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CEQA Guidelines Update
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Comments on OPR's Draft Guidance for SB226

The City and County of San Francisco applauds any effort to streamline the CEQA process for urban infill development. The Office of Planning and Research's (OPR's) draft guidance on SB 226 is generally well-developed, but could benefit from some key clarifications. The Narrative Explanation is particularly helpful and we urge OPR to continue to make this available on its web page indefinitely. The draft guidance closely mirrors the community plan exemption (CPE) process. San Francisco has used the CPE process for several years with mixed success, but we like the fact that the approach proposed by OPR is similar to the process that our Planning Department already uses for CPEs. Based on our extensive local experience, we recommend some further clarifications to enhance SB 226's goal of streamlining CEQA review for infill development, including making sure that the new guidelines do not undermine existing tools for CEQA review of infill development, specifically, the CPE, statutory exemptions and the Class 32 infill categorical exemption. Key elements that should be further clarified are:

- Expand the definition of the type of EIRs that qualify as "planning level decision" EIRs for which subsequent projects could be eligible to use the SB 226 process;
- Provide definitions of "uniformly applicable development policies or standards;"
- Modify some of the performance standards in Appendix M;
- Clarify what facts would satisfy the proposed new "substantially mitigate" standard for uniformly applicable development policies or standards;
- Fix inconsistencies in the proposed procedures concerning larger commercial projects and clarify an aspect of the procedures for residential projects;
- Clarify whether the OPR guidance implementing SB 226 affects CEQA Guidelines pertaining to the existing Class 32 Infill Categorical Exemption;
- Provide consistency in the guidelines for terms used in SB 226 that are also used for the CPE;
- Clarify that the substantial evidence standard would apply to appellate review of SB226's provisions.

As noted in OPR's excellent Narrative Explanation, SB 226 was enacted to streamline and expedite the CEQA review process for environmentally beneficial infill projects. (Pub. Resources Code, § 21094.5.) Further, SB 226 focuses on a particular set of environmental objectives that such projects should promote, including:

- Increasing efficiencies in transportation, water use and energy use;
- Reducing greenhouse gas emissions;
- Supporting transit; and
- Benefiting public health.

(Pub. Resources Code, § 21094.5.5(b).) Although an exemption for the construction of pedestrian-friendly, multi-modal “complete streets” was not expressly identified as a category of “project” qualifying for streamlining under SB226, we feel that streamlining (or fully exempting) complete street projects in dense, urban areas is an implicit and fully complementary policy goal. Accordingly, we would request that OPR consider such an exemption within the context of its draft guidance, perhaps as an elaboration on the definition of “transit station,” or pursue separate legislation that would accomplish a similar outcome.

We respectfully offer the following comments addressing the concerns summarized above:

1. Planning Level Decision EIRs

OPR’s proposed guidance on the definition of a “planning level decision EIR” replicates SB 226 (Section 15183.3(e)(2)) but does not further elaborate on the SB 226 language. Specifically, it lists the following types of EIRs as creating eligibility for subsequent projects to use the proposed new streamlined procedures: general plans, community plans, specific plans, or zoning code changes.

We request that OPR consider elaborating the definition of “planning level decision EIR” to include other types of long-range plan EIRs that don’t fit precisely into any one of the four listed EIR categories. For example, after years of exhaustive public process, San Francisco recently approved several large-scale 30-year development agreements that authorize the construction of over 20,000 units of new infill housing, transit-oriented neighborhood serving commercial uses, ecologically regenerative parks and open space and substantial multi-modal transportation infrastructure. Specific recent projects include Parkmerced, Treasure Island and Shipyard-Candlestick. While none of these developments satisfy the exact definition of a community plan or specific plan, all of them involved detailed Project EIRs that could be used for several years to approve on-going infill development within the project areas. The SB 226 process seems very appropriate for these types of projects that clearly will involve subsequent infill development. Further clarification by OPR of the definition of planning level decision EIR could ensure that the SB 226 streamlining process could be used for these types of long-term “infill” projects. This could be accomplished by clarifying that a planning level decision EIR as used in SB 226 can include an EIR prepared for an area plan or a development agreement that anticipates build-out over 20 years.

San Francisco has experience preparing Community Plan EIRs and then using the Community Plan Exemption (CPE) for subsequent infill projects, applying procedures very similar to what SB226 and OPR’s guidance proposes for broader use. OPR should consider explicitly identifying CPE procedures as a primary application of SB226’s provisions and could usefully cite to examples of CPEs that San Francisco has produced as prototypes for its new procedures.

Specific Plan EIRs are not commonly used in San Francisco because of inflexibility in adapting to changed economic conditions. OPR’s proposed guidance apparently would delete existing CEQA provisions that limit use of these EIRs to a five-year period after FEIR certification. If the legislative intent of SB226 was to expand the use of planning level decision EIRs to facilitate subsequent infill projects, OPR should extend this beneficial provision to all area plan and development agreement EIRs, as noted above.

OPR should also provide further guidance on how an EIR for a General Plan Element, such as a Housing Element, could be used by a subsequent project under the SB 226 process. Examples of how OPR believes such a process would work given the generalized nature of General Plan elements would be helpful. Guidance as to which details or "minimum criteria" that a General Plan Element would need to include and the levels of analysis a supporting EIR would need to provide in order to enable use of SB226's provisions would be useful in the preparation of General Plan Element EIRs. Such guidance would be particularly useful for subsequent infill projects that implement a Housing Element or to subsequent transit infrastructure projects that accommodate infill development consistent with a Transportation Element.

Finally, in summary, OPR should delineate the following three distinct types of planning level decision EIRs and clearly describe how subsequent projects could be eligible for SB226's provisions by each type:

- Community Plans and Area Plans, with or without changes to a zoning code
- Specific Plans and Development Agreements that involve multi-phase build-out, with or without changes to a zoning code
- General Plan elements

2. Uniformly Applicable Development Policies or Standards

OPR lists examples of potential uniformly applicable development policies or standards in Section 15183.3(e) (8). In general, these examples usefully focus on ordinances and actionable requirements rather than amorphous policies such as transportation demand management programs. We suggest providing some further examples that would increase the clarity of this section. For example, "design guidelines" could be expanded to read: "Design guidelines, including but not limited to, those that emphasize design features that facilitate transit, bicycle and pedestrian accessibility, minimize conflicts with these modes, discourage auto use, address impacts to historic resources, reductions in greenhouse gases, or are specifically emblematic of infill development." Subsection (e)(8)(A) could be expanded as well to address "provisions for discovery of hazardous materials" and "urban tree protections."

Finally, we note that this same terminology is used in CEQA Section 21083.3 and CEQA Guidelines Section 15183, concerning a community plan exemption. Section 15183 defines this terminology differently. We urge OPR to reconcile its guideline language so that the same language is defined in the same way in the guidelines to avoid confusion and misinterpretation.

3. Appendix M Performance Standards

SB 226 directs OPR to develop statewide standards for infill projects that promote certain enumerated policies. (See Pub. Res. Code Section 21094.5.5(b).) OPR has proposed those standards in Appendix M. We would suggest the following modifications to the Appendix M proposed standards.

a. Renewable Energy. Including solar panels in each project in the dense urban environment of San Francisco is often not practical. Consequently, San Francisco is addressing the reduction in greenhouse gases and promotion of renewable energy through broader municipal policies, such as promoting solar loan programs, installing wind and solar projects on certain public buildings, requiring new buildings to meet energy efficiency standards, switching buses to alternative fuels and other programs. This provision should be expanded to allow projects to show that they are consistent with local policies that have been adopted to reduce consumption of nonrenewable energy resources, so

that each project in San Francisco does not need to show the infeasibility of providing solar panels as part of its design.

b. Retitle "Active Transportation" to "Transit and Active Transportation" to make it clear that projects that are located near transit service are eligible.

c. Clarify what is meant by "Transit Station Area Plans." San Francisco has an established transit system with hundreds of transit stops. It is unclear what is meant by "transit station" – would only some transit stops fall within this requirement? Without clarification, this could become another hurdle that projects in San Francisco would have to establish that they meet, when we believe that we should be able to qualify virtually all projects in San Francisco on the basis that they include elements that promote use of "transit" or "active transportation" given that most, if not all development in San Francisco will be near and accessible to transit.

d. Soil and Water Remediation. The referenced list is handy but problematic. It includes, for example, underground storage tank sites and solid waste sites. The Regional Board never removes underground storage tank sites from the list, even when they have been closed and fully remediated. Preliminary endangerment assessments, referenced in the guidance, are typically only used at sites under the jurisdiction of the Department of Toxic Substances Control. Further, a Phase I environmental assessment typically only involves a records search – it does not provide recommendations on remediation. We suggest rewording this section to read: "If the project site is included on any list compiled pursuant to Section 65962.5 of the Government Code, the project shall document how it has remediated the site, if remediation is completed; alternatively, the project shall implement recommendations provided in a preliminary endangerment assessment or comparable document that identifies remediation appropriate for the planned project use."

4. Substantially Mitigate Standard

OPR's guidance suggests that adverse environmental effects could be adequately addressed if impacts were "substantially mitigated by uniformly applicable development standards." (Table 1) OPR's draft Appendix N Infill Environmental Checklist Form also introduces this as a new standard. OPR's Section 15183.3(c)(1)(E) states that "'substantially mitigate' means that the policy or policies will substantially lessen the effect, but not necessarily below the level of significance." As this establishes a new CEQA concept, we urge OPR to provide a further explanation as to how SB 226 leads to this interpretation. We note that while this same language appears in CEQA Section 21083.3 and CEQA Guidelines Section 15183, concerning community plan exemptions, the CEQA Guidelines Section 15183 does not include this interpretation of substantially mitigate. We urge OPR to modify Section 15183 to be consistent with the language it is proposing in Section 15183.3 where the same terminology is used.

5. Eligibility of Residential Projects and Large Commercial Projects

Residential projects near high-volume roadways must show that they comply with general plan, specific plan, zoning code or community risk reduction plans for protection of public health; and if no provisions exist in those documents, the project must include enhanced air filtration and project design to promote public health. San Francisco addresses this issue through an ordinance codified in its Public Health Code. The ordinance requires an assessment of localized particulate matter and air filtration systems or design changes if specified levels are exceeded. Please expand the list of eligible documents to include any local ordinances or regulations that establish policies and standards for the protection of public health that are designed to address this air quality issue.

OPR provides conflicting guidance about the extent to which large commercial projects could be eligible under SB 226's provisions. OPR's proposed Appendix N Checklist Item 6b indicates that "commercial projects exceeding 75,000 square feet" would not be eligible unless existing regional VMT would be reduced or "an absolute reduction in VMT" by the project can be demonstrated. Elsewhere, OPR's guidance appears to limit this provision to "commercial and retail buildings" of this size or "regional serving retail" of this size. OPR needs to provide a consistent definition.

OPR's apparent intent is to exclude big box retail projects. A large cluster of urban retail greater than 75,000 square feet could be oriented to serve local residents in conjunction with dense residential development patterns, with vastly different effects than big box retail. While regional serving retail can often be identified by a combination of size and location, whether the character of smaller retail becomes and remains local-serving is essentially impossible to document or monitor. Consistent with OPR's proposed treatment for office buildings, these complications could be avoided by applying proximity to an urban center as metrics for all commercial uses rather than specifying the size limitation now proposed.

6. SB 226 and Existing Class 32 Infill Categorical Exemption

The definition of "infill projects" contained in SB 226, as further defined by the proposed guidelines is substantially different than the language used in the CEQA Guidelines for a Class 32 Categorical Exemption. While we understand that the purpose of the guidance proposed by OPR is to address SB 226, we urge OPR to clarify whether the proposed guidelines intend to apply the SB 226 definitions for infill projects to the Class 32 infill exemption. Regardless of OPR's intentions in this regard, the Class 32 exemption serves an important function in furthering infill development in urban areas and should be preserved, whether modified or not, to provide lead agencies with another tool for encouraging infill development.

The primary constraints in San Francisco to greater use of Class 32 Infill Categorical Exemptions are twofold: no mitigation measures can be included; and legal vulnerability. OPR should address each of these issues in its guidance. For example, could the use of uniformly applicable development policies or standards substitute for mitigation measures for projects otherwise eligible under a Class 32 Infill Categorical Exemption?

Assuming the Class 32 language is left intact, this would be an opportune time for OPR to clarify that the applicable standard for determining compliance with the Class 32 Infill requirements is substantial evidence, as established in *Banker's Hill v. City of San Diego*, 139 Cal. App. 4th 249 (2006).

7. Clarify that the substantial evidence standard would apply to appellate review of SB226's provisions.

San Francisco's experience, based on comparable streamlined administrative procedures, has been that these practices alone, including greater reliance on comprehensive EIRs, will not promote use of SB226's provisions, reduce development uncertainty, nor create incentives for infill development unless OPR presents corresponding legal guidance regarding standards for appellate review that are consistent with SB226's legislative intent for streamlining. We recommend that OPR specify that the substantial evidence legal standard applies for appellate reviews of any environmental documents prepared under the provisions of SB226. This would be consistent with the court's reasoning concerning legislative intent to encourage infill development in Banker's Hill. This would also be consistent with case law support for the substantial evidence standard for addenda prepared for subsequent projects after preparation of an EIR or MND. More generally, this standard would be

appropriate given SB226's intent to streamline eligible subsequent infill projects encompassed in a prior programmatic EIR.

8. Miscellaneous

Section 15183.3(c)(1)(B). This section references Section 15150 regarding incorporation by reference. However, given that subsection (c)(1)(B) states in detail how the written checklist shall identify the portions of a prior EIR that it is relying on (e.g. incorporate by reference), the requirement to also follow Section 15150 is simply confusing, as it provides different direction on how to incorporate by reference. Rather than referencing Section 15150, this section should clarify which portions of Section 15150 are applicable and it should expressly state that the rest of its provisions do not apply.

Section 15183.3(c)(2). This section sets out the process for documenting what type of environmental document is required beyond the checklist. Subsection (c)(2)(A) states that if the checklist demonstrates that the project would not cause any new specific effect or effects that are more significant than previously analyzed or if uniformly applicable development policies would substantially mitigate such effects, then no further review is required and the project may file a notice of exemption. Given that under these circumstances no further environmental review is needed, it is unclear why subsections (c)(2)(B),(C) and (D) repeat the language in (c)(2)(A) that where the lead agency finds that uniformly applicable development policies substantially mitigate the significant effect, the lead agency shall make the finding described in subdivision (c)(2)(D) concerning uniformly applicable development policies. If a negative declaration, sustainable communities environmental assessment or infill EIR and overriding considerations is required, it is because there are not uniformly applicable development policies that substantially mitigate the significant effect. It would be less confusing to delete this repetitive language at the end of each of these three subsections.

Appendix N. A number of provisions in Appendix N are addressed by the above comments. In addition, please revise performance standard Item 2, to include transit, not just active transportation.

Thank you for this opportunity to comment.

Sincerely,



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