Public Law Update – AB 1633: Addressing CEQA's Use To Indefinitely Block Infill Housing

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On October 11, 2023, Governor Newsom signed AB 1633 into law, which became effective January 1, 2024. At its core, AB 1633 expands the Housing Accountability Act (Government Code Section 65589.5, the "HAA") to provide that a local agency's failure to exercise its discretion with respect to the California Environmental Quality Act (CEQA) can be an HAA violation if certain conditions are satisfied. Specifically, if a qualifying housing development project can be found categorically exempt from CEQA but a local agency requires additional environmental review, or if a local agency fails to adopt a negative declaration or addendum for the project, certify an environmental impact report for the project, or approve another comparable environmental document for a qualifying housing development project, a court can find that the local agency disapproved the housing development project in violation of the HAA.

AB 1633 seeks to address the increasing use of CEQA to indefinitely block infill housing development projects. In essence, AB 1633 empowers a project applicant to push back when an agency delays or refuses to adopt a CEQA exemption or refuses to adopt a negative declaration or certify an environmental impact report and requests additional environmental review when the record already includes substantial evidence sufficient to support the use of the exemption or the adoption/certification of such CEQA documents for the qualifying housing project.

Prior to AB 1633, neither CEQA nor the HAA provided a remedy if a local agency unreasonably delayed or refused to make a CEQA determination as it considered a new housing project nor if it required more CEQA review than was legally required. AB 1633 addresses this gap by expanding the HAA's definition of what actions constitute "disapproving a housing development project" and defining when those actions are deemed to be an actionable abuse of discretion. The protections provided by AB 1633, however, are only afforded to certain housing development projects. To be protected, a housing project must be located on an urbanized parcel of land which, among other criteria, has one or more of the following: is within one half mile walking distance to either a high-quality transit corridor or a major transit stop; is in a very low vehicle travel area; or is proximal to six or more amenities defined in the statute. The housing project must also

meet or exceed 15 dwelling units per acre and not be located in a very high fire hazard severity zone.

AB 1633 expands the definition of "disapproving a housing development project" to now include when local agencies *fail to make a determination that a project is exempt from CEQA if certain criteria are satisfied* or *commits an abuse of discretion*. If a local agency fails to act on an applicable CEQA exemption, or if it finds that an exemption does not apply when substantial evidence in the record supports use of the exemption, applicants can require a local agency's response by bringing an action to enforce Gov. Code section 65589.5 Project applicants now must give written notice to the local agency of the action or inaction that the applicant believes disapproves of the housing project. Upon receiving such notice, the local agency will have 90 days to make a determination regarding the exemption before they will be considered to have disapproved of the housing development project. The local agency may provide a written response to the applicant within 90 days of the applicant's written notice to extend the time period to make their determination by no more than 90 days, given certain requirements. If there is substantial evidence in the record that a CEQA exemption applies, and no potential exceptions to the exemption are present, then the local agency *must* find the project exempt from CEQA or face liability under the HAA for inappropriate action that amounts to illegal disapproval of a housing development project.

AB 1633 also provides that a project will be considered disapproved *if the local agency fails to adopt a negative declaration or fails to certify an environmental impact report, or approve another environmental document such as a sustainable communities environmental assessment* despite having held a meeting where such action could have been taken. Applicants will be able to provide notice to local agencies of the action or inaction they believe constitutes an abuse of discretion or failure to decide. Once the local agency is put on notice, the local agency will have 90 days to make a lawful determination about whether to adopt, approve or certify the environmental review document. If a local agency fails to make a lawful determination within the 90 days, no opportunity to extend the decision timeline will be provided and the project will be deemed disapproved, and the local agency may face liability under the HAA.

AB 1633 also modifies attorney fee awards under the HAA and Code of Civil Procedure 1021.5 to provide a local agency with some relief provided that it makes a good faith effort to comply with its requirements. If the local agency improperly denies a project, ordinarily, a successful petitioner can recover its attorney fees from a local agency if it prevails in an HAA action; however, if a court finds that a local agency improperly required additional CEQA review in violation of the HAA, but the violation was made in good faith based

on a reasonable difference in opinion regarding CEQA's requirements, then the local agency shall not be liable for attorneys' fees. In addition, the law provides some protection for a local agency that approves a project in reliance on the CEQA process required under AB 1633.

Gov. Code section 65589.5(p) now provides two varying levels of protection based on the criteria of the proposed housing development project. The "due weight" protection applies to all housing development projects. It requires that the court give "due weight" to three factors: whether the local agency's approval furthers the policies of the HAA, the site suitability of the project, and the reasonableness of the decision of the local agency. Separately, the second, heightened protection only applies to certain projects and requires that attorneys' "fees should rarely, if ever, be awarded" if the housing development project is located in an area that meets certain criteria. For example, in order for the second, higher standard to apply, the project must be located within one half mile walking distance to high-quality of major transit and the project must have a density which meets or exceeds 15 dwelling units per acre. If a local agency approves a housing development project that meets these criteria, but a project opponent successfully challenges the approval under CEQA, AB 1633 provides that attorneys' fees should rarely, if ever, be awarded to the petitioner if the approval was given in good faith.

AB 1633 is set to sunset after seven years, which gives the Legislature the opportunity to evaluate whether the law's protections are effective at increasing housing production.