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EFFECTIVENESS & ACCOUNTABILITY INITIATIVE

Senate Select Committee on Infrastructure Streamlining and Workforce Equity

Thursday June 29, 2023

Issue:

Administrative Records Review as reflected in SB 149

Summary

SB 149 changes the way the administrative record, the comprehensive document on which the California Environmental Quality Act (CEQA) cases are argued, is prepared with the intent of shortening the amount of time it takes to prepare the record. The proposed language would shorten the record by removing internal communications on non-substantive materials, like meeting invitations. SB 149 would also create a process by which a public agency can opt to take over the preparation of the record if the plaintiff/petitioner fails to complete the record within 60 days. Under this new process, if a public agency chooses to take on the preparation of the record, it must also take on the cost of doing so, and is prohibited from passing costs along to the plaintiff/petitioner.

Comments

The ABC's of CEQA

CEQA is designed to (a) make government agencies and the public aware of the environmental impacts of a proposed project, (b) ensure the public can take part in the review process, and (c) identify and implement measures to mitigate or eliminate any negative impact the project may have on the environment. CEQA is a self-executing statute that is enforced by civil lawsuits that can challenge any project's environmental review. Public agencies, as well as private individuals and organizations, can file lawsuits under CEQA.

Administrative Record

The administrative record is at the heart of CEQA lawsuits. The administrative record is the comprehensive document on which CEQA cases are argued. As such, it includes all the material that might be important to address questions and concerns that could arise when the judge considers a CEQA case. Relevant documents can include: studies, analyses, transcripts of meetings or proceedings, all environmental review documents, reports, and public comments related to the environmental review of the project. Internal staff emails about the project and staff notes are also included in the record of proceedings.

Timeline and Cost for Preparing the Record.

Because the administrative record is so exhaustive, it can be time intensive and cost thousands to tens of thousands of dollars to complete. Either the plaintiff/petitioner or the lead agency may take on the responsibility of preparing the record. When the plaintiff/petitioner files a challenge to a CEQA decision, they simultaneously file either a request that the public agency prepare the record or file a notice that they will prepare the record. In the majority of CEQA cases, the plaintiff/petitioner requests that the public agency prepare the administrative record. The public agency typically has better access to pertinent records, more experience in preparing records, and more resources than a plaintiff/petitioner, making it easier for them to prepare the record. However, the plaintiff/petitioner may choose to prepare the record themselves to maintain more control over the process, including more control over what information is included in the record and on the amount of time spent on preparing the record.

If the plaintiff/petitioner prepares the record or asks the public agency to prepare the record, they pay for the preparation costs. The public agency can withhold the record until it receives payment for preparing the record. However, if the petitioner wins the case, then they can recover reasonable costs paid for the preparation of the record.

Under current law, the administrative record must be prepared and certified within 60 days. However, this 60-day deadline can be extended. Each extension can be up to 60 days, and there is no limit to the total number of extensions that can be granted. Courts are directed to "liberally grant" extensions for the preparation of the record, and as a result, the process can stretch out indefinitely.

Internal Staff Emails in the Administrative Record

Because the entire CEQA case is argued off of the administrative record, it behooves the plaintiff/petitioner to include all documents and materials that could be relevant to making their case. As a result, the administrative record can be extremely bulky and weigh down the review process. The record can be many thousands of pages long and preparing it takes, as reported in case law, between four and 17 months.

Entities preparing the record and for courts hearing CEQA cases can both benefit if the material in the record includes all the necessary information, but does not include extraneous information that can be costly and time-consuming to collect and review.

One category of materials that have recently been under scrutiny for their relevance in the administrative record are internal staff notes and emails that are never shared with the deciding entity on the CEQA case in question. The argument against including internal staff materials is that there is no definitive end to the number of emails that could theoretically be included. The sheer volume of internal staff emails that could be relevant to the record ultimately poses challenges in managing, organizing, and comprehensively reviewing the record of proceedings. Alternatively, proponents of including these internal emails argue that these communications provide critical, often unvarnished insight into how the staff who are closest to a project view it. In this view, including internal staff emails as part of a CEQA case can strengthen transparency and accountability.

Recent case law has established that internal staff emails and notes can provide important information into projects and should be retained by the public agency. In *Golden Door Properties, LLC, et. al. v. Superior Court of San Diego County* (2020) 53 Cal.App.5th 733), the Fourth District Court of Appeal held that a lead agency should retain all project-related writings and e-mails, including internal staff emails, during the CEQA statute of limitations period or any CEQA litigation.

SB 149: Creates Time-Saving Process for Preparing the Record

While there is no cutoff on the number of legitimate extensions a plaintiff or petitioner can be granted for preparing the record in current law, there is a precedent that a plaintiff cannot unreasonably delay the preparation of the record. In *LandWatch San Luis Obispo County. v. Cambria Community Service District (2018)25 Cal.App.5th 638,* the Second Appellate District ruled that a lead agency could take over the process for preparing the record and recover costs associated with the preparation when the petitioner took what the court viewed as unreasonable delays in preparing the record.

SB 149 builds off of this ruling by developing a specific process by which the public agency can take over the preparation of the record if the plaintiff fails to prepare the record in the statutorily required 60 days, unless both parties agree to a time extension, or if the court finds there is a good reason for the delay. Under SB 149, a petitioner and public agency must meet to discuss the management of the case within 30 days of the filing of the complaint to discuss the timing and costs of the record of proceedings. If the public agency chooses to take over the preparation of the record after the stipulated deadline has passed, it would also assume the associated costs.

SB 149 would also shorten the window for preparing the record by changing the current standard for a court to grant an extension “liberally” to only granting an extension upon a showing of good cause.

SB 149: Pares Administrative Record Down to the Essentials

The Administration proposed to narrow the scope of the record by excluding all internal staff emails that had not been reviewed by the deciding entity and that are related to the project under question. SB 149 revises this provision to remove only non-relevant internal staff emails, such as logistical communications, like calendaring invites.

Notably, while the language in SB 149 would remove internal staff emails on draft materials from the list of documents that can be included in the record, it also specifies that the public agency may include any documents in the record of proceedings that are not specifically listed. This means that while the plaintiff or petitioner may not require all internal emails or staff notes on draft materials to be included in the record, the public agency could choose to include them.

SB 149 recognizes the need to reduce unnecessary bulk in the administrative record, which can slow down the CEQA litigation process, while also preserving critical information that could be instrumental in deciding the CEQA case.
