



Defining Good Infill

A Convening Report on SB 226 and the California Environmental Quality Act

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Photos courtesy of Greenbelt Alliance.





SB 226 and the UC Berkeley Convening

On March 9, 2012, UC Berkeley, UC Davis, and UCLA Schools of Law hosted a convening at UC Berkeley on Senate Bill 226 (Simitian), California's 2011 law to streamline environmental review for eligible infill projects under the California Environmental Quality Act (CEQA). Under SB 226, qualifying infill projects can avoid environmental review of impacts that were addressed in prior, program-level analysis or where local development standards already mitigate them. Project proponents can also analyze environmental impacts specific to the project through a more streamlined CEQA process.

The Governor's Office of Planning and Research (OPR) is responsible for developing regulations to implement SB 226. To provide guidance to OPR in this effort, the three law schools invited a group of expert CEQA legal practitioners, representing a range of clients and organizations, as well as technical experts, largely drawn from the field of transportation modeling and academia (for a complete list of participants, see page 5). Staff from OPR assisted with the facilitation of the discussion and presented their draft regulations for feedback.

This report provides a brief overview of SB 226 and its implementation and a summary of the March 9, 2012 discussion.

How does SB 226 work and what has OPR done to implement the law?

In order for infill projects to qualify for the CEQA benefits in SB 226, they must meet statewide performance standards developed by OPR. The statute requires that these performance standards promote the state's greenhouse gas emission reduction goals enshrined in AB 32 (Nuñez) and SB 375 (Steinberg), state planning priorities, water conservation and energy efficiency standards, transit-oriented development policies, and public health.

OPR has developed draft performance standards as well as implementing guidelines to clarify the statutory language. Among other features, the performance standards include requirements that residential and commercial projects meet or exceed specified, regional vehicle miles traveled (VMT) thresholds or conform to specific green building standards. Commercial projects can also qualify if they are located near residences or transit. The projects must also include various energy efficiency and renewable energy features.

Once lead agencies determine that a project meets these performance standards, the statute allows project proponents to avoid environmental review for impacts that are



already studied in a previous programmatic environmental review document or mitigated by locally adopted development standards. Any unmitigated effects specific to the project can be analyzed in an “infill” environment impact report (EIR) that limits review only to those impacts without the need to analyze alternatives or growth-inducing impacts. In order to implement this section of SB 226, OPR has proposed draft guidelines to clarify the key legal terms contained in the statute.

What were the primary concerns raised by the convening participants with OPR’s draft performance standards?

Participants at the Berkeley convening were generally comfortable with the VMT metric, primarily due to a lack of other suitable metrics and a recognized desire to keep the process simple for local governments and builders. However, they voiced concerns about the lack of data associated with VMT models, as well as concerns related to the geographic boundaries of the “region” and how those boundaries could affect VMT results.

Participants did not like the additional burdens placed on residential projects in low VMT areas to add renewable energy and other performance features. They also did not believe that green building standards were an adequate substitute for projects located in high VMT areas, given that some areas have already adopted green building ordinances for new projects. In general, participants favored more simplicity and more focus toward low VMT areas, with streamlining not appropriate for high VMT areas.

For commercial projects, participants had various concerns with OPR’s framework. First, some felt that because retail trips tend to be shorter than commute trips, using regional travel levels as a reference may be less appropriate than using a smaller radius. Second, opinions differed on whether “big box” retail stores increase VMT by attracting longer trips or reduce VMT by enabling less frequent one-stop shopping trips. Finally, some participants recommended that the performance standard for commercial buildings be determined by proximity to transit or through a housing/retail balance metric.

In general, participants did not favor adding new requirements to the performance standards, such as alternative energy or active transportation measures, citing CEQA as not the appropriate tool for forcing these changes. Many (although not

all) members also wanted to drop the category of consistency with an adopted transit-oriented development plan, given concerns about the uneven standards associated with some of these plans that are in effect.

What were the primary concerns raised by the convening participants with the legal guideline language?

Participants expressed different concerns regarding the streamlining provisions contained in SB 226. Some participants believed that the SB 226 framework would allow project proponents to avoid reviewing and mitigating significant impacts caused by the projects. By contrast, many participants expressed doubt that the new guidelines would provide enough certainty to remove the threat of litigation over lead agency determinations of SB 226 compliance. New language in the statute and regulations could be subject to legal challenges in order to clarify them. As a result, a number of participants encouraged OPR staff to be as specific as possible in defining new terms while taking a leadership role to acknowledge the unavoidable impacts of infill projects on traffic and noise, among other areas.

SB 226 requires projects to be “consistent” with SB 375, the state’s 2008 law requiring regional plans to reduce VMT through transportation spending, housing allocations, and CEQA benefits. However, participants were generally unsure how to determine criteria that would inform a consistency determination. Regional entities are still in the process of developing the first SB 375 plans. Participants instead urged a definition of consistency that would not unduly complicate project eligibility in the event that SB 375 plans do not become effective at reducing VMT or at encouraging infill development.

Participants also debated what kind of prior planning would be adequate to exempt new projects from review of those impacts studied in the plans. Participants noted that many general plans, for example, are old and not thorough in their analysis of impacts. Furthermore, determining “consistency” with these prior plans will be challenging (and likely to be challenged legally). For example, when does a project proponent know that an impact has been adequately studied in a prior document? Some participants encouraged OPR to use legislative and regulatory language already employed in other, similar contexts (such as in the existing CEQA tiering provisions) to provide more certainty.



Next Steps and Concluding Thoughts

As a next step to this convening, OPR staff will incorporate the participant input and the public comments received to date and refine the proposal for submission to the Natural Resources Agency to certify through the state's administrative process.

Ultimately, the UC Berkeley gathering illustrated the difficulty of developing statewide policy to define “good” or desirable infill and of devising precise legal language to avoid project-level review for impacts that could be studied at a programmatic scale. To become well-utilized, the SB 226 option will at a minimum need to be more effective for streamlining infill development than the existing statutory and regulatory exemptions for infill and the mitigated negative declaration process under CEQA. To the extent that the statutory language offers flexibility, OPR will have opportunities to revise both the performance standards and guideline language to improve the process in the future.

Despite the challenges, SB 226 could have notable impacts in a few key ways. First, the process of developing a precise and comprehensive statewide definition of desirable infill projects could have benefits beyond SB 226. Future legislation or regulations to benefit infill will be able to reference the SB 226 definition through the performance standards, which will potentially make the process of developing these standards a critical opportunity in California's effort to encourage infill. Once the state defines desirable infill projects properly and precisely, it can more effectively develop policies to encourage it.

Second, should SB 226 be successful, the emphasis on programmatic review could encourage municipalities wishing to promote infill development to develop comprehensive master-level planning. Particularly with the elimination of redevelopment agencies as a financing tool for catalyzing development in downtowns, municipalities may find that reducing the cost of infill through less time-consuming and costly environmental review can partially compensate for dwindling public subsidies. Improved master-level planning could result in better designed communities with a host of benefits beyond individual infill projects. Furthermore, the lessons learned in the SB 226 process regarding how planning can most effectively streamline review for infill projects may inform OPR's future activities, such as updates to the General Plan Guidelines and other technical guidance.

Finally, SB 226 and its performance standards could bolster existing state policies to design communities more efficiently. The emphasis on VMT could encourage greater investment in VMT modeling efforts and the data collection needed to make them accurate. This modeling effort will both support and benefit from the SB 375 process, which also requires accurate and sensitive modeling to track regional VMT. In addition, better modeling data will benefit CEQA analysis on all types of projects and help policy makers make more informed decisions about a range of projects, from transit systems to road and highway infrastructure to large buildings.

OPR staff will need to keep these considerations in mind as they revise the draft proposal and monitor SB 226 implementation in the years to come.

SB 226 Convening Participants

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