CEQA may be constraining physical and economic development in California in ways that are detrimental to environmental justice communities.</td>
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CEQA Litigation: Enforcement vs Abuse

Jennifer Hernandez
IN THE NAME OF THE ENVIRONMENT

How Litigation Abuse Under the California Environmental Quality Act Undermines California's Environmental, Social Equity and Economic Priorities – and Proposed Reforms to Protect the Environment from CEQA Litigation Abuse

Jennifer Hernandez, David Friedman and Stephanie DeHerrera | Holland & Knight
CEQA is Great – CEQA Litigation Abuse Is Not

Why CEQA Lawsuits Are An Unusually Powerful Leverage Tool

» Anonymous Lawsuits Are Fine!

» Judges “like” deciding these cases

» Most common judicial remedy is reversal of project approval
  - Most money waits for lawsuit outcome (3+ years)

» Bottom Line: lawsuit stops project!

15 Years of Win/Loss CEQA Stats

- Cat Ex: 20 Agency Wins, 56 Petitioner Wins
- Neg Dec: 43 Agency Wins, 40 Petitioner Wins
- EIR: 43 Agency Wins, 40 Petitioner Wins
- Total: 20 Agency Wins, 56 Petitioner Wins

Figure 1: Statewide (2010-2012)
CEQA Lawsuits Targeting Taxpayer-Funded and Privately-Funded Projects

- Residential: 21%
- Retail: 10%
- Commercial: 5%
- Entertainment: 2%
- Industrial: 4%
- Mining: 5%
- Agricultural & Forestry: 1%
- Energy: 4%
- Agency Property: >1%
- Agency Plans and Regulations: 15%
- Other Public Services & Infrastructure: 17%
- Water: 7%
- Schools: 5%
- Parks: 4%
Figure 1B: SCAG Regional CEQA Update (2013-2015)

- Residential (33%)
- Industrial (11%)
- Entertainment (1%)
- Commercial (1%)
- Mining (1%)
- Energy (4%)
- School (4%)
- Park (2%)
- Water (2%)
- Public Services & Infrastructure (14%)
- Agency Plan/Regulations (14%)
- Retail (10%)
Figure 2: Statewide (2010-2012) – CEQA Infrequently Used To Fight “Sprawl”
CEQA Lawsuits Targeting Greenfield Versus Infill Projects
(Select Project Types Shown – See Tables 2B through 2D for all Project Types)
98% of Challenged Housing Units were in “Infill” Locations – OPR “Infill” Definition (99% under US Census Bureau “Urbanized Area” Definition)

- **Infill: Multifamily/Mixed Use** 9,912 units (71%)
- **Infill: Single Family with some Multifamily/Mixed Use** 3,810 units (27%)
- **Infill: Construction or Remodel of One Single Family Home** 39 units (too small to show as wedge on chart)
- **Greenfield** 185 - 120 Multifamily/Mixed Use & 65 single-family mixed use (2%)

Figure 2b: SCAG Regional CEQA Update (2013-2015)
70% - 10,188 Housing Units - Targeted by CEQA Lawsuits Were Located Inside SCAG Transit Priority Areas/High Quality Transit Corridors

* Transit priority area means an area within one-half mile of a major transit stop which is defined as a site containing an existing rail transit station, a ferry terminal served by either a bus or rail transit service, or the intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods. (Pub. Resources Code § 21064.3)

Source: Holland & Knight LLP, SCAG, 2016 | Date: 9/29/2016
P:\Jung\CEQA_Litigation\mxd\CEQA_Lawsuits_TPA_HQTA_2040.mxd
99% of Housing Units Targeted by CEQA Lawsuits Located Inside US Census Bureau “Urbanized Areas” – Already Most Dense in US
78% - 10,440 Housing Units – Targeted by CEQA Lawsuits Located Outside the Cal/EPA “Disadvantaged Community” Areas
Today’s Urban Infill CEQA Lawsuits are not Properly “Justiciable” as then-Mayor Brown Wrote in an Amicus Brief to the California Supreme Court

Litigation Abuse CEQA Reforms: Mend It, Don’t End It

1. Require Litigation Transparency
2. End Duplicative Lawsuits
3. Align the Judicial Remedy with the Harm: Vacating Project Approvals Reserved for Health/Environmental Harms (Kings Arena/Legislative Office Remodel Examples)

Should Voters and Elected Officials Shape Non-Polluting, Infill Policy Choices (e.g., Climate-based Transit-Oriented High Density) . . . Or Should CEQA Petitioners and Judges?
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CEQA Streamlining: A Historical Perspective

Terry Rivasplata, AICP
A Brief Legislative History
Streamlining is Nothing New

- 1970s-style streamlining
- PRC 21166 and Guidelines Sections 15162-15164:
  - Subsequent/supplemental/addendum EIR
- Guidelines Section 15168:
  - Program EIR
- Guidelines Section 15183:
  - Focus on impacts “peculiar to the project”
- Gov. Code 65454:
  - Apply 15162 to residential projects under a specific plan
The 1980s – A Quiet Time

- No legislation of note
- Early court cases upholding Section 15162:
  - Clarifying that the “fair argument” doesn’t apply to the subsequent EIR question
The 1990s – The Legislature Awakens

- Business begins to focus on CEQA “reform”
- Environmental groups begin to play defense
- One result: Master EIR:
  - Like a program EIR, with an expiration date
- Another: a definition of “substantial evidence”:
  - Slightly less ambiguity over fair argument
- Statutory exemptions for infill:
  - Lots of qualifiers – seldom used
- More changes suggested, but never reached the Governor
The 21st Century

- **More pressure to reform CEQA:**
  - Multiple bills to reduce potential for litigation, limit the fair argument standard, and limit analysis to resources not covered by other regulations
  - Senator Rubio proposes fundamental change in late 2012, but resigns in 2013 and it goes nowhere
- **No success in passing these changes:**
  - Countervailing forces of development/business and environmental lobbies
The Favorite Approaches - SCS

- **SB 375:**
  - Streamlined review for transit priority projects
  - Exemption for sustainable communities projects

- **SB 226:**
  - Streamlined review for infill projects

- **SB 743:**
  - Streamlined review for certain projects with a specific plan

- **All of the above:**
  - Require consistency with a Sustainable Communities Strategy
  - Are complicated to understand
The Favorite Approaches – Streamlined Litigation

- **Environmental Leadership Development Projects:**
  - Environmentally cool; $100 million investment in CA
  - Front-loaded administrative record
  - Shortened litigation schedule

- **Special legislation: certain sports projects (e.g., Warriors and Kings arenas):**
  - Front-loaded administrative record

- **Doesn’t streamline the CEQA process itself**
Why Can’t We Streamline, Without Making it Complicated?

- **Business v. Environmental Lobbies:**
  - Compromise isn’t pretty
  - Environmental lobby currently has the upper hand

- **Some of the Key Issues We Fight Over:**
  - Fair argument
  - “Late hits”
  - Litigation: Causes of action and NIMBY challenges

- **Is change in the air?**
  - Broad push this session to improve housing production
  - Of the 100+ housing bills, some suggest streamlined CEQA processes
Recent Streamlining Efforts

Erin Efner & Darin Ranelletti
Overview of Recent CEQA Streamlining

- The California Legislature has created several new methods of streamlining infill development over the past few years

- For Example:
  - SB 226 streamlining for projects meeting adopted performance standards
  - SB 743 for projects consistent with a specific plan
  - SB 375 for transit priority projects
## CEQA Streamlining Comparison

<table>
<thead>
<tr>
<th>Time Limit</th>
<th>None</th>
<th>5 Years (&quot;refreshed&quot; with updated information)</th>
<th>None</th>
<th>None</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plan Consistency</td>
<td>Not explicitly required, but &quot;within the scope&quot;?</td>
<td>Silent</td>
<td>Consistency with General Plan and Zoning</td>
<td>Consistency with SCS</td>
</tr>
<tr>
<td>Project-Level Detail</td>
<td>Not required, but a PEIR &quot;will be most helpful ... if it deals with the effects of the program as specifically and comprehensively as possible.&quot;</td>
<td>Late projects must have been specifically identified in the Master EIR</td>
<td>Not required</td>
<td>Not required</td>
</tr>
<tr>
<td>Document Containing First Tier Analysis</td>
<td>An EIR prepared for a program, plan, policy or ordinance</td>
<td>A Master EIR for specified projects</td>
<td>An EIR for a comprehensive general plan amendment or zoning code</td>
<td>An EIR for a planning level decision, as well as any supplements or addenda thereto</td>
</tr>
<tr>
<td>Uniformly Adopted Development Standards</td>
<td>Can be used as thresholds of significance in an analysis, but not conclusively</td>
<td>Can be used as thresholds of significance in an analysis, but not conclusively</td>
<td>Can be used to address peculiar impacts of the project, only if adopted by a city or county with a finding that the standard will substantially mitigate the effects of future projects. Findings can be made at project approval</td>
<td>Can be used to address either new specific impacts or impacts that are more significant than previously analyzed, provided the finding is made at project approval</td>
</tr>
<tr>
<td>Limits on Analysis of Later Project</td>
<td>&quot;Substantially more severe&quot; impacts</td>
<td>New or more severe impact</td>
<td>Impacts peculiar to the project or its site</td>
<td>New specific impacts or impacts that are more significant than previously analyzed</td>
</tr>
</tbody>
</table>
# CEQA Streamlining Comparison

<table>
<thead>
<tr>
<th></th>
<th>Subsequent/Supplement /Addendum (15162-15164)</th>
<th>Specific Plan EIR (Section 15182)</th>
<th>Specific Plan EIR (Section 21155.4) – SB 743</th>
<th>SCEA/SCEIR (Section 21155.2) – SB 375</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Time Limit</strong></td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td><strong>Plan Consistency</strong></td>
<td>Not explicitly required, but project must relate to the original CEQA document’s subject</td>
<td>Residential project consistent with specific plan</td>
<td>Residential, employment center, or mixed-use development project consistent with specific plan and SCS, within a transit priority area</td>
<td>Consistency with SCS.</td>
</tr>
<tr>
<td><strong>Project-Level Detail</strong></td>
<td>Subsequent analysis focuses on later project</td>
<td>Detail at level of Specific Plan</td>
<td>Detail at level of Specific Plan</td>
<td>No explicit level set for “prior EIRs”</td>
</tr>
<tr>
<td><strong>Document Containing First Tier Analysis</strong></td>
<td>An EIR or MND</td>
<td>EIR certified for approved Specific Plan</td>
<td>EIR certified for approved Specific Plan</td>
<td>Prior certified EIRs</td>
</tr>
<tr>
<td><strong>Uniformly Adopted Development Standards</strong></td>
<td>Can be used as thresholds of significance in an analysis, but not conclusively</td>
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</tr>
<tr>
<td><strong>Limits on Analysis of Later Project</strong></td>
<td>New or substantially more severe impacts</td>
<td>New or substantially more severe impacts</td>
<td>New or substantially more severe impacts</td>
<td>For SCEA: no fair argument. For SCEIR on residential or mixed-use project: growth inducing impacts and vehicle GHG emissions</td>
</tr>
</tbody>
</table>
# Comparing Use of Streamlining Methods

<table>
<thead>
<tr>
<th>Streamlining Method</th>
<th>Relative Ease of Use(^a)</th>
<th>Breadth of Applicability(^b)</th>
<th>Extent of Streamlining(^c)</th>
<th>RTP/SCS Consistency Required?</th>
</tr>
</thead>
<tbody>
<tr>
<td>SB 375: Sustainable Community Project Exemption Under SCS</td>
<td>4</td>
<td>5</td>
<td>1</td>
<td>Yes</td>
</tr>
<tr>
<td>SB 375: Residential or Mixed-use Projects Consistent with SCS</td>
<td>3</td>
<td>4</td>
<td>4</td>
<td>Yes</td>
</tr>
<tr>
<td>SB 375: Transit Priority Project Under SCS – SCEA or SCEIR</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>Yes</td>
</tr>
<tr>
<td>SB 226: Urban Infill</td>
<td>4</td>
<td>3</td>
<td>4</td>
<td>Yes</td>
</tr>
<tr>
<td>SB 743: Partial Exemption for Parking/Aesthetics</td>
<td>1</td>
<td>3</td>
<td>5</td>
<td>No</td>
</tr>
<tr>
<td>SB 743: Specific Plan Exemption</td>
<td>1</td>
<td>3</td>
<td>1</td>
<td>Yes</td>
</tr>
</tbody>
</table>

Note: SB 375: Sustainable Community Project Exemption received a “4” under Relative Ease of Use because it requires the review of existing environmental conditions, which is not otherwise generally required under CEQA.

\(^a\) Scale of 1-5, with 1 being easiest.

\(^b\) Scale of 1-5, with 1 indicating the greatest range of applicable projects.

\(^c\) Scale of 1-5, with 1 indicating the greatest reduction of standard CEQA processes or least number of qualifying standards.
Role of the Regional Transportation Plan/Sustainable Communities Strategy

- To be eligible for most streamlining methods, a project must be consistent with the regional Sustainable Communities Strategy

Plan Bay Area:
- PBA describes how region can accommodate 820K new households and 1.3 million jobs by 2040
- Identifies Priority Development Areas (PDAs), calls for housing/jobs around PDAs
- Transit Priority Areas (TPAs) contain Transit Priority Projects (TPPs)
- If a TPP, you have cleared first hurdle for streamlining (under SB 375)!
TPP Areas

Source: Draft Plan Bay Area 2040.
Jurisdictions Using Streamlining

- **City and County of San Francisco:**
  - Community Plan Exemption, CEQA Guidelines Section 15183
  - Infill Exemption, CEQA Guidelines Section 15183.3

- **Menlo Park:**
  - Infill EIR, CEQA Guidelines Section 15183.3

- **City of Los Angeles:**
  - Starting to use SB375

- **Cities of Sacramento and West Sacramento:**
  - SB375
Case Study: City of Oakland

- **City of Oakland:**
  - Policies to update and streamline CEQA process
    - e.g., Housing Element of General Plan; Energy and Climate Action Plan
  - Specific Plans:
    - Accompanying EIR used for future streamlining
    - Program-level versus project-level
  - Uniformly Applied Development Standards:
    - “Standard Conditions of Approval” adopted by City Council, updated by Planning Director
  - CEQA Document: “CEQA Analysis” = customized combination document:
    - Relies on multiple streamlining approaches, e.g., exemptions, tiering, addendum
  - Updated Thresholds of Significance:
    - e.g., early implementation of SB743 to replace LOS with VMT in transportation analysis
Takeaways

- Don’t forget about the RTP/SCS if you don’t have a first-tier EIR
- Establish development and environmental policies; modify CEQA process to support policies
- Local agencies have more control of the CEQA process than they may think
- Community engagement helps with reform efforts
- Ideas for funding the reform work at the local agency:
  - Technical assistance grants from government agencies
  - Surcharge on permit application fees
Available Summer 2017!
Questions for Discussion

- Are streamlining techniques always useful, or do they just make things more complicated in some cases?
- When are they best employed?
- While employing streamlining techniques on a local level, should we simultaneously be pursuing legislation reform? If so, what should be the focus?
- Where are we with the Governor’s By Right proposal? Will this return in some iteration?