

# Client Alert.

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## OPR Proposes S.B. 226 CEQA Streamlining Guidelines: Too High a Threshold to Help Infill Projects?

By Zane Gresham, Miles Imwalle, and Corinne Quigley

Last October, Governor Brown signed into law Senate Bill 226 (Simitian) as part of a package of CEQA reforms intended in part to streamline CEQA review for infill projects. The intention was clear: to relieve certain beneficial development projects from unnecessary and costly CEQA documentation. Now, the Governor's Office of Planning and Research ("OPR") has proposed rules to implement those streamlining measures ("Guidelines").<sup>1</sup> Unfortunately, these proposed Guidelines have introduced a host of limitations and requirements not mandated by S.B. 226 that may severely limit the availability of this expedited process for many infill projects.

OPR is soliciting comments on the proposed Guidelines through February 24, 2012. All those interested in infill development—local governments, property owners, affordable housing advocates, economic development proponents, and developers—should make sure that OPR hears their concerns about the unintended negative impact of the proposed Guidelines. Those comments could play a significant role in the practical utility of the final adopted Guidelines.

### SUMMARY OF THE PROPOSED STREAMLINED PROCESS<sup>2</sup>

The gist of the Guidelines is to allow infill projects meeting certain specific criteria to avoid preparing a full environmental impact report ("EIR"). Qualifying projects are eligible for more limited CEQA review, but getting past the initial thresholds and taking advantage of S.B. 226's benefits may prove to be a difficult task.

*Infill Projects.* Broadly speaking, the Guidelines would apply to an "infill project" that includes residential, retail, commercial, transit station, school, or public office building uses, or any combination of those uses.

*Qualifying for Streamlined Review.* In addition to meeting the use requirements, to qualify for streamlined review, an infill project must satisfy the following criteria:

- The project must be located in an urban area, on a site that was previously developed or is mainly surrounded by urban uses;
- The project must be consistent with land use requirements specified for the area in a sustainable communities strategy or alternative planning strategy, or if the community does not have such a strategy, the project must meet minimum density requirements; and
- The project must meet statewide performance standards included in the proposed Guidelines (see description provided below).

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<sup>1</sup> Senate Bill 226 exempts two types of projects from CEQA review—rooftop solar projects and certain infill developments—and contains other miscellaneous reforms. However, as directed by the bill, OPR's proposed Guidelines only address infill projects.

<sup>2</sup> Additional information on the proposed Guidelines, including a detailed description from OPR and the text of the proposed Guidelines, performance standards, and checklist can be found at [http://www.opr.ca.gov/s\\_sb226.php](http://www.opr.ca.gov/s_sb226.php).

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*Level of CEQA Review.* Once a project has cleared the qualification threshold, the lead agency will determine what level of streamlining is appropriate, ranging from a complete exemption to a narrower, project-specific “infill EIR.” To determine which CEQA document is appropriate, the lead agency will undertake two inquiries: First, if the effects of the infill project were addressed in a prior planning-level EIR (e.g., prepared for a general plan, community plan, specific plan, or zoning code), they need not be analyzed again. Second, even if the effects were not addressed in a prior EIR (either because they are new effects or because they are more significant than what was previously analyzed), if they are substantially mitigated by uniformly applicable development policies, the effects need not be analyzed further. Examples of uniformly applicable development policies include construction activity regulations (e.g., noise, dust control, or stormwater runoff regulations); building, grading, and stormwater codes; design guidelines; high volume roadway air pollution protections; and public improvement impact fee programs. The proposed Guidelines include a new checklist for the lead agency to follow when assessing infill projects.

The most stringent level of review that could result from these inquiries is an infill EIR. An infill EIR is limited to new project-specific effects that were not analyzed in a previous planning-level EIR and which cannot be substantially mitigated by uniformly applicable development policies. As an added benefit, an infill EIR need not address growth-inducing impacts or alternative locations, densities, or building intensities.

*Performance Standards.* The heart of the qualification process lies in the proposed performance standards, which impose a broad range of requirements. Senate Bill 226 directed OPR to develop performance standards that promote various state planning priorities, including the land use and transportation policies in Senate Bill 375, reduction of greenhouse gas emissions under Assembly Bill 32, and other goals for the creation of sustainable and transit-oriented communities. While many infill projects may be generally consistent with these high-level goals, they may have difficulty meeting the detailed performance standards that OPR is proposing to implement those goals. As the Guidelines are currently drafted, an infill project must meet the following requirements before it is eligible for streamlined review:

- All projects must:
  - Include renewable energy components, where feasible;
  - Promote walking and bicycling;
  - If within one-half mile of a transit station, be consistent with station area planning provisions; and
  - Remediate soil and water, if required.
- Residential projects must:
  - Implement certain green building standards, depending on the traffic associated with the project (measured in vehicle miles traveled); and
  - If within 500 feet of a high volume roadway, implement measures to protect public health, such as enhanced air filtration.
- Commercial/retail projects must:
  - If less than 75,000 square feet, generate traffic at less than 75% of the region’s average level, or be located within one-half mile of 1,200 households, or be located within one-quarter mile of a transit stop; or
  - If greater than 75,000 square feet, reduce total vehicle miles traveled.

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The good news is that if a project satisfies these criteria, it is eligible for streamlined review that could avoid unnecessary time and expense that might otherwise be required to shepherd an infill project through the permitting process.

### MAKING S.B. 226 WORK

There have been many efforts to streamline CEQA review over the years. As with those prior efforts, the success of S.B. 226 will depend on the practical utility of the associated CEQA Guidelines.

As currently drafted, OPR's proposed Guidelines theoretically may provide significant streamlining opportunities for infill projects. Yet it is uncertain how many projects realistically would be able to satisfy the strict qualification criteria that OPR has proposed. If S.B. 226 is to help good infill projects move forward without unnecessary CEQA entanglements, these Guidelines need to be scrutinized carefully to make sure that they are not just another CEQA "reform" that turns out to provide only illusory benefits.

OPR needs to receive input from stakeholders during the public review process about any difficulties engendered by the proposed Guidelines. That would enable OPR to address and rectify provisions that in practice would defeat the purpose of S.B. 226. Accordingly, anyone interested in infill development should submit comments and concerns to OPR by the February 24, 2012 deadline, with a particular focus on the types of projects that may qualify for streamlining and the range of performance standards that are technically and economically feasible for this type of development. OPR is required to transmit the final Guidelines to the Natural Resources Agency by July 1, 2012, and the Natural Resources Agency must certify them by January 1, 2013.

#### Contact:

**Zane Gresham**

(415) 268-7145

[zgresham@mofo.com](mailto:zgresham@mofo.com)

**Miles Imwalle**

(415) 268-6523

[mimwalle@mofo.com](mailto:mimwalle@mofo.com)

**Corinne Quigley**

(415) 268-6249

[cquigley@mofo.com](mailto:cquigley@mofo.com)

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