October 29, 2015

The Honorable Ken Alex, Director
Chris Calfee, Esq., General Counsel
Governor's Office of Planning and Research
1400 Tenth Street
Sacramento, CA 95814

Re: Comments on Proposed 2015 Amendments to the CEQA Guidelines

Dear Messrs. Alex and Calfee:

On behalf of the Council of Infill Builders, I offer these comments on the Governor's Office of Planning and Research (OPR) proposal to amend the California Environmental Quality Act (CEQA) Guidelines.

The Council of Infill Builders ("Infill Builders") is a 501(c)(3) nonprofit corporation made up of real estate professionals committed to improving California through infill development. Infill development revitalizes neighborhoods and communities, provides transportation choices, creates viable close-knit mixed-use areas, reduces greenhouse gas emissions, and improves the overall economy. The Infill Builders seek to educate the public about these benefits through research and outreach. They have been instrumental in the passage of legislation promoting infill, such as the recently enacted Assembly Bill 744, which will allow developers to request reduced minimum parking requirements for affordable housing projects near transit. Individual Council of Infill Builder members have created mixed-use projects such as the transit-oriented infill project "Kings River Village" in the San Joaquin Valley, and the Lofts on 18th project in Bakersfield. They take a very active part in the legislative and regulatory arena, commenting on proposed state legislation and local ordinances and programs that affect infill development. We offer these comments as part of that effort.

GENERAL COMMENTS

It seems a perennial feature of California governance for various parties to demand that CEQA procedures or provisions be reformed or streamlined in the name of eliminating obstacles to worthwhile projects and blocking meritless litigation. The Infill Builders certainly agree that CEQA can cause delays and raises obstacles to meritorious infill projects, and we agree that some abuse of CEQA does occur. However, we believe that the proper venue for reform discussions is in the Legislature, and with agencies implementing legislative directives, such as OPR's work to develop implementing regulations for SB 743 (Steinberg, 2013). As a result, we recognize that in proposing the 2015 amendments to the CEQA Guidelines, OPR is charged with interpreting and making specific the requirements of CEQA, and with revising the Guidelines to reflect consensus judicial interpretation of the statute – not with amending the statute as some parties may wish could occur.

To contextualize the impact of CEQA on infill development, the Council issued a report, "Bringing Downtown Back," that identifies the major obstacles we, as developers of infill projects, see as blocking infill development, of which CEQA is one. They include:

1. CEQA: Convenient transit by itself makes urban infill an obvious green choice, and those walkable, transit-friendly city locations have more neighbors than remote greenfields. Inevitably, some of those neighbors are attorneys and activists, making NIMBY challenges more likely to infill projects. This may be unavoidable, but the problem is worsened by how NIMBY challenges are sometimes made using the California Environmental Quality Act as the basis for a lawsuit, even in cases when the real concerns have nothing to do with environmental issues. The use of CEQA to favor greenfields over infill developments is obviously concerning.

2. General Plans: General plans usually make it impossible to redevelop existing sites with a single type of construction (e.g., industrial) into mixed use neighborhoods without revising the general plans first. As with CEQA, challenges to general plan updates can be filed by unhappy neighbors, making such a process lengthy, risky and more expensive. Even though this is an essential process, some kind of reform is needed to help encourage redevelopment.

3. Density: Because of height limits, it is often easier to get permits to build low-rise sprawl than an elegant 5-story mixed-use community. Zoning limits how different uses may be stacked vertically (e.g., homes over shops) and horizontally (e.g., factories next to daycare). In addition, better models are needed to estimate traffic generated by sustainable developments, particularly for mixed-use pedestrian-oriented sites near transit and those using ride sharing, bicycle networks and other means to reduce the need for cars. Existing traffic models are mostly based on numbers of people present, which has only a limited correlation to car traffic in a deeply sustainable community.

4. Boundaries and Limits: City limits and urban growth boundaries are flexible and relatively easily changed, leading developers to conclude that it may be more profitable and less risky to seek to initiate an annexation process for greenfield sites just outside city limits than to contend with NIMBY concerns on infill sites.

Finally, we have noticed, as have various commentators and legal bloggers, that some subjects that are addressed by OPR's proposal are also issues in cases currently before the California Supreme Court, and that decisions on such issues may mandate reversals or expansions of the OPR proposals. However, the California Supreme Court has been active in the CEQA area in the past few years, with cases from Communities for a Better Environment v. South Coast Air Quality Management District (2010) 48 Cal.4th 310 to Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal.4th 1086 having ruled on issues that the Guidelines revisions address. *See, e.g.*, articles at https://ucdavis.edu/centers/environmental/files/Flood-of-CEQA-decisions.pdf; and www.lexology.com/library/detila.aspx?g+aee74efa-3944-4039-bd52-a9a464adb.

If OPR waits until the California Supreme Court has no CEQA cases before it, then public agencies, developers, and the public will be deprived of the benefits of revised Guidelines for many years. There is no ideal time for revision, and no one can know in advance what issues our high Court will or will not resolve in any given case, nor how definitive its rulings may be. The court may split, previously unperceived jurisdictional issues may arise, or the decision may not be specific, or general, enough to resolve any given issue to the satisfaction of agencies, developers, or potential petitioners. It is time to do what can be done now, and see whether new decisions mandate further revisions.

SECTION BY SECTION COMMENTS

15064(b)(2): This proposal is useful in that it makes clear that thresholds of significance can be used in determining the significance of an impact. Use of well supported thresholds to determine impact significance can shorten and strengthen the EIR process, and this proposal, as well as the proposed change to section 15064.7(d)(1), below, may be very helpful to agencies making those determinations. The proposed change is also consistent with the statute, in that it indicates that such thresholds are not necessarily dispositive. Courts have long held that compliance with a threshold of significance adopted by the lead agency or another agency does not automatically mean that an impact is not significant. (See, e.g., Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 716-17.) If OPR adopts its proposed change to Section 15064.7, the proposed change to Section 15064 is particularly necessary to avoid confusion, to conform to Kings County Farm Bureau and other similar cases, and to carry out the California Supreme Court's holding in Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 259 that "the Legislature intended [CEQA] to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language."

15064.7(d)(1): See comments on section 15064(b)(2), above. It may be useful to make explicit here that the public agency may adopt or apply a standard adopted by a different agency, so long as the prescribed process of public adoption was followed by that other agency, or the current lead agency does so. As an example, agencies in smaller counties outside the boundaries of the larger, regional air quality management districts may wish to take advantage of the expertise of the South Coast Air Quality Management District, the San Joaquin Valley District, Bay Area Air Quality Management District, etc., and use a threshold of significance for increased emissions of air contaminants set by one of these large, technically sophisticated agencies. The public interest would be served by allowing use of such a threshold, under appropriate circumstances.

OPR may also wish to consider whether state and local agencies should be permitted to adopt and/or apply thresholds set by federal agencies, where such thresholds are no less stringent than state standards.

15168: The proposal's clarification that the determination as to whether a later activity would be within the scope of a program EIR already certified would be a factual determination by the lead agency, and that the deferential substantial evidence test would therefore apply to it, is very useful, and may speed up some CEQA cases. The listing of specific factors that a lead agency may use to make the determination is also helpful, as is the notation that the list is not exclusive, and the agency may therefore cite to other factors if relevant.

15152(h): We question whether this provision is really necessary, since it is a well-established rule that the specific usually governs over the general, but the change may be helpful in making this principle explicitly applicable.

15182: The Council welcomes this addition to the Guidelines, which tracks the statutory provisions for exemptions for qualifying transit-proximate projects.

15182 (b)(1): The guidelines could clarify that the 0.75 floor area ratio (FAR) should be calculated to include both the new and existing floor that will be retained, to cover adaptive reuse projects.

Updating the Environmental Checklist: Most of the changes proposed to the Checklist clarify and update it, and therefore should make it a more efficient tool. We have specific comments as follows:

> Energy: By definition, the kind of compact, mixed-use, transit friendly projects that the Council's members build avoid wasteful, inefficient, or unnecessary consumption of energy, and we support adding this provision to the Checklist. The establishment of aggressive greenhouse gas reduction targets for California through multiple statutes, including AB 32, SB 375, and SB 350, as well as Executive Order S-03-05, has committed the State to more efficient use of energy in all sectors of the economy, including use of energy in buildings. Due to its potential to increase greenhouse gas emissions and contribute to climate change, which are clearly significant environmental impacts, the wasteful use of energy should be considered a significant environmental impact, and included in the Checklist. This is analogous to including increases in smog-forming chemicals as significant impacts, and perhaps even more important. This comment also applies to proposed § 15126.2(b).
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> Exposure of people to greater flooding, wildfires, and other dangers: Some commentators and bloggers have characterized these proposed changes to the Checklist as "reverse-CEQA," arguing that they concern the effect of the environment on the project, rather than the effect of the project on the environment. However, the Checklist has always asked whether a project would increase human exposure to conditions caused by harm to the environment, such as wildfires that may be caused by introducing urban uses into forest areas, or disturbance to fragile soils or geological structures that may cause mudslides or other results of slope instability. The current proposed additions all concern impacts that are directly linked to environmental damage, and they are therefore appropriate for the Checklist. It is important to remember that CEQA is concerned with: "[t]he maintenance of a quality environment for the people of this state now and in the future[.]" (Public Res. Code § 21000(a).)
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> Transportation: The proposal would add a substantial increase in vehicle miles traveled as a potentially significant impact. In light of the mandate for Sustainable Communities Strategies contained in SB 375, with its goal of reducing VMT, coupled with the legislative mandate in SB 743, there seems no doubt that increased VMT caused by a project is a potentially significant impact and should be added to the Checklist. Again, the infill, transit-friendly projects built by the Council's members should result in decreased, not increased VMT.

The Council has no comments on the proposed changes to CEQA procedure. We thank OPR for this opportunity to comment, and for its attention to our comments.

Sincerely,

Curt Johansen
Chairman, Council of Infill Builders