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Opinions on how laws are affecting CRE

An Update on CEQA Reform

The best path to reform, from the perspective of the CRE industry

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Every year, we who deal with CEQA and its impacts on the commercial real estate industry on a regular basis get our hopes up about CEQA reform, and typically one thing happens that derails the whole process. For years, most of the people involved in CEQA reform believed that it could only be done on a wholesale basis, that it had to be a package deal. One of the reasons for this belief was because there were so many people invested in the process, and the folks working for CEQA reform wanted everyone at the table. As a result, when one piece of that package fell apart, everything fell apart. It was extremely frustrating to watch from afar.

In light of that perspective, I personally believe that changes need to be made on an incremental basis — slow and steady will win the race. We can continue to work for big changes, but we have to keep making little ones, because if we make enough small changes, I am sure we will force a course correction in the process.

Regardless, however, of whether we have some big or little wins, we all need to keep trying to fix CEQA because the system is broken. CEQA has become a tool, and there are a lot more sophisticated players involved now who willingly use a CEQA challenge as a sword to be able to get what they want and not necessarily what the environment needs. Many of these new players do not bother to work very hard to hide behind plausible environmental claims; they are much more upfront about their own personal and political goals. For instance, I was a member of a union in high school and was raised by a union shop steward, so while I personally appreciate what unions provide to their members, it upsets me that when project negotiations fail, unions will use the environment as a stepping stone to reach their goals. That is not and should not be the purpose of CEQA.

So, how do we stop others from using CEQA for their own ends? We cannot do it today, but if project opponents had some skin in the game, we might be able to start leveling the playing field. Ideally, CEQA would require a petitioner group to disclose its membership and the statute would include a reciprocal process to the current private attorney general statute, whereby developers could receive some of their fees back if the petitioner lost. If publicity and cash were an issue, then it would be clear who was behind the fight and what were the real reasons for the challenge. New petitioner entities crop up, and you can never be sure who or what is standing behind that group. They go by names like "Citizens Against So and So" and "Responsible Neighbors for Whatever." Are those legitimate neighbors with real concerns? Are those business owners who want to prevent competition? Are those unions who want prevailing wage? The applicants generally have no idea because the process as currently drafted is clear as mud.

What is clear, however, is that a CEQA challenge will slow a project down during the administrative process and then on the litigation side. To those outside the industry, it probably seems like a CEQA challenge is the end of a project. But based on my experience, projects can keep moving forward because a CEQA lawsuit is generally not the end of the road. Rather, it is an off-ramp from the originally planned route that will slow the project down — either incrementally, if we can reach a settlement with the project opponents, or significantly, if we have to litigate the project in the trial and appellate courts.

At the end of the day, our advice to our developer clients is always to keep going. It may take longer than you (or your investors) want, and you may be a bit bruised and battered, but you will come out the other side.

Having said that, and in the absence of CEQA reform, the best and most expedient path forward now is to avoid CEQA entirely by finding an infill project that is by-right or takes advantage of streamlining exemptions (transit-oriented or transit-priority projects or those consistent with a general plan, for example). There are a lot of available exemptions in CEQA now, but there is not a lot of discussion at the local level of how people can and should use those exemptions. We all have to grab the bull by the horns, submit those projects, and work with the local agencies to get staff and the elected officials comfortable with the process. The more we can streamline and encourage density where it is supposed to be through CEQA exemptions, the better off we all will be in the grand scheme of things.

Unfortunately, I do not see a clear ending to the road we are on, but the path continues to go forward and we all need to stay on it. There is still so much good that can come out of projects with the least environmental impact, but society at large has mucked up the process and made it way too difficult. I really believe that people do have good intentions, but CEQA should not be a tool for someone's political purposes. Until we stop the continuing corruption of CEQA, projects will continue to get challenged. But if you have the necessary consultants, experts, and financial feasibility to continue on your development path, you need to keep your head down and keep going.

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