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May 31, 2012

VIA EMAIL: CEQA.Guidelines@ceres.ca.gov.

CEQA Guidelines Update

c/o Christopher Calfee
1400 Tenth Street
Sacramento, CA 95815

Re: SB 226 REVISED PROPOSED GUIDELINES

Dear Mr. Calfee:

California homebuilders, as represented by the California Building Industry Association (CBIA), are grateful to you for providing us this opportunity to comment on the SB 226 Revised Proposed Guidelines (Proposed Guidelines).

We are grateful for some of the changes made to the original proposal, including the elimination of CALGreen Tier 1 and Tier 2.

As we mentioned in our comments dated February 24, 2012, we view SB 226 largely as a missed opportunity to obtain some meaningful CEQA reform. We also reiterate that VMT is not likely to remain a valid proxy for environmental impacts as vehicles increasingly make the switch to zero emission fuels.

CEQA: The Project's Effect on the Environment vs. The Effect of the Environment on the Project

More than a few CEQA cases have held that CEQA is not concerned with the effect of the environment on proposed projects:

- Consideration of the effect of the environment on the project are "beyond the scope of CEQA." *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, 1468 (existence of contamination near proposed project that might adversely affect the project and its residents is irrelevant to CEQA review).
- The purpose of an EIR is to identify the significant effects of a project on the environment, not the significant effects of the environment on the project. Therefore, an EIR is not required to discuss the impacts on staff and student health of locating the project near freeways. *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889, 905.
- For the same reason, an EIR is not required to discuss the impact of sea level rise on a project. The Court in *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455 (*Ballona*), went so far as to invalidate portions of Guideline section 15126.2 (locating a subdivision astride an active fault line, floodplains, coastlines, wildfire risk areas, etc.) and the Appendix G checklist form (same).¹ *Ibid.* at 473-474.

¹ These existing hazards are already addressed and mitigated pursuant to other laws and should not be inserted in CEQA to provide project opponents with another bite at the apple.

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- The impact of noxious odors on future resident of the development was not a significant effect on the environment and therefore did not require an EIR. *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1614-1618

The Proposed Guidelines continue to provide examples of “uniformly applicable development policies or standards” including “[r]equirements for protecting residents from air pollution associated with high volume roadways”. Section 15183.3(e)(8)(D).

Accordingly, the statute and Proposed Guideline should be interpreted and applied in a manner consistent with CEQA’s overall scope of focusing on a project’s impact on the environment rather than the environment’s impact on the project. This means that the focus of this goal should be to protect vulnerable *existing* populations from air or water pollution, or soil contamination caused by the project. Methods to address the impacts of existing air, water or soil pollution on occupants of a project are contained in other laws.

The Narrative (at p. 5) supports this interpretation with the following:

Infill development is also linked to health benefits. According to the American Lung Association,

Sustainable, mixed-use communities designed around mass transit, walking and cycling have been shown to reduce greenhouse gas emissions, air pollution, and a range of adverse health outcomes including traffic injuries, cancers, lung and heart disease, obesity, diabetes, and other chronic health conditions. In addition to the benefits to lung health, individuals who live in mixed-use and walkable communities have a 35 percent lower risk of obesity.

(American Lung Association in California, “Land Use, Climate Change & Public Health Issue Brief: Improving public health and combating climate change through sustainable land use and transportation planning” (Spring 2010).) Beyond the benefits from reductions in obesity, diabetes, heart and lung disease, cancers and other chronic illnesses associated with increased physical activity, smart growth development patterns “could help California cut over 132,000 tons of air pollution and avoid up to 140 premature deaths, 105,000 asthma attacks and other respiratory symptoms, 16,550 work days lost and \$1.66 billion in health costs in 2035.” (American Lung Association in California, Fact Sheet, “Smart Growth will help California avoid air pollution-related illnesses, deaths and costs.”)

In other words, there are significant health benefits just in producing infill. This should be sufficient to comply with both the statutory language in SB 226 and the Proposed Guidelines, above.

Unfortunately, Appendix M: Residential Units Near High-Volume Roadways and Stationary Sources, the Narrative Explanation of the Proposed Guidelines and the Appendix N: Infill Environmental Checklist all require that the project proponent identify and mitigate air quality impacts of the pre-project environment on the project. See, Appendix M, p.2; Narrative Explanation, pp. 19-20¹ and Appendix N².

¹ The Narrative Explanation states:

With regard to air pollution, attention has focused in recent years on the health effects of developing sensitive uses near sources of toxic air contaminants, such as high-volume roadways.

Appendix M: Residential Units Near High-Volume Roadways and Stationary Sources and the Appendix N Checklist at 2 triggers mitigation measures for residential projects located within 500 feet of a high volume roadway. The Bay Area Air Quality Management District recently enacted a similar requirement which was subject to legal challenge. The Court, in *California Building Industry Association v. Bay Area Air Quality Management District* (Alameda County Superior Court Case No. RG10-548693) found that there is evidence to support a fair argument that these requirements might discourage urban infill development or encourage suburban development. See, Statement of Decision at p.6, previously provided. The Court set aside the requirement as a result. These Proposed Guidelines will have the same impacts.

The Appendices M and N requirements are “beyond the scope of CEQA,” and are contrary to the purpose of the Proposed Guidelines. The Proposed Guideline Section 15183.3(a) states that “[t]he purpose of this section is to streamline the environmental review process for eligible infill projects”. The Proposed Guidelines are also titled: “Streamlining for Infill Projects”. One does not streamline or incentivize infill by making it more burdensome and expensive.

Evidence indicates that risk increases near high volume roadways, generally within 500 feet, though precise distances and risk factors vary considerably based on local topography, meteorology and other site-specific factors. (See, e.g., CARB 2005 Handbook; BAAQMD CEQA Thresholds (May 2011), § 5.2.5.) Many transit corridors are located near high volume roadways. Prohibiting any new development within the transit corridors would counteract the policies described above that direct new growth toward transit-served locations. Notably, it would also undermine the health benefits from active transportation associated with transit-oriented development. Some design strategies have been identified that may ameliorate the adverse effects of high volume roadways, such as high efficiency air filters, locating air intakes away from roadways, etc. The effectiveness of such strategies, however, is also highly dependent on site-specific circumstances. (California Air Pollution Control Officers Association, “Health Risk Assessments for Proposed Land Use Projects,” April 2009.) Therefore, similar to the soil and water contamination standards described above, the performance standards would call on projects to implement whatever design requirements are identified in local plans or ordinances that address such effects. If such plans have not been adopted, the performance standards require projects to implement whatever measures are identified in a health risk assessment or environmental document prepared for the project.

² Appendix N provides:

2. If the infill project includes residential units located within 500 feet, or such distance that the local agency or local air district has determined is appropriate based on local conditions, a high volume roadway or stationary source of air pollutants describe the measures that the project will implement to protect public health. Such measures may include policies and standards identified in the local general plan, specific plans, zoning code or community risk reduction plan, or measures recommended in a health risk assessment, to promote the protection of public health. Identify the policies or standards, or refer to the site specific analysis, below.

Accordingly, we recommend that these provisions of Appendix M: Residential Units Near High-Volume Roadways and Stationary Sources (p.2), the Narrative Explanation (p.19-20) and Appendix N be removed.

Similarly, the Appendix N checklist purports to require projects to consider and mitigate the impact of the existing environment on the proposed project. See various provisions in Appendix N contained in the following: III. Air Quality; VI. Geology and Soils; VIII Hazards and Hazardous Materials; IX. Hydrology and Water Quality; XII Noise.³ Provisions that require projects to consider and mitigate impacts of the environment on the project should be removed.

³ Air Quality: "Would the project ...[e]xpose sensitive receptors to substantial pollutant concentrations?" Section III(d); Air Quality: "Would the project ...[c]reate objectionable odors affecting a substantial number of people?" Section III(e).

Geology and Soils: "Would the project ... [e]xpose people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving:

i. Rupture of a known earthquake fault, as delineated on the most recent Alquist-Priolo Earthquake *Fault Zoning Map issued by the State Geologist for the area or based on other substantial evidence of a known fault? Refer to Division of Mines and Geology Special Publication 42.*

ii. Strong seismic ground shaking?

iii. Seismic-related ground failure, including liquefaction?

iv. Landslides?"

Section VI(a).

Geology and Soils: "Would the project ... [b]e located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in on- or off-site landslide, lateral spreading, subsidence, liquefaction or collapse?" Section VI(c).

Geology and Soils: "Would the project ... [b]e located on expansive soil, as defined in Table 18-1-B of the Uniform Building Code (1994), creating substantial risks to life or property?" Section VI(d).

Hazards and Hazardous Materials: "Would the project ... [b]e located on a site which is included on a list of hazardous materials sites compiled pursuant to Government Section 65962.5 and, as a result, would it create a significant hazard to the public or the environment?" Section VIII(d).

Hazards and Hazardous Materials: "For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project result in a safety hazard for people residing or working in a project area?" Section VIII(e).

Hazards and Hazardous Materials: "For a project within the vicinity of a private airstrip, would the project result in a safety hazard for people residing or working in a project area?" Section VIII(f).

Hazards and Hazardous Materials: "Would the project ... [e]xpose people or structures to a significant risk of loss, injury or death involving wildland fires, including where wildlands are adjacent to urbanized areas or where residences are intermixed with wildlands?" Section VIII(h)

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Language

The Proposed Guidelines use new language to refer to existing concepts. For example, the Proposed Guideline section 15183.3(d)(1)(E) uses the term “substantially mitigate”. In existing law, Guideline section 15162(a)(3)(B) provides that a supplemental EIR is required only if the impacts with mitigation are substantially more severe. In order to avoid unnecessary litigation, we recommend using “substantially more severe.”

Thank you for considering our views. We believe that these recommendations would make the Proposed Guidelines more likely to be used.

Very truly yours,



Nick Cammarota
General Counsel

Hydrology and Water Quality: “Would the project ... [p]lace housing within a 100- year flood area as mapped on a federal Flood Hazard Boundary or Flood Insurance Rate Map or other flood hazard delineation map?” Section IX(g).

Hydrology and Water Quality: “Would the project ... [e]xpose people or structures to a significant risk of loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam?” Section IX(i).

Hydrology and Water Quality: “Would the project ... [expose people or structures to i]nundation by seiche, tsunami, or mudflow?” Section IX(j).

Noise: “Would the project result in ... [e]xposure of persons to or generation of noise levels in excess of standards established in the general plan or noise ordinance or applicable standards of other agencies?” Section XII(a).

Noise: “Would the project result in ... [e]xposure of persons to or generation of excessive groundborne vibration or groundborne noise levels?” Section XII(b).

Noise: “For a project located within an airport land use plan or, where such a plan has not been adopted, within two miles of a public airport or public use airport, would the project expose people residing or working in the project area to excessive noise levels?” Section XII(e).

Noise: “For a project located within the vicinity of a private airstrip, would the project expose people residing or working in a project area to excessive noise levels?” Section XII(f).