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How to Effectively Participate in the Environmental Review Process

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This article addresses the procedural aspects of participating in the environmental review process under the California Environmental Quality Act (CEQA), and the relatively easy steps that you can take to preserve your rights to challenge a flawed decision by an administrative agency in court.

I. Why Participate in the Environmental Review Process?

Individuals and groups can often affect the course of approval of unwanted development proposal by participating in the environmental review process provided by CEQA. Even if you may not intend to actually sue over a decision, you should make your concerns known, because it will enhance your credibility with reviewing agencies (and the developers probably exerting pressure on them) and send a message that a lawsuit is at least a risk. Sometimes, showing public agencies that they may be vulnerable to a legal challenge can force significant changes in a project from agencies and/or developers wary of the time, expense, and uncertainty of defending against litigation, or even result in non-approval. But
if you don't raise issues during the administrative review of a project, you can find yourself legally precluded from challenging questionable agency decisions in court (in legal parlance, one has a duty to "exhaust one's administrative remedies" prior to filing suit).

II. What are CEQA's Specific Exhaustion Requirements?

The exhaustion doctrine is codified in CEQA at Public Resources Code Section 21177, which bars suits over issues that were not raised during the administrative review, with some minor exceptions. Whether exhaustion requirements have been met is a fact intensive inquiry, requiring a court to look at comments submitted and determine whether those comments meet the requirements to preserve an issue for litigation.

There is considerable variation among courts in what constitutes adequate exhaustion. Some courts are strict, while others are more relaxed about CEQA's exhaustion requirements. For example, in *Woodward park Homeowners Ass'n v City of*

Fresno (2007) 150 Cal App 4th 683, the court found that exhaustion requirements regarding alternatives were met because the group objected to use of a full build alternative permitted by underlying zoning as a "no build" alternative for purposes of the EIR. Compare that outcome with *Sierra Club v. City of Orange* (2008) 163 Cal. App. 4th 523, where the court ruled that a "piecemealing" challenge was barred under the exhaustion doctrine, even though the group had raised concerns during the administrative review about air quality impacts "from all phases of the project." Fortunately, a Petitioner can raise any issue raised by any person who participated in the administrative proceeding. (See *Galante Vineyards v Monterey Peninsula Water Management Dist.* (1997) Cal App 4th 1109.)

III. When to Comment.

A typical administrative review process has multiple layers. For example, review by a city's planning commission will often be followed by review by the City Council (since CEQA allows automatic appeals of decisions from unelected decision making bodies to elected bodies on the issue of the adequacy of the environmental review). It is preferable to raise issues and objections as early as possible because courts will often look more skeptically at claims raised for the first time late in the administrative process, even if the claims are raised before the final decision. Courts may also be suspicious of the motives that led to comments for the first time late in the process. The California Supreme Court has bluntly stated that "We cannot, of course, overemphasize our disapproval of the tactic of withholding objections…solely for the purpose of obstruction and delay," stressing that strategically delaying commenting on a project is not a "game to be played by persons who...are chiefly interested in scuttling a particular project." (*Citizens of Goleta Valley v. Bd. Of Sup'rs of Santa Barbara County* (1990) 52 Cal. 3d 553, 568. ("*Goleta*") While every comment that is made before a decision is rendered is part of the record, if you come to the process late, it would be helpful to explain why you didn't comment earlier, and make it clear that you are not engaging in the type of strategic delay that the Supreme Court disapproved of in *Goleta*, or "sandbagging". Also, courts will generally expect much more detailed consideration of comments and concerns that are submitted to an agency early in the review process, rather than at the last minute (see *Goleta*). You also stand a better chance of finding the agency with an "open mind" early on, before opinions have hardened. There are thus very good tactical and practical advantages to commenting early on, although issues may continue to arise during the administrative process.

It is not enough, however, to raise objections early and then wait to commence legal action. Claims are also waived if issues and objections are not raised at the *final* administrative step, typically before the City Council for a controversial CEQA project (although procedures vary by locality so you should inquire what the local or state review and appeal process entails). See *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal. App. 4th 577, 592 ("*Tahoe Vista*"). The best course is to comment at each stage of the process. The more reasonable concerns and objections you get into the administrative record, the better your position will be in litigation, and the more influence

you will have on the administrative process. However, if you can only comment at one point, make sure it is the last stage in the administrative process, since you may not be able to pursue a court challenge over any issue that wasn't raised at the final administrative step.

If you form a group after the project is approved for the purposes of bringing suit, the group will be able to raise any claim that has previously been raised from any source if someone in the group objected at the appropriate time.

IV. Commenting After the Formal Commenting Period Has Closed.

Although ideally comments should be made early on, if for whatever reason you don't know about a project until the last minute, comment anyway. Even if you submit detailed comments immediately before a final vote is taken by the last administrative decision maker, the issues are preserved for purposes of administrative exhaustion and litigation. See *Tahoe Vista, supra*, 81 Cal. App. 4th at 594.

VI. Be as Specific as Possible in Your Comments.

The comments and objections must be specific enough for the agency to understand the nature of the concern and to satisfy the administration exhaustion requirements. (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal App 3d 1994, 1197.) Some courts have said this means that the "exact issue" raised in a lawsuit must generally have been raised before the administrative agency (*Sierra Club v City of Orange* (2008) 163 cal App 4th 523.) Others have been more forgiving of the "exact issue" requirement in administrative proceedings than in legal proceedings, because individuals and groups participating in administrative proceedings are generally not represented by counsel. (*Citizens Association for Sensible Dev. of Bishop Area v. County of Inyo* (1985) 172 Cal App 3d 151, 163.) Note, however, that at least one reviewing court was very strict with the "exact issue" requirement with an unrepresented citizens group in a non-CEQA case. (*Park Area Neighbors v Town of Fairfax* (1994) 29 Cal App. 4th 1442.)

When commenting in the CEQA process, it is logical to start with a general comment, for example a statement such as "the traffic impacts of the project will be severe." However, such a general statement may not meet the "exact issue" requirement in some courts, since a broad statement is unlikely to provide much guidance to the responding agency. Thus, it is important to also include more specific concerns, such as traffic impacts at specific intersections or the need for specific mitigation measures. Also, the old adage that a picture is worth a thousand words applies here. Whenever possible, include pictures of the existing setting, or the surrounding traffic, or other things that could help the decisionmaker—and a judge—understand the situation! Videos or computerized mock-ups (for example of how a building will block views) can be quite effective.

VII. Commenting On Different Types of CEQA Documents.

To be most effective when submitting comments as part of a CEQA review, you should know what document you are commenting on, and what legal standard applies. Unless an agency determines that a project is exempt from CEQA, it will typically start the review process with notice that one of several documents is being reviewed and has an associated comment period, and sometimes some type of public hearing, too. The most important document is the Environmental Impact Report (EIR), which should contain a detailed description of the project, analysis of project impacts, and discussion of alternatives, and mitigation measures. In the easiest case, it may be clear that the project will have significant environmental impacts, in which case the agency may have already decided to prepare an EIR detailing impacts, alternatives, and mitigation. If this is the case, the agency will issue a "Notice of Preparation" for the EIR and solicit comments on what the EIR should contain. Normally, the Notice of Preparation will be accompanied by an "Initial Study" that will provide a rough sketch of what the agency thinks are likely to be important issues. Your comments should simply reflect what you think will likely be important issues that need to be addressed, along with any background information you think would be helpful.

Sometimes, an agency will not have decided whether to prepare an EIR, and will prepare an Initial Study to help guide its decision. In this case, you will also want to raise any issues you may think are important, but you need to be more concerned with backing up your claims. Under CEQA, an agency must prepare an EIR if the record contains "substantial evidence" that supports a "fair argument" that the project may have a significant environmental impact. In this case, you will want to raise issues, but be sure not simply to assert a conclusion, but rather provide some information to support your claims. For example, don't simply say "the agency should study traffic impacts." Rather, point out existing traffic problems, highlight key intersections, and provide more detailed information to show there is a "fair argument" that there will be significant impacts if the project is approved. In any case, be sure to state the basis for your opinion, such as if you have lived in particular community for a great length of time, pass by a certain intersection frequently, or have often hiked along a particular river or through a given forest.

Often an agency will have decided against preparing an EIR, and will issue a "Negative Declaration" or more commonly a "Mitigated Negative Declaration" (MND). In this case, you will need to explain why there is a "fair argument" that impacts will be significant. The agency will usually prepare an Initial Study to support its decision. You will want to carefully pick apart its reasoning and detail any weaknesses. The "fair argument" test is a relatively easy standard to meet, but it does require that the record contain "substantial evidence" of an impact, which is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion." In other words, tie your argument back to relevant facts. Bare conclusions or unsupported opinions, however strongly felt, will not suffice to meet the "substantial evidence" test.

The responsibility of an agency to respond to comments varies depending on the stage of the review. An agency need not respond in depth to comments submitted on an Initial Study or Notice of Preparation, but it must fully consider such comments. Once an agency issues a Draft EIR is issued, a much stricter obligation to respond in good faith to comments received applies, and the comments and responses will be part of the Final EIR.

VIII. Do I need to hire experts?

"Substantial evidence" includes expert opinions supported by facts. Experts can be useful, especially if the subject matter is highly technical or complex (traffic and noise studies are classic examples). Individuals may find it too expensive to hire an expert, but groups may be better able to bear the financial burden. Experts can cost thousands of dollars or even more. California allows a prevailing party to recover costs of litigation (including attorneys fees) if the litigation is brought to vindicate an important public right, and the person or group bringing the litigation does not have a strong financial interest in the outcome. However, expert fees are currently not included in the recoverable costs. If you or your group cannot afford to hire an expert, and even if you can, it is a good idea to contact state agencies and try to persuade them to write a comment letter expressing concerns. For example, if a local agency claims that a project will not have a significant impact on endangered species, but the California Department of Fish and Game comments to the contrary and points to a study or survey to support its position, a court is likely to give great weight to the state's concerns. Universities and colleges are often another good source of volunteers to provide expert comments. And in groups, individuals may possess the needed expertise. And don't forget the internet! A great deal of information regarding studies that may show impacts and can be cited, and incorporated by reference, and thus become part of the administrative record. If you do that, be sure to summarize the study and give the full webpage address, or URL.

IX. What impacts should I look for?

CEQA takes a broad view of environmental impacts, though not an unlimited one. In general, any clearly environmental issue is fair game. Purely economic impacts are not considered environmental impacts, nor are purely private aesthetic impacts (for example, a development that blocks one person's private views from an abutting property). The limits of CEQA's subject matter jurisdiction are explored in the case law. However, you don't need to be familiar with the case law to make effective comments. If it sounds like an "environmental" issue, you should comment. That said, commenting about a potential depreciation in your property value is not a good idea since it is not an environmental impact and can complicate attempts to recover attorney's fees if you prevail in court.

XI. What other resources are available?

CEQA can seem daunting, especially at first. . Most court systems must appoint designated judges specifically to build expertise in administering CEQA, since it is a complex law with an even more complex subject matter- the natural and human environment. Fortunately, there are numerous web based and printed resources available to assist you in making the most out of your participation in the process. The Planning and Conservation League Foundation puts out an excellent guide, currently available for $35, entitled "Community Guide to the California Environmental Quality Act." The Foundation also sponsors a series of all day workshops on CEQA, moderated by environmental law practitioners. The California Resources Agency and Governor's Office of Planning and research maintain the California Environmental Resources Evaluation System (CERES) website (www.ceres.ca.gov), which discusses CEQA at some depth. Of particular interest on the CERES website are the Guidelines for the implementation of CEQA. Appendix A of these Guidelines contains an interactive flowchart for how the CEQA process is supposed to proceed. Our firm's website (www.cbcearthlaw.com) also contains links to various other resources to guide you through CEQA and other key environmental laws.

Good luck in using CEQA to protect the environment and your quality of life!