



June 1, 2012

VIA EMAIL

CEQA Guidelines Update
c/o Christopher Calfee
1400 Tenth Street
Sacramento, California 95814
Email: CEQA.Guidelines@ceres.ca.gov

Re: Comments on OPR's Revised CEQA Guidelines Proposal Pursuant to SB 226

Dear Mr. Calfee:

Thank you for the opportunity to provide input on the Governor's Office of Planning and Research's ("OPR's") revised draft of proposed additions to the Guidelines for Implementation of the California Environmental Quality Act ("CEQA Guidelines"). This proposal effectuates the direction in SB 226 (Simitian, 2011) to prepare additions to the CEQA Guidelines setting forth a streamlined review process for infill projects and the performance standards that will be used to determine an infill project's eligibility for that streamlined review. OPR released a preliminary draft of the proposal in January for a thirty-day public review period on which the California Infill Builders Federation ("Infill Builders") submitted written comments on February 23, 2012. The Infill Builders now submit these additional comments on OPR's revised proposed CEQA Guidelines ("Revised Guidelines").

The Infill Builders represent builders and developers of urban areas whose work often focuses on the transformation of abandoned and neglected properties. The Infill Builders support development projects that are both good for the bottom line and improve Californian's quality of life. California's current regulatory structure makes it difficult to construct well-planned, convenient neighborhoods and retail areas. While the market for complete neighborhoods continues to grow, extra costs put infill at a significant disadvantage. The Infill Builders believe that infill projects consistent with smart planning should receive permits with little administrative burden.

To that end, the Infill Builders commend OPR on the Revised Guidelines. It is evident that OPR took great time and care to thoughtfully consider all of the comments it received. In particular, the Infill Builders are pleased with the revisions to the applicable standard of review. Clarifying and strengthening the standard of review increases the probability that developers will be able to take advantage of SB 226's streamlining provisions. In its previous draft, the legal standard under which a reviewing court would review a lead agency's determination of an infill

project's eligibility for SB 226's streamlining provisions was unclear. Thus, developers would be unlikely to utilize the new infill streamlining provisions because it was uncertain what a project opponent would have to prove to defeat the use of the streamlining provisions. Clarifying the standard of review is one more factor tipping the scales to make infill building, rather than greenfield development, a more viable option for developers.

OPR's approach to the standard of review in the Revised Guidelines is analogous to the approach adopted for categorical exemptions. Indeed, the purpose of the SB 226 and the Revised Guidelines mirrors that of the Legislature's enactment of CEQA amendments to streamline environmental review by creating categorical exemptions. In recommending that the Legislature adopt a bill to create the categorical exemptions from CEQA, the Department of Finance noted that "exempting certain classes of projects" creates "[a] reduction in administrative cost . . . at the state and local level." Enrolled Bill Report, Dept. of Finance, at p. 1 (Dec. 11, 1972). As a result, Section 21084 of CEQA mandated that the CEQA Guidelines shall include a list of projects "that have been determined not to have a significant effect on the environment and that shall be exempt" from CEQA and to "make a finding that the listed classes of projects referred to . . . do not have a significant effect on the environment," which it now does. Thus, categorical exemptions, much like the proposed infill streamlining provisions, were added to CEQA to save lead agencies and project applicants the burden and expense of unnecessary environmental review for classes of projects that ordinarily do not have a significant effect on the environment or that are eligible for infill streamlining provisions due to the very nature of the project. One of the categories listed in the CEQA Guidelines even exempts certain infill projects from CEQA review. 14 Cal. Code Regs. § 15332.

The "substantial evidence" test governs a court's review of a lead agency's factual determination that a project falls within a categorical exemption. *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251; *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1348. Under the substantial evidence standard, the court does not review the ultimate correctness of an agency's environmental conclusions, but only whether its findings and decisions are supported by substantial evidence in the record. *Citizens for Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

Like the "substantial evidence" test, the Revised Guidelines affords deference to a lead agency's determination that a project qualifies for streamlined environmental review. The Revised Guidelines state that "[determinations regarding [the streamlining provision's] applicability to an infill project are a question of fact to be resolved by the lead agency" and that such "determinations must be supported with enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached" provide deference to a lead agency.

The deferential standard of review proposed for SB 226's streamlining provisions for infill development, like the deferential standard of review that applies to categorical exemptions, increases the likelihood that lead agencies and developers will be able to reap the benefits of the infill streamlining provisions. The Revised Guidelines heighten the burden for prospective petitioners to prevail on CEQA lawsuits devoid of merit, thereby adding much needed certainty and predictability to environmental review for financially-constrained infill projects. OPR's clarification for the standard of review will save an infill developer time and money. This increased certainty makes infill development more viable to developers in a fractured economy, especially since urban infill projects already operate on thin margins due to the high costs

associated with infill projects. It also makes infill development more palatable for prospective investors, thereby also diminishing the allure of investing in greenfield projects.

The Revised Guidelines are just one step in the right direction. There is still more work to be done to clear the path for greener and cost-effective infill development for a growing state. The Infill Builders hope that OPR will continue to move in this direction. The Infill Builders appreciate the opportunity to comment on these draft guidelines and welcomes the opportunity to participate in future conversations on this issue of vital importance to California's economic and environmental future.

Sincerely,

A handwritten signature in black ink that reads "Meea Kang". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Meea Kang
President, California Infill Builders Federation