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Sent: Wednesday, February 12, 2014 3:58 PM
To: CEQA Guidelines
Subject: 2014 CEQA Guidelines Update

These suggestions are my own, and are not made on behalf of the County of San Diego or its Office of County Counsel.

Your notice of December 30, 2013 states that you are considering augmentation of the definition of “discretionary project” (Guidelines section 15357) to provide further guidance about whether a project is ministerial or discretionary. Section 15357 interacts with the Guidelines definition of “ministerial” (Guidelines section 15369).

Section 15357 disfavors “judgment or deliberation” but also asks whether a determination depends upon “conformity with applicable statutes, ordinances, or regulations.” Section 15369 wants ministerial decisions to be based only on “fixed standards or objective measurements.” These sections together are sometimes interpreted to mean that any program that cannot be reduced to a checklist is discretionary. But a “fixed” statutory standard can be based on facts that elude objective measurement. A determination of whether there is “conformity with applicable statutes, ordinances, or regulations” can require expert professional judgment by agency staff. That kind of judgment is different than discretion and different than reliance on the “wisdom” referenced in section 15369.

The CEQA statute does not reach ministerial projects, but also does not define “ministerial.” The CEQA guidelines should accommodate as “ministerial” all programs that compel an outcome based on specific facts, even if determining those facts requires expert judgment instead of objective measurement.

For example, septic system permits (for conventional systems) cannot be issued in San Diego County unless there is at least five feet of separation between the bottom of the dispersal system (e.g., a leach line trench) and the highest anticipated groundwater level. Because groundwater levels vary with rainfall patterns, in some cases over the course of several years, the “highest anticipated” groundwater level must be determined based on available data supplemented by expert judgment. But the issue being addressed is still a factual question that will determine conformity with a statute or ordinance.

Another example would be a community event permit program that requires a determination by the Sheriff of whether the security proposed for an event is adequate to protect public safety. Judgment informed by experience and by consideration of the particulars of each event would be required to make that determination. But the determination would not involve policy discretion—if the public will be safe and other requirements are met, the permit must be issued. That kind of judgment does not implicate the purposes of CEQA.

Adding language like the following to sections 15357 and 15369 would help to clarify these distinctions:

“Expert professional judgment may be required to apply a standard set out in a statute, ordinance or regulation. This does not make a project discretionary.”

“A project can be ministerial even if expert professional judgment is required to apply a standard set out in a statute, ordinance or regulation.”

Thank you.
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