JENKINS & HOGIN, LLP
A LAW PARTNERSHIP

MICHAEL JENKINS
CHRISTI HOGIN
MARK D. HENSLEY
BRADLEY E. WOHLENBERG
KARL H. BERGER
GREGG KOVACEVICH
JOHN C. COTTI
ELIZABETH M. CALCIANO
LAUREN B. FELDMAN

MANHATTAN TOWERS
1230 ROSECRANS AVENUE, SUITE 110
MANHATTAN BEACH, CALIFORNIA 90266
(310)643-8448 • FAX (310) 643-8441
WWW.LOCALGOVLAW.COM

WRITER'S EMAIL ADDRESS:
CHOGIN@LOCALGOVLAW.COM

CEQA 101:

Knowing the Environmental Impacts while Managing the Lawyer Magnet

Christi Hogin
City Attorney, cities of Lomita and Malibu
Jenkins & Hogin, LLP
Planners Institute
League of California Cities
March 26, 2008

The California Environmental Quality Act[1] (CEQA) is like a lawyer magnet. Most cities at one time or another have experienced the barrage of lawyer letters, replete with citation to court decisions, arguing opposite conclusions based on the same facts. You do not need a law degree to understand CEQA and satisfy its objectives. As someone who has read thousands of pages of lawyer letters, legal briefs and court decisions, I have lived to tell that courts understand that the primary purpose of CEQA is to assure that decision makers are informed about the potential adverse impacts to the environment of their decision *before* they make their decisions to approve a project.[2] If you undertake your environmental review pursuant to CEQA with the central purpose of assuring that decisionmakers are well-informed about the potential environmental impacts of an approval, you are unlikely to lose your way through the CEQA maze.

The "maze" consists of the statute itself, the state CEQA guidelines, the decisions of the courts and the local guidelines.[3] However, navigation is relatively

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[1] Public Resources Code § 21000 et seq. *See also* 14 Cal. Code Regs. § 15000, *et seq.* The Secretary of the California Resources Agency has adopted comprehensive regulations governing the requirements of CEQA When interpreting CEQA, courts must accord "great weight" to the state CEQA Guidelines unless clearly unauthorized or erroneous. *Laurel Heights Improvement Association v. Regents of the University of California*, 47 Cal. 3d 376, 391 n.2 (1988).

[2]The legislature specifically cautioned the courts not to interpret CEQA to impose procedural or substantive requirements beyond those explicitly stated in CEQA or the state CEQA Guidelines. Pub. Res. Code § 21083.1.

[3]Cities must adopt local procedures to evaluate proposed projects and administer the city's responsibilities under CEQA. 14 Cal. Code Regs. § 15022. The local guidelines must be consistent with CEQA and the state CEQA Guidelines. *See* Pub. Res. Code § 21082; 14 Cal. Code Regs. § 15022.

straightforward when approached systematically. The first question is always: Does CEQA apply?

1. DOES CEQA APPLY?

Unless exempt, all "discretionary projects" proposed to be carried out or approved by a city must receive environmental review pursuant to CEQA. Pub. Res. Code § 21080(a). Discretionary projects are those which require the exercise of judgment or deliberation, as opposed to merely determining whether there has been compliance with applicable laws and regulations. 14 Cal. Code Regs. § 15357; *see also* 14 Cal. Code Regs. § 15369. "Ministerial projects" involve a governmental decision requiring little or no personal judgment by the public official and are exempt from CEQA. Pub. Res. Code § 21080(b)(1); 14 Cal. Code Regs. § 15369. Beware though, even approvals which ordinarily are ministerial, such as the issuance of building permits, can become subject to CEQA if the city in effect exercises discretionary control over the project. *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal. App. 3d 259 (1987).

The definition of "project" for the purposes of CEQA is very broad. "Project" means any activity which has the potential to cause a direct or reasonably foreseeable indirect physical change in the environment, and which is any of the following: (1) activities directly undertaken by a public agency; (2) activities which receive financial assistance from a public agency; and (3) activities involving the issuance of a lease, permit, license, or other entitlement for use by a public agency. Pub. Res. Code § 21065; 14 Cal. Code Regs. § 15378(a). Legislative actions such as general plan amendments, zone changes, and annexations may ultimately lead to physical environmental changes and therefore are “projects” for the purposes of CEQA. 14 Cal. Code Regs. § 15378(a)(1); *Bozung v. Local Agency Formation Commission*, 13 Cal. 3d 263, 279 (1975). "Project" includes a legislative body submitting an initiative measure to the voters that may lead to voter approval of the project. However, a citizen-sponsored initiative, or a city-sponsored initiative that will not lead to voter

approval, is not a "project." *Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal. 4th 165, 105 Cal. Rptr. 2d 214 (2000); 14 Cal. Code Regs. § 15378(b)(3).

There are two types of exemptions under CEQA, exemptions set forth in the statute itself and those determined by the Resource Secretary to be in a category of projects which generally may be assumed not to have an adverse environmental impact. Statutory exemptions are hard and fast; categorical exemptions are more akin to rebuttable presumptions.

Statutory exemptions are found in the Public Resources Code. *See* Pub. Res. Code § 21080(b) and §§ 21080.01 through 21080.33 as well as §§ 21159.21 through 21159.23; 14 Cal. Code Regs. §§ 15260 through 15285 (further describing statutory exemptions). *See also* Gov't Code § 12012.45(b)(1)(C) (exempting execution of an intergovernmental agreement between a tribe and a county or city negotiated pursuant to a tribal-state gaming compact).

Projects which are disapproved are not subject to CEQA review. Pub. Res. Code § 21080(b)(5); 14 Cal. Code Regs. § 15270. *See also Main San Gabriel Basin Watermaster v. State Water Resources Control Board*, 12 Cal. App. 4th 1371 (1993). A city may disapprove a project on the merits without regard to the initiation or completion of CEQA procedures. 14 Cal. Code Regs. § 15270(b). When you think about this it makes perfect sense because, as discussed earlier, the purpose of CEQA is to inform decisionmakers of the potential adverse environmental consequences of a decision. A decision to deny a project necessarily avoids any impacts the project might have had.

The categorical exemptions are found in the State CEQA guidelines. These are the categories of projects that the Secretary of the Resources Agency has determined that under normal circumstances will have no significant effect on the environment and would thus be exempt from CEQA. Pub. Res. Code § 21084. These categorical exemptions are listed in 14 Cal. Code Regs. §§ 15300 through 15333.

However, even if a project falls within one of the classes of projects described in the state CEQA guidelines, the categorical exemptions do not apply to projects

located in a sensitive environment, projects involving significant cumulative impacts, projects which may have a significant environmental impact due to unusual circumstances, projects which adversely affect scenic highways, projects which cause substantial adverse changes to designated historical resources, and projects which are located on properties included on the State Secretary for Environmental Protection's list of hazardous waste sites. *See also* Cal. Pub. Res. Code §§ 21084(b), (c), (e), 21084.1. Accordingly, a preliminary assessment of whether the project is truly categorically exempt is required.

In addition to the listed statutory and categorical exemptions, the CEQA guidelines have a catch-all category called the "common sense" exemption. CEQA does not apply to projects where the lead agency determines "with certainty that there is no possibility that the activity in question may have a significant effect on the environment." 14 Cal. Code Regs. § 15061(b)(3); *Martin v. City and County of San Francisco*, 135 Cal. App. 4th 392, 403 (2005) (citing this "common sense" exemption in support of conclusion that alterations to the interior of a private residence, which have no significant effect on the public environment, are not subject to CEQA).

Whenever relying on an exemption, especially a common sense exemption, it is good practice to draft a memo for the file documenting how you reached the conclusion that the project was exempt and always file a notice of exemption after approval of the project in order to trigger the applicable statute of limitations.

2. Negative Declaration or Environmental Impact Report?

If a project is not exempt from CEQA, unless an EIR is definitely required, the city must prepare an initial study to determine whether the project will have a significant effect on the environment. *See* 14 Cal. Code Regs. § 15063. An initial study is exactly what it sounds like, an initial examination of the project description in light of the existing environment. Its purpose is to evaluate whether an EIR is required and determine the project's significant environmental impacts to be evaluated in the EIR. 14 Cal. Code Regs. § 15063(c). The initial study may also reveal modifications to the project that would mitigate potential adverse environmental impacts to the project as

proposed and thus alleviate the need for an EIR. 14 Cal. Code Regs. § 15063(c)(2). Appendices G and H to the state CEQA Guidelines contain an "environmental checklist form" which meets the requirements for an initial study and should be used. The initial study must be completed within 30 days after an application is accepted as complete, unless this deadline is extended for up to 15 days with the applicant's consent. 14 Cal. Code Regs. § 15102.

If on considering available information in connection with the initial study the city determines that a "fair argument" can be made that the project as proposed may have a significant adverse impact on the environment, the city is required to prepare an EIR. The “fair argument” must be supported by “substantial evidence.” Substantial evidence is facts, testimony or information that a reasonable person would rely on to tend to prove or disprove a conclusion and the fact finder reasonably determines in credible.

"Significant effect on the environment" means a substantial or potentially substantial adverse change in the physical conditions within the area affected by a project. 14 Cal. Code Regs. § 15382. For certain types of impacts, a mandatory finding of significance is required. 14 Cal. Code Regs. §§ 15064.5, 15065. Usually, however, the determination of significance is based on thresholds of significance adopted by the city with guidance from the city’s general plan or the city’s best judgment considering the whole record. 14 Cal. Code Regs. §§ 15064(b), 15064(f).

A "negative declaration" is the conclusion that, following an initial study, no substantial evidence before the city supports a fair argument that the project may have a significant impact on the environment. Pub. Res. Code § 21080(c)(1), (c)(2); 14 Cal. Code Regs. § 15070(a). A “mitigated negative declaration” is the conclusion that, although the initial study identifies potentially significant impacts of the project as originally proposed, revisions made to the project clearly reduce impacts to a level of insignificance and therefore there is no substantial evidence to support a fair argument that the revised project may have a significant adverse environmental impact. There must be no substantial evidence that the project, as revised, would have a significant effect on the environment. Pub. Res. Code § 21080(c)(2).

A negative declaration must contain: (1) a description of the project; (2) the location of the project; (3) a proposed finding that the project will not have a significant environmental impact; (4) a copy of the initial study documenting reasons to support the finding; and (5) mitigation measures, if any, incorporated into the project. 14 Cal. Code Regs. § 15071. A proposed negative declaration must be circulated for public review and must be recirculated if the document is substantially revised after it has been circulated, but before adoption. *See* 14 Cal. Code Regs. § 15073.5.

Before a city may approve a project, it must consider the proposed document together with any comments received during the public review process. The conclusion in the document must reflect the city's independent judgment and analysis. 14 Cal. Code Regs. § 15074(b).

If, on the other hand, the initial study identifies substantial evidence that supports a fair argument that the project may result in a significant adverse impact, an EIR must be prepared. Substantial evidence of impacts requiring an EIR must consist of factual information or expert opinion rather than speculation, unsubstantiated opinion or clearly inaccurate information. Pub. Res. Code §§ 21080(e), 21082.2(c); 14 Cal. Code Regs. § 15064(f)(5). EIRs are expensive and time-consuming. Project proponents often make the mistake of trying to persuade the project planner that the record does not contain substantial evidence. From experience, this effort generally is fruitless. The standard for when an EIR is required is low. The statute is designed to *favor* the preparation of EIR. Remember that CEQA is primarily about gathering information and facilitating well-informed decisionmaking. Thus, litigation over whether an EIR should have been required after months of processing an application based on inadequate environmental review is likely to result in the loss of more time and money than would have resulted from preparation of an EIR. When evaluating a record in connection with an initial study, project planners should always use their independent judgment, rely on substantial evidence, but favor more environmental review over less whenever there is doubt.

An EIR must contain a description of the physical environmental conditions at the project site and in the project vicinity as they exist at the time the notice of preparation is published or, if no NOP is published, then as it exists at the time the environmental analysis is commenced. This environmental setting is the "baseline" physical condition from which the city measures whether an impact is significant. 14 Cal. Code Regs. § 15125(a).

The state CEQA Guidelines set forth in detail the required contents of an EIR. *See* Cal. Pub. Res. Code § 21100; 14 Cal. Code Regs. §§ 15122 *et seq*. Generally, an EIR must: (1) accurately describe the proposed project; (2) identify and analyze each significant environmental impact expected to result from the proposed project; (3) identify mitigation measures to reduce those impacts to the extent feasible; (4) evaluate a range of reasonable alternatives to the proposed project; and (5) include a statement briefly indicating the reasons for determining that any effects on the environment are not significant and, thus, have not been discussed in detail. Additionally, an EIR must describe in a separate section any significant effects on the environment that cannot be avoided if the project were implemented and any significant effects on the environment that would be irreversible if the project were implemented. *See* Cal. Pub. Res. Code § 21100(b)(2). *See also* Cal. Pub. Res. Code § 21100; 14 Cal. Code Regs. §§ 15126, 15126.2, 15130, 15355.

An adequate EIR facilitates informed decisionmaking which takes into account the environmental consequences of a project. As I mentioned earlier, courts reviewing the adequacy of EIRs have not demanded perfection. Courts have upheld EIRs where the record reflects good faith effort at full disclosure.

A draft EIR is prepared and circulated to the public and affected public agencies for review and comments for a specified period of time (usually 30-45 days). Once all the comments are received, the city prepares written responses to the comments. The response to comments must provide reasoned, good faith analysis regarding all significant environmental issues raised in EIR comments. The final EIR consists of the draft EIR plus the responses to comments.

When "significant new information" is added to an EIR after the expiration of the public comment period but before certification, the EIR must be recirculated for additional public comment. Pub. Res. Code § 21092.1; 14 Cal. Code Regs. § 15088.5. Recirculation is only required when the information added to the EIR changes the EIR in a way that deprives the public of a meaningful opportunity to comment on either a substantial adverse environmental impact of the project or a feasible project alternative or mitigation measure that would clearly reduce the impact and which is not going to be implemented.

The city must certify that the final EIR was completed in compliance with CEQA, was reviewed and considered by the decision-making body before project approval and reflects the independent judgment of the city. The City must also address each significant impact identified in the EIR and the impact of the project as a whole. For each significant environmental impact identified in the EIR, the city must find that the evidence supports one of three conclusions: (1) the impact has been mitigated to a level of insignificance; (2) mitigation measures are the exclusive responsibility of another public agency which has adopted or will adopt them; or (3) specific economic, social or other considerations make infeasible the mitigation measures or project alternatives identified in the final EIR. The city also must find, based on substantial evidence one of the following: (1) the project will not have a significant effect on the environment; or (2) the significant effects of the project have been eliminated or substantially lessened when feasible and the remaining significant environmental effects are acceptable because the benefits of the project outweigh its unavoidable adverse environmental impacts. This second finding is commonly known as a "statement of overriding considerations" and is necessary to approve a project when the EIR demonstrates the project will create adverse environmental impacts which cannot be mitigated to a level of insignificance.

If mitigation measures are required to reduce an otherwise significant impact to a less than significant level, whether through an EIR or a mitigated negative declaration, the city must adopt a reporting or monitoring program to ensure compliance with those mitigation measures. The mitigation measures must be enforceable through permit conditions, agreements, or other mechanisms.

After deciding to approve or carry out a project for which a negative declaration or mitigated negative declaration h**as been approved, the cit**y must file a notice of determination **with the county clerk**. The filing of the notice triggers certain litigation deadlines so do your city attorney a favor and file the NOD as soon as possible after the project is approved.

While CEQA can seem intimidating to new planners and those unaccustomed to working with the statute, as the description above demonstrates, CEQA is primarily a set of procedures meant to organize the collection of information about a project's potentially adverse environmental impacts and facilitate its public review and consideration by decisionmakers. Lawyers often inject themselves into the administrative process and may make CEQA compliance seem more complicated than it truly is. CEQA compliance is grounded in proceeding in good faith to obtain all relevant information, circulate it publicly and consider it before taking action.