

CEQA abuse on the rise

What businesses should know if a project needs discretionary permits

INTERVIEWED BY ROGER VOZAR

The California Environmental Quality Act (CEQA) was signed into law in 1970, designed to ensure that when state and local agencies make decisions that impact the environment, the impact of those decisions is analyzed.

What is becoming more common today, however, is that CEQA can be misused.

“It is usually the vehicle of choice for people who don’t like what is going on,” says Andrew L. Faber, partner, Berliner Cohen.

“Although CEQA is sometimes actually invoked by project opponents for sincere environmental reasons, it seems more and more in recent years that it is misused by: (1) neighborhood groups that simply oppose a local project; (2) business competitors; (3) unions trying to put pressure on a non-union employer (for example, Walmarts with a grocery store are routinely challenged by unions, claiming to be concerned about the environment).”

Smart Business spoke with Faber on why businesses should be concerned about CEQA and its implications.

When might CEQA affect a business?

CEQA applies to “discretionary” approvals made by the state or local entities, including cities. Discretionary approvals involve matters such as issuing a planning permit, rezoning or changing a general plan. In granting any such approval, CEQA requires some level of documentation, ranging from a relatively cheap and quick initial study all the way to a full blown environmental impact report (EIR), which can cost hundreds of thousands of dollars and a year or more to prepare.

CEQA compliance can be straightforward. For example, there normally is no problem for, say, a retail business moving into an

established commercial area. Similarly, a minor expansion of an existing business should be simple. I’m sure that’s what the owner of Moe’s Stop and Gas in San Jose thought when he embarked on a minor expansion of his gas station.

What happened to Moe’s?

If ever there was a poster child for CEQA reform, it would be the owner of Moe’s gas station. He needed a conditional use permit from San Jose to add three gas pumps to his existing gas station/convenience store. San Jose approved the permit based on a “negative declaration,” a form of CEQA compliance much less onerous than a full EIR — but after all, this was an existing business proposing a minor expansion.

However, the gas station across the street wanted to stifle this competition. The easiest way to do so was to hire a traffic expert and an attorney, who filed suit claiming there was a “fair argument” that there would be traffic impacts at their common intersection. The trial judge agreed that this very low standard for requiring a full EIR had been met, so he ordered the city to do an EIR for this trifling project.

Ultimately, after spending hundreds of thousands of dollars on the EIR and attorneys’ fees, and having to close his store for eight months, Moe’s request was again approved by the City of San Jose, more than



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two years after filing the original application.

Should I play it safe and prepare a full EIR?

According to the “fair argument standard,” if it can be fairly argued, based on substantial evidence, and in light of the whole record, that a project may have a significant environmental effect, then an EIR must be prepared.

Because this standard is very low, and the courts have always interpreted CEQA as favoring the preparation of full EIRs in doubtful cases, we often do advise project applicants to start out with a “defensive” EIR. If serious opposition to a project is expected, it can be advisable to do a full EIR, even though the EIR may report no environmental impacts. Should a lawsuit arise, this approach is more defensible.

What approach do you suggest?

When looking at potential CEQA compliance requirements, a business should think first of hiring an experienced land use attorney. CEQA compliance is more of an art than a science, as there are many gray areas and judgment calls have to be made throughout the process. While involving an attorney early on may seem to some businesses as an unnecessary expense, having the expert counsel of an experienced attorney often saves time and money in the long run. ●