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DOES A CEQA LAWSUIT STOP YOUR PROJECT? IT DEPENDS

CEQA can be a dirty abbreviation among the California development community, but it's not always a blaring red Stop sign.

By David Waite and Alexander DeGood

Few issues in the world of California development generate more debate and controversy than the California Environmental Quality Act (CEQA). For many years, developers and their allies have charged that the CEQA process is too lengthy, CEQA compliance is too complicated and CEQA litigation provides too easy an avenue for project opponents to challenge and stifle all manner of development. These are legitimate concerns.

While recent state legislation related to housing production provides some CEQA relief for residential projects that meet specific requirements for infill development, transit-oriented development and the production of affordable housing, in general it does not appear that California will adopt fundamental CEQA reform any time soon (if ever). Gov. Jerry Brown has described CEQA reform as "doing God's work." Many decision-makers and elected officials roundly embrace CEQA for its transparency regarding

project details and potential environmental impacts (putting aside that many so-called impacts really are not environmental as that term is generally used), and the ability to impose mitigation measures on development to mitigate project impacts. Given this status, for most developers, there is a recognition that CEQA is here to stay.

Impact of CEQA Litigation on Project Construction

As noted, it is not difficult to file CEQA litigation. CEQA's standing requirements are easily met, and CEQA petitioners can often retain counsel that take cases on contingency in the hopes of recovering attorneys' fees under California's private attorney general law. Funding CEQA litigation is often not an obstacle for project opponents.

Once petitioners file litigation, our developer clients often find themselves asking a central question: what are the risks to moving forward with

an approved project while it is being challenged in litigation? As a general matter, an approved project has a legal right to develop while in litigation, absent a petitioner obtaining an injunction stopping construction (a difficult task for many projects). But just because a developer has the right to construct does not mean it necessarily makes sense to do so. Recently, we litigated a case on behalf of Forest Lawn Memorial Park-Association, a major cemetery and mortuary owner and operator in Southern California. This case illustrates the dangers of moving forward with a project while CEQA litigation is pending and offers a lesson in how developers must analyze this risk.

After years of documenting damage caused to its property by construction activities on the I-10 freeway undertaken by the California Department of Transportation (Caltrans), Forest Lawn filed a CEQA suit alleging that Caltrans had not sufficiently analyzed

or mitigated the impacts of proposed additional freeway construction, and filed suit for damages. Among other claims, Forest Lawn alleged that Caltrans had committed fundamental procedural errors in certifying the freeway expansion's environmental impact report (EIR). At trial, the court agreed, ruling that Caltrans ignored the clear CEQA notice and comment requirements, and invalidated the entire EIR.

As a result of the ruling, Caltrans faced the prospect of stopping construction entirely on a project budget-

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ed at more than \$550 million while it prepared a new project EIR, recirculated it and reapproved the entire project. Such a process would have subjected Caltrans to extremely high construction delay damages (without a guarantee a new EIR would be upheld if challenged). Caltrans instead elected to settle with Forest Lawn, agreeing to pay \$35 million to remedy damage to Forest Lawn's property.

The Caltrans case illustrates that not all CEQA challenges are equal with respect to the risk of moving forward with project construction

during litigation. A challenge that alleges errors in some part of a project's CEQA analysis, such as traffic analysis, is far different than a challenge that alleges fundamental deficiencies in complying with CEQA's procedural mandates. A loss in a CEQA case on a discrete issue involving a particular project mitigation measures, for example, can often be remedied relatively quickly. Even though the project approvals will likely be set aside until the CEQA deficiency is addressed, a traffic study can be revised or a noise analysis can incorporate additional mitigation measures, and construction is often

not delayed for an extended period of time. A challenge that attacks the entire procedural basis, on which an EIR was approved, however, has the potential to result in a much longer delay. Rather than fixing a discrete area of analysis, a new EIR must be circulated, receive public comment, respond to comments and be approved again by the lead agency.

The decision to move forward with a project while simultaneously defending a CEQA challenge requires careful analysis of the scope of the litigation and the specific legal defects alleged in the lawsuit. Consideration needs to be given as to the

extent of any delay that will be necessary to remedy the alleged CEQA defects and how the project might need to change to address the alleged defects, if successful in the litigation. Other factors, such as the ability to obtain project financing, are also implicated by a CEQA challenge. But developers should always be informed whether their project's entire environmental review is at risk, and what the impact will be if the CEQA determinations are invalidated.

David Waite, Partner, and Alexander DeGood, Associate, Cox, Castle & Nicholson in Los Angeles