In the Zone

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Legislative Changes to California's CEQA Ease Requirements for Urban Infill Projects

By Kenneth A. Kecskes

California lawmakers further streamlined the environmental review of infill residential, mixed-use and "employment center" projects under a new bill passed at the end of the legislative session in September.

By way of background, all development projects must comply with the California Environmental Quality Act (CEQA) prior to project approval. Under CEQA, state and local agencies must identify the significant environmental impacts of a proposed development project and avoid or mitigate those impacts, if feasible.

Senate Bill 743 was initially intended as a CEQA streamlining bill for a new sports and entertainment arena for the Sacramento Kings, an NBA team at risk of being lured away by another U.S. city. Legislative leaders and the business community have been asking for broader CEQA reform, because the environmental review process is time-consuming and fraught with litigation risk for developers and local governments. After last minute talks among Governor Jerry Brown and legislative leaders, the bill was amended to begin to ease requirements for certain classes of urban infill projects statewide.

The most significant changes:

- ***Inadequate parking and aesthetic impacts cannot be used to challenge a project under CEQA if the project is "on an infill site within a transit priority area."*** An "infill site" is a previously-developed lot in an urban area or a vacant lot largely surrounded by urban uses. A "transit priority area" includes any area within a half mile of an existing or planned "major" transit stop. As stated, this exemption applies *only* to challenges brought under CEQA. A project must still comply with other existing (or future) laws that apply to aesthetic or parking impacts. There is also a backdoor for a CEQA challenge based upon "impacts on historic or cultural resources" that result in a significant impact.
- ***New guidelines will be developed to determine the significance of transportation impacts of projects in transit priority areas.*** These new guidelines must promote the reduction of greenhouse gas emissions, the development of multimodal transportation networks and a diversity of land uses. To that end, OPR must recommend potential metrics that move away from the level of service standards most frequently used in traffic studies and instead focus on vehicle miles traveled, vehicle miles traveled per capita, automobile trip generation rates or automobile trips generated, among other metrics.
- ***Automobile delay, "as described solely by level of service or similar measures of vehicular capacity or traffic congestion," shall not be considered a significant impact on the environment under CEQA***. This is a huge benefit for project proponents, since many projects wrestle with traffic delay issues at intersections near or adjacent to their proposed projects. Some land use practitioners may point out that the state's Office of Planning and Research (OPR) may promulgate regulations that limit the scope of this carve out in "locations specifically identified in the guidelines, if any." However, State Sen. Darryl Steinberg has indicated his desire to see OPR move away from level of service standards and the Governor is likely on the same page, which should influence OPR's rulemaking. In addition, any rulemaking must comply with California's Administrative Procedures Act. OPR's rules will need evidentiary support if it makes distinctions between "locations" and the metrics applicable to different locations. We will have to wait and see how OPR handles these issues when the regulations come out, but if specific locations are identified, expect APA related litigation. In the meantime, developers and land use

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practitioners should note that air quality, noise, safety, "or any other impact associated with transportation" may still rise to a level of significance and be the subject of a CEQA challenge.

- ***The adequacy of parking for a project shall not support a finding of significance.*** Presumably, this exemption applies to "transit priority areas," but does it also apply to "employment center projects" and "infill site[s]" that are also a subject of the "section"? Does it apply more broadly to other projects? This provision of the bill is going to need clarification or it will be litigated.
- ***Residential, employment center or mixed use development projects in a specific plan area in which a prior environmental impact report (EIR) was prepared are eligible for a new CEQA exemption.*** The exemption applies if (i) the project is in a "transit priority area," (ii) the proposed project is consistent with a sustainable communities strategy or an alternative planning strategy for which the State Air Resources Board has accepted a metropolitan planning organization's determination that greenhouse gas emissions targets will be achieved, and (iii) subsequent or supplemental environmental review is not required because of significant new information or substantial changes must be made to the prior EIR's environmental impact analysis. This provision further eases the requirements that apply to projects that fit within California's land use/transportation planning legislation focused on reducing greenhouse gas emissions in the state.
- ***Review of "environmental leadership projects" returns to the superior court, as well as appellate court, but both rounds of review must be completed within 270 days.*** The bill fixes a prior legislative attempt at CEQA litigation streamlining that sought to skip trial court level proceedings for certain consequential development projects certified by the Governor. That law was held unconstitutional earlier this year.
- ***Certain streamlining provisions to CEQA were added for the benefit of a planned entertainment and sports center project in the City of Sacramento.*** The Legislature continues its practice of granting special exceptions to CEQA for high profile, litigation likely projects.

These changes to CEQA will greatly assist the urban infill projects that qualify. In particular, the elimination of parking and aesthetic impacts as grounds for a CEQA challenge in urban infill areas is particularly welcome. New traffic metrics will bring significant changes to how traffic engineers, land planners and counsel analyze projects and present them in CEQA documents. For developers of projects in infill locations, thoughtful strategic analysis of this new law and its carve outs with counsel is essential.

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Calling All Businesses: The New Jersey Economic Opportunity Act Is Signed into Law

By Jeffrey M. Hall and Daniel V. Madrid

On September 18, 2013, Governor Christie signed the New Jersey Economic Opportunity Act into law after nearly nine months of consideration, wrangling and negotiation between both houses of the New Jersey legislature. With the passage of this bipartisan bill, the State of New Jersey has crystallized its existing array of economic development programs into two surviving programs: the Grow New Jersey Assistance Program (Grow NJ) and the Economic Redevelopment and Growth Grant Program (ERGG). In contrast to their earlier versions, the amended Grow NJ and ERGG have wider applicability and a lower cost to entry and should be considered by any business that is undertaking a capital investment in a real estate project located in New Jersey. This article provides a general overview of Grow NJ, and will be the first in a series of articles addressing the Economic Opportunity Act's potential benefits to you and your business.

Grow NJ provides a tax credit to businesses (other than point-of-sale retail) that create or retain jobs in New Jersey and make a qualified capital investment at a qualified business facility. Grow NJ reflects the state's smart growth policies by adjusting the amount of tax credits available to be awarded based on the geographic location of a project and by lowering the threshold of required capital investment for projects involving the redevelopment of an existing facility. Additionally, Grow NJ reflects the state's strong push to attract certain targeted industries by providing bonus tax credits for such businesses.

Requirements

Capital Investment	
To qualify under the Grow NJ program, a business is required to make a capital investment in the following amounts:	
For the rehabilitation of an existing industrial project:	**$20 per square foot**
For the new construction of an industrial project:	**$60 per square foot**
For the rehabilitation of an office project:	**$40 per square foot**
For the new construction of a non-industrial project:	**$120 per square foot**
The capital investment threshold can be met through expenses used for site acquisition (if purchased within 24 months of the application), site preparation and construction, repair, renovation, improvement, equipping and furnishing real property as well as the cost of obtaining and installing furnishings and machinery, apparatus and equipment.	

Jobs Requirement	
A business is also required to either employ new employees or retain jobs that are at risk of leaving the state in the following minimum amounts:	
For technology startups or manufacturing businesses:	**10 new or 25 retained**
For targeted industries including transportation, defense, energy, logistics, life sciences, technology, health and finance:	**25 new or 35 retained**
For all other business and industries:	**35 new or 50 retained**

Minimum Environmental Standards and Net Benefits
Additionally, Grow NJ requires a business to construct a project in accordance with minimum environmental and sustainability standards and further establish that the award of the tax credits will result in a net positive benefit to the state.

Tax Credit Award

Upon meeting the threshold requirements, a business may be entitled to a tax credit applicable to New Jersey State corporate business tax, insurance company tax and franchise tax. In the event that a qualifying business does not have sufficient tax liability to make use of the credits, Grow NJ allows the business to sell the credits for an amount not less than 75 percent of the transferred credit amount pursuant to procedures established in the statute.

The tax credits are calculated on a per job/per year basis in the following base amounts based upon the geographic location of the qualifying business facility:

- Category 1: Urban Transit Hub Municipality or Garden State Growth Zone (Camden, Trenton, Passaic, Patterson, Newark, Elizabeth, East Orange, Hoboken, Jersey City and New Brunswick) - $5,000 per job/per year
- Category 2: Distressed Municipality (approximately 50 municipalities) - $4,000 per job/per year
- Category 3: Priority Area (including metropolitan and suburban areas) - $3,000 per job/per year
- Category 4: Other Eligible Areas - $500 per job/per year

Bonus tax credits may also be awarded for businesses that fall into the following categories:

- Businesses that result in job creation or retention of 250 or more jobs
- Businesses that pay average salaries that are 35% higher than the surrounding county average

- Business that are located near public transit are considered "Mega Projects"
- Businesses that develop workforce housing for employees located in the qualifying business facility
- Businesses that achieve a certain level of LEED certification
- Businesses that undertake environmental remediation in conjunction with the development or redevelopment of a qualifying business facility

Grow NJ also provides additional incentives and a lower jobs and capital investment threshold for businesses located in Camden, Trenton, Paterson and Passaic, and businesses located in the following eight Southern New Jersey Counties: Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Ocean and Salem.

If your business is considering a capital improvement project in the state of New Jersey, and you meet the requirements referenced in this article, we urge you to contact us.

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Cell Tower Companies Face a Heavy Burden of Proof To Succeed in a Validity Challenge to a Zoning Ordinance

By Levin V. Czubaroff

The zoning process for the construction of new cellular telecommunications towers is highly controversial and often times cell tower companies find themselves fighting an uphill battle against a municipality and local residents to obtain the necessary zoning approvals. On occasion, each strategic decision in the zoning approval process to build a cellular telecommunications tower is comparable to a key at bat in the late innings of a playoff game between the Red Sox and the Yankees.

One of the strategies available to cell tower companies, in the event they do not obtain the necessary relief at the outset from the zoning hearing board, is to file a validity challenge to a municipality's zoning ordinance asserting that a zoning ordinance is de facto exclusionary and in violation of the Federal Telecommunications Act of 1996 (Telecommunications Act). Specifically, Section 332 of the Telecommunications Act provides that municipalities retain the power to regulate the zoning and placement of cellular telecommunications facilities; however, Section 332 also provides that the regulation of construction, placement or modification of a cellular facility may not operate so as to prohibit the provision of personal wireless services.

However, as evidenced by a recent Pennsylvania Commonwealth Court case, it is imperative for cell tower companies to prepare their expert witnesses and have a proactive strategy for a validity challenge to a zoning ordinance. Otherwise, similar to a baseball starting pitcher who gets knocked out of the game in the early innings after not practicing between starts, a cell tower company can spend a significant amount of time and money in seeking to obtain the zoning approvals to build a cell tower with little or no success.

There are several strategic lessons that a cell tower company can learn from the recent Pennsylvania Commonwealth Court case of *Wireless Development Group, LLC vs. Penn Township* to enhance the chances that a cell tower company will succeed in its validity challenge to a municipality's zoning ordinance. Wireless Development Group, LLC (WDG) appealed the Court of Common Pleas prior denial of WDG's validity challenge to Penn Township's Zoning Ordinance as it applies to the placement of cellular telecommunications towers. Specifically, WDG argued that Penn Township's Zoning Ordinance was de facto exclusionary of cellular towers and was a violation of the Federal Telecommunications Act of 1996 because of a significant gap in cellular coverage.

By way of background, WDG filed an application with the Penn Township Zoning Hearing Board (ZHB) to construct a 275-foot cellular telecommunications tower (Tower) on a property where a single-family dwelling was located (Proposed Site) in the M Planned Light Industrial Zoning District (M District). In addition to seeking conditional use approval for the Tower, WDG also sought variances from the following zoning ordinance requirements: (i) the 200-foot cap on the height of cellular telecommunications towers; (ii) the buffer from property lines equal to the radius of the height of the Tower; and (iii) the minimum lot size to be equal in width and depth to the height of the Tower (collectively, the Variances).

WDG sought to establish through the initial zoning hearings WDG's right to obtain the conditional use approval and the Variances through testimony of several radio frequency engineers regarding the height necessary for the cellular tower and the lack of cellular service in the applicable portion of Penn Township. Furthermore, WDG's legal counsel testified about WDG's unsuccessful attempts to lease or purchase the Sprang Property (a potential alternate property on which to construct the Tower). The general counsel for Sprang also testified that his company was unable to reach an agreement with companies wishing to lease only part of the Sprang Property for construction of cellular towers because Sprang's primary concern was selling the Sprang Property for commercial and residential development.

Unfortunately for WDG at the second hearing held by the ZHB on WDG's validity challenge, the general counsel for Sprang changed his testimony and asserted that, once the details of a gas lease had been finalized and other portions of the Sprang Property sold, he believed that Sprang would be willing to lease part of the remaining property for a cellular telecommunications tower.

In *Wireless Development Group, LLC vs. Penn Township*, the Court denied WDG's validity challenge because the Penn Township Zoning Ordinance did not effectively prohibit cellular telecommunications towers, as WDG failed to show that all other properties in the M District were unsuitable for the Tower. Specifically, WDG failed to evaluate the potential suitability of four other properties for the Tower as identified by a land use administrator for Penn Township. In addition, WDG's radio frequency engineer admitted he did not examine all of such additional properties to determine whether these alternate properties could satisfy the gaps in coverage with which WDG was concerned.

This case highlights the heavy burden that cell tower companies need to satisfy to be successful in a validity challenge to a municipal zoning ordinance to establish that a zoning ordinance is de facto exclusionary and in violation of the Telecommunications Act. Furthermore, this case illustrates it is a fatal mistake for a cell tower company to assert a validity challenge unless the cell tower company can establish through site acquisition due diligence documentation and expert testimony there are no properties in the applicable zoning district that are feasible for placement of a cellular tower to resolve the gap in coverage.

I am rooting for the cell tower companies to succeed in their validity challenges to municipal zoning ordinances, as I am interested in watching streaming video of the Red Sox on my smart phone as the Red Sox hopefully advance towards the World Series.

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NJ Supreme Court Invalidates COAH's Affordable Housing Growth Share Methodology

By Henry Kent-Smith

In a 3-2 decision, the New Jersey Supreme Court reaffirmed the fundamental principles of the *Mount Laurel* Doctrine in a narrowly constructed opinion grounded on its interpretation of the Fair Housing Act. N.J.S.A 52:27D-301 et seq. The Court upheld Judge Stephen Skillman's Appellate Division opinion *In Re: Adoption of N.J.A.C. 5:96 and 5:97*, 416 N.J. Super. 462 on the narrowest grounds possible. The Court held that the Fair Housing Act (Act) did not authorize the Council on Affordable Housing (COAH) to deviate from the Act's requirements for determining and allocating municipal affordable housing obligations on a regional basis pursuant to N.J.S.A. 52:27D-301 *et. seq*.

Under COAH's third round formula, statewide affordable housing was calculated on a statewide basis. This statewide need projection was then allocated to each municipality. The Supreme Court found this allocation methodology violated the Fair Housing Act's focus on the calculation and allocation of **regional affordable housing need**.

As important, the Supreme Court upheld the Appellate Division remedy requiring that COAH recalculate municipal affordable housing obligations based upon the prior round methodology used to for the 1987-1993 first round and the 1994-1999 second round.

So What Happens Now?

The Court's decision affirms Judge Skillman's remedy and requires COAH to recalculate third round municipal obligations based upon the prior round methodology. COAH must also adopt procedural and substantive rules. These new rules will define how the third round obligation may be satisfied, what credits may be taken, what bonuses may be awarded and how each municipality is to prepare its housing element and fair share plan. COAH must complete and adopt these new rules within five months of the date of the Court's Order, or by the end of February 2014. It will be interesting to see whether COAH reconstitutes itself and undertakes this task, since COAH has only met once in the last two and a half years.

Will the Legislature Respond?

The other open question is whether the legislature accepts the Court's invitation to modify the Fair Housing Act in order to permit some form of growth share. The Supreme Court opinion observes that a comprehensive amendment to the Fair Housing Act is a necessary precondition to adoption of a growth share formula.

However, what is problematic in this holding is properly identified by Justice Helen Hoens in her dissent. By leaving complete discretion to the Legislature as to modification to the Fair Housing Act, relative to the allocation of affordable housing need, there is no "constitutional backstop" by which the Legislature's authority is restrained by the requirements of the constitutional obligation. Therefore, the likely outcome of this decision will be years of more litigation, if the Legislature enacts amendments to the Fair Housing Act, or the maintenance of the prior round formula for this third round cycle.

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Are You Ready for Philadelphia Energy Benchmarking Beginning on October 31

By Philip Hinerman

On October 31, 2013, the first step of Philadelphia's building energy benchmarking begins and may require you to take action. Energy benchmarking is a method to measure and compare energy performances of buildings. It provides a standard to compare the energy efficiency of similar buildings, like the miles per gallon number used by cars.

Under the new law, any commercial building owner or manager with indoor floor space of 50,000 square feet or more, or any owner or manager of a mixed-use building where the commercial portion is at least 50,000 square feet, must register information regarding the use of utilities for the building.

To comply with the new requirements, you must add information to EPA's EnergyStar Portfolio Manager System. The EnergyStar Portfolio Manager is an online tool available at www.energystar.gov/buildings.

EnergyStar Portfolio Manager requires entry of information regarding the building's energy expenses, its water efficiency and its carbon emissions. Building owners or managers enter information from billings on energy meters and water meters. The Portfolio Manager then calculates an EnergyStar rating for the building.

Philadelphia will create a registry of information for all the buildings subject to the new ordinance. A prospective purchaser or lessee, upon request, may get a copy of the statement of Energy Performance that is generated by the Portfolio Manager. Also, the public will have access to the newly created database. The ordinance is intended to allow tenants, prospective purchasers, lessees and the public to compare the energy profiles of large buildings in the City.

It is the hope of the ordinance's sponsors that buildings subject to the new Ordinance will be spurred to want a better EnergyStar score and use energy saving measures. Failure to comply with the ordinance is subject to a fine and penalties, calculated on a daily basis.

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Legislative Update in Pennsylvania

By David H. Comer

House Bill No. 1688 proposes to add a provision to the Pennsylvania Municipalities Planning Code (MPC) that would require county comprehensive plans to include additional information regarding common interest ownership communities.

Specifically, the proposed legislation would add a requirement that a county comprehensive plan shall "[i]dentify, by name and physical location, all residential and mixed-use common interest ownership communities, as well as the total land area, lot size, number of units and infrastructure of each, including, but not limited to, information concerning the presence and condition of sanitary sewer, water and storm watersystems, recreation facilities and roadways."

Representative Mario Scavello who represents a portion of Monroe County, is the prime sponsor of House Bill No. 1688. Representative Scavello noted in a Memorandum he prepared to all House members regarding the proposed legislation that the Joint State Government Commission (JSGC) was directed to study the impact of Common Interest Ownership Communities (CIOCs), which he adds are commonly referred to as "planned communities." Representative Scavello provided that as part of its study the JSGC noted that there is "an absolute lack of information on CIOCs across Pennsylvania" and that only two counties' (Pike County and Monroe County) planning offices collect data on CIOCs. Representative Scavello introduced House Bill No. 1688 in an effort to be a "remedy to this massive data void."

As for the status of House Bill No. 1688, it has not yet been passed. After the bill was introduced, it was referred to the Committee on Local Government, where it remains.

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