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CEQA Reform: The Aggrieved Instigator

Law360, New York (March 05, 2013) -- For California Environmental Quality Act practitioners, only one thing is certain in this current economic and political climate: change. The CEQA, originally passed in 1970 to increase public information and reduce environmental impact, has evolved into a putative form of business regulation and is therefore oft at the center of the long-standing tension between environmental interests and business interests.

Whether or not the act is as powerful as critics contend,[1] one perception is that this granddaddy of environmental impact assessment requirement is a roadblock to development and thus economic growth. As efforts to recharge California's economy ramp up, the CEQA finds itself at the forefront of the discussion.

Gov. Jerry Brown, in his Jan. 24, 2013, State of the State address, charged that the CEQA needed rethinking to "provide greater certainty and cut needless delays;" the California Economic Summit identified the CEQA "refinement" as one of its seven Signature Initiatives;[2] and the state legislature in 2013 will undoubtedly pick up the CEQA debate where it left off in 2012 — efforts to push through SB 317, an amend bill that would have reformed the CEQA enforcement, were abandoned at the end of the 2012 legislative session.[3]

The CEQA's flexible language and deference to local discretion have always made it vulnerable to what may be called abuse, insofar as those invoking the act have motivations besides the CEQA's original purposes of environmental protection and public disclosure. It has been argued that the CEQA has been utilized for political purposes, as a means of deterring business competition, and to gain favorable terms for labor unions, among other reasons.

The CEQA generally requires "a three-tiered process to ensure that public agencies inform their decisions with environmental considerations."[4] First is to determine whether the CEQA applies because the activity is a "project" not within an applicable enumerated "exemption."[5]

Applicability triggers potential delay, expense and complication for a permit seeker. Whether the project "may have a significant effect on the environment"[6] must be decided, and if the answer to that is positive, an environmental impact report prepared then must withstand challenge.[7]

If faced with determined opposition, the process can take years and substantial resources to accomplish. And therein lays the CEQA appeal: By simply asserting that the CEQA is applicable to something like the construction permit of an entity disfavored by a local interest group, supporters can be energized and publicity garnered, causing delay and sometimes crippling expense. Such occurrences are among the impetuses for the CEQA reform.

Given this reality, discussion regarding the critics and opponents of the CEQA cannot be confined to environmental and business interests, since the CEQA dynamics extend beyond these. Rather than an environmental compliance line item, it can, in practical terms, take on more the role of a tactical tool in a disagreement that involves state actors. As such, this is a discussion about conflicted interests generally, and the CEQA has merely become a weapon found on any battleground.

Take the heckler's veto: first coined in a footnote by the United States Supreme Court in 1966,[8] the heckler's veto denotes "restrictions on speech that stem from listeners' negative reactions to a particular message."[9]

It might take the form of an injunction against the activities of a citizen group based on the "disruption" of the group opposing it,[10] banning anti-war black armbands at school for fear of disruption,[11] or fees based on the anticipated costs of maintaining public order during an event.[12]

"[T]he First Amendment does not permit a heckler's veto,"[13] but practitioners can still face a the CEQA variation of it when representing controversial entities seeking permits. Individuals or groups opposed to a particular entity for political or other reasons may protest it opening or expanding in their locality.

They or others may then cite the potential effects of those protests, such as traffic and business disruption, as a "significant effect" under the CEQA. The more unruly, persistent, and sizable the protests, the greater that supposed the CEQA "effect" would be. Not only would opponents be incentivized to maximize the pain of protests, but under the CEQA's liberal standing rules, it is also possible that those directly causing the "effect" could be the same as those seeking to require its study and mitigation under the CEQA.

Analysis of a the CEQA heckler's veto begins with applicability. By its terms, the CEQA does not apply to "[m]inisterial projects," meaning those whose approval or implementation "involv[es] little or no personal judgment by the public official as to the wisdom or manner of carrying out the project."[14]

The "[i]ssuance of building permits" is presumptively "ministerial" and thus "exempt from the requirements of the CEQA," unless more than code compliance is required.[15] Issuance of small, typical construction permits are among the most commonly cited examples of nondiscretionary acts.[16]

A proponent of the CEQA's application may seek to end-run this rule by convening expansive discretion on the relevant decision-maker. Take the example of a routine construction permit. Many municipal codes will contain preambles mentioning "public health," "prosperity," "general welfare" and the like.[17] These, a CEQA proponent may argue, require a freewheeling policy inquiry into the wisdom of allowing a particular construction, so all such allowances are discretionary.

However, “[a]dministrative authorities are properly concerned with questions of compliance with the ordinance, not with its wisdom. To subject individuals to questions of policy in administrative matters would be unconstitutional.”[18]

Moreover, “[t]he determination of what is ‘ministerial’ can most appropriately be made by the particular public agency involved based upon its analysis of its own laws,”[19] and not many of them are likely to take the position that permitting a dishwasher replacement requires a philosophical foray into their societal benefits.

Discretionary projects may nonetheless be categorically exempt under the CEQA. Common CEQA exemptions include modification or repair of existing structures, replacement or reconstruction of a structure with one of approximately the same size and purpose, small new construction, including single family homes, minor alterations of land and actions by environmental protection agencies to protect environment or natural resources.[20]

If an agency finds the project within an exemption, the burden falls to the challenger to demonstrate that there “is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.”[21]

The height of that bar is currently a matter of some uncertainty. In Berkeley Hillside Preservation v. City of Berkeley, currently on review by the California Supreme Court,[22] the Court of Appeal disallowed exemptions for a largish single family home that would be exempt under the CEQA when one engineer wrote that geotechnical issues were present at the site, while two others found that this was “based on a misreading of the relevant plans.”[23]

Compressing “unusual circumstances” and environmental effects, it held that “the fact that proposed activity may have an effect on the environment is itself an unusual circumstance” and thus that “projects may not be categorically exempt where there is any reasonable possibility that the project may have a significant environmental effect.”[24]

Then, invoking the rule under the fair argument standard that when there is “disagreement among experts over the significance of an effect, the agency is to treat the effect as significant and prepare an [environmental impact report],”[25] it ordered “the preparation of an EIR.”[26]

An exemption that can be undone so easily is arguably not much of one. However, even if the result in Berkeley Hillside should stand, it would not allow the use of a CEQA heckler’s veto. Under the CEQA guidelines, the “existence of public controversy over the environmental effects of a project will not require preparation of an EIR if there is no substantial evidence before the agency that the project may have a significant effect on the environment.” [27]

This, on its face, would seem to preclude relying on the incidence of public controversy, such as disruption from protests, as effects “on the environment” under the CEQA.

Finally, practitioners can tactfully remind that singling a permit application out for disparate treatment because of the identity of the permit-seeker can have consequences, apart from engendering heated debate in Sacramento, Calif. California law recognizes that there is a violation of constitutional due process "when municipalities refuse to issue nondiscretionary building permits."[28]

Even if the permit is granted, a "deliberate flouting of the law may be said to have occurred if the city's demands for information and other procedural demands [are] so excessive and irrelevant to the regulatory task at hand as … to conclude that such demands were imposed … to obstruct or discourage."[29]

Thus, when a city council voted to withhold a building permit "although all requirements had been satisfied," the Ninth Circuit affirmed liability for the city and the council members who had "personally inflicted [permit-seeker's] constitutional injury[.]"[30]

Efforts to expand the reach of the CEQA can present challenges for CEQA practitioners representing special interest targets. But the CEQA remains inapplicable to ministerial permits or exempt ones, and challenger's adaption of a heckler's veto argument is unlikely to change this result. The more considerable challenge, by far, will be grappling with the evolution that is certain to be imposed on the CEQA practice in the coming legislative sessions.

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[1] Eliza Barbour & Michael Teitz, Public Policy Group of California, "CEQA Reform: Issues and Options 13" (2005) (finding only 1:354 environmental reviews are brought to court, and the vast majority of projects are approved).

[2] The California Economic Summit, summit action plan 2012, http://www.caeconomy.org/pages/summit-action-plan-2012.

[3] Rebekah Kearn, "Last-Minute 'Assault' on CEQA Dies," Courthouse News Service, Aug. 27, 2012, http://www.courthousenews.com/2012/08/27/49668.htm.

[4] Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego, 139 Cal. App. 4th 249, 257 (Cal. App. 4th Dist. 2006).

[5] Id.; CEQA Guidelines § 15063(d); Calvert v. County of Yuba, 145 Cal. App. 4th 613, 622 (2006).

[6] CEQA Guidelines § 15063.

[7] Id.

[8] Brown v. Louisiana, 383 U.S. 131, fn. 1 (1966)

[9] Ctr. for Bio-Ethical Reform Inc. v. Los Angeles County Sheriff Dep't, 533 F.3d 780, 788 (9th Cir. Cal. 2008)

[10] San Diego Unified Port Dist. v. United States Citizens Patrol, 63 Cal. App. 4th 964, 970 (4th Dist. 1998)

[11] Tinker v. Des Moines, 393 U.S. 503, 508-509 (1969)

[12] Forsyth County v. Nationalist Movement, 505 U.S. 123, 134, 112 S. Ct. 2395, 120 L. Ed. 2d 101 (1992)

[13] Ctr. for Bio-Ethical Reform Inc. v. Los Angeles County Sheriff Dep't, 533 F.3d 780, 788 (9th Cir. Cal. 2008)

[14] Stockton Citizens for Sensible Planning v. City of Stockton, 48 Cal. 4th 481, 498 (2010) quoting CEQA Guidelines, § 15369.

[15] 14 CCR 15286.

[16] Id.; Calvert v. County of Yuba, 145 Cal. App. 4th 613, 622 (2006); Friends of Juana Briones House v. City of Palo Alto, 190 Cal. App. 4th 286, 303 (2010) (“Run-of-the-mill building permits are ‘ministerial’ actions not requiring compliance with CEQA.”); Court House Plaza Co. v. City of Palo Alto, 117 Cal. App. 3d 871, 883 (1981) (“[M]andamus is particularly appropriate to compel the issuance of building and use permits since they are generally ministerial in character.”).

[17] See e.g., Lynwood Municipal Code § 25-1-1; South Pasadena Municipal Code § 101.2

[18] Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947 (1998).

[19] 14 CCR § 15286.

[20] 14 CCR 15300 et seq

[21] 14 CCR § 15300.2(c).

[22] See 203 Cal. App. 4th 656 (2012), as modified on denial of reh'g (Mar. 7, 2012), review granted and opinion superseded, 277 P.3d 742 (Cal. 2012).

[23] Id. at 675.

[24] Id. at 671.

[25] Id. at 675 quoting Sierra Club v. County of Sonoma, 6 Cal. App. 4th 1307, 1317 (Cal. App. 1st Dist. 1992)

[26] Id. at 676.

[27] 14 CCR § 15064(f)(4)

[28] Galland v. City of Clovis, 24 Cal. 4th 1003, 1036 (2001)

[29] Id.

[30] Bateson v. Geisse, 857 F.2d 1300, 1303-1304 (9th Cir. 1988).