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ENVIRONMENT

OPR Proposes to Increase CEQA's Costs, Complexity, and Litigation Risks with SB 743 Implementation

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HIGHLIGHTS:

- ▶ Recent proposed revisions to CEQA guidelines implementing SB 743 do not address parts of SB 743 that are designed to streamline CEQA guidelines for some infill projects.
- ▶ OPR's proposal suggests a mandatory new "vehicle miles traveled" transportation study and several recommended mitigation measures that conflict with the SB 743 goal of encouraging infill.

Background

On August 6, 2014, the Governor's Office of Planning and Research (OPR) issued proposed revisions¹ to the California Environmental Quality Act (CEQA) guidelines implementing SB 743 – the Sacramento Kings arena bill – carried by Senator Darrell Steinberg and adopted by the legislature in 2013.

OPR's proposed amendments to the guidelines do not incorporate the parts of SB 743 that are designed to streamline CEQA guidelines for infill projects in some locations (e.g., eliminating aesthetics, parking and automobile delay as CEQA impacts for such projects). Instead, OPR proposes to dramatically expand CEQA by mandating evaluation and mitigation of "vehicle miles traveled" (VMT) as a new CEQA impact and single out certain infill projects as the first category of projects that must comply with this new VMT regime before it becomes mandatory for all projects in 2016. This approach is surprising, given the governor's repeated support for efforts to reform and streamline CEQA. OPR's VMT proposal goes far beyond CEQA's statutory scope by recommending mitigation measures that delve into socioeconomic issues, undermine regional and local greenhouse gas reduction plans, attempt to erode local agency constitutional land use policy authority, and increase the cost, complexity and litigation uncertainty already inherent in CEQA.

OPR's proposal is counterproductive to SB 743's stated goal of streamlining CEQA for infill projects and is a clear departure from the governor's support for CEQA streamlining. The deadline for OPR to receive comments is October 10, 2014, but supporters of CEQA reform can also write directly to the governor, Sen. Steinberg and OPR to request withdrawal of this "expand CEQA for infill project" proposal.

Summary

Upon its introduction into law, SB 743 became the last-minute vehicle for what were supposed to be changes to CEQA to help infill development. In part, SB 743 requires OPR to establish the following:

... criteria for determining the significance of transportation impacts of projects within transit priority areas. Those areas shall promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks, and a diversity of land uses. In developing the criteria, the office shall recommend potential metrics to measure transportation impacts that may include, but are not limited to vehicle miles traveled, vehicle miles traveled per capita, automobile trip generation rates, or automobile trips generated. The office may also establish criteria for models used to analyze transportation impacts to ensure the models are accurate, reliable, and consistent with the intent of this section. (Pub. Res. Code Section 21099(b)(1)).

OPR's proposal also includes the addition of a mandatory new VMT transportation study, with a new list of recommended VMT mitigation measures that go beyond CEQA's statutory scope and delve into socioeconomic and land use policy planning issues that the legislature has repeatedly declined to include in CEQA. These radical mitigation recommendations are included in proposed revisions to CEQA Guidelines Appendix F (previously used to consider energy conservation). OPR's mitigation suggestions include the following:

- **"Improving or increasing access to transit."** thereby paving the way for transit service mitigation measures and fees to be added to CEQA compliance obligations, fee negotiations and litigation opportunities, even for infill projects located in transit districts that comply with regional and local land use as well as transportation policy plans.
- **"Increasing access to common goods and services such as groceries, schools, and daycare."** thereby adding "access to groceries and daycare" (at minimum, since school impact issues are already covered) to CEQA's analytical study, mitigation and litigation menu.
- **"Incorporating affordable housing into the project."** notwithstanding pending appellate and California Supreme Court cases that will address the extent to which the California Constitution and other applicable laws allow individual project applicants to be required to provide or fund affordable housing, and opening a new CEQA-specific litigation window that can be disputed over for several more years even after the pending affordable housing cases are resolved by the California Supreme Court and other appellate courts.
- **"Improving the jobs/housing fit of a community."** a task that the California Constitution and myriad other laws already assign to local governments and state housing and economic development agencies. This proposed objective to study and develop mitigation for a "jobs/housing fit" expands CEQA's reach into socioeconomic impacts and mitigation measures that the legislature has repeatedly declined to enact.
- **"Incorporating a neighborhood electric vehicle network."** a vaguely defined concept that could include the installation of electric charging stations or separate paths for small electrically powered vehicles. This is another transportation and land use policy planning concept that could create litigation opportunities when applied to specific projects.

OPR then proposes to immediately apply this new VMT study and mitigation regime to infill

projects (i.e., projects within one-half mile of major transit stops or high-quality transit corridors), pending approval of OPR's proposed amendments to the guidelines (later this election year) and then applicable statewide to all projects starting on January 1, 2016. (Proposed Guidelines Section 15064.3(d)).

In short, OPR's new proposal conflicts with the SB 743 goal of encouraging infill by:

- increasing CEQA's project-level study/mitigation scope (e.g., what is required to analyze a project's "jobs/housing fit?")
- providing a new target zone for CEQA lawsuits as litigants may now argue that a project's study/mitigation approach is inadequate
- expanding costly CEQA mitigation requirements (e.g., subsidizing transit and/or building a "neighborhood electric vehicle network")
- requiring only qualified infill projects in qualified infill locations to immediately comply with this unique new and costly as well as potentially uncertain and litigious VMT study/mitigation requirement

Reasons to Oppose OPR's Proposal to Expand CEQA

There are several reasons why OPR's proposal should be tabled in favor of a far more pragmatic and environmentally effective response to SB 743's goal of making modest CEQA streamlining reforms to reduce CEQA's compliance costs and risks while encouraging infill.

Notably, SB 743 only imposes one deadline: for OPR to circulate a draft revision on or before July 1, 2014 (Pub. Res. Code Section 21099(b)(5)). There is no need for a rush adoption or immediate application of the revised guidelines by adopting a new VMT study and mitigation regime until the implications of this concept are thoroughly vetted, tested, and modified or withdrawn as needed to achieve SB 743's policy goal of making modest CEQA streamlining revisions for infill projects.

The following specific comments address the OPR proposal and suggestions for alternative approaches:

1. Absence of Available, Public and Cost-Effective VMT Models

Providing that a development project that "results in vehicle miles traveled greater than [the] regional average for the land use type ... may indicate a significant impact" (Proposed Guidelines Section 15064.3(b)(1)), it must be acknowledged that we have few, if any, models that purport to be able to accurately characterize VMT at a project-specific level for infill projects. The absence of such models will lead to increased study costs (at a minimum) and litigation/enforcement uncertainty as "NIMBY" opponents will have a new tool to use in CEQA lawsuits aimed at stopping or delaying a project.

Alternatively, if OPR wants to promote VMT as a new CEQA impact for which mitigation and/or alternatives are required "to the greatest extent feasible" consistent with CEQA's current framework, then OPR should start by partnering with regional and local agencies to develop VMT models that it believes are effective at a project level, and then pilot these in volunteer jurisdictions. This should all occur before launching this new mandate at infill projects, beginning immediately upon adoption of the guidelines' revisions and for all other projects statewide by January 1, 2016.

2. No Level of Service Relief

SB 743 eliminates automobile delay, most commonly measured through Level of Service (LOS) in urbanized intersections, as a CEQA significant impact for a very limited category of infill projects located in "transit priority areas" (Pub. Res. Code Section 20199(b)(1)). Notably, these "transit priority areas" differ from the Bay Area's "Priority Development Areas" (PDAs) recognized in the region's Sustainable Communities Strategy Plan adopted pursuant to SB 375.

However, SB 743 does not eliminate the need to evaluate and mitigate for LOS impacts under CEQA – and VMT may not be an adequate LOS substitute. OPR is forthright about only a couple of the reasons that LOS will continue to be a vital and costly part of the CEQA process for infill projects.

Reasons include:

- » State Congestion Management Plan (CMP) law still mandates attainment of LOS levels for key intersections, and SB 743 leaves this CMP mandate in place but allows local jurisdictions to go through a separate "infill opportunity area" designation process – a process which will itself trigger CEQA – to avoid having to enforce LOS through state CMP laws. Until jurisdictions succeed in achieving "infill opportunity area" status (and battling through any accompanying CEQA lawsuits), CEQA still requires that projects evaluate consistency with – and adopt all feasible mitigation measures to comply with – LOS standards for CMP roads and intersections.
- » Virtually all local jurisdictions continue to use LOS for traffic mitigation fee programs, general plan circulation elements, and other planning and zoning mandates, including previously adopted mitigation measures. OPR acknowledges SB 743 does not create any relief from these local agency mandates (Pub. Res. Code Section 21099(b)(4)). Amending traffic mitigation fees, general plans, and other planning and zoning mandates that use LOS cannot occur without CEQA compliance, and will then be subject to CEQA lawsuit challenges.
- » SB 743 makes clear that roadway "safety" – for pedestrians, bicycles and other vehicles alike – must still be evaluated as part of the CEQA process (Pub. Res. Code Section 21099(b)(3)). OPR acknowledges that localized congestion conditions can and often do create more bicycle and pedestrian safety conflicts. Furthermore, the proposed amendments include a new list of safety factors to be evaluated in CEQA documents, including a project's potential to "contribute to speed differentials" or "increase distance between pedestrian or bicycle crossings" (Proposed Guidelines Section 15064.3((b)(3))). Even for local jurisdictions that complete the above steps, LOS will remain a "safety" issue requiring evaluation and potential mitigation under CEQA.
- » CEQA still requires a full analysis of air quality, greenhouse gas impacts, noise and any other impacts associated with transportation. Again, this is explicitly acknowledged in SB 743 (Pub. Res. Code Section 21099(b)(3)). A number of impacts are greater when trips are delayed due to congestion. Conventional air pollution levels are higher (e.g., the Bay Bridge morning backup results in a slug of pollution that funnels into to the Central Valley); toxic air contaminants are higher near congested high-volume streets and intersections; and greenhouse gas emissions are higher for longer commutes, due to congestion conditions. The necessity of using LOS data in traditional air quality and other transportation-related analyses and mitigation under CEQA will continue even if OPR's VMT proposal is adopted.

Alternatively, some jurisdictions, including San Francisco, are planning to take the steps necessary to truly minimize reliance on LOS, but these are the exceptions rather than the

rule. OPR should test its VMT CEQA regime in partnership with these early adaptors, as suggested above. This phased application would allow for a more pragmatic, cost-effective and legally defensible rollout of a statewide VMT mandate.

3. Proposal Undermines SB 375 – and Local Land Use Plans.

OPR's proposal also effectively converts project-level CEQA review into a regional and local land use planning process unless, as has been reported, the real mandate OPR wants to create through CEQA is a tool to allow CEQA litigants to freely re-trade on adopted land use plans like the SB 375 regional greenhouse gas (GHG) reduction plan (known as "Sustainable Community Strategy" or "SCS" plans) and local general plans.

Regions in California have now spent well in excess of \$100 million on SB 375 plans to meet GHG reduction targets by increasing development densities in infill areas and prioritizing transit over roadway investments, and we are just now reaping the GHG reduction benefits of these new plans. By mandating a new project-level VMT analytical and mitigation/alternatives regime, OPR is undermining those plans. For example, according to the Association of Bay Area Governments (ABAG), Bay Area market rate infill projects have higher VMT. The region's experience so far (even early in this land use transformative process) is that infill housing has produced relatively costly units, occupied by relatively more affluent people and affluence rather than location has led to higher VMT levels. The debate about what drives economic success in infill areas is ongoing, but political leaders including Governor Brown and many big-city mayors have put their bet on market-rate housing in urban cores as a key driver – and regional as well as local plans are left to sort through the rest of the planning framework required to create healthy infill communities.

OPR's proposal undermines the SB 375 planning framework with a VMT regime most clearly articulated in revised Appendix F that has social justice and planning implications that extend beyond CEQA's existing framework. This regime would apply on a project-level basis regardless of the regional planning decision made in the overall SB 375 or local general plan framework.

This proposal raises many litigation issues for those unhappy with the land use decisions made in approved SCS and local general plans, specific plans and community plans – and allows project opponents to happily use CEQA to seek different projects or a different project location (e.g., affordable housing would have lower VMT in transit-friendly areas; therefore, CEQA requires the project to be moved away from transit-starved enclaves).

Alternatively, SB 375 plans need to be updated every five years. If it turns out – contrary to all expert predictions – that the focus on increasing urban densities has not in fact reduced GHG emissions as expected, then the SB 375 plans should be revisited. Until then, analysis of project-level consistency with SB 375 plans is a much more pragmatic, far less costly and far less litigious approach to encouraging infill than OPR's proposed new VMT CEQA mandate.

4. Litigation Uncertainty – Now and Into the Future

With OPR's proposal, some litigation concerns arise. For example, with a new CEQA VMT impact required to be mitigated to a level below some VMT regional norm, what should a project-level VMT model assume by way of employment over time for future residential unit occupants? Should the VMT model offer a level of precision inconsistent with evolving market conditions and life cycle conditions? For example, instead of estimating transportation trip rates, one must now estimate GHG emissions by layering on further

guesses (e.g., destinations and destination length, by transit mode). However, one can generously estimate GHG levels using these crude guesses and end up with more GHG mitigation. This is the pragmatic approach CEQA practitioners have been using for years, given OPR's decision to avoid clarifying GHG significance thresholds, notwithstanding legislative directives to do so.

The stakes, cost, complexity and litigation risks are much higher if VMT is itself elevated to a new numerically significant threshold defined relative to a regional VMT norm. For a new infill residential or mixed-use project, it's necessary to determine what percentage of residents will be commuting to various regional locations and, of that population, how many will have access to a Google Bus (which has a share of a VMT metric) versus Caltrain (which doesn't). Also, for CEQA mitigation monitoring and reporting/enforcement purposes, one will have environmental impact reports (EIRs) with a VMT impact expressed in total miles for an undetermined period that must either be mitigated to a less than significant level or have a project condition that requires compliance with some regional VMT norm. So what happens when a building resident changes jobs or gets married or divorced, when Google Bus services get cut back in the next downturn, or when San Francisco's ongoing expansion into high-tech/biotech jobs results in yet another change in commute patterns? EIR mitigation enforcement lawsuits are proliferating, which begs the question – are building owners or associations now obligated to track tenant VMT? There's at least one South Bay jurisdiction that has wanted GHG limits to be "bonded" over time to assure compliance, but the question remains if that is appropriate for this VMT metric.

CEQA is by far the most frequently used, and least costly, NIMBY lawsuit tool. NIMBY lawsuits dominate CEQA litigation and are overwhelmingly focused on infill projects. This is yet another anti-infill CEQA argument regarding VMT, which may not be the most effective way of encouraging infill as SB 743 (and SB 375 before it) intended.

An alternative approach could be to keep VMT out of the hands of CEQA litigators until VMT models, metrics and mitigation measures have been developed and pilot tested, and then consider proposing a guideline revision that provides practical and litigation-ready direction for all stakeholders.

While this is ongoing, the general plan guidelines could be updated to provide local governments with practical tools to step away from LOS in circulation elements and strip SB 743 of the requirement that jurisdictions that want to opt out of LOS must endure yet another drill of infill opportunity zone designation. Meanwhile, OPR and other stakeholders can rest assured that the tools for encouraging infill are in place. SB 743 at least provides some streamlining for aesthetics, parking and LOS (see Pub. Res. Code Section 21099(b)(2),(d)) – which OPR could affirm in a guidelines update. Moreover, many areas are doing infill at a relatively brisk pace.

Progress is also being made on the infill financing front. Affordable housing may get a much-needed financial boost from cap-and-trade revenues and infrastructure financing district reforms that will provide another financing tool for infill are also advancing in the legislature.

SB 743 in no way requires OPR to expand CEQA to elevate VMT to a new CEQA impact, and this abrupt expansion of CEQA increases the cost, time and litigation risk for infill projects. OPR should consider withdrawing its VMT proposal before mandating this CEQA expansion.

Next Steps

OPR's proposal to expand CEQA imposes new cost burdens and litigation risks on infill and other projects and adds a shiny new target for abusive CEQA lawsuits to burden our already-stretched municipal and judicial resources. OPR's proposal also takes us in precisely the wrong direction as the state attempts to remain at the forefront of efforts to combat climate change with cleaner energy and transportation technologies, increased investments in transit systems, and implementation of regional and local plans to reduce greenhouse gas emissions. Achieving these policy goals requires CEQA to be more stable and predictable, to be more closely integrated with California's famously stringent environmental standards and plans, and to be less dependent on end-of-session CEQA exemptions for politically favored projects.

OPR is soliciting comments, to be sent to CEQA.Guidelines@ceres.ca.gov, by October 10, 2014. To date, however, OPR has repeatedly rejected comments urging CEQA streamlining and opposing CEQA expansion. Commenting only to OPR is unlikely to be effective.

Instead, given the enormous investment that California communities and policymakers have made to encourage infill, and the governor's support for CEQA reform (and the absence of any suggestion that the governor supports expanding CEQA), it would also be helpful for comments to be made directly to the governor and members of the legislature.

Notes

¹ OPR's full discussion draft, entitled "Updating Transportation Impacts Analysis in the CEQA Guidelines," is available at the following URL:
http://opr.ca.gov/docs/Final_Preliminary_Discussion_Draft_of_Updates_Implementing_SB_743_080614.pdf.

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