12-17-1991

Assembly Bill 2223 (Moore) Permit Streamlining Act Issues

Senate Committee on Local Government

SENATE COMMITTEE ON

LOCAL GOVERNMENT

SENATOR MARIAN BERGESON, CHAIRMAN

ASSEMBLY BILL 2223 (MOORE)
PERMIT STREAMLINING ACT ISSUES

A SUMMARY REPORT FROM THE INTERIM HEARING OF THE SENATE COMMITTEE ON LOCAL GOVERNMENT

December 17, 1991
State Capitol
Sacramento

California Legislature

Senate Committee on Local Government

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TABLE OF CONTENTS

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On Tuesday, December 17, the Senate Local Government Committee held an interim hearing on Assembly Bill 2223 by Assemblywoman Gwen Moore, relating to the Permit Streamlining Act.

Four state senators heard attorneys, planners, lobbyists, and citizen activists explore the relationship between the Permit Streamlining Act and the California Environmental Quality Act (CEQA). The Committee members also heard the witnesses describe other problems with the Permit Streamlining Act.

The four Committee members who attended the hearing were:

Senator Marian Bergeson, Chairman
Senator Ruben S. Ayala, Vice Chair
Senator Charles M. Calderon
Senator Newton R. Russell

In addition, Assemblywoman Gwen Moore, author of AB 2223, joined the Senators to explore these issues.

The hearing began at 1:45 p.m. and finished at 4:45 p.m. About 30 people attended the hearing in the State Capitol.

This summary report contains the Committee staff's explanations of what happened at the hearing (the **white** pages), reprints the briefing paper that the staff wrote for the Committee (the **blue** pages), and reproduces the written materials that the witnesses and others submitted (the **yellow** pages).

STAFF FINDINGS

Any attempt to distill an entire afternoon's discussion and dialogue into a few findings glosses over important details. But after carefully reviewing the oral testimony and written presentations, the Committee's staff identified these key findings:

- The deemed approved provision of the Permit Streamlining Act is not working.
- Project applicants are dissatisfied because the Act does not deliver the certainty it seemed to promise.
- Public officials are dissatisfied because the deadlines are too rigid and they lose the power to mitigate problems.
- Citizens are dissatisfied because they suffer when public officials miss the deadlines.

- Despite their common dissatisfaction, applicants, officials, and citizens can't agree on the way to harmonize the deadlines of the Permit Streamlining Act and CEQA.

- However, there is growing interest in "tolling" the Permit Streamlining Act's deadline until the CEQA process is finished.

- Besides deadlines, other problems exist and reforms are possible.

THE WITNESSES

Ten people spoke at the Committee's hearing. Seven of them submitted written comments which appear in the **yellow** pages.

Robert E. Merritt*
McCutchen, Doyle, Brown & Enersen

Franklin P. Eberhard*
Los Angeles City Planning Department

Bill Christopher*
People for Livable and Active Neighborhoods in Los Angeles (PLAN-LA)

Debra L. Bowen*
Coastal Area Support Team (COAST)

Sherman L. Stacey*
Attorney for Stephen M. Blanchard

Darryl Young
Sierra Club

Ernest Silva*
League of California Cities

Dwight Hansen
California Building Industry Association

James P. Corn
California Council of Civil Engineers and Land Surveyors

James G. Moose*
Remy & Thomas

[* = See the written material reprinted in the **yellow** pages]

ADDITIONAL COMMENTS

In addition, three other individuals and groups wrote to the Committee. Their materials also appear in the **yellow** pages.

John Powers, Terry Conner, and Debra L. Bowen
Coastal Area Support Team (COAST)

Honorable Ruth Galanter
Los Angeles City Councilwoman

Jackie Freedman, Laura Lake, and Patricia O'Brien
Friends of Westwood, Inc.

LEGISLATORS' INTRODUCTORY REMARKS

Senator Bergeson opened the hearing by concentrating the legislators' attention on the central policy question: "what is the relationship between the deadlines in the Permit Streamlining Act and the California Environmental Quality Act?"

The Senator reminded the witnesses that her Committee is "not here to judge whether the City of Los Angeles bent or broke the law in its handling of the '601 Ocean Front Walk' project." Instead, she urged the Committee to focus on the policy implications of that case. "We need to think about how the one-year deadline in CEQA for finishing an EIR should fit with the Permit Streamlining Act's one-year deadline for acting on projects."

Assemblywoman Moore thanked the Committee for taking time to study her AB 2223 and to sort out the relationship between the two statutes. Her intent is to find a way that the CEQA and Permit Streamlining Act processes can "run concurrently." Public officials need to consider environmental issues when they approve permits. She challenged the witnesses to balance the rights of property owners with the general public welfare.

"THE DREAM AND THE REALITY"

The Committee's lead witness was San Francisco attorney **Robert E. Merritt**, an editor of the Land Use Forum and author of "The Permit Streamlining Act: The Dream and the Reality."

Rather than advocating a particular view, Merritt served the Committee as an expert policy advisor. Drawing from his recent article (reprinted in the **blue** pages), Merritt outlined a brief history of the Permit Streamlining Act and its two stages: the application stage and the deemed approval stage.

Merritt then sketched "four major problems" which he claimed "prevent the Permit Streamlining Act from accomplishing the objective of speedy processing of land use entitlements."

- The Act does not apply to legislative actions.
- There can be no deemed approval under the Act unless the project is consistent with underlying policies.
- The Act may fail constitutional due process requirements because it does not provide for hearings.
- If deemed approval occurs, it still is not clear exactly what has been approved.

Turning to the relationship between the Permit Streamlining Act and CEQA, Merritt reviewed the two statutes' time deadlines. He conceded that "it is quite easy" to reach the deemed approval deadline without having a completed EIR. To avoid this perverse result, Merritt described three possible alternatives to the Committee.

First, the Legislature could declare that without a certified EIR, a project cannot be deemed approved. "AB 2223 says this in no uncertain terms."

Second, the Legislature could impose a "real" one-year deadline on the preparation of an EIR and allow a project to be deemed approved even if the agency is not yet completed.

Third, the Legislature could suspend ("toll") the deemed approval until 45 days after the agency completes its CEQA process.

Merritt noted that his article suggests the third alternative as a solution to a similar situation involving legislative actions. At the end of the hearing, Merritt explained the Legislature's alternatives and described four other problems with the statute; see pages 8 and 9.

DEEMED APPROVED

The key struggle in what **John Powers** called the "disharmony" between the Permit Streamlining Act and CEQA is the deemed approved provision. "It's time to reconsider the Permit Streamlining Act," asserted **Ernie Silva**, acknowledging the continuing conflict between the two statutes. To Silva, the deemed approved provision moots CEQA's requirements for environmental balancing.

Landowners' constitutional rights may be at risk if a deemed approved project proceeds without a public hearing, said **Jim Moose**. The constitutional defect overshadows other problems.

For **Frank Eberhard**, deemed approval denies citizens their political access to decision-making and it allows projects to avoid the usual requirements for conditions and exactions. **Debra Bowen** agreed, arguing that the Act's deemed approved provision imposes a penalty on the general public, not on the public agency which missed the statutory deadline. The most controversial projects take the longest to review, she said, but they are the most likely to be deemed approved. Perhaps the Legislature should replace the deemed approved provision with the ability to reverse a poor decision, suggested **Ernie Silva.**

Darryl Young told the legislators that there should be no automatic approval of any project and he would rather not have any statutory deadlines. Responding to **Senator Bergeson**, Young conceded that he did not have a solution to completing projects in a timely manner.

Postponing the deemed approval until after an agency completes its CEQA process would mean "no automatic approval at all" under the Permit Streamlining Act, according to **Jim Corn.** The Legislature addressed the Act to governments that fail to act, said **Dwight Hansen.** So eliminating the deemed approved provision would gut the statute's impact.

More discussion on time limits and deadlines appears below.

DEADLINES

For cities the size of Los Angeles, **Frank Eberhard** contended that the Permit Streamlining Act's "time limits are too stringent" for controversial or complex projects. When **Senator Bergeson** asked if state law needed "more explicit deadlines," Eberhard said, "Not really." A better approach is for the Legislature to "set a timeline after the EIR is done to approve the project." **Assemblywoman Moore** observed that Eberhard's approach "delays the process" because there would be no final deadline for action.

Bill Christopher explained that to cope with these deadlines, Los Angeles city officials do not consider an application complete (under the Permit Streamlining Act) until the CEQA process has been completed. **Senator Bergeson** responded by reemphasizing her commitment to the principle that there "should be a time when everything is certain." **Senator Ayala** agreed. **Debra Bowen** said that having a "stringent deadline for completing the CEQA process also ignores the reality that the larger a project, and the more adverse its impacts, the longer the CEQA review takes." Bowen suggested that AB 2223 include a defined time limit for CEQA review or allow the developer and the agency to decide together what a feasible deadline should be.

After offering the legislators a chart showing both Acts' time deadlines, **Ernie Silva** said that "existing time limits can be unworkable." Silva's testimony sliced the one-year deadline into its component parts, showing how little time local staffers have to review proposed projects. A one-year timeline works for less controversial projects, Silva said. The problem comes with the more complicated proposals. **Senator Calderon** observed that the Legislature should not slow down the process just to let cities catch up. If there are deadline problems, "maybe we should have arbitrators decide" these cases.

"Cities want to approve projects" because they want development, Silva said. City officials find it "tough" to be caught between "the NIMBYs" and the developers. **Senator Russell** noted that "if you're the person paying the bills," even a one-year deadline "is a long time."

The statutory analysis by **Jim Moose** exposed the legislators to several different conflicting interpretations of these deadlines.

But emphasizing the importance of the statutory deadlines, **Sherman Stacey** reminded the legislators of the bipartisan support that accompanied the 1977 passage of the Permit Streamlining Act. In signing the bill, Stacey reported that Governor Jerry Brown said that the Act's one-year deadline "helps guarantee that every proposed development receives a prompt and fair hearing." The result, Stacey said, is that "99% of all projects meet the time deadlines of the Act." Of course, timetable will be viewed differently from each side, added **Dwight Hansen**.

Because of "judicial disfavor," **Jim Corn** acknowledged that automatic approvals are "not terribly efficacious." However, he does not favor their repeal because the threat of an automatic approval "still has sufficient validity to convince some agencies to act within the time limits." Rather than repeal the deadlines, Corn wanted reforms. CEQA and the Permit Streamlining Act should "run concurrently and be consistent." He wanted the Legislature to:

- Cut the basic deadline from one year to six months with the opportunity for one additional six-month extension. Corn argued that the current one-year deadline makes every project a one-year effort.

- Require the agency to refund the applicant's processing fees if the agency violates the statutory time limits. Faced with lost revenues, public officials will pay attention to deadlines.

MISSING CONDITIONS

A very practical problem with projects that are deemed approved under the Permit Streamlining Act is that public officials lose their ability to impose conditions and specific mitigation measures. Both **Sherman Stacey** and **Ruth Galanter** noted that it was the California Coastal Commission, not the City of Los Angeles, that imposed development conditions on the 601 Ocean Front Walk project. City officials lost their chance when they allowed the project to be deemed approved.

Bill Christopher, **Debra Bowen**, and **Senator Ayala** agreed that the absence of findings and conditions poses a problem. **Ernie Silva** said that the preparation of an EIR after a project is deemed approved would be "futile" because it would come after the fact.

When **Assemblywoman Moore** asked if this problem would be resolved if agencies took mitigating actions before the project started, **Frank Eberhard** explained that completing the CEQA process was necessary to identify the potential problems and to explore the possible mitigation conditions.

Testimony from **Jim Moose** explained the situation behind Patterson v. City of Sausalito, a pending appellate case in which he represents the City. The Superior Court held that a project was deemed approved "in precisely the form originally proposed by the applicant, despite the fact that a completed EIR showed that it would cause numerous significant environmental effects." Moose contended that Sausalito officials could have diminished or avoided these documented problems if the Court had allowed them to impose mitigation measures.

One remedy, suggested **Sherman Stacey** in response to **Assemblywoman Moore's** question, would be for agencies to adopt standard conditions that would automatically apply to all applications. "Rules are not set and should be," he asserted.

TOLLING --- A POSSIBLE ALTERNATIVE?

Bob Merritt introduced the Committee to the concept of tolling as a possible way to harmonize the time deadlines in both Acts. The Legislature could "suspend the deemed approval until a fixed time elapses (e.g. 45 days) after the CEQA process is complete," Merritt suggested.

Frank Eberhard agreed with the alternative of tolling but suggested a 60-day time limit. **Bill Christopher** and **Ernie Silva** acknowledged that tolling was one alternative to the current conflict between the Acts. **Debra Bowen** told the Committee that AB 2223 already infers a variation on the tolling option by requiring agencies to finish their CEQA documents before acting on the underlying proposal.

SOME FINAL WORDS OF ADVICE

As the hearing closed, **Senator Bergeson** invited **Bob Merritt** to provide the Committee with more general advice on the Permit Streamlining Act. Merritt began by noting that the deemed approved concept probably seemed "quick and efficient" to legislators when it was first enacted in 1977. But the concept has become "complicated and proven unworkable."

Merritt then suggested dropping the deemed approval provision in favor of other approaches:

- Quick court action. Merritt's first alternative was a summary judicial proceeding. If an agency misses its deadline, the developer could ask the court for "a preemptory writ of mandate directing the agency to act on the application." The Act could lay out the necessary legal tools and forms to speed its implementation. The court could act on written pleadings, without oral argument. The order could be "non-appealable." Successful applicants could recover their attorneys' fees and possibly even damages if "the agency acted capriciously."

According to Merritt, the key is a judicial remedy that is:

1. Limited to a single issue (the deadline).
2. Readily available.
3. Results in cost to the agency for dragging its feet.

- With hearings. Terming it "more moderate proposal," Merritt offered a second alternative that followed the first suggestion but required a hearing. But, he conceded, if the agency does not act after the hearing, the current difficulties still remain.

- Legislative vs. adjudicatory. Merritt's third suggestion was to eliminate the distinction between legislative and adjudicatory decisions. The Act could require agencies to impose deadlines on their legislative decisions if they apply to specific locations; e.g., site-specific rezoning requests.

- Other improvements. Contending that it is possible to streamline the Streamlining Act, Merritt offered a series of specific changes to improve the implementation of the statute:

  * Standard cover page for applications.
  * Eliminate the hazardous waste statement.
  * Standard submittal when requirements are missing.
  * Standard conditions for deemed approved projects.

Merritt concluded that "the whole entitlement process" would be simpler if the Legislature could "simplify the CEQA process." But ever the political realist, he concluded that this "is the subject for a different day."

NOTE: I could not have prepared this summary report without the help of my colleagues Dave Kiff and Jen Hilger. I needed their help at a very difficult time. I am very grateful.

- Peter Detwiler

California Legislature

Senate Committee on Local Government

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ASSEMBLY BILL 2223 (MOORE)

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A Briefing Paper

for the

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TABLE OF CONTENTS

ASSEMBLY BILL 2223 (MOORE): PERMIT STREAMLINING ACT ISSUES

On July 17, the Senate Local Government Committee postponed action on Assemblywoman Gwen Moore's Assembly Bill 2223. On a motion made by Senator Newton Russell, the Committee voted 5-0 to hold AB 2223 for further study during the Legislature's interim recess. Senator Marian Bergeson, the Committee's Chairman, has called a hearing on AB 2223 for Tuesday afternoon, December 17.

AB 2223 IN SUMMARY

Assembly Bill 2223 says that a development permit shall be "deemed approved" under the Permit Streamlining Act only if the public agency has complied with the California Environmental Quality Act. The bill's text appears in **Appendix A.**

To understand the bill, legislators must also know that:

- *The California Environmental Quality Act (CEQA) requires public officials to review projects' environmental effects before they act.*
- *Environmental impact reports (EIRs) must be ready within one year.*
- *The Permit Streamlining Act requires officials to act on development projects within one year.*
- *If officials fail to act within a year, the Permit Streamlining Act says that a project is "deemed approved."*
- *The "deemed approved" provision of the Permit Streamlining Act does not apply to EIRs.*
- *Los Angeles City officials agreed that permits for a Venice mini-mall were deemed approved even though they had not completed the CEQA process.*
- *Assemblywoman Moore introduced AB 2223 to prevent this situation from happening again.*

Briefing paper. To prepare state legislators and the witnesses for their December 17 discussions, this staff briefing paper explains:

1. The origins and workings of the California Environmental Quality Act and the Permit Streamlining Act.

2. How the courts have interpreted these laws.

3. The specific situation in Los Angeles that prompted Assemblywoman Moore to introduce her bill.

The briefing paper then frames the central policy question and offers three alternative answers. In addition, this paper contains two appendices:

Appendix A is the text of Assembly Bill 2223, as amended in the Senate on July 14, 1991.

Appendix B reprints an excellent commentary by Robert E. Merritt, "The Permit Streamlining Act: The Dream and the Reality."

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Familiarly known as "CEQA," the 1970 California Environmental Quality Act requires state and local agencies to review the environmental effects of projects before they make decisions. If a project may have adverse environmental effects, public officials must avoid the effects, mitigate the effects, or proceed anyway in light of overriding concerns. Although easily described, determining a project's environmental effects can be complicated in practice.

Process. Officials must first determine whether their decision is a project which is subject to CEQA. Both the Act and its interpretive regulations, the CEQA Guidelines, exempt certain types of projects. If a project is not exempt, officials conduct an **initial study** to discover whether the project may have significant adverse environmental effects. If there are no significant effects, the agency fulfills its CEQA obligation by issuing a **negative declaration.** But if there may be significant effects, officials must prepare an **environmental impact report (EIR).** After circulating a draft EIR and receiving public comments, the agency completes and certifies the final EIR. For each significant effect, the agency must avoid it, mitigate it, or adopt a finding that there are social or economic considerations that override the environmental effect.

Deadlines. CEQA sets several deadlines for public officials to act, but one deadline is particularly important in understanding AB 2223. Every state and local agency must set a deadline for completing its environmental documents. The maximum deadline for EIRs is one year, measured from the date that the agency accepted the project application as complete. The maximum deadline for negative declarations is 105 days. The statute allows public agencies to provide "reasonable" time extensions for "compelling circumstances," and the CEQA Guidelines permit one 90-day extension. But the statute bans the earlier practice of rejecting applications unless they agree to waive the time deadline (SB 523, Russell, 1987).

THE PERMIT STREAMLINING ACT

Responding to the political controversy surrounding Dow Chemical Company's problems in getting permits to build a chemical plant in Solano County, the Legislature passed the Permit Streamlining Act (AB 884, McCarthy, 1977). The Legislature wanted officials "to expedite decisions" on projects.

Process. The Act applies to every "development project," a term which includes entitlements and permits to construct, but not permits to operate. Nor does it include ministerial (non-discretionary) permits. The Act does not apply to legislative decisions, such as general plan and zoning adoptions and amendments and LAFCO boundary changes. For example, a discretionary conditional use permit is a "development project" subject to the Permit Streamlining Act, but a ministerial building permit is not.

The process begins when a proponent files an application for a development project with a public agency. The agency has 30 days to determine if the application is complete. Public officials must tell the applicant what criteria they use to decide whether an application is complete. If the agency finds that the application is not complete, officials must tell the applicant what's missing. If the agency fails to respond within 30 days, then the Act says that the application "shall be deemed complete."

Deadlines. If CEQA requires an EIR for the project, the Permit Streamlining Act requires the agency to approve or disapprove the application within one year, measured from the date that the agency accepted the project application as complete. The Act allows one 90-day extension if both the agency and the applicant consent. If the agency has extended CEQA's deadline to complete an EIR, the Permit Streamlining Act requires officials to act on the project within 90 days of certifying the EIR (SB 413, Davis, 1983). Further, the Act explains, these statutory deadlines are "maximum time limits" and directs public agencies to act sooner "if possible."

Deemed approved. If the public agency does not act within the statutory time limits, the Act says that "failure to act shall be deemed approval" of the project. In other words, inaction leads to approval. According to Robert Merritt, a close observer of this statute, "automatic approval lies at the heart of the Act." But, Merritt notes:

> In the brief 13 years since enactment, numerous appellate court decision have interpreted the Act. Only two cases ... have upheld automatic approval. For the most part, the judiciary has been hostile to the Act, severely limiting its application.

Merritt's excellent review, "The Permit Streamlining Act: The Dream and the Reality," appears in **Appendix B.**

WHAT THE COURTS SAY

Knowing what the Legislature has done, now it is important to understand how the courts interpret the Permit Streamlining Act.

The "Landi" decision. Just what the "deemed approved" provision applies to and what it does not affect was one of the earliest issues in implementing the Permit Streamlining Act. California's land use laws generally distinguish between **legislative acts** which make policies and **adjudicatory decisions** which apply the policies to specific situations. The adoption and amendment of general plans and zoning ordinances are legislative acts which set land use policies. The approval of development projects (e.g., subdivision maps, conditional use permits) are adjudicatory decisions.

The court used this distinction in the 1983 decision Landi v. County of Monterey. When asked if the Permit Streamlining Act applied to the rezoning of 18 acres, the Court said that the law only covers adjudicatory actions. Therefore, the Act's deadlines and its central "deemed approved" concept do not apply to legislative decisions such as zoning ordinances and their underlying general plans. In his article, Merritt shows how other courts have applied the Landi decision.

The "Palmer" decision. The 1986 case Palmer v. City of Ojai upheld the automatic approval of a permit because city officials failed to meet the Permit Streamlining Act's deadlines. But after the Palmer decision, attorneys became worried that adjacent landowners' rights to due process could be violated. If the Act resulted in automatic approvals without adjacent landowners receiving notice, the landowners would be deprived of their constitutional right to due process; public notice of an action affecting their property. Another court reached this conclusion in a 1989 case, Selinger v. City Council.

Alerted by attorneys to anticipate the problem, the Legislature responded to the Palmer decision in 1987 by amending the Act to require that public notice be given before a permit can be deemed approved. The Act now allows the applicant to give 60 days of public notice, then the permit is deemed approved (AB 1486, Sher, 1987). Merritt, however, worries that the Act remains constitutionally insufficient despite this reform. Although adjacent landowners now have a way to receive public notice, they still do not have an opportunity to be heard at a public hearing.

The "Land Waste Management" decision. When interpreting two statutes which apply to the same case, the courts often write

about the need to harmonize the laws; to read them together so that they both make sense. The August 1990 case Land Waste Management v. Contra Costa County Board of Supervisors interpreted the relationship between the "deemed approved" provision in the Permit Streamlining Act and CEQA's requirement to complete an EIR.

The decision held that CEQA does not automatically certify an EIR even if officials miss the statutory one-year deadline. Further, the court said that the automatic approval provisions of the Permit Streamlining Act do not apply to CEQA. "Nowhere in CEQA is there any provision for automatic or 'deemed' certification of EIRs if action is not taken within one year." The Court's decision continued:

> Moreover, the Permit Streamlining Act, which was enacted after CEQA, did not add any automatic approval provision for EIRs, and did not mention EIR certification in the automatic approval provisions which it did set forth. The Legislature must be presumed to have been aware of the CEQA time limits at the time it enacted the Permit Streamlining Act, indicating its tacit intent to leave the law as it stands. [citations] In view of the Legislature's failure to enact such a drastic provision, we now decline to read it into CEQA ourselves.

Reviewing the Land Waste Management case, Merritt comments:

> Implied, but unstated, was rejection of the concept of a deemed approval without compliance with CEQA. Unfortunately, Land Waste Management does not address the question of how the time periods for action on adjudicatory permits are affected when the agency ... fails to complete the CEQA process.

Merritt's article goes on to note that exactly this kind of conflict between CEQA and the Permit Streamlining Act surfaced in a land use controversy in the City of Los Angeles neighborhood of Venice.

601 OCEAN FRONT WALK

In mid-October 1988, Stephen M. Blanchard filed four applications with the City of Los Angeles to develop his property at 601 Ocean Front Walk in the Venice area. Blanchard wanted to build a multi-story building with restaurants and retail stores. These applications "were deemed complete by the Planning Department" in late October. In November 1988, city planners told Blanchard that he needed to apply for two more city permits. By mid-January 1989, all of Blanchard's permits "were 'deemed complete' by the City."

City planners published and mailed notices of their April 1989 public hearing before an Associate Zoning Administrator. In October 1989, the city staff issued a proposed "mitigated negative declaration" for the first set of Blanchard's applications. In November 1989, a neighbor protested the proposed negative declaration. In early December 1989, Blanchard's attorney asked the City to act on his client's applications, reminding the City of the Permit Streamlining Act's deadlines. In February 1990, the city staff issued another proposed mitigated negative declaration; this time covering all of Blanchard's applications. In March 1990, the neighbor also protested this CEQA document.

In mid-May 1990, Blanchard's attorney "demanded that the City immediately issue each of the permits." Because the City had failed to act within the one-year deadline of the Permit Streamlining Act, Blanchard's attorney claimed that the permits had been deemed approved. In mid-July 1990, the Los Angeles City Attorney advised planners that it appeared that the permits were deemed approved. Later in July 1990, the Associate Zoning Administrator issued a formal ruling that Blanchard's six permits were all deemed approved.

In early August 1990, the District Court of Appeal issued its Land Waste Management decision. The court said that the Permit Streamlining Act's "deemed approved" provision does not apply to EIRs prepared under CEQA.

In August 1990, the neighbor appealed the staff decision to the City's Board of Zoning Appeals. The Venice North Beach Coalition, a neighborhood group, sued the City, naming Blanchard as the real party in interest. The Coalition asked the Superior Court to reverse the city staff's ruling, to require the City to reconsider the permits, and to require the City to prepare an EIR.

In early October 1990, the State Department of Justice, acting in the name of then-Attorney General John Van de Kamp, told the City's Board of Zoning Appeals that the recent Land Waste Management decision was the controlling law. The state's attorney told city officials that they should reverse their Zoning Administrator's decision.

In mid-October, the City's Board of Zoning Appeals overruled its Zoning Administrator, determined that the permits had not been deemed approved, and sent the issue back to the staff.

In January 1991, Blanchard sued the City, asking the Superior Court to mandate city officials to issue his permits. Blanchard also filed a $20 million damage claim against the City.

In March 1991, Assemblywoman Moore introduced her Assembly Bill 2223 at the request of Los Angeles City Councilmember Ruth Galanter who represents the Venice area.

On May 31, 1991, the Los Angeles City Council signed a settlement agreement with Blanchard and agreed to:

1. Issue all six permits, subject to detailed conditions.
2. Grant other permits, subject to detailed conditions.
3. Not oppose permits issued by the Coastal Commission.
4. Not oppose Alcoholic Beverage Control Board permits.
5. Withdrawal of Blanchard's suit and damage claim.
6. Mutual release of all claims and liabilities.
7. Defend the agreement against legal challenges, including the Coalition's suit against the City.

In early June 1991, the Assembly passed AB 2223 by the vote of 43-30. On July 17, the Senate Local Government Committee held the bill for interim study.

In November 1991, the Coastal Commission approved its permits for Blanchard's project.

The Coalition's suit against the City is still pending. The Superior Court may hear the case before the end of 1991.

THE POLICY QUESTION AND THE ALTERNATIVES

Regardless of the legislative record, the court decisions, and even Venice project's contentious history, the 1991-92 Legislature must confront this central policy question:

> *What is the relationship between the deadlines in the Permit Streamlining Act and the California Environmental Quality Act?*

The Committee members need to step back from the specifics of the bill and decide how CEQA's one-year deadline for finishing an EIR should fit with the Permit Streamlining Act's one-year deadline for acting on projects. The December 17 hearing should give legislators at least three choices:

1. CEQA first. Public officials must comply with CEQA before they act on development projects. In October 1990, advising Los Angeles officials, the Attorney General's office wrote:

> Allowing a project to be approved without compliance with CEQA would result in the very "gamesmanship" the [Permit Streamlining Act] was designed to avoid. Applicants could attempt to delay the approval process as long as possible to gain approval without compliance with CEQA. Similarly, governmental entities could avoid their CEQA obligations by failing to act on development applications, thereby allowing the project to be "deemed approved" without full compliance with CEQA.

Other observers reject this approach, saying that the Attorney General was "absolutely wrong." They argue that an agency could easily circumvent the "deemed approved" provision of the Permit Streamlining Act merely by dragging its feet in the CEQA process. As long as the agency never finishes its CEQA document, then the Permit Streamlining Act never applies. Officials could use CEQA to vitiate the Legislature's desire for a one-year deadline on development decisions.

2. **Same deadlines.** Use the one-year deadlines in both CEQA and the Permit Streamlining Act. CEQA says that one year is long enough to complete an EIR, but it allows time extensions. The Permit Streamlining Act sets a one-year deadline on development decisions, but it allows one 90-day extension. Agencies can still disapprove projects that are harmful or unpopular. Neither law requires officials to approve development projects; they just have to make up their minds within the year.

If a project is deemed approved under the Permit Streamlining Act without having a final CEQA document, it is still possible to challenge the project. CEQA already gives potential litigants 180 days to file lawsuits challenging projects for failure to have an EIR or negative declaration.

Those who oppose this approach complain that it involves too much litigation, usually at the expense of neighborhood groups who are poorly financed. Why should citizens' groups have to sue public agencies when officials fail to follow the law? Shouldn't the Legislature instead place the legal burden on public officials to follow the law?

3. **Tolling.** Merritt's article suggests "tolling" as a third alternative. Noting that Permit Streamlining Act's deadlines do not apply to legislative decisions (the Landi and Land Waste Management cases), Merritt explores the possibility that the Act's one-year deadline should be suspended while officials finish their legislative decisions.

> In other words, if the required legislative action is not taken by the time the ... one-year time period has run on the permit applications, the time is extended until the legislative action occurs. Thus, at the time of the legislative action, the agency will also be required to act on the permits.

Similarly, Merritt suggests that the conflict between the CEQA and Permit Streamlining Act deadlines could be resolved by using "the tolling approach [to] breathe some life back into the Act." He argues that tolling would be more consistent with the Act's original purpose and less drastic than having to wait for a final CEQA document.

SOURCES

In preparing this briefing paper, the most useful source was:

Robert E. Merritt, "The Permit Streamlining Act: The Dream and the Reality," Land Use Forum, (Fall 1991).

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The Committee's staff benefitted from the information and advice provided by:

Don Collin, general counsel to the California Building Industry Association.

Barry Fisher, attorney for the Venice North Beach Coalition.

Gail Ruderman Feuer, Deputy Attorney General.

Sherman L. Stacey, attorney for Stephen M. Blanchard.

* * * * * * *

In addition, the briefing paper relied on:

Daniel J. Curtin, Jr. and Michael H. Zischke, "New Limits On Deemed Approval Of Projects Under The Permit Streamlining Act," McCutchen Update, Walnut Creek: McCutchen, Doyle, Brown & Enerson, September 28, 1990.

William Fulton, Guide To California Planning, Pt. Arena: Solano Press Books, 1991.

Michelle Marchetta Kenyon, "Courts Interpret Permit Streamlining Act," Public Law Bulletin, Oakland: McDonough, Holland & Allen, November 7, 1990.

Michael H. Remy, et al., Guide to the California Environmental Quality Act (CEQA), Fourth Edition, Pt. Arena: Solano Press Books, 1990.

Ken Wilson, "The Development Permit Process. Time Limits," in Longtin's California Land Use, 2nd Edition, James Longtin, ed., Malibu: Local Government Publication, 1987.

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Peter Detwiler, consultant to the Senate Local Government Committee, wrote this briefing paper which was produced by Sharon Jennings, Committee Secretary. Peter and Sharon thank the Senate Reprographics staff for their help.

021

AMENDED IN SENATE JULY 14, 1991
AMENDED IN ASSEMBLY MAY 24, 1991

CALIFORNIA LEGISLATURE—1991-92 REGULAR SESSION

ASSEMBLY BILL No. 2223

Introduced by Assembly Member Moore

March 12, 1991

An act to amend Section 65956 of the Government Code, relating to local planning.

LEGISLATIVE COUNSEL'S DIGEST

AB 2223, as amended, Moore. Development project approval: California Environmental Quality Act.

Existing law requires state and local agencies to hold hearings, give specified public notices, and approve or disapprove development projects, as defined, within specified times. Existing law specifically requires a public agency which is a lead agency, as defined, to approve or disapprove a development project within one year from the date an application requesting approval is received and accepted as complete by the lead agency and requires a responsible agency, as defined, to approve or disapprove development projects within 180 days of the date the lead agency takes action or within 180 days of the date on which the application is received and accepted as complete. In the event that a lead agency or responsible agency fails to meet these time limits and the public notice required by law has occurred, the failure is deemed to be approval of the permit application for the development project under existing law.

This bill would also require compliance by the permitting agency with the California Environmental Quality Act prior to the permit application for the development project being deemed approved due to the failure of the lead agency or

022

responsible agency to meet those time limits.

The bill would also state the intent of the Legislature in amending these provisions of existing law.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 65956 of the Government Code is amended to read:

65956. (a) If any provision of law requires the lead agency or responsible agency to provide public notice of the development project or to hold a public hearing, or both, on the development project and the agency has not provided the public notice or held the hearing, or both, at least 60 days prior to the expiration of the time limits established by Sections 65950 and 65952, the applicant or his or her representative may file an action pursuant to Section 1085 of the Code of Civil Procedure to compel the agency to provide the public notice or hold the hearing, or both, and the court shall give the proceedings preference over all other civil actions or proceedings, except older matters of the same character.

(b) In the event that a lead agency or a responsible agency fails to act to approve or to disapprove a development project within the time limits required by this article, the failure to act shall be deemed approval of the permit application for the development project. However, the permit shall be deemed approved only if the public notice required by law has occurred and the permitting agency has complied with Division 13 (commencing with Section 21000) of the Public Resources Code. If the applicant has provided seven days advance notice to the permitting agency of the intent to provide public notice, then no earlier than 60 days from the expiration of the time limits established by Sections 65950 and 65952, an applicant may provide the required public notice using the distribution information provided pursuant to Section 65941.5. If the applicant chooses to provide public notice, that notice shall include a

023

description of the proposed development substantially similar to the descriptions which are commonly used in public notices by the permitting agency, the location of the proposed development, the permit application number, the name and address of the permitting agency, and a statement that the project shall be deemed approved if the permitting agency has not acted within 60 days. If the applicant has provided the public notice required by this section, the time limit for action by the permitting agency shall be extended to 60 days after the public notice is provided. If the applicant provides notice pursuant to this section, the permitting agency shall refund to the applicant any fees which were collected for providing notice and which were not used for that purpose.

(c) Failure of an applicant to submit complete or adequate information pursuant to Sections 65943 to 65946, inclusive, may constitute grounds for disapproving a development project.

(d) Nothing in this section shall diminish the permitting agency's legal responsibility to provide, where applicable, public notice and hearing before acting on a permit application.

SEC. 2. In amending subdivision (b) of Section 65956 of the Government Code by this act, it is the intent of the Legislature that the time limits set by Chapter 4.5 (commencing with Section 65920) of Division 1 of Title 7 of the Government Code run concurrently with the time limits of the California Environmental Quality Act, Division 13 (commencing with Section 21000) of the Public Resources Code. It is the further intent of the Legislature that no development project shall be deemed approved pursuant to Section 65956 of the Government Code until the lead agency and any responsible agency has filed the notice required by Section 21108 or Section 21152 of the Public Resources Code.

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Robert E. Merritt

THE PERMIT STREAMLINING ACT

The Dream and the Reality

It was an idea whose time had come—a way to cut through the labyrinth of red tape and dispel California's antibusiness reputation. Embraced by the Jerry Brown administration and written by Assembly Speaker Leo McCarthy, the bill creating the Permit Streamlining Act (Govt C §§65920–65963.1) (AB 884) received only one "no" vote as it sailed through the Legislature. It garnered support from such diverse groups as the California Chamber of Commerce, the California Manufacturers Association, the Sierra Club, and Friends of the Earth. Almost everyone agreed that the land use permitting process in California had gone completely out of control. An editorial comment in the *San Francisco Chronicle* reflected the optimism behind the legislation. "This spur to regulatory action is welcome and reasonable, and certain to assure potential business developers that California welcomes them." *San Francisco Chronicle*, May 29, 1977.

The single event that served as a catalyst to enactment of the Permit Streamlining Act was the withdrawal by Dow Chemical Company of applications to build a $500 million petrochemical plant at Collinsville, a small town east of San Francisco. Dow reportedly spent two and a half years and over $4.5 million in attempts to obtain 65 required permits. After obtaining only four despite its efforts, Dow called it quits.

In fact, the real problem for Dow was not delays in getting permits but its inability to meet air quality standards dictated largely by the 1970 federal Clean Air Act. Permit streamlining would have done nothing to remove this roadblock. Nevertheless, when Dow made the decision to build elsewhere, the blame was placed on a faceless bureaucracy and to a lesser extent on the Brown administration. Ironically, less than a year earlier the Bay Area Pollution Control District had also blocked Arco Chemical Company, a division of Atlantic Richfield, from building a $1 billion petrochemical facility on property adjoining the Dow site. In comparison to the furor raised over the Dow facility, Arco's denial went virtually unnoticed.

HOW IT WORKS—IN THEORY

The Permit Streamlining Act (not the Act's official designation—the name has been tacked on by various courts and commentators) was intended to establish rigorous time lines for state and local agencies to act on development permits. On the filing of an application for a development project, the agency has 30 days to notify the applicant of deficiencies in the application or it will be deemed complete. Govt C §65943(b). The agency then has a limited period within which to take action on the application once it is complete; one year if the project requires an environmental impact report under the California Environmental Quality Act (CEQA) (Pub Res C §§21000–21177), and six months if a negative declaration is required or the project is exempt from CEQA. Govt C §65950. Failure of the agency to act within the applicable time period results in the application being "deemed approved," which means approved as a matter of law without actual action being taken. Govt C §65956(b).

The focus of this article is on applications processed through local agencies, although the basic scheme of the Act applies to state agencies as well.

The Office of Permit Assistance (OPA), a part of the Governor's Office of Planning and Research, is charged with the duty of assisting agencies in implementing the Act and resolving conflicts

Robert E. Merritt

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when a development project affects more than one agency. The office is also eager to assist applicants who feel that an agency is not adhering to the Act. As an arm of the Governor's office, OPA can bring considerable pressure to bear on state agencies. Action against recalcitrant local agencies usually takes the form of written or verbal reminders of the agency's responsibilities under the Act. Unfortunately, many frustrated applicants do not seek assistance from OPA, probably because they do not realize assistance is available. Another problem is that applicants who do seek help wait too long. The benefit of OPA's involvement comes from cajoling agencies into compliance; OPA cannot punish the agency after the fact. (Applicants with problems involving compliance with the Act should contact David C. Nunenkamp or Christine Kinne of OPA.)

The scope of the Act is determined by the key terms, "development project," "development," and "project." The Act is triggered by the filing of an application for a development project. A development project is defined as any project undertaken for the purpose of development. Project means any activity involving the issuance to a person of a lease, permit, license, certificate or other entitlement for use by one or more public agencies. Govt C §65931. Development is broadly defined to encompass virtually any activity affecting land or water. It includes the placement or erection of any solid material or structure; grading, removing, dredging, mining, or extraction of any material; change in the density or intensity of use of land; and construction, reconstruction, demolition, or alteration of the size of any structure. Govt C §65927. The definition was clearly taken from the California Coastal Act of 1976 (Pub Res C §30000–30900), because the two definitions of development are virtually identical. Compare Govt C §65927 with Pub Res C §30106, and see *Georgia-Pacific Corp. v California Coastal Comm'n* (1982) 132 CA3d 678, 695, 183 CR 395, 405. Although the Act specifies that its definitions only shall govern construction of the Act, cases interpreting "development" under the Coastal Act may be persuasive. See, *e.g., Sierra Club v Marsh* (SD Cal 1988) 692 F Supp 1210 (U.S. acquisition of land for wildlife refuge not development); *Monterey Sand Co. v California Coastal Comm'n* (1987) 191 CA3d 169, 236 CR 315 (sand extraction from sea floor is development); *Delucchi v County of Santa Cruz* (1986) 179 CA3d 814, 225 CR 43 (greenhouses constitute development); *California Coastal Comm'n v Quanta Inv. Corp.* (1980) 113 CA3d 579, 170 CR 263 (stock cooperative conversion deemed development).

There are a number of express exclusions from the Act, including permits to operate (Govt C §65928), final subdivision maps (Govt C §65927), ministerial projects (Govt C §65928), change of organization or a reorganization under the District Reorganization Act of 1965 (Govt C §§56000–56498) (Govt C §65927), land divisions in connection with the purchase of land by public agencies for public recreational uses (Govt C §65927), removal or harvesting of major vegetation other than for agricultural purposes (Govt C §65927), kelp harvesting (Govt C §65927), timber operations under the Z'Berg-Nejedly Forest Practice Act of 1973 (Govt C §65927), certain applications to appropriate water under the Water Code (Govt C §65955), and activities of the State Energy Resources Development and Conservation Commission (Govt C §65922). There are also special provisions on application of the Act to issuance of permits for hazardous waste facility projects. Govt C §65963.1.

An important exclusion is for "permits to operate." Vague at best, this phrase has been construed by only one court, which found that it encompassed a permit required by the State Lands Commission to conduct geophysical research in coastal waters. Accordingly, the permit was not subject to the Act. *Meridian Ocean Sys. v State Lands Comm'n* (1990) 222 CA3d 153, 271 CR 445. When the permit relates to both the siting and operation of a facility, it is unclear whether the Act applies. This is frequently the case with conditional use permits for location of businesses. For example, a truck terminal may be given the right to operate in a particular location as long as truck movement is confined to particular hours. A court would probably look carefully at the permitting process and the underlying zoning and general plan designations to determine whether their main purpose is to regulate development or use.

Ministerial actions are not covered by the Act. Therefore, if the action is not taken, the applicant must bring an ordinary mandamus action under CCP §1085 to compel the agency to issue the permit. *Hollman v Warren* (1948) 32 C2d 351, 355, 196 P2d 562, 565; *California Ass'n of Health Facilities v Kizer* (1986) 178 CA3d 1109, 1114, 224 CR 247, 249. Building permits are often ministerial. Some jurisdictions, however, have made building permits discretionary, in which case the Act should apply. *Fontana Unified School Dist. v City of Rialto* (1985) 173 CA3d 725, 219 CR 254. Attorneys can make this determination by reviewing the local building ordinance. When the building permit is discretionary, usually no action under CEQA is required because issuance of the permit may well be categorically exempt. 14 Cal Code Regs §§15301, 15303. Therefore, the six-months deemed approval provision of the Act will apply. (See The Deemed Approval Stage, below.)

Sometimes questions are raised about whether the Act applies to public agencies. There appears to be nothing precluding application when one agency is seeking a permit from another. The definition of "project" under the Act refers to "the issuance to a *person* of a lease, permit, license, certificate, or other entitlement" (emphasis added) and the term "person" often includes public agencies. Govt C §65931; see, *e.g.*, Pub Res C §21066 with respect to CEQA. Consistent with this view, "development" includes "construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, *public*, or *municipal* utility." (Emphasis added.) Govt C §65927. To see how the Act works, it helps to separate the Act into two stages—the "application stage" and the "deemed approval stage." These two stages are explained below and summarized in the chart on p 38.

The Application Stage

The application stage is the starting line for permit applications under the Act. It begins when the applicant files an application for a development project with the lead agency. The "lead agency" is the one having principal responsibility for approving the development project. Govt C §65929. It must be distinguished from "responsible agencies," which have discretionary approval power over a project, but which are not lead agencies. 14 Cal Code Regs §15381.

The application stage also serves an important function under the Subdivision Map Act (Govt C §§66410–66499.37). Completion of the application locks in the ordinances, policies, and standards that apply to the local agency's decision to approve or disapprove the tentative map. Govt C §66474.2. Likewise, in the case of a vesting tentative map, these ordinances, policies, and standards generally establish the nature of the vested right to develop the property. Govt C §66498.1.

To inform the applicant of the agency's application requirements, the Act requires each state and local agency to develop and keep current a list of information required in submitting an application. Govt C §§65940, 65942. The information must include the criteria the agency will apply in determining the completeness of the application. Govt C §65941.

On submission of an application, the lead agency has 30 calendar days to determine if the application is complete. To trigger the 30-day requirement, the applicant must state in the application that it is an application for a development permit. Govt C §65943. In addition, the applicant must submit a signed statement indicating whether the project is located on any listed hazardous waste sites. Lists of these sites are distributed to each city and county by the Secretary of Environmental Affairs. Govt C §65962.5. If the agency fails to make a written determination within 30 days, the application is deemed complete. Agencies are held strictly to the 30-day period. See *Orsi v City Council* (1990) 219 CA3d 1576, 268 CR 912 (court refused to allow a city to reject an application 41 days after filing). A complete application, whether determined by the agency to be complete or deemed complete by passage of time, starts the clock running for action on the application—the deemed approval stage.

If the application is found incomplete, the agency's response to the applicant must include a list and description of the specific information needed to make the application complete. The applicant may then resubmit the application along with the required materials listed by the agency. The resubmittal begins another 30-day period for the agency to determine completeness, and, if the agency does not respond with a written determination, the application will be deemed complete. If the agency again determines that the application is not complete, the applicant must be provided a means to appeal. Local agencies may provide for appeals to the planning commission, the governing body, or both. Agencies having no governing body may designate the director to hear appeals. The appeal must be decided within 60 calendar days after the application is received; if it is not, the application shall be deemed complete. The applicant and the agency can mutually agree to extend any of the time limits under the application submission stage. Govt C §65943.

The resubmittal provision of the Act applies only when the agency rejects the application in a timely manner. In *Orsi v City Council, supra*, after the 30-day period had run and the application had been deemed complete by operation of law, the applicant resubmitted the application at the city's request. The court found that by cooperating with the city in making the resubmittal, the applicant did not waive the benefits already obtained under the Act.

The Deemed Approval Stage

Once the application is complete and assuming the project is not exempt from CEQA, the lead agency must conduct an initial study under CEQA to determine whether an EIR is required or whether a negative declaration will suffice. 14 Cal Code Regs §15063. The lead agency is directed to make this determination within 30 days, although this time can be extended by 15 days with consent of the applicant and the agency. Pub Res C §21080.2. If the lead agency requires preparation of an EIR, then it must approve or disapprove the project within one year from the date the application was complete or deemed complete. Govt C §65950. If the project is exempt from CEQA or the agency determines that a negative declaration can be adopted, the agency's period to act is limited to six months. Govt C §65950. The applicable time can be extended for up to 90 days by agreement of the applicant and the agency. Govt C §65957.

There are some exceptions to these time limits. For instance, when an extension of time is given to complete and certify the EIR, the agency must act within 90 days after certification of the EIR. Govt C §65950.1. If an EIR is combined with an environmental impact statement under the National Environmental Policy Act (42 USC §§4321–4347), the agency can waive the time limits under the Act, but must act within 60 days after the combined statement is adopted. Govt C §65951.

Responsible agencies must act within 180 days after the lead agency approval of the project or 180 days after acceptance of a completed application by the responsible agency, whichever is later. Govt C §65952. If the lead agency disapproves the application, the application before the responsible agency is deemed to be withdrawn. Govt C §65952(b).

The Subdivision Map Act imposes certain time limits on subdivision approvals. Govt C §§66452.1, 66452.2, 66463. Failure of the agency to meet these limits also results in deemed approval. Govt C §66452.4. The Act provides that these time limits shall continue to apply and are not extended by the time limits specified in the Act. Govt C §65952.1. Although this provision may shorten the time for acting on subdivision maps, it has little practical impact because the approval of the maps must still comply with due process and the deemed approval does not avoid the need to make findings as required under the Subdivision Map Act. *Horn v County of Ventura* (1979) 24 C3d 605, 156 CR 718; *Woodland Hills Residents Ass'n v City Council* (1975) 44 CA3d 825, 118 CR 856.

The penalty for the lead or responsible agency's failure to act within the time allowed is "deemed approval" of the project. Govt C §65956(b). This automatic approval lies at the heart of the Act. However, when the law requires public notice and opportunity for a hearing, the process perfecting deemed approval has become quite involved. The process and its deficiencies are discussed in The Third Blow: Denial of Due Process, below.

This simplistic explanation of the Act conceals a tortured past. In the brief 13 years since enactment, numerous appellate court decisions have interpreted the Act. Only two cases (*Palmer v City of Ojai* (1986) 178 CA3d 280, 223 CR 542, and *Orsi v City Council, supra*, discussed below) have upheld automatic approval. For the most part, the judiciary has been hostile to the Act, severely limiting its

application. We turn now to some of these judicial strikes and assess the damage.

THE FIRST BLOW: Legislative Acts Are Not Subject To the Act

No one would have guessed from the publicity attending the Act's passage that it was intended to apply to something less than the entire bundle of entitlements required for a development project. In fact, given the breadth of the definition of "development" and the fact that it includes a "change in the density or intensity of use of land," one would have expected few limitations on the scope of the Act. Nevertheless, the first appellate case to construe the Act held that it did not apply to legislative actions—in this case an application to rezone 18 acres in Monterey County to comply with the general plan. The court held that only adjudicatory actions are "projects" under the Act. *Landi v County of Monterey* (1983) 139 CA3d 934, 189 CR 55.

It is unclear what influenced the court in *Landi*. The court focused on the term "project," stating that zoning and similar legislative acts are not projects under the Act. But that term is not limited to permits—it includes any "other entitlement for use." Govt C §65931. The view that the Act applies only to adjudicatory acts was held by members of the staff within the Office of Planning and Research, who were heavily involved in drafting the legislation creating the Act. An article by one of the staff expressing this interpretation may have had an effect. See Wright, *AB 884: Streamlining the Permit Process*, Office of Planning and Research (circa 1977–78). Probably the court simply could not accept that the Legislature intended major land use planning within a community to occur by default. The legislative-adjudicatory distinction was a convenient line between policy decisions affecting the community at large (such as general plan amendments) and those entitlements that were project oriented (such as subdivision maps). Of course, because most major adjudicatory land use decisions must be consistent with the community's general plan, by excluding legislative changes from the ambit of the Act, the court put the Act on a collision course with the consistency doctrine if the underlying legislative foundation (particularly amendment of the general plan) has not been laid. The collision occurred seven years later in *Land Waste Management v Board of Supervisors* (1990) 222 CA3d 950, 271 CR 909, discussed below. For a discussion of general plan consistency requirements, see Curry, Merritt & Rivera, *General Plans: Coming of Age in California*, 14 CEB Real Prop L Rep 141 (May 1991). In any event, the rule that the Act does not apply to legislative actions is now clearly established. Moreover, the Legislature apparently acquiesced with the decision in *Landi*. The Act was amended in 1987 to provide that the failure of the agency to act resulted in approval of the "permit application," where formerly the statute referred to approval of the "project." Stats 1987, ch 985 §5. This was viewed by a later court as validating the *Landi* decision. See *Land Waste Management v Board of Supervisors* (1990) 222 CA3d 950, 960 n4, 271 CR 909, 915 n4; *Meridian Ocean Sys. v State Lands Comm'n* (1990) 222 CA3d 153, 271 CR 445.

The legislative-adjudicatory distinction is simple in concept. An action is legislative if it prescribes a new policy or plan; it is administrative or adjudicatory if it merely pursues a plan already adopted by the legislative body. *McKevitt v City of Sacramento* (1921) 55 CA 117, 203 P 132; 5 McQuillin on Municipal Corporations §16:55 (3d ed 1989). Adoption of general plan amendments, specific plans, development agreements, and zoning measures are usually legislative. In contrast, approval of tentative subdivision maps, variances, and conditional use permits are seen as adjudicatory. *Arnel Dev. Co. v City of Costa Mesa* (1980) 28 C3d 511, 169 CR 904; *Simpson v Hite* (1950) 36 C2d 125, 222 P2d 225. Sometimes the distinction becomes blurred, however. In *Wheelright v County of Marin* (1970) 2 C3d 448, 85 CR 809, for example, the court held that an ordinance governing construction of an access road according to a previously established planned community was legislative in nature. The court rejected the argument that the purpose of the ordinance was only to give effect to the previously declared legislative intent. More recently, in *Southwest Diversified, Inc. v City of Brisbane* (1991) 229 CA3d 1548, 280 CR 869, the court held as administrative a rezoning that reconfigured the boundaries of open space and planned development districts to conform to revised development plans. The court found that the action was one of a series to implement the development plans and as such was administrative in nature. See also *W.W. Dean & Assoc. v City of S. San Francisco* (1987) 190 CA3d 1368, 236 CR 11 (amendment to legislatively enacted habitat conservation plan was administrative in nature).

Just because something is called a "permit" does not mean it is adjudicatory. In *Meridian Ocean Sys. v State Lands Comm'n, supra*, an application for a permit to conduct geophysical surveys using underwater air guns was held to be legislative rather than adjudicatory. The court found that the "primary thrust" of deliberations by the State Lands Use Commission concerning the permit involved a policy decision about continuing to issue such permits without first requiring an EIR. These cases illustrate that, in the increasingly complex world of land use permitting, some approvals will require close analysis before it can be determined whether the Act applies.

Other examples of close calls between adjudicatory and legislative decisions are not hard to imagine. For example, consider amendment of a development agreement entered into between a developer and a city pursuant to Govt C §65864–65869.5. The statute provides that enactment of an ordinance approving a development agreement is a legislative act, subject to referendum. Govt C §65867.5. Also, the statute provides that amendments must be adopted under the same procedure. Govt C §65868. Yet many thoughtfully drafted development agreements provide that minor amendments that do not alter the required provisions of the agreement can be approved administratively at the city staff level. Assuming the validity of this abbreviated (and as yet untested) amendment procedure, would a minor amendment be viewed as legislative or adjudicatory? If adjudicatory, at what point does the substance of the amendment convert the process from adjudicatory to legislative? Would the result change if the city processed the same minor amendment with the formalities accorded in adoption of the agreement?

THE SECOND BLOW: Approvals Must Await Legislative Action

When an applicant seeks land use approvals that involve a combination of legislative and adjudicatory actions, what happens if the legislative actions have not occurred by the time the deadline for permit approval has arrived? This issue was

confronted in *Land Waste Management v Board of Supervisors, supra,* in which the applicant sought, but had not received, amendment of the general plan, a solid waste management plan, and zoning to permit a sanitary landfill project. Because one member of the Board of Supervisors abstained, the Board was deadlocked on enactment of these measures. The court held that the county was powerless to take accompanying adjudicatory actions—cancellation of a Williamson Act contract and issuance of a land use permit—because they were inconsistent with the existing county general plan and other legislatively enacted measures. Enactment of the pending legislative measures was a prerequisite. This holding is a logical extension of *Landi* and cases holding that issuance of permits inconsistent with the general plan or zoning are ultra vires. See *Lesher Communications, Inc. v City of Walnut Creek* (1990) 52 C3d 531, 277 CR 1; *City & County of San Francisco v Board of Permit Appeals* (1989) 207 CA3d 1099, 255 CR 307.

A similar situation arises if the deadlines under the Act run before CEQA processing for the project is complete. The time limits under the Act are tied to the determination of whether the project requires an EIR or a negative declaration. The lead agency has 30 days to make the determination, although this period can be extended. Pub Res C §21080.2.

The law provides no penalty for failure of the agency to make a determination as to whether to prepare an EIR or negative declaration within the 30-day period (as it may be extended). Likewise, once this determination is made, there is no penalty for the agency failing to adopt a negative declaration within 105 days or certify an EIR within one year. See 14 Cal Code Regs §§15107, 15108. The absence of a penalty has been construed as meaning that the time constraint is directory, rather than mandatory. See *Meridian Ocean Sys. v State Lands Comm'n, supra.* If directory, the applicant must wait for the agency to act or bring a mandamus action under CCP §1085 to force the agency to decide and then prepare the negative declaration or an EIR.

In *Land Waste Management v Board of Supervisors, supra,* the court rejected the idea that the EIR for the project was automatically certified by the expiration of the one-year time period. Implied, but unstated, was rejection of the concept of a deemed approval without compliance with CEQA.

Unfortunately, *Land Waste Management* does not address the question of how the time periods for action on adjudicatory permits are affected when the agency delays adopting necessary legislative enactments or fails to complete the CEQA process. It should have no effect on the application stage. There is nothing in the Act or *Land Waste Management* to suggest that applicants must wait for all legislative approvals before submitting applications for tentative subdivision maps, conditional use permits, or other adjudicatory approvals. In fact, the Act states that an agency must respond to the application within 30 days after it is received. The use of the word "received" rather than "filed" or words of similar import suggests the agency may not be able to refuse a proffered application. Govt C §65943. In many jurisdictions this is not a concern because local agencies allow or even encourage a combined filing of all land use applications to coordinate processing. However, it may be a problem in some jurisdictions where the agency desires to condition submission of an application on completion of necessary legislative acts. One case—not involving the Act but decided after its enactment—held that a city by ordinance could lawfully refuse to accept the filing of any application for subdivision of property until zoning for the property has been completed. *Benny v City of Alameda* (1980) 105 CA3d 1006, 164 CR 776.

"The intricate interplay of adjudicatory and legislative actions in land use entitlements was not envisioned by the Legislature, and [a] tolling approach would breathe some life back into the Act."

The problems arise in the deemed approval stage. A major concern is whether the time for the agency to act begins to run before the legislative enactments have occurred. One view is that the time period does not commence while legislative action is pending, but this seems unduly harsh. There is no reason for the applicant to be penalized by having to wait an additional six months or one year from the time the legislative action occurs. Another view is to treat the permits as being approved, subject to the granting of the necessary legislative enactments. But this approach runs counter to the holding in *Land Waste Management v Board of Supervisors, supra,* that agencies are powerless to issue land use permits that are inconsistent with governing legislation. Also, this solution would deny due process to adjoining landowners—a problem which is discussed later.

A better approach is to toll the time period under the Act until the agency adopts the necessary legislative approvals. In other words, if the required legislative action is not taken by the time the six-month or one-year time period has run on the permit applications, the time is extended until the legislative action occurs. Thus, at the time of the legislative action, the agency will also be required to act on the permits. This approach allows the agency to attach conditions to the permits or even deny them at that time. If it fails to act, the permits are deemed approved, but only to the extent they are consistent with the legislative enactments. While this may be fairest to applicants, by no means does it assure action on the permit. The root of the problem is that the agency is not required to act on legislative matters. Without a mandate requiring the agency to act, the applicant cannot appeal to the courts through mandamus to require the agency to act. Eventually the applicant may be able to perfect an action for inverse condemnation, but this rarely is a practical strategy. It requires the applicant to jump through numerous procedural hoops and even then it may not be possible to show that existing zoning and general plan designations deny the applicant economically viable use of its land. See *Agins v City of Tiburon* (1980) 447 US 255. The sad fact is that if the agency wants to drag its feet, there is little the applicant can do. The problem is most acute at the local agency level when legislative actions are routinely required in conjunction with the permitting process. At the state level, there is frequently no need for legislative action so that the agency can be brought into court if it chooses to ignore the Act.

A related question arises if the deemed approval occurs before CEQA processing is complete. Assume the agency has determined an EIR is required, but the one year for action on the permit application arrives before the EIR is ready for certification. Let's look at the possibilities. Following the logic of *Land Waste Management*, a court might find that the agency is without authority to approve the permit application until the CEQA process is completed. This would give the agency time to build into any approval mitigation measures required by the EIR or negative declaration. Or, the agency could deny the permit if warranted by adverse impacts. As suggested with respect to pending legislative measures, time under the Act could be tolled until the CEQA process was complete. Another possibility would be for the court to find a deemed approval (assuming due process issues were adequately addressed) reasoning that failure of the Legislature to condition approval under the Act on compliance with CEQA evidences an intent to subordinate CEQA to the Act. If this were the outcome, the courts should permit members of the public to challenge the approval for failure to comply with CEQA if an action alleging this deficiency was brought within the 180-day statute of limitations applicable when no EIR or negative declaration has been prepared. Pub Res C §21167(a). Since the approval resulted in the absence of a decision, the statute of limitations would run from the date of commencement of construction, or if not obvious, the date the public knew or should have known of the development project. *Concerned Citizens of Costa Mesa, Inc. v 32nd Dist. Agricultural Ass'n* (1986) 42 C3d 929, 231 CR 748.

The facts presented in our hypothetical arose recently in the context of an application for construction of a minimall in the Venice area of Los Angeles. The city zoning administrator initially took the position that the permit was deemed approved even though there had been no compliance with CEQA, but the Board of Zoning Appeals reversed after the Attorney General interceded and argued that *Land Waste Management* required a denial. The applicant then filed suit, and as part of a settlement the city council agreed to find the permit deemed approved. This incident has prompted introduction of legislation amending the Act (AB 2223), now pending, providing that a permit will only be deemed approved if the agency has complied with CEQA. (An interim hearing on the bill will be held in Sacramento on December 17, 1991. See *Upcoming Events*, p 73.)

Although the Act provides express time periods and a limited 90-day extension for deemed approval, it is unclear whether a court is justified in grafting a tolling concept onto the Act. The intricate interplay of adjudicatory and legislative actions in land use entitlements was not envisioned by the Legislature, and the tolling approach would breathe some life back into the Act. While it would require some judicial engineering, the result would be more consistent with the legislative purposes and less drastic than ruling that the time periods do not begin running on permit approvals until legislative actions are complete.

THE THIRD BLOW: Denial Of Due Process

One of the first questions raised under the Act was the constitutionality of deemed approval in cases where permits would otherwise require public notice and opportunity for a hearing. The basis for concern was *Horn v County of Ventura* (1979) 24 C3d 605, 156 CR 718, which held that public notice and opportunity for a hearing is required by due process when approval of a parcel map substantially affects the property rights of other landowners. See also *Kennedy v City of Hayward* (1980) 105 CA3d 953, 165 CR 132. In *Palmer v City of Ojai* (1986) 178 CA3d 280, 223 CR 542, the Second District Court of Appeal dismissed the constitutional issue with relative ease. This did not go unnoticed (see 9 CEB Real Prop L Rep 112 (July 1986)), and three years later the Fourth District Court of Appeal held the deemed approval section of the Act unconstitutional insofar as it led to approval of applications without provision for notice and opportunity for a hearing to affected landowners. *Selinger v City Council* (1989) 216 CA3d 259, 264 CR 499. However, before the decision in *Selinger* came down, the Legislature, apparently uneasy with the holding in *Palmer*, amended Govt C §65956 to address the due process concern. Stats 1987, ch 985.

As the Act now reads, the applicant is given two alternatives to obtain a deemed approval in cases where the law requires public notice and hearing. The first (added in 1982) requires the filing of an action under CCP §1085 (traditional mandamus) requesting the superior court to order the agency to give notice, to hold the hearing, or both. The action must be filed at least 60 days before expiration of the time limit resulting in deemed approval. The Act gives the court no guidance on how to proceed except to state that the matter shall have preference over other civil actions and proceedings. Govt C §65956(a). The court should be able to consider any issues that may be raised in defense of application of the Act, such as the agency's failure to have enacted necessary legislative approvals that are a prerequisite to issuance of the permits.

The other choice (added by the due process amendment in 1987) is for the applicant to resort to a form of self-help by providing the public notice that the law requires. The applicant must give the agency at least seven days' advance notice of intention to provide the public notice. However, the notice cannot be given earlier than 60 days after expiration of the time at which deemed approval occurred. The reason for this requirement is not clear. Probably it was meant to allow the agency sufficient time to act on its own, even after the deemed approval period had run. The agency must provide the applicant with the requirements for distribution of the public notice. Govt C §65941.5. The contents of the notice shall include a description and the location of the proposed development, the permit application number, the name and address of the permitting agency, and a statement that the project shall be deemed approved if the permitting agency has not acted within 60 days. The 60-day period begins running from the date the notice is given. Govt C §65956.

Even though the Act was amended to meet the due process requirements in *Horn v County of Ventura, supra*, the language does not actually require a public hearing or ensure the opportunity for one. A notice given unilaterally by the applicant without more can hardly be said to provide opportunity for a hearing. The assumption seems to be that, once notice is given, the agency will wake up or be forced by its constituency to hold a hearing. If it is inclined to do so, some additional notice will be required because the applicant's notice will not set a time and place for the hearing (unless this has been worked out with the agency, which is un-

likely because then the agency would have noticed the hearing itself). The statute states that, if the agency fails to respond after the developer initiates the notice, the deemed approval will occur.

The self-help remedy does not remedy the due process dilemma. Under *Horn v County of Ventura, supra,* due process requires opportunity for a hearing as well as notice. Without a hearing being scheduled, there is no opportunity for adjoining landowners to object to a project. Thus, an applicant may be forced to petition the court to order a hearing. Regrettably, the Act falls short in not authorizing such an action after the applicant has provided public notice. Nevertheless, one is inclined to believe that a court would imply authority to order a public hearing at the applicant's request if the giving of notice did not prompt the agency to do so on its own.

The hearing need not occur at any particular time to satisfy due process. A recent case indicates that due process will be satisfied if project opponents are given the opportunity to be heard by a reviewing body conducting a *de novo* hearing on an appeal of the deemed approval. *Ciani v San Diego Trust & Sav. Bank* (Sept. 12, 1991, 4 Civ D015057) 91 Daily Journal DAR 11309, 91 Recorder CDOS 7418. In *Orsi v City Council, supra,* seven public hearings were held on the applicant's planned unit development (PUD) permit without action being taken within the applicable time period. Stating in a footnote that the requirements of notice and hearing were not at issue, the court found that the permit was deemed approved. However, to satisfy due process, the notice and public hearing would have to relate to the issuance of the permit; it would not be sufficient if the hearing was limited to some collateral aspect of the permitting process, such as certification of the EIR.

LINGERING CONCERNS

Absence of Findings

If notice and an opportunity for a hearing are given to adjoining landowners, does due process also require findings based on substantial evidence to support the approval? The answer turns on whether, without findings, a court can adequately review the approval. Nothing in the Act is intended to preclude appeals of deemed approvals and the statutory appeal provided for agency-issued permits has been held to be equally available for permits deemed approved under the Act. *Ciani v San Diego Trust & Sav. Bank, supra.* Moreover, due process in adjudicatory actions requires a right of judicial review at least on questions of law and abuse of discretion. *St. Joseph Stockyards Co. v U.S.* (1936) 298 US 38; *Laisne v State Bd. of Optometry* (1942) 19 C2d 831, 123 P2d 457. Adequate judicial review requires the agency to take evidence and make findings. *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 113 CR 836.

The absence of findings was not an issue in *Orsi,* nor was it raised in *Palmer v City of Ojai, supra,* the only other case upholding automatic approval under the Act. However, it was the basis for denying deemed approval of a tentative subdivision map under a provision in the Subdivision Map Act (Govt C §§66410–66499.37). In *Woodland Hills Residents Ass'n v City Council* (1975) 44 CA3d 825, 118 CR 856, a neighborhood association opposed a tentative subdivision map on the ground that it was inconsistent with a recently enacted amendment to the city's general plan. The map was approved by the advisory agency. On appeal to the planning commission and city council, both bodies were unable to render a decision because of tie votes. Under the Subdivision Map Act and local ordinance the effect of a tie vote is to deny the appeal and affirm the action of the advisory agency. Govt C §66452.5(e). At no point in the approval or appeal process were findings made. The trial court ruled that findings were implied in approval of the map and denial of the appeal. In reversing the trial court, the court of appeal rejected the notion that findings could be implied and held that the absence of findings was fatal to the approval of the map. Quoting at length from the supreme court decision in *Topanga Ass'n for a Scenic Community v County of Los Angeles, supra,* the court held that findings were essential to enable the parties to determine on what basis to seek review and to apprise the reviewing court of the basis for the action.

The issue of findings as it relates to the Act has not gone completely unnoticed. It was briefly discussed in *Selinger,* where the court declined to follow *Woodland Hills,* stating that the insoluble conflict between the findings requirements of various statutes (such as the Subdivision Map Act) and the Act must be resolved in favor of the latter. But *Selinger* can hardly be considered as having disposed of the issue. It did not focus on findings as a due process requirement and did not need to, since it went on to rule that the deemed approval section of the Act was unconstitutional for failure to provide notice and opportunity for a hearing. Moreover, *Selinger* preceded *Land Waste Management* which emphasized the need for consistency in the land use process and held that projects lacking such consistency cannot be deemed approved. Findings are critical to the consistency determination. In *Topanga,* the court based its decision on CCP §1094.5. However, the opinion suggests that the requirement of findings may be constitutionally grounded as well. The supreme court noted that its ruling arises from "judge-made law" and finds support in "persuasive policy consideration." *Topanga Ass'n for a Scenic Community v County of Los Angeles* (1974) 11 C3d 506, 515, 113 CR 836, 841. Faced with the question, it would not be surprising for a court to rule that due process requires findings to support the approval when rights of adjoining landowners are significantly affected. The right of appeal is no less important than notice and the opportunity for a hearing and the reviewing court's ability to fairly rule on any challenge to the approval should not be impaired by the lack of findings.

Deemed Approval of What?

In cases where the rights of adjoining owners are affected, there appears to be little left of deemed approval. The applicant is best advised to go to court and obtain an order requiring the agency to act. But when notice and hearing are not required by due process, deemed approval may still work. In these cases it is interesting to ask the question: Exactly what is approved when the time period has run? Cases holding that permits have been deemed approved are not helpful.

In *Palmer v City of Ojai, supra,* the court reversed a judgment denying a petition for a writ of mandate compelling approval of a subdivision map, conditional use permit, and building permit. The only issue before the court was the constitutionality of the deemed approval provision of the Act. On remand, the trial court ultimately determined based on the facts that the application was not entitled to a

"deemed approval" status under the Act. In *Orsi v City Council, supra*, the court found the PUD permit that petitioners had applied for was approved under the Act. Nothing was stated about the details of the approval.

Deemed approval has many ramifications. Take the case of a subdivision map. Is the map approved without conditions or are conditions implied so that it meets requirements of the agency's subdivision ordinance? If the ordinance requires streets to be improved to a certain standard, can the agency still require the subdivider to enter into a subdivision agreement and post bonds or other forms of security as provided in the Map Act? See Govt C §§66499–66499.10. Some commentators have suggested that agencies would do well to draft standard conditions applicable to deemed approvals. Wright, *AB 884: Streamlining the Permit Process*, Office of Planning and Research (circa 1977–78); Wilson, *Down Stream from Streamlining*, 7 Cal Law 67 (Aug. 1987). And what about the need to address specific conditions that may relate only to the particular development project, such as mitigation measures recommended in an EIR or mitigated negative declaration? Do they automatically become conditions? Can an ordinance require that deemed approvals incorporate recommendations of staff for dedications, exactions, and other conditions that are made in reviewing the application? Could a city even enact a "poison pill" ordinance that would impose conditions on deemed approvals far more onerous than would normally apply? We can only speculate on answers to these questions because neither the courts nor the Legislature has seen fit to grapple with the question of what "deemed approval" really means.

WHAT ARE THE ANSWERS?

The Act may be dying, but it is not dead. Changes can be made legislatively to restore its vitality. Some suggestions follow.

- Provide for the Act to apply to legislative decisions that are site specific, *i.e.* those that affect only the property for which an accompanying adjudicatory permit is sought (*e.g.*, zoning). Require agencies to concurrently process both legislative and adjudicatory entitlements that are site specific unless infeasible. General plan amendments would be excepted from these provisions.
- Build in a tolling concept so that when delays occur in CEQA processing or enactment of necessary legislative prerequisites, the agency must act on the permit soon (within 30 days) after such actions occur.
- Scuttle the idea of deemed approval when notice and opportunity for hearing are required by law. Provide for a summary court procedure allowing the applicant to quickly obtain an order requiring the agency to give notice and hold such a hearing (or be held in contempt). In large counties, such matters could be referred to referees. Limit the defenses that can be raised to whether the applicable time period has run for the agency to act. Make the order nonappealable, so that it can only be reviewed by extraordinary writ. Allow the prevailing party to recover reasonable attorney fees. A less desirable alternative would be to provide for *de novo* hearings by reviewing courts on appeal of deemed approvals when no hearings were conducted by the permitting agency.
- In cases not requiring notice and opportunity for a hearing, define what "deemed approval" means. Provide for each agency to adopt standard conditions that shall apply in the case of deemed approvals, provided those conditions can be justified on the basis of health and safety.

CONCLUSION

The Act was born out of frustration. It was a protest against bureaucracy and for that reason alone was warmly embraced. But in attempting to force a solution simple in concept to remedy a problem, complex in scope, it was doomed to fail. Lacking was a thoughtful integration of the permitting process into long-standing constitutional principles inherent in administrative law. Nor was its interaction with the overall land use process any better thought out. As a result the judiciary has hamstrung the "deemed approval" concept to the point where it is virtually meaningless.

But all has not been lost. The mechanism for bringing closure to the application process through the concept of "deemed completeness" appears to be intact. And even though judicial involvement may be required to gain a permit approval, if this remedy can be expedited, then the goals of the Act are still partly attainable. The reality is that the problems of governmental delay and inaction, which the Act set out to cure, still remain. The task ahead, which must be undertaken by the Legislature, is to revitalize the Act to meet this challenge. The reasons to do so today are more pressing than in 1978. The political question is not one of growth versus no growth because the Act in no way limits an agency's ability to say no. Rather the question is one of fairness. ✓

RESOURCES

General Reading

Wilson, *Down Stream From Streamlining*, 7 Cal Law 66 (Aug. 1987)

Sahm, *Project Approval Under the California Environmental Quality Act: It Always Takes Longer Than You Think*, 19 Santa Clara L Rev 579 (1979)

Industry/Government Publications; Studies; Reports; Position Papers

Curtin & Byrd, *Development Moratorium Does Not Toll The Permit Streamlining Acts' Time Limitations*, Public Law News (Winter 1990).

Wright, *AB 884: Streamlining The Permit Process*, Office of Planning and Research (Circa 1977–78).

Other

Curtin & Wood, "Ambit of Permit Streamlining Act Is Shrinking," *Los Angeles Daily Journal* (Oct. 5, 1990).

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THE PERMIT STREAMLINING ACT

(Govt C §§65920-65963.1)

ALL CITATIONS ARE TO THE GOVERNMENT CODE UNLESS OTHERWISE NOTED.

The Application Stage

APPLICATION IS FILED

Lead agency must determine if application is complete within 30 days or notify applicant that application is incomplete. §65943(a).

- If agency finds application incomplete, it must notify applicant of deficiencies within 30-day period. Applicant may resubmit the application which again triggers the 30-day period. §65943(a), (b).
  - If agency again deems application incomplete, applicant may appeal to governing body, planning commission, or agency director (as specified). Appeal must be decided within 60 days or application will be deemed complete. §65943(c).
- If agency determines the application is complete, deemed approval period begins to run.
- If agency fails to act within 30 days, application is deemed complete and deemed approval period begins to run. §65943(a).

The Deemed Approval Stage

APPLICATION IS DETERMINED TO BE COMPLETE OR DEEMED COMPLETE

Lead agency has 30 days to determine whether (1) EIR must be prepared, (2) negative declaration may be issued or (3) project is exempt from CEQA. Pub Res C §21080.2.[1]

- If agency determines negative declaration may be issued or project is exempt, agency has 6 months to approve or disapprove permit. §65950. Period can be extended up to 90 days if mutually agreed. §65957.[2,3,6]
  - If agency fails to act, and permit is *not* one that requires notice and hearing, permit is deemed approved. §65956(b).
  - If agency fails to act, and permit *is* one that requires notice and hearing, permit may *not* be deemed approved without further action by applicant. §65956(b).
    - Applicant may bring traditional mandamus action to compel agency to give notice and/or hold hearing. Action must be filed at least 60 days before approval period expires. §65956(a).[4,5]
    - Applicant may itself provide notice. This notice may not be given until 60 days after approval period expires. §65956(b).[5,7]
- If EIR is required, agency has 1 year to approve or disapprove permit. §65950. Period can be extended up to 90 days if mutually agreed. §65957.[2,3,6]

NOTES:

1 If the agency fails to make the CEQA decision within 30 days (plus any extension), no express remedy is provided under the Act. See p 34.

2 If legislative acts (*e.g.*, rezoning) are necessary prerequisites to approval, the permit may not be deemed approved until they have occurred. Whether such delays would toll or otherwise affect the deemed approval period is unknown. See p 34.

3 The rule stated in Note 2 would probably also apply if the CEQA process had not been completed before the approval period expired. Again, whether such delays would toll or otherwise affect the approval period is unknown. See p 35.

4 If the agency still fails to act within the 60-day period, the applicant's only resort appears to be (1) request court to hold agency in contempt, or (2) the "self-help" process described in §65956(b).

5 The fact that the Act provides only a mechanism for notice and not for a hearing raises several problems with respect to due process. See p 35.

6 Subdivision Map Act time limits to approve a tentative map or parcel map for which a tentative map is not required continue to apply. §65952.1.

7 If approval by a responsible agency is required, the responsible agency must approve or disapprove the project by whichever is later: (1) 180 days from lead agency approval, or (2) 180 days from when application was determined to be complete or deemed complete by responsible agency. §65952.

Policy

SACRAMENTO / BRADLEY INMAN

Effort to Ease Doing Business in California Tries to Avoid Old Pitfalls

Next year, Gov. Pete Wilson is expected to announce a legislative plan for streamlining the government permit process so that state and local bureaucrats don't needlessly get in the way of job-producing enterprises wanting to build new plants and facilities.

More than 14 years ago, another California governor, Edmund G. Brown Jr., made the same promise and successfully pushed through a bill (AB 884) that vowed to make government permits easier to obtain and mollify California's anti-business reputation.

Wilson could learn a lesson from the earlier streamlining initiative, which most experts agree hasn't worked. The experience has proven that it's much easier to build a body of law that makes the government permit process onerous than it is to reform it.

With overwhelming bipartisan support and a lot of hoopla, the 1977 streamlining bill, which was crafted by former Assembly Speaker Leo McCarthy and was supported by both business organizations and environmental groups, was easily passed by the Legislature and signed by Brown.

KEVIN FINNEY / For The Times

Just like the mood today, "the act was born out of frustration," wrote attorney Robert E. Merritt in a report on AB 884 that was recently published by the American Bar Assn.'s Land Use Forum. "It was a protest against bureaucracy, but in attempting to force a simple solution to remedy a complex problem, it was doomed to fail."

For example, the 14-year-old statute created a new government department--the Office of Permit Assistance--that was supposed to be an advocate for businesses that were frustrated with the permit approval process.

One problem with the 1977 act is that businesses "do not seek assistance from OPA because they do not realize assistance is available," Merritt said.

A more fundamental problem with AB 884 has been the court's interpretations of its limitations. "No one would have guessed from the publicity attending to the act's passage that it was intended to apply to something less than the entire bundle [of approvals] required for a development project," Merritt wrote. "The judiciary hamstrung the concept to the point where it is virtually meaningless."

For example, the courts decided that the act only applied to administrative acts and did not affect legislative decisions, such as changes in local zoning, where many large development projects are often stalled.

The 1977 streamlining bill relied on timetables to force public agencies to act with more dispatch. For example, agencies have 30 days to notify a business firm that its application for a new project is complete. If the business doesn't hear from the government agency, the application is presumed to be adequate to proceed through the approval process.

"Developers dreamed of projects being automatically approved if a government agency was slow in making a decision," said attorney James Moose who specializes in environmental law. "But the courts have never seen [the law] that way."

Plus, the approval process is muddled by other conflicting laws and agency actions and there is no penalty when the bureaucracy fails to meet its own deadlines. For example, on most development projects, the government agency must decide whether an environmental impact report (EIR) is necessary. This analysis catalogues what damage the proposed project might do to the surrounding environment. The 1977 act puts no limitation on how long an agency can take to decide whether an EIR is necessary.

The time limits also conflict with other state laws that require public hearings and notification of surrounding property owners who might be effected by the project. Often these hearings cannot take place within the time periods prescribed in the 1977 bill.

"You must give people next door an opportunity to voice their opinions," Moose said.

Merritt offers some ideas for Wilson when he attempts to streamline government approvals. He recommends that streamlining apply to legislative actions such as zoning and that local governments be required to make decisions on EIRs within the 30-day limit. Also, there should be alternatives to the public hearing requirement so it doesn't become another way to delay a project.

Last week, the Senate Local Government Committee held a hearing on streamlining where there was general agreement that the 1977 act doesn't provide the certainty for business that the legislature originally intended. Without changes, Merritt concluded, the reforms do nothing to obviate the problems of governmental delay and inaction that it set out to cure.

BRADLEY INMAN *is an Oakland writer specializing in California business issues.*

Holiday Card Features Politics and Dr. Seuss

If acrimony is troubling to Gov. Wilson and state legislative leaders working for solutions to the many problems that plague the state, they are off to a bad start.

The California Democratic Party's annual holiday greeting card took a cynical swipe at Wilson's controversial welfare reform proposal with a depiction of the Republican governor as the Grinch who stole Christmas.

Inside, the card reads, "Unlike Governor Wilson, the California Democratic Party Bids You Good Tidings."

Democratic party officials defend their holiday message as necessary because, "Wilson is trying to solve our economic ills by bashing immigrants, renters and poor, single mothers," said Bob Mulholland, political director for the California Democratic Party.

STATEMENT TO SENATE COMMITTEE ON LOCAL GOVERNMENT
CONCERNING AB 2223
Robert E. Merritt
December 17, 1991

Madam Chairman and Committee Members:

My name is Robert Merritt. I am a partner in the San Francisco office of the law firm of McCutchen, Doyle, Brown & Enersen. I practice in the area of real estate and land use and have authored books and articles on various land use topics. I am also an editor of the Land Use Forum, a publication of the California Continuing Education of the Bar which is a non-profit organization sponsored jointly by the State Bar and the University of California. I appreciate the opportunity to appear before you today on the subject of the Permit Streamlining Act.

My presentation consists of two parts. First, I will spend a few minutes briefing you on the Permit Streamlining Act as a way of setting the stage for the testimony on AB 2223. Toward the end of the hearing I will reappear to make some concrete suggestions as to how the Permit Streamlining Act could be improved.

My remarks to you today are intended to be neutral rather than advocate a particular view other than finding ways to improve the Act. I want to assist in your understanding of the Permit Streamlining Act and suggest measures that might be taken to restore its vitality.

As you are probably aware, the purpose of the Act when enacted in 1977 was to create a more favorable business climate in the State by setting a finite time frame within which permits for development must be acted on. The legislation was not intended to shortcut environmental review or limit the power of government--either state or local. It was simply designed to "streamline" the process. While frustration with bureaucracy is nothing new--a number of newsworthy incidents gave rise to a surge of interest for reform in this area. The most notable was the effort of Dow Chemical to locate a petrochemical plant at Collinsville, a small town east of San Francisco. Dow spent two and one-half years and over $4.5 million attempting unsuccessfully to obtain 65 required permits. It finally gave up. Although the main stumbling block for Dow was federal--not state--permits, the blame for Dow's decision to abandon the project was placed on the state. The result was enactment of the Permit Streamlining Act which sailed through the legislature virtually unopposed and was supported by development and environmental interests alike.

HOW THE ACT IS SUPPOSE TO WORK!

I think of the Act as having two stages--the application stage and the deemed approval stage. The application stage requires the agency to inform the applicant for a development permit within 30 days whether or not the application is complete. In order to know what to submit, the agency is required to keep current a list of information required for submittals. If the application is found not to be complete, the agency must notify the applicant in writing as to deficiencies. If the agency fails to give notice of deficiencies within the 30 day period then the application is deemed complete.

Once the application is complete, either because the agency notifies the applicant of that fact or the agency fails to give notice, the second stage begins. This one is more complicated. In its simplest terms, the agency must determine what kind of environmental review is required under CEQA. If the project is exempt or can be processed under a negative declaration, the agency is allowed a period of 180 days to approve or deny the application. If an EIR will be required, the applicable time is one year. These periods begin running from the end of stage one--that is, the date that the application is found to be complete or is deemed complete. It is possible to extend these time periods for up to 90 days with the agreement of both the applicant and the agency.

If the agency fails to act within the 180 day or one year period, the project is deemed approved. In theory this should allow the applicant to walk in, pick up the permit and start construction. However, things rarely work out that way. Due process requires notice and opportunity for hearing for many development permits before the permit application can be approved. In these cases the Act gives the applicant two choices--go to court to order the agency to give notice and hold a hearing or resort to self-help by giving public notice. Among other things, the public notice must state that unless acted upon in 60 days the application will be deemed approved.

We have not had much experience with applicants obtaining deemed approval using either approach. Going to court can take a long time and is expensive. Therefore, there is considerable incentive to using the self-help approach. But it has problems as well. In a recent appellate decision, the court rejected an applicant's effort to obtain a deemed approval using this self-help approach because the applicant failed to give adequate notice. Ciani v San Diego Trust & Sav. Bank (1991) 233 CA 3d 1604. And, whether self-help can overcome constitutional due process objections is yet to be determined.

WHAT HAS GONE WRONG?

There are four major problems which prevent the Permit Streamlining Act from accomplishing the objective of speedy processing of land use entitlements. Most of these problems have arisen out of litigation involving the Act.

1. The Act does not apply to legislative actions such as general plan amendments and zoning actions. It applies only to adjudicatory decisions such as issuance of use permits and tentative subdivision map approvals. This distinction was drawn by the Court in Landi v County of Monterey (1983) 139 CA3d 934, which refused to apply the Act to the rezoning of 18 acres. Since many projects require legislative action (e.g. general plan amendments), these projects cannot move ahead until the agency decides to act. The Act provides no help in expediting these legislative actions.

2. There can be no deemed approval under the Act unless permit applications are consistent with the general plan and other underlying legislative actions as required by state law. Various state laws require adjudicatory actions, such as approval of tentative subdivision maps, to be consistent with the local agency's general plan. In Land Waste Management v Board of Supervisors, (1990) 222 CA3d 950, the Court ruled that adjudicatory permits (those subject to the Act) will not be

deemed approved unless these consistency requirements are met. This means if an application for a tentative map requires amendment of the general plan in order for consistency to exist, there can be no deemed approval until that amendment has occurred. And we know from Landi that the local agency is under no compunction to amend their general plan. Thus the whole mechanism for approval can get stalled indefinitely.

3. The Act may fail to meet constitutional due process requirements by not providing an opportunity for a hearing. In Horn v County of Ventura (1979) 24 C3d 605, the California Supreme Court held that a local agency must provide notice and opportunity for hearing when land use decisions substantially affect property rights of other landowners. Two cases have addressed this issue as it affects deemed approval under the Act. Palmer v City of Ojai (1986) 178 CA3d 280, found that the rule set forth in Horn did not apply to the Act. But in the later case of Selinger v City Council (1989) 216 CA3d 259, the Court disagreed and found the deemed approval provisions of the Act unconstitutional. In 1987, the legislature amended the Act to provide a means for the applicant to give notice in order to obtain deemed approval. But this amendment of the Act may not have gone far enough. The notice does not guarantee an opportunity for a hearing and without such an opportunity the deemed approval mechanism may still be constitutionally flawed.

The recent case of Ciani v San Diego Trust & Savings Bank (1991) 233 CA3d 1604 involved an attempt to achieve a deemed approval of a Coastal Act permit by utilizing these notice procedures. The Court found that no deemed approval had occurred because the applicant failed to give notice to the Coastal Commission. Thus, the issue of whether deemed approval could occur without an opportunity for a hearing did not confront the court. Nevertheless, in an interesting footnote the Court observes that even had the notice been proper there are still legitimate issues over rights of the public to object to the approval and the lack of any findings upon which to base an appeal of the approval. (See 233 CA3d at 1615, f. 4).

4. If deemed approval does work, it is not clear exactly what has been approved. In the case of most permits, conditions will be attached by the agency which provide standards of performance and mitigate environmental impacts. Does a deemed approval simply allow the project to proceed without any of the usual conditions designed to protect public health and safety? Are conditions to be implied? If so, what are they? When improvement are to be constructed, do customary design standards apply? Can the agency require security for performance? Can the agency enact a standard set of conditions that apply to all deemed approvals? Could these standards be more onerous than would otherwise apply to discourage deemed approvals (a "poison pill")? The Act fails to address any of

these questions and the few cases that have found deemed approvals have never probed these questions. Nevertheless, if the Act is to be made to work, these questions must be answered.

RELATIONSHIP OF THE ACT TO CEQA

The Permit Streamlining Act followed enactment of CEQA by eight years. Although the Act's time limitations turn on the kind of environmental analysis required under CEQA, the Act does not specifically address the possibility that a deemed approval could occur before the CEQA process is complete. CEQA provides for a decision to be made on whether a negative declaration or EIR will be required within 30 days after an application is complete. This time can be extended 15 days if both the applicant and agency agree. (Resources Code § 21080.2). State CEQA Guidelines require that if a negative declaration is required, it be completed within 105 days and if an EIR is required it shall be certified within one year from the time the application is complete. (14 Cal Adm Code § 15107, 15108). This time can be extended for an EIR if both the applicant and the agency agree. Also, if the applicant delays the preparation of necessary environmental documents these time limits do not apply. If an extension of time is given to complete the EIR, the Permit Streamlining Act deemed approval date of one year no longer applies and the deadline becomes 90 days after certification of the EIR. Although CEQA time lines are generally consistent with the Act, they are not

binding on the Agency. CEQA does not provide any penalty for missing deadlines, and for that reason the courts treat the timelines as merely directory rather than mandatory. (Meridian Ocean Systems v State Lands Comm'n (1990) 222 CA3d 153). Therefore it is quite easy to have the situation arise that resulted in AB 2223--a deemed approval deadline, but no completed EIR. Under existing law it's not clear what happens next.

In the Land Waste Management case, the Court rejects the idea that the EIR can be deemed certified by expiration of the time limits under the Act. What the Court does not say, but one can imply, is that without the EIR being certified the project cannot be deemed approved. AB 2223 says this in no uncertain terms.

Two other alternatives to denying deemed approval for lack of a certified EIR are mentioned in your briefing paper. One is to impose a real one year deadline on preparation of an EIR (and presumably a 180 day deadline on preparation of a negative declaration) which would overrule the court's holding on this issue in Land Waste Management. The effect would be to allow the project to go ahead without an EIR if it were not completed. A second approach is to toll or suspend the deemed approval until a fixed time elapses (e.g. 45 days) after the CEQA process is complete. I have suggested this tolling in a

similar situation--the failure of the agency to take legislative actions that are prerequisites to permit issuance. I anticipate you will hear the pros and cons of these approaches in the testimony that follows. This concludes my briefing and I am happy to answer any questions you may have.

PART 2

In my opening remarks I pointed to many of the problems with the current Permit Streamlining Act--that it does not operate as to legislative actions, the conflict with state law consistency requirements, due process concerns, not knowing what deemed approval means and, of course, the CEQA concern that is the focus of AB 2223. I would like to leave you with some suggestions.

Thought should be given to whether the concept of "deemed approval" is really the best enforcement mechanism. I am sure it was initially favored because it seemed quick and efficient, but to the contrary it has become complicated and proved unworkable. I suggest eliminating "deemed approval" and replacing it with a summary judicial proceeding. In other words, if the agency fails to meet its deadline for taking action under the Act, following reasonable notice to the agency, the applicant could petition the court to issue a premptory writ of mandate directing the agency to act on the application. The Act should provide for a simple form of

petition and response, limit the issues to whether the time limits under the Act had been exceeded, and allow the court to summarily issue the writ directing the agency to act after affording the agency the opportunity to respond. The court could issue the writ based on pleadings and affidavits without oral argument. The order could be made non-appealable. If successful, the applicant should be awarded attorney's fees and the court could be authorized to award a multiple of these fees in cases where the agency acted capriciously in disregarding the time lines under the Act.

Compelling the agency pursuant to court order to take action puts teeth into the Act and eliminates the concerns that have plagued deemed approvals. To insure CEQA compliance, the court's order would require the agency to complete and certify the EIR or adopt the negative declaration, as appropriate, within the time set for acting on the permit. In setting a time within which the agency must act, the court can consider reasonable requests for extensions to comply with CEQA. The action taken by the agency could then be reviewed on appeal as with any administrative decision and permit approvals would be conditioned to require adherence to standard requirements of the agency. The key to this approach is to fashion the judicial remedy so that it is limited to a single issue (i.e. compliance with time limits), readily available and results in cost to the agency for dragging its feet.

A more moderate proposal would be to keep deemed approval, but allow it to be invoked only after a hearing has been held. The Act now provides for this alternative, but pursuing the action under standard mandate procedures is expensive and time consuming. Providing a summary form of judicial mandate action and taxing the cost to the agency as I have described would encourage its use. The problem is that if, after holding a hearing, the agency still does not take action the difficulties with deemed approval still remain.

Another way the Act can be strengthened is by eliminating the legislative versus adjudicatory distinction created by Landi. While the Act should probably not compel action on general plan amendments because they frequently raise broad policy issues of consequence to an entire community, it should be made to apply to applications for legislative actions that are site specific, such as a rezoning requests relating to a particular parcel for which development permits are requested.

Finally, I think there are some other ways in which the Act can be improved--if you will, "streamlined." It would help to prescribe a standard cover page applicable to applications under the Act, to eliminate as a prerequisite for the Act to apply that the applicant submit a signed statement indicating whether the project is located on any listed hazardous waste site, and to provide for a standard submittal

package when the agency has failed to develop the required list of information for applications. If deemed approval remains in the Act, then agencies should be required to adopt measures defining what it means. Most significantly, the whole entitlement process can be streamlined if efforts are made to simplify the CEQA process. I believe this can be done without sacrificing protection of the environment, but that is the subject for a different day.

Department of City Planning
City of Los Angeles

December 17, 1991

Presentation to Senate Committee on
Local Government
by
Franklin P. Eberhard
Chief Deputy Director of Planning
on
Permit Streamlining Act Issues
AB 2223 (Moore)

Honorable Committee Members - Good afternoon.

I am Franklin Eberhard, Chief Deputy Director of Planning For the City of Los Angeles.

Thank you very much for asking me to speak to you on this matter. I am aware that time is limited so I will make my comments short.

Briefly, the City of Los Angeles believes there is a strong need to amend the Permit Streamlining Act in order to carry out spirit and intent of the California Environmental Quality Act (CEQA). The current act requires approval or disapproval of a project within one year if an EIR is required or within 6 months if a negative declaration is issued. If an action is not taken with in these time limits and the applicant chooses to avail himself of the provisions of the current permit streamlining act, the project is "deemed approved by operation of law". For a jurisdiction of our size and complexity these time limits are too stringent when projects which are environmentally controversial or complex are being considered. Our reasons for concern are outlined as follows:

1. Issues which are extremely complex or controversial are often not quickly resolved. The six month time limit on negative declarations

does not adequately allow for preparation of a full initial study, publishing the results, receiving comment, responding to public comment and or redoing and publishing of a new initial study and negative declaration. This process can take up to 6 months or more to accomplish if the issues are sufficiently complex and full review by applicant, public agencies and the public as intended by CEQA is accomplished. If not appropriately settled pursuant to CEQA rules, then appeals and litigation relating to CEQA compliance can delay a project for lengthy periods of time defeating the purpose of the Permit Streamlining Act.

2. A project which is "deemed approved by operation of law" before public input and hearings on the entitlement process occur effectively denies neighbors and an impacted public effective input into the decision making process.

3. A project which is "deemed approved by operation of law" may not be thoroughly reviewed an exactions imposed on it which would normally be required of it by the local government. By this I mean adequate traffic control measures, street lights, street trees, fire hydrants and the like all necessitated by the project might not be required except those which would normally be required by the building permit process. This is particularly important where significantly adverse environmental impacts might result unless adequate mitigations are required of the project during the entitlement process.

Amending the Permit Streamlining Act to provide that a project be deemed to be approved by operation of law if the local jurisdiction does not act on the matter within the times now specified by the law or within 60 days of completion of the final environmental clearance which ever comes last would solve this problem.

Department of City Planning
City of Los Angeles

December 17, 1991

I would like briefly to describe to you the background from which I am addressing you. The City of Los Angeles Planning Department processes approximately 14,000 discretionary actions in a busy year ranging from simple plan or site plan approvals to extremely complex projects involving many complex entitlements. All involve some form of environmental clearance. Of those 14,000 actions about 25 require EIRs and another 1200 acquire either a negative declaration or mitigated negative declaration. While seeking to comply with CEQA, both as to the letter of the law and to its spirit and intent, the City struggles to produce environmental actions suitable to each project in an expeditious and efficient manner. We have been quite successful in this endeavor as to the processing of negative declarations and are still struggling with the production of EIRs in a more timely manner.

We have, however, been impacted by the Permit Streamlining Act. The provisions of the act were invoked on a property located in the Venice Community of Los Angeles at 601 Ocean Front Walk. The project is described as a 3 story 18,925 square foot shopping center with 152 on-site parking spaces. The applicant requested a project permit under a current interim control ordinance, a yard variance requesting a zero foot setback on a side yard, a zone variance to permit compact parking spaces in excess of the maximum number established by the Municipal Code, a conditional use for a mini-mall and a conditional use to sell alcoholic beverages for on-site consumption. All were combined into one proceeding and environmental clearance. The project is located in an extremely congested area which also experiences severe off-street parking problems.

A number of valid issues were raised by opponents of the project challenging the mitigated negative declaration issued by the Planning Department. They included the following:

Department of City Planning
City of Los Angeles

December 17, 1991

1. Analysis of the impacts caused by traffic generated by the project.

2. Adequacy of analysis of cumulative impacts in the traffic study of this and neighboring projects in the traffic study which is a part of the initial study leading to a mitigated negative declaration for the project.

3. Adequacy of off-street parking provided by the applicant.

4. Noise created by the project and its impact on surrounding residents.

Resolution of these issues caused the retrieval of the original mitigated negative declaration and the issuance of a second negative declaration. The time taken to resolve these issues exceeded the six months allocated to do so by the permit streamlining act for such processes. While clearly the City's handling of the matter is also at issue in this matter, the legitimate environmental controversy engendered by this case caused delays which exceeded those allowed.

After after 17 months of the application having been deemed complete by the City, the applicant exercised his right to have the project "deemed approved by operation of law" and the Zoning Administrator adhered to his request on advice of the City Attorney. The matter was then appealed to the City's Board of Zoning Appeals who granted the appeal and reversed the Zoning Administrator's action. The applicant filed suit against the City which was subsequently settled by the City and applicant granting the requested project entitlements. The project being located in the California Coastal Zone was then required to acquire a coastal development permit from the Coastal Commission which was granted with conditions by that Commission. The matter, however, is not over

because local residents have challenged the City's settlement of the law suit in court. The matter is still being litigated.

Again I would like to impress on you the City's and my belief that the Permit Streamlining Act needs be amended so as to permit full examination and review of project in accordance with CEQA. To fail to do so would defeat both the aims of CEQA and permit streamlining act due to there inherent conflicts with each other. Amending the Permit Streamlining Act to provide that a project be deemed to be approved by operation of law if the local jurisdiction does not act on the matter within the times now specified by the law or within 60 days of completion of the final environmental clearance which ever comes last would solve this problem.

Thank you very much for your attention. I would be pleased to answer any questions which you might have on this matter.

PEOPLE FOR
LIVABLE AND
ACTIVE
NEIGHBORHOODS IN
Los Angeles

732 N. Gardner Street
Los Angeles, CA 90046

December 17, 1991

Honorable Marian Bergerson
Chair
Senate Committee on Local Government
Room 2085, State Capitol
Sacramento, CA 94248-0001

Re: Assembly Bill 2223 (Moore)
Permit Streamlining Issues

Members of the Committee:

People for Livable and Active Neighborhoods in Los Angeles, **PLAN/LA**, is a coalition of over 150 neighborhood groups stretching across Los Angeles from Sun Valley to San Pedro. In the matter before you, we are specifically representing the Federation of Hillside and Canyon Associations, approximately 50 homeowner associations located in the Hollywood Hills and the Santa Monica Mountains. We are here in support of the proposed amendment (AB2223) to the law known as the "Permit Streamlining Act".

* ***CEQA must come first***

* ***Community groups cannot rely on the courts to resolve every issue***

* ***Due Process for adjoining property owners must be protected, including appeal options***

We firmly believe that no permit application should be "deemed approved" prior to the completion of the CEQA process and notice of such completion has been lawfully filed. Community groups must rely heavily on the provisions of the California Environmental Quality Act (CEQA) for protection from significant impacts emanating from development projects. We are not in a position, as

volunteer organizations, to carefully scrutinize each and every application before a local jurisdiction, and then, if an issue arises, to be forced to seek relief from the court in cases where the local agency fails to act in a timely manner.

It is essential, as underscored by the Oceanfront Walk case, that act be clarified to provide for full CEQA compliance prior to any such "deemed approval". In the staff discussion of three alternative approaches, we come down on the side of the "CEQA First" option. It is our opinion that CEQA requires compliance prior to any discretionary action on the part of a local agency as was implied in the *Land Waste Management* case.

We do not believe that the same deadlines can be used in both CEQA and the Streamlining Act. No penalties are provided for failure to comply with the deadlines indicated in CEQA. In practice, most complicated EIR's require a minimum of 12 months to prepare and many extend well beyond that time frame. Allowing the one year limit contained in the Streamlining Act to stand would result in numerous major projects being deemed approved without mitigation, forcing the courts to step in and attempt to determine mitigation after the fact. Community groups must not be placed in the position of relying on the courts to deal with individual cases. In response to this very issue, **the City of Los Angeles will not deem an application complete until the CEQA process has been completed.**

Tolling is a possible solution to this dilemma. We would advocate that the one year clock be suspended at such time as the local agency finds that an EIR is necessary. The clock could be restarted once the draft EIR is released for public comment, or after the final EIR is relaeased, which would allow sufficient time for the agencies to deal with the application.

While we support AB2223 in its attempts deal with this narrow issue, it does not address the many other problems with the Act.

Due Process

It appears that in cases involving the due process rights of other parties in interest, the applicant cannot rely on the Streamlining Act in seeking an approval, without notice and a hearing. However, the Act (or this proposed amendment) does not clarify what happens if notice is given and a hearing is held, yet the agency still fails to act. The absence of findings and conditions in such a "deemed approval" do not appear to be worth much, which is as it should be. We feel that the Act should be clarified to remove such cases from the purview of the legislation entirely.

Hence we are left with "ministerial" reviews, which in the City of Los Angeles, now revolves around a process called Site Plan Review. The language of the Act as written still does not deal with the question of findings or conditions that might apply to projects "deemed approved". Hence appeals rights that accrue to the neighbors in any subsequent dispute may be compromised.

It is obvious that the Streamlining Act must be compatible with CEQA, or our environmental protection laws will be severely compromised. It is also fair to say that some degree of certainty must be imposed on the permitting system. Ideally the law should mandate notice, a hearing and a decision on any development application within one year.

Two alternatives are available to achieve this. The first option would allow this time frame to be tolled at the point of determination of the need for a mitigated negative declaration or an EIR. The clock would restart upon publication of the mitigated negative declaration or the release of the Final EIR. The second option would follow the LA City Planning model which presently *requires CEQA to be complete before an application is deemed complete*. Both could apply to projects involving due process, as well as "ministerial" applications.

The issues of mandating a hearing, findings and conditions then become more acute. Mitigations contained in the CEQA clearance should automatically become conditions. Standard findings and conditions should also prevail in any "deemed approval".

We hope that these issues can also be resolved in the near future. In the interim, we remain in support of the proposed amendment AB2223 (Moore).

Sincerely,

PEOPLE FOR
LIVABLE AND
ACTIVE
NEIGHBORHOODS IN
Los Angeles

Bill

Bill Christopher
Coordinator

cc: Assemblywoman Moore
Councilwoman Galanter
G. Murley
A. Kishbaugh
B. Fine
S. Brown
D. Bowen
File

PEOPLE FOR LIVABLE AND ACTIVE NEIGHBORHOODS IN Los Angeles

Member Organizations
Updated October 19, 1991

Brentwood Community Federation

Mandeville Canyon Association
Lower Mandeville Canyon Association
Brentwood Hills Association
Brentwood Homeowners Association
Brentwood Terrace Homeowners Association
Crestwood Hills Association
South Brentwood Homeowners Association
Sullivan Canyon Property Owners Association

Coastal Area Support Team (COAST)

Villa Marina Council
Villa Marina East
Presidents Row Neighborhood
Venice Town Council
Zanja Neighborhood Residents Association
Vista Del Mar Neighborhood Association
Friends of Ballona Wetlands
Homeowners Organized to Monitor the Enviroment (HOME)
Del Rey Homeowners Association

East Los Angeles

Neighborhood Action Committee

Federation of Hillside and Canyon Associations

Bel Air Association
Bel Air Knolls
Ber-Air Skycrest
Benedict Canyon Association
Beverly Crest Homeowners Association
Beverly Glen Park

Beverly Highlands Homes Association
Briar Summit Homeowners Association
Briarcliff Improvement Association
Cahuenga Pass Property Owners Association
Casiano Estates Homeowners Association
Coldwater Canyon
Curson Canyon
Echo Park Improvement Association
Encino Property Owners
Franklin Hills Residents Association
Franklin-Hollywood Blvd. West
Friends of Caballero Canyon
Glassell Park Improvement Association
Glenridge Homeowners Association
Homeowners of Encino
The Highland's Owners Association
Hillside Village Property Owners Association
Hollywood Crescent
Hollywood Dell Civic Association
Hollywood Heights Association
Hollywood Hills Inmprovement Association
Hollywood Knolls Community Club
Hollywoodland Improvement Association
Lake Hollywood Homeowners Association
Laurel Canyon Association
Lookout Mountain Associates
Los Feliz Improvement Association
Miramar Homeownwers Association
Mountaingate Community Association
Mt. Olympus Property Owners Association
Mt. Washington Association
Mulholland Property Owners Association
North Beverly Dr. Franklin Canyon Association
Nichols Canyon Association
Outpost Homeowners Association
Pacific Palisades Residents Association
Residents of Beverly Glen
Roscomare Valley Association
Sherman Oaks Homeowners Association
Studio City Residents Association
Sunset Plaza Civic Association
Tarzana Property Owners Association
The Eagle Rock Association (T.E.R.A.)
Topp of the Canyon Association
Torreyson/Flynn Association
Whitley Heights Civic Association
Wonderland Park Neighborhood Association
Woodland Hills Homeowners Association

LA Crusaders

CAN Community Action Network
NAC Neighborhoods Against Crime
COBRA Citizen Opposing Burglary Robbery & Assault
Friends of St. Basil's Church
Inner City Alliance
Pico Union Housing Corporation
Hollywood-Wilshire Committee on Aging
Melrose Hill North End Committee
Brezee Foundation
Drexel Avenue Neighborhood Watch
Rampart Rangers
East Hollywood Neighborhood Watch
Wilshire Center Community Involvement Association

Mid-Cities

Baldwin Hills Neighborhood Homeowners Association
Kinney Heights Homeowners Association
Western Heights Neighborhood Association
Country Club Park Neighborhood Asocciation

San Fernando Valley Federation

Homeowners of Encino
Sunland-Tujunga Association of Residents
Van Nuys Homeowners Association
Hansen Hills Homeowners Association, Inc.
Lakeview Terrace Improvement Association
Lakeview Terrace Homeowners Association
Porter Ranch is Developed Enough (PRIDE)
Pacoima Property Owners Association, Inc.
Northridge Civic Association
North Valley Homeowners Federation
North Hollywood Residents Association
West Hills Community Organization
Reseda Community Association
S.T.O.P. of North Hollywood
Valley Village Homeowners Association
Friends of Caballero Canyon
Valley Horseowners Association

San Pedro & Penninsula Homeowners Coalition

Barton Hill
Courtyards
El Prado
Leland Park
Mira Catalina
Miraflores Park
Palisades
Palos Verdes Shores
Point Fermin
Rolling Hills Riveria
San Pedro Harbor
San Pedro Highlands
South Shores
Tennis Club
Westmont
RPV Homeowners Council

South East Central Homeowners Assocition, Inc.

Westside Civic Federation

Beverly Angeles
Beverly Roxbury
Beverly Wilshire Homes Association
Beverlywood Homeowners Association
California Country Club Homeowners Association
Carthay Circle Homeowners Association
Cheviot Hills Homeowners Association
Holmby Westwood Property Owners Association
Melrose Action Coalition
Miracle Mile Residential Association
Roxbury-Beverwil
South Carthay Neighborhood Association
South of Burton Way Association
Tract 7260
Westwood Gardens Civic Association
Westwood South of Santa Monica
Westside Village Civic Association

Wilmington

Banning Park Neighborhood Association
Wilmington Home Owners
New Wilmington Committee
L.A. Harbor Boat Owners
WIN Neighborhood Association
Wilmington North Neighborhood Association

Wilshire Homeowners Alliance

Brookside Homeowners Association
Fremont Place Association
Hancock Park Homeowners Association
Larchmont Village Homeowners Association
Windsor Square Association
Windsor Village Association
Boulevard Heights Homeowners Association
Oxford Square Association
Ridgewood-Wilton Neighborhood Association

Others

Elysian Valley Property Owners, Renters & Businessmen's Association

061
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Statement Submitted to the

Senate Local Government Committee

on Assembly Bill 2223

December 17, 1991

Senator Bergeson and Committee Members:

There is not a shred of doubt that the legislature should clarify the relationship between the California Environmental Quality Act (CEQA) and the Permit Streamlining Act. The existing ambiguity virtually assures needless litigation, which creates higher costs to project proponents and invites inconsistent results. There is no reason to postpone action until a nuclear power plant or a toxic waste incinerator is "deemed approved" with no safety conditions.

The ambiguity must be resolved by making compliance with CEQA a condition precedent to the application of the Permit Streamlining Act. The CEQA process serves two critical purposes that would be subverted by any other solution. First, the public would lose its "privileged position" in the environmental review process, since a deemed approval effectively cuts off public input -- in some instances, before there has been any opportunity whatsoever for public review of a project. This would further erode trust in our governmental institutions at a time when we can ill afford this.

Second, the agency (and indirectly, the public) would lose the ability to impose mitigation measures to counter the adverse environmental impacts of a project. Because the Permit Streamlining Act does not provide any means for imposing mitigation measures on a permit that is "deemed approved," full compliance with CEQA is critical if appropriate mitigation measures are to be imposed on projects that are approved under the Permit Streamlining Act.

By limiting "deemed approval" to cases in which the agency has completed the CEQA process, AB 2223 in effect adopts a variation of the tolling concept advocated by Robert E. Merritt in "The Permit Streamlining Act: The Dream and the Reality," 1 Land Use Forum 30 (1991). Once the applicable deadline under the Permit Streamlining Act has passed, the agency should be required to act on the project application(s) within a short time after it certifies the EIR, approves the negative declaration, or takes other action to complete its CEQA review. The post-CEQA time period can be fairly short; 45 to 90 days

should allow the agency sufficient opportunity to consider the applications in light of the information provided through the environmental review process.

The crocodile tears shed by project applicants over the delays in environmental review do not bring much sympathy from the public, which is often forced to wait years beyond the time limits of the Permit Streamling Act for action on broad policy documents, such as General and Specific Plans, that will affect thousands of people. For example, efforts to adopt a Local Coastal Plan for the Venice area have taken over four years. Work on a Specific Plan for the Maxella-Glencoe area is in its third year even though there is no public controversy -- the homeowners, renters, business owners and property owners have worked together to reach concensus on both goals and implementation.

The public has no equivalent to the Permit Streamlining Act. We must simply wait until the environmental review of our General Plans, our Coastal Plan, and our Specific Plans is completed by the various departments of the responsible public agency. Adding a firm deadline to the CEQA timeline would statutorily place the interests of the development community ahead of the interests of the public at large. This is not good public policy.

A stringent deadline for completing the CEQA process also ignores the reality that the larger a project, and the more adverse its impacts, the longer the CEQA review takes. As an example, a critical aspect of the EIR is the requirement that the lead agency respond to comments on the draft document. This gives the public "an opportunity to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom." Sutter Sensible Planning, Inc. v. Board of Supervisors, 122 Cal.App.3d 813, 822 (1981). Those projects with the most negative impacts -- for example, a toxic waste incinerator -- are likely to require a relatively longer amount of time to prepare the required "reasoned response" than projects such as an apartment complex. It is simply not reasonable to require that all EIR's be completed within one year.

What will happen if you require strict compliance with the CEQA time guidelines for every project, and the penalty for delay is deemed approval? The most environmentally damaging projects will be most likely to be deemed approved.

Moreover, the opposite rule -- allowing a deemed approval under the Permit Streamlining Act without CEQA compliance -- could actually have the unexpected consequence of increasing the likelihood that project approvals would be overturned. Such a rule would lengthen the time in which a project opponent could file a CEQA challenge: instead of the 30-day statute of limitation that governs lawsuits for projects with either EIR's or negative declarations, project opponents would have 180 days to file a lawsuit under the statute of limitation that governs

CEQA challenges when the agency has not complied with CEQA. The shorter statute of limitation, combined with the fact that it is generally quite difficult for an opponent to overturn an EIR, means that a project applicant might actually be better off waiting for a laggardly agency to finish its CEQA review than to risk a CEQA suit that is likely to overturn the deemed approval.

Finally, there is enough litigation over environmental disputes without adding "CEQA vs. The Permit Streamlining Act." All of the potential cases with this subheading could be resolved in advance with the passage of this bill.

I would suggest two improvements to AB 2223. First, the bill should establish a specific event that signals the end of the environmental review. This will prevent the otherwise inevitable litigation over whether an agency has "complied with CEQA" as of any given date.

Most important, the Permit Streamlining Act must specify that a "deemed approval" includes both 1) the standard conditions that are normally imposed by an agency (such as a school impact fee) and 2) the conditions or mitigation measures identified during the CEQA process.

These conditions are at the heart of the public interest. They range from critical policy matters, such as requiring the replacement of lost affordable housing, the funding of transportation mitigations and the use of permeable paving materials to reduce water-polluting urban run-off, to more subtle issues that directly affect the quality of life for both project residents and tenants and their neighbors, such as landscape buffers, reasonable operating hours, and providing room for recycling containers.

It is meaningless to require completion of CEQA review before deemed approval if the results are not going to be used for something. I urge you to address the issue of conditions, adopt the tolling concept with respect to CEQA compliance, and pass a bill resolving these issues before this State wastes more of its resources in unnecessary litigation.

Thank you for your consideration of these concerns.

Sincerely,

Debra L. Bowen

cc: Assemblywoman Gwen Moore
Councilwoman Ruth Galanter
Frank Eberhard, Acting Planning Director, City of Los Angeles
Mr. John Powers, COAST
Mr. Bill Christopher, PLAN-LA

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December 17, 1991

The Honorable Marian Bergeson
Chairman
Senate Committee on Local Government
Room 2085, State Capitol
Sacramento, California 94248

Re: Assembly Bill No. 2223

Dear Senator Bergeson:

I appreciate the opportunity to testify with regard to Assembly Bill 2223 relating to amendments to California Government Code §65956, the operative provision of the law commonly known as the Permit Streamlining Act. I represent Stephen M. Blanchard, an individual whose plans for development of property in the Venice area of the City of Los Angeles, seems to be the catalyst for this legislative change. I believe that the legislative change which is sought in this bill is not in the best interest of the people of the State of California.

The Permit Streamlining Act was adopted in 1977. It was introduced by then Assembly Speaker McCarthy and passed with bipartisan support and was signed by Governor Brown. In his press release of October 2, 1977, the Governor stated:

> This measure required early cooperation between state and local agencies on major projects; sets a one-year deadline for lead agency permit decisions; and consolidated public hearings and environmental impact documents. AB 884 helps guarantee that every proposed development receives a prompt and fair hearing and meets the governor's 1975 commitment to "cut through the tangle of overlapping environmental and land use rules which delay needed construction."

The purpose for which the Permit Streamlining Act was adopted is as important today as it was in 1977 and the proposed legislation would effectively negate the Permit Streamlining Act entirely.

Assembly Bill 2223 would require that no permit could be deemed approved unless a final action has been taken on a negative declaration or an environmental impact report. Therefore, although there are time limits for completion of these processes under the California Environmental Quality Act, there

is no penalty for the failure to meet such time deadlines. Only the Permit Streamlining Act provides any effective measure to compel state or local government to act in a timely manner. Only the existence of the Permit Streamlining Act over the past 14 years has resulted in timely decisions. AB 2223 would remove this incentive for the government to act timely.

When the Permit Streamlining Act was passed, the impetus for the law was the failure of the state and local agencies to be able to determine whether or not to grant a permit for the construction of an important industrial plant which ultimately became located in another state. Rather than discourage needed development for the citizens of this State, the Permit Streamlining Act assured those who would expend the substantial sums necessary to apply for permits that they would receive prompt action by the government. The Enrolled Bill Report prepared for the Governor by the Resources Agency on September 27, 1977 stated that the subject was "speeding up the permit and CEQA process" and stated clearly "[i]f an agency fails to act on an application within the time limit required, that agency's permit would be automatically approved."

My experience is a clear basis on which the effectiveness of the Permit Streamlining Act can be assessed. On my client's behalf I filed an application to build a small commercial project on a C-2 zoned property in the City of Los Angeles. Due to the complexity of the City's ordinances, six separate discretionary permits were required (although all permits are consolidated into a single hearing process). Four permit applications were filed on October 13, 1988. The City notified us that two additional applications were required and those were filed on January 13, 1989 and all applications for the project were deemed complete by the City on that date.

A public hearing was held on April 10, 1989. Public notice was given to all surrounding owners and tenants. Many people attended the hearing. More than a year later, the City had still not acted on the permit. The reason for this delay was that the environmental review process had not been completed. Although the City proposed a mitigated negative declaration on October 11, 1989, opponents of the project insisted that an environmental impact report was required. (The City also failed to include all permits in the mitigated negative declaration.) The City examined the objections and issued a new mitigated negative declaration on February 7, 1990. The opponents continued to object and appealed this decision.

On May 5, 1990, with no decision having been reached, I demanded that the City comply with the Permit Streamlining Act and deem our permits approved so that we could then proceed to the California Coastal Commission. The City Attorney agreed. The City Board of Zoning Appeals disagreed. The project stalemated for another year until the City settled the dispute by agreeing to issue the permits. An appeal to the Coastal Commission ensued which approved the project with conditions on November 14, 1991. Still dissatisfied, project opponents have continued with litigation and tomorrow will seek a preliminary injunction in Los Angeles Superior Court. More than three years after filing his applications (which were only filed after a year of meetings with community groups), the property owner is still unable to build.

Why does this set of circumstances exist? It is because opponents to development are willing to exploit unfairly the environmental laws of this State to delay and (hopefully like Dow Chemical) defeat the development not through a decision but through the absence of a decision. Without a time limit like that in the Permit Streamlining Act, these activities will be encouraged. The Permit Streamlining Act is not directed at the time occupied for making a decision on a project but rather at the time for environmental review. It is during this period that overstated objections, false and misleading information, unfair characterizations and conclusions and other charges are levelled at a project. Under CEQA each objection requires analysis and review, even if without merit. Even when the initial environmental reviewer reaches a conclusion, he can be bombarded with objections to his conclusion and ultimately an appeal on the environmental document alone.

A determination to issue a negative declaration is almost always challenged in a controversial project on the grounds that an environmental impact report should be prepared. Most cities and counties, like the City of Los Angeles, do not finalize the environmental determination except in conjunction with the action on the permit itself. Therefore, every delay in an environmental process becomes a delay in the permit process.

How does the Permit Streamlining Act cure these problems. By placing a time deadline under which all parties must operate, the City is compelled to adopt procedures which result in prompt decision making. A file cannot sit on a planners desk for weeks because he does not want to deal with a controversial issue. Opponents to projects must be economical in their objections. Not every project has catastrophic environmental effects. However, to read a sample of the

objections to my client's project, you would think it were a nuclear fuel reprocessing plant and not a commercial project in a commercial zone. Opponents will be discouraged from badgering City employees who make decisions they do not like. Opponents will have an equal interest in the prompt decision and will stop debating procedural or impact issues which are truly insignificant and deal with the real policy issues which are raised by a development.

Before the Committee acts it should inquire as to whether or not the effect of the present Permit Streamlining Act has resulted in unwarranted or harmful development. If the best those who wish to amend the law can point to is one small commercial building in a commercial zone in the City of Los Angeles (a commercial building which met the strenuous requirements of the California Coastal Commission) then there seems little reason for a change. Indeed, the Committee should be congratulating itself that the Permit Streamlining Act worked as expected. The law should be left alone.

Very truly yours,

SHERMAN L. STACEY

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League of California Cities
California Cities
Work Together

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Sacramento, CA
December 17, 1991

Senator Marian Bergesen, Chair
Senate Committee on Local Government
State Capitol
Room 2085
Sacramento, CA 95814

Dear Senator Bergesen:

Since its inception the Permit Streamlining Act has conflicted with the California Environmental Quality Act. Recent examples which will be discussed at this hearing include the City of Los Angeles City Council's attempts to review staff CEQA determinations and its status as respondent in lawsuits filed by both applicants and project neighbors. The City of Sausalito is also litigating issues of the conflicts between CEQA and the Permit Streamlining Act. There, a project was deemed approved despite expert agency comments on an Environmental Impact Report that the applicant's project was so poorly designed that human lives could be lost from geologic failure. Finally, a recent decision involving the City of San Diego demonstrates that a literal reading of the Permit Streamlining Act may result in an impermissible deprivation of third party due process rights. (Ciani v. San Diego Trust & Savings Bank 233 Cal.App.3d 1604, 1615 [Sept.1991].)

In sum, the land use approval process requires the delicate balancing of a number of issues and criteria. The Planning and Zoning Act, the California Endangered Species Act, and the California Clean Air Act each have their own set of issues which locally elected officials must evaluate. It is the environmental review process under CEQA which provides the umbrella under which all of the health, safety and environmental criteria must be assessed. In stark contrast to the myriad of environmental protections provided by the legislature over the past twenty years, the Permit Streamlining Act appears to override all of the other concerns by erecting a litmus test for review of development projects and a troubling corallary: "If the review takes more than one-year, the project must be deemed approved; If the environmental analysis takes more than one-year, you may not use it."

It is time to reconsider the Permit Streamlining Act.

Continuing Conflict Between CEQA and PSA

Both Government Code section 65950 (Permit Streamlining Act, "PSA") and Public Resources Code section 21151.5 (California Environmental Quality Act, "CEQA") provide a 365-day period from the date at which an application is accepted as complete in which to take specified governmental actions. Under CEQA, a lead agency must certify an Environmental Impact Report within its one year rule. Certification establishes that the EIR "has been completed in compliance with CEQA" and that the lead agency has reviewed the information within the EIR prior to approving the project. (Cal. Code of Regs. section 15090.) Under PSA, a lead agency must approve or deny a project within one year. Since both of these timelines begin running at the same time, it is possible that the one year rule will run before the lead agency has the opportunity to hold hearings on the project, to deliberate its merits and to make a fully informed decision. While the CEQA process may be complete, no time will be left for project review by the decision makers. If the elected decision makers are not ready to act on the day of certification, the project is "deemed approved". That is, the applicant's proposal is approved by act of law, with no conditions, mitigations, or other limitations to protect the public health and safety, including the environment.

The PSA Allows the Applicant to Control the Process

Over time and in response to judicial disapproval of the sometimes draconian results of the one year rule, various attempts at extending the time lines have been adopted. Under the PSA, a single 90-day extension of the time to approve or deny may be granted if the applicant consents. While a voluntary written extension may be granted by an applicant. It also happens that agency-applicant discussions of conditions and process continue, implicitly indicating a waiver of the one-year rule, until 365 days pass and the applicant's attorney demands permit issuance. This abuse of the Permit Streamlining Act is involved in recent litigation against the City of Sausalito.

CEQA also allows "reasonable extensions" of the one-year rule for certifying an EIR, if the applicant consents. While flexibility in extending the CEQA limitations is important both in reviewing the complicated projects which warrant an EIR and in assuring that CEQA's substantive environmental provisions are carried out, existing law inadequately serves lead agencies. First, an applicant can force a local agency to speed through the CEQA process in order to meet the arbitrary one-year rule by withholding consent for an extension. Second, many interpret the PSA and CEQA rules to mean that CEQA's "reasonable extensions" are limited to one ninety day extension to certify and one ninety day PSA extension to act. Applicant attorneys often read the 90-day extension in the Government Code as a limitation on the more open ended CEQA extension language. In either instance, it is the applicant which controls the process.

The applicant's control is not illusory. It is common with controversial projects for

environmental groups and other project opponents to begin threatening CEQA suits ahead of the time that the EIR is even prepared. Local officials then find themselves wedged between a developer threatening to invoke CEQA's one-year rule to force a premature EIR and NIMBY groups threatening to litigate even the slightest analytical defect. If the CEQA analysis is faulty, the public will pursue costly litigation. If the agency requires more than a year to complete the analysis, the applicant can assert the PSA's deemed approved provisions and litigate to force issuance of the permits. Other witnesses have testified that the City of Los Angeles was involved recently in this double bind.

CEQA Intends to Limit Approvals to Projects Where Environmental Consequences are Known and Alternatives or Mitigation Imposed

The policies of CEQA are clear.

> "The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects ... .
>
> * * *
>
> The Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof." [Public Resources Code, section 21002.]

CEQA contains strong procedural and substantive mechanisms to effectuate these policies. Among them are a requirement to prepare environmental analysis, elicit and respond to public comment, formulate alternatives and conditions which would lessen the environmental effects to acceptable levels, and produce findings and an administrative record subject to judicial challenge.

In essence, CEQA requires a careful review and balancing of environmental and other criteria related to a proposed development. In contrast, the Permit Streamlining Act ignores all of the environmental, health and safety concerns in CEQA. Instead, the only relevant issue becomes has the lead agency approved or denied the application within 365 days of its submittal. As today's testimony shows the conflicts between CEQA and the PSA continue to exist and have arisen recently in the cities of Los Angeles, Sausalito and San Diego.

Existing Time Limits Can Be Unworkable

The risk faced by local government officials in attempting to fully analyze the consequences of complicated development projects is that analysis may take longer than the arbitrary 365-

day period. The constraints of the one-year rule are best understood by reversing the timeline. (Please see "CEQA-Permit Streamlining Act Limitations" attached.) Assume a thirty-day period for scheduling and noticing a City Council hearing. Assume a thirty-day period for scheduling and noticing a planning commission hearing. Assume a thirty-day period for responding to comments and preparing a "Final EIR". Assume a 45-day public review period for the "Draft EIR". Assume 30 days to revise the administrative draft pursuant to lead agency direction. Assume 30 days for review of the Administrative Draft EIR by all of the affected city departments (planning, engineering, public works, transportation, parks and recreation, etc.). Assume a 30 day scoping period to elicit issues to be addressed within the EIR from other agencies and the public.

The remaining 140 calendar days are available to prepare and issue a request for proposals, to interview and select a consultant, and to negotiate a contract and secure the applicant's commitment to reimburse the lead agency. Last, hopefully not least, there is some time to have the consultant begin preparing the background studies which may be necessary to perform the CEQA analysis (e.g., traffic modeling, noise assessment, biological inventories for endangered species, etc.), to perform the necessary environmental impact analysis, and to prepare the administrative draft EIR.

The existing 365 day limitation does not allow for much flexibility in scheduling project approvals or for much time for decision maker review of the available information. Even under the best circumstances, there is not much room before the "deemed approved" hammer for elected officials to weigh the costs and benefits of a proposal. With threats of litigation from both applicants and NIMBYs, City Officials attempt to balance all of the competing interests in an impossible situation.

CEQA is Meaningless Where Mitigation, Alternatives or Denial is **Ultra Vires**

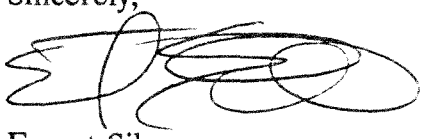
The PSA's deemed approval provisions render the detailed environmental analysis and environmental balancing required under CEQA moot. Where a project is "deemed approved", the ability to condition a project to avoid dire environmental consequences is ultra vires. The applicants' argument that citizens may bring a CEQA suit to protect the environment is specious at best. Where the lead agency has no power to condition or deny a project, a court's authority to order the preparation of an EIR is futile.

Conclusion

There are only two ways to resolve this conflict. Either the legislature must adopt a brightline rule that no project can be deemed approved without the completion of CEQA and a reasonable period of time within which to approve or deny the project once the environmental consequences of the project are known, or the deemed approved rule must be modified to toll the approval and to include all of the mitigations recommended in the CEQA analysis.

Thank you for the opportunity to share the views of the League of California Cities with the Local Government Committee.

Sincerely,



Ernest Silva
Legislative Representative

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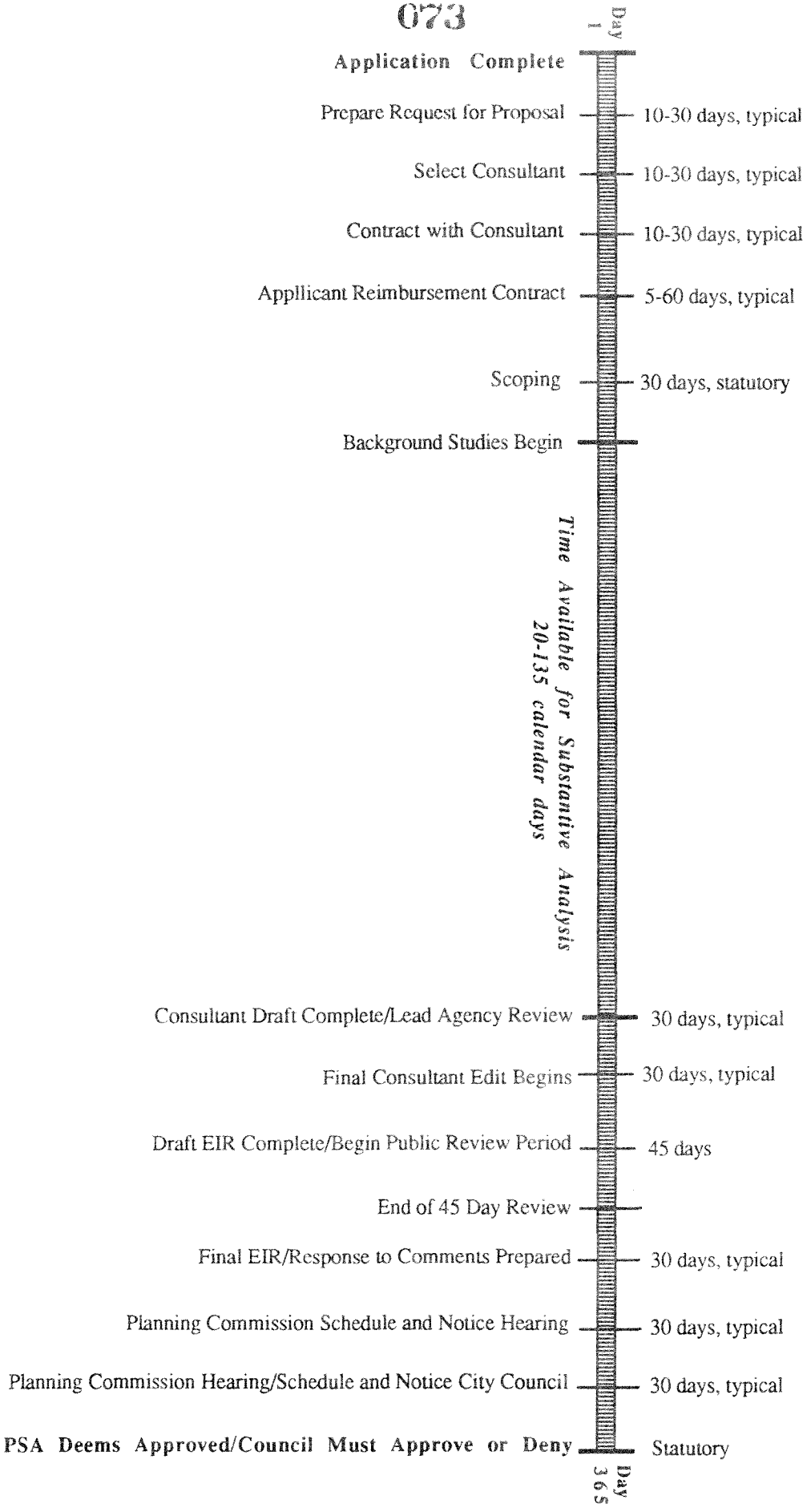
CEQA-Permit Streamlining Act Limitations



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December 17, 1991

Senate Local Government Committee
Marian Bergeson, Chairwoman
Room 2085, State Capitol
Sacramento, CA 94248

Re: AB 2223 and Problems with the Permit Streamlining Act Generally

Dear Senator Bergeson:

AB 2223 is an important bill that would significantly improve the Permit Streamlining Act ("PSA") (Gov. Code, § 65920 et seq.) by ensuring that "development projects" are not "deemed approved" prior to completion of negative declarations or environmental impact reports ("EIRs") required by the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.). In its current form, PSA has been understood, at least by Superior Courts throughout the State, to allow development projects to be deemed approved before anyone fully understands their environmental consequences, and before the formulation and imposition of reasonable, feasible mitigation measures. As will be discussed below, "automatic approval" in such situations can have dire environmental consequences.

For example, the Marin County Superior Court ordered the City of Sausalito to issue permits for a project in precisely in the form proposed by the applicants, even though the California Department of Transportation ("Caltrans"), in EIR comments, warned

that the project, to be located on a steep hillside north of the Golden Gate, could increase the likelihood of a landslide onto U.S. Highway 101, with possible loss of life. Because AB 2223 should reduce the chances that similarly absurd situations will occur in the future, the bill should be approved and sent to the Senate Floor. [1]

Although the legislation at hand will improve PSA, the Senate Local Government Committee should have no illusion that the Act will not need subsequent amendments to address different problems. The difficulty of reconciling PSA with CEQA requirements is by no means the only problem with the Act. PSA also conflicts with a number of aspects of the Planning and Zoning Law (Gov. Code, § 65000 et seq.) and the Subdivision Map Act (Gov. Code, § 66410 et seq.). More fundamental, however, is the conflict between the concept of automatic approval and the federal and state procedural due process rights of landowners affected by such approvals. It is unclear whether this conflict can be resolved at all. If it cannot, the statute (and the concept of automatic approval) must give way to the federal and state constitutions. Thus, the Legislature should begin to consider substituting another approach for ensuring or at least encouraging quick agency action on proposed development projects.

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[1]/ This endorsement does not suggest, however, that the language of the bill could not use some minor tinkering. In particular, proposed Section 2 of the bill is ambiguous and unclear, and should be tightened before the bill becomes law.

BASIC PROVISIONS OF PSA

PSA was enacted in order to prevent what the Legislature considered to have been unacceptable delays in processing applications for "development projects." (See Gov. Code, § 65928.) [2] Under the statute, public agencies' failure to either approve or deny such projects within specified timelines will cause the projects to be deemed approved by operation of law, subject to certain qualifications discussed below. (Gov. Code, § 65950.)

PSA time requirements apply to all applications for development projects filed with cities, counties, and all other local and state public agencies, except the California Energy Commission in its function of siting certain power plant facilities. The act does not apply, though, to "administrative

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[2]/ "Development" is defined in Government Code section 65927 to include the following, both on land or in or under water: the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including subdivisions and other land divisions except when done in connection with a public agency's purchase of land for recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations pursuant to a timber harvesting plan. "Structures" are defined to include "any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line." (Gov. Code, § 65927.)

In applying the concept of "development," at least one Court of Appeal decision declined to extend it to a situation that did not seem to be "development" in the common meaning of the word. (Meridian Ocean Systems, Inc. v. California State Lands Commission (1990) 222 Cal.App.3d 153, 167 [271 Cal.Rptr. 445] (PSA did not apply to permits for underwater geophysical testing designed to ascertain the character of ocean floor).)

appeals within a state or local agency or to a state or local agency." (Gov. Code, § 65922; see also Ciani v. San Diego Trust and Savings Bank (1991) 233 Cal.App.3d 1604, 1612-1618 [285 Cal.Rptr. 699].)

Significantly, the term "development project," as used in PSA, does not apply to proposed agency actions that are legislative or quasi-legislative in character, such as requests for general plan amendments and zoning changes. Nor does the term embrace agency actions that are ministerial in nature. Rather, the statute applies only to requests for quasi-adjudicatory actions such as approvals of tentative subdivision maps, use permits, and variances. Agencies therefore are under no time pressure to respond to proposals for legislative actions, even when such requests are presented within multi-part applications that also include requests for quasi-adjudicatory actions. (Gov. Code, § 65928; Landi v. County of Monterey (1983) 139 Cal.App.3d 934 [189 Cal.Rptr. 55]; Meridian Ocean Systems, Inc. v. California State Lands Commission (1990) 222 Cal.App.3d 153, 167 [271 Cal.Rptr. 445]; and Land Waste Management v. Contra Costa County (1990) 222 Cal.App.3d 950 [271 Cal.Rptr. 900].)

Government Code section 65950 is the heart of PSA. It provides that, for any development project for which an *EIR* is required, agency action must be taken either approving or denying the project within a *year* after the application has been "received and accepted as complete." Government Code section 65957 allows a single 90-day extension with the applicant's consent. These two sections, however, must be read in conjunction with Government Code

section 65956, as well as Public Resources Code sections 21100.2 and 21151.5 (from CEQA), all of which are discussed below.

Section 65950 also provides that, for projects for which a *negative declaration* will suffice, or which are exempt from CEQA review altogether, agency action must occur within *six months*, "unless the project proponent requests an extension of the time limit." The statute does not expressly limit how long such an extension can be. In many situations, the opportunity to request such an extension may benefit an applicant, who may be faced with the dilemma of either going past the ostensible deadline for approving a negative declaration or accepting the need to prepare a full EIR. Again, though, this aspect of section 65950 must be read in conjunction with Government Code section 65956 and Public Resources Code sections 21100.2 and 21151.5.

PSA/CEQA INTERFACE

The interface between PSA and CEQA is extremely complex; and in applying the two statutory schemes together, interested parties are confronted with ambiguities, seeming inconsistencies, and legal and practical difficulties. Unfortunately, these problems can only be resolved either by legislative amendments or further litigation.

The two CEQA provisions referenced above (sections 21100.2 and 21151.5) apply to all projects "involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." Because this list of projects includes some that are not "development projects" within the meaning of PSA, the two sections from CEQA apply to a larger

universe of activities than PSA does. Still, all projects subject to PSA are also subject to the two CEQA sections.

Sections 21100.2 and 21151.5 require state and local agencies to establish time limits by which EIRs are completed and certified within one year, and negative declarations are completed within 105 days. The two statutes also allow for an unspecified "reasonable extension of the time period in the event that compelling circumstances justify additional time and the project applicant consents thereto." Although the statutes do not provide any express limitations on how long such extensions may be, Government Code section 65950.1 requires that, where such extensions have been granted, the lead agency must approve or deny the project within 90 days after the EIR has been certified. That 90-day period, however, may be subject to a single additional 90-day extension; Government Code section 65957 can be read to allow such an extension, although the statute is not a model of clarity.

When one reads Public Resources Code sections 21100.2 and 21151.5 together with Government Code section 65950, it becomes clear that a lead agency cannot satisfy PSA simply by satisfying the two CEQA sections. Under section 65950, a lead agency must *approve or deny* a project within a year after an application is accepted as complete, whereas under the two Public Resources Code sections the obligation is only to *certify* an EIR within that same time period. Certification, of course, is not the same as project approval. (See CEQA Guidelines, § 15090.) [3] Thus, when dealing

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[3]/ The CEQA Guidelines are found in Title 14 of the California Code of Regulations, commencing with section 15000.

with a "development project," a lead agency must be sure not only to certify a project's EIR within a year, but also to take action approving or denying the project.

For projects that are either exempt from CEQA or can be approved with a negative declaration, reading the various statutes together presents even more difficulties. As noted above, Government Code section 65950 requires that, for development projects exempt from CEQA or subject only to negative declarations, lead agencies must take action approving or denying the projects within six months after the applications are accepted as complete, unless the applicants seek extensions. In contrast, sections 21100.2 and 21151.5, which do not apply to exempted projects, merely require lead agencies to complete negative declarations within 105 days. There is no requirement to actually *approve* projects within any time frame; and extensions are only allowed under "compelling circumstances," as described above. Moreover, as with the requirement to complete and certify an EIR within a year, there is no penalty provided for failure to complete a negative declaration within 105 days. The requirement, then, may only be "directory" rather than "mandatory," and may therefore be unenforceable. (See Meridian Ocean Systems, Inc. v. California State Lands Commission (1990) 222 Cal.App.3d 153, 168 [271 Cal.Rptr. 445].)

If the statutes are read literally, moreover, an applicant for a development project subject to a negative declaration may be willing to waive the six-month time limit under section 65950 but find an agency unwilling to grant an extension pursuant to section

21100.2 and 21151.5, which require "compelling circumstances" to justify variance from statutory time limits. Such a result would be anomalous, to be sure, but would be consistent with the statutory language. For the contrary result to occur, an applicant would have to be able, essentially, to demand that an extension be granted pursuant to the two CEQA sections.

It is not clear what happens if, for development projects requiring EIRs, extensions based on "compelling circumstances" pursuant to sections 21100.2 and 21151.5 go beyond the deadlines of six months, one year, and fifteen months (one year plus 90 days) set by sections 65950 and 65957. One view is that such extensions operate wholly separate from those deadlines, and that, where there really are "compelling circumstances," no real deadlines apply, except for the need to take final action within 90 days of certifying an EIR. (See Gov. Code, section 65950.1.) Another view is that fifteen months represents the absolute deadline for final action pursuant to PSA.

Things become even more complex when section 65950 is read in conjunction with section 65956, which provides that automatic approval can occur "only if the public notice required by law has occurred." This requirement was added in 1987 after the Court of Appeal issued Palmer v. Ojai (1986) 178 Cal.App.3d 280 [223 Cal.Rptr. 542], which held that automatic approval could occur even if property owners adjacent to the project sites in question had been given no opportunity to voice their concerns at a public hearing. (As will be discussed below, the opposite conclusion was

reached in a more recent decision, Selinger v. City Council (1989) 216 Cal.App.3d 259, 271-274 [264 Cal.Rptr. 499].)

As amended, section 65956 creates two strategies by which applicants can attempt to force agencies to hold public hearings. Subdivision (a) provides that, for development projects for which public hearings are required but for which none has been scheduled as of 60 days prior to the expiration of the time periods of section 65950, the applicant or his or her representative may file a legal action compelling the lead agency to "provide the public notice or hold the hearing, or both." Applicants, then, can force the agencies to give affected property owners the chance to be heard.

The practical effects of subdivision (b), which provides another option, are much less clear. The subdivision states that "the permit shall be deemed approved only if the public notice required by law has occurred," but then describes a kind of "public notice" that differs substantially from that which is contemplated in subdivision (a). Rather than notify interested persons of a pending public hearing, the "public notice" described in subdivision (b) may be provided by the applicant, not the agency, and may simply state that the project will be deemed approved if the agency does not act within 60 days. Before publishing such notice, the applicant must provide seven days advance notice to the agency, apparently so that the publication may prove to be unnecessary. Once the notice is published, the agency then has sixty days in which to act on the project. Such notice, then, is apparently intended to give the agency one last chance to act, and

to inform interested and affected persons of the need to ensure that the agency does so. (Ciani v. San Diego Trust and Savings Bank (1991) 233 Cal.App.3d 1604, 1609, 1618-1620 [285 Cal.Rptr. 699].)

Both subdivisions (a) and (b) must be read in light of subdivision (c), which states that "[n]othing in this section shall diminish the permitting agency's legal responsibility to provide, where applicable, public notice and hearing before acting on a permit application."

What remains unclear is whether, if the agency fails to act within 60 days after an applicant provides the "public notice" authorized by subdivision (b), the mere notice of pending automatic approval has allayed the constitutional concerns raised in the Selinger decision. In that case, which is described in more detail below, the Court of Appeal for the Fourth District rejected the Second District's decision in Palmer, supra, and concluded that the absence of a public hearing deprived property owners adjacent to the project area of their constitutional right to be heard. Selinger interpreted section 65956 before it was amended in 1987, and thus did not directly address the question of whether those amendments cured the identified constitutional problem. It is unclear whether the due process rights of those property owners can be adequately protected simply by an applicant publishing a notice stating that an agency had better take action soon or face the consequences. Although the Court stated, in dicta, that "[t]he recent amendments to the Permit Streamlining Act . . . resolve the constitutional issue for all current applications," the Court may

have mistakenly interpreted subdivision (b) as requiring both notice and a *public hearing*, rather than simply notice that automatic approval could occur within 60 days. (216 Cal.App.3d at 265, fn. 3, 274, fn. 8 [264 Cal.Rptr. 499].)

CASE LAW INTERPRETING PSA

Two recent published Court of Appeal opinions addressing issues arising under PSA merit extended discussion. In Selinger, supra, a developer filed an action against a city seeking a court order declaring that his tentative tract map for a 260-acre parcel was approved by operation of law. The city had failed to take action on the developer's project (for which an EIR was to be prepared) within a year of the date on which the application had been accepted as complete. Interpreting Government Code section 65956 before it was amended in 1987, the Court of Appeal denied the requested relief, holding that, in the absence of a public hearing on the proposed project, automatic approval would unconstitutionally deprive adjacent landowners of their right to be heard on the city's quasi-adjudicatory decision.

When this case arose, as noted above, section 65956 included no provision requiring that any kind of public hearing be held, or that "public notice" be provided, before automatic approval occurred. In Palmer, supra, which interpreted the former statute, the Court of Appeal for the Second District had held that such as scheme was constitutional. In so concluding, the Court reasoned, in effect, that a local agency should not profit by its own

failures, regardless of the harsh effect on adjacent property owners.

In Selinger, however, the Court of Appeal for the Fourth District reached the opposite conclusion, relying primarily on Horn v. County of Ventura (1979) 24 Cal.3d 605 [156 Cal.Rptr. 718], in which the California Supreme Court held that a tentative subdivision map could not be approved automatically under the Subdivision Map Act without a public hearing, because such a result deprived adjacent property owners of their constitutional right to be heard. Applying the logic of Horn to the facts of its own case, the Fourth District concluded that such persons' constitutional rights were similarly violated when automatic approval occurred under PSA in the absence of a public hearing. In other words, section 65956, being only a *statute*, had to give way to *constitutional* due process requirements. (216 Cal.App.3d at 272-274 [264 Cal.Rptr. 499].)

On its face, the Court's conclusion may now seem to be primarily of academic interest because, despite the holding in Palmer in 1986, the Legislature in 1987 amended section 65956. As noted above, however, it remains unclear whether those amendments remedy the constitutional problem identified by the Selinger court. In stating in a footnote, in dicta, that the amendments had solved the problem, the Court referred to its own interpretation of the amendments, which apparently read subdivision (b) to require applicants to provide both notice and a *public hearing*, not merely notice that the project could be automatically approved even

without a hearing. (216 Cal.App.3d at 265, fn. 3, 274, fn. 8 [264 Cal.Rptr. 499].)

Probably the most important PSA case issued to date, and the only extant published case directly addressing the 1987 amendments, is Ciani v. San Diego Trust and Savings Bank (1991) 233 Cal.App.3d 1604 [285 Cal.Rptr. 699]. [4] Most significantly, the opinion suggests that automatic approvals under the Act remain subject to whatever administrative appellate procedures would normally apply to projects directly approved or denied by an agency decisionmaking body.

Ciani involved a coastal development permit granted by the City of San Diego ("City") acting as the California Coastal Commission's "delegated local agency" for administering local coastal permits under the California Coastal Act. (See Pub. Resources Code, § 30600.5.) Under Public Resources Code section 30603 (of the Coastal Act), the City's decisions on such permits were normally appealable to the Commission. In holding that even automatic approvals remained subject to such appeals, the Court cited the interests of "third party contestants" in language that would seem to apply in other contexts, such as local proceedings in which planning commission approvals or denials are appealable to a city council or board of supervisors. (233 Cal.App.3d at 1615 [285 Cal.Rptr. 699].)

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[4]/ The losing party in Ciani filed a petition for review with the California Supreme Court. The petition was denied. The State's highest court therefore is aware of the holding in Ciani, and declined either to reverse it or "depublish" the opinion.

In Ciani, the Court of Appeal held that two permits issued by the City were invalid due to noncompliance with PSA and certain Coastal Act provisions. The coastal development permit, as well as a demolition permit issued by the City pursuant to its municipal code, would have allowed the destruction of four historic properties within an area of La Jolla known as the "Green Dragon Colony." The City had granted the two permits in settlement of a PSA lawsuit filed by the applicant (a trust), which complained that the City had taken no action for more than a year after the applications were filed. The Coastal Commission and an individual plaintiff urged that demolition should not proceed until the Commission reviewed the coastal development permit. The property owner had commenced demolition on the same day the City issued the permit. (233 Cal.App.3d at 1610 [285 Cal.Rptr. 699].)

Prior to filing its suit, the landowner had sent a letter to the City's planning director in accordance with the seven-day notice provision of Government Code section 65956, subdivision (b). Such notice warned the City that the trust intended to invoke what it perceived to be its rights under PSA. Seven days later, the trust caused a public notice to be sent to neighboring landowners and interested parties, specifying that, unless the City acted on the coastal development permit within 60 days, the permit would be "deemed approved." No copy of the notice, however, was sent to the Commission. (233 Cal.App.3d at 1609-1610, 1617, 1620 [285 Cal.Rptr. 699].)

After waiting more than 60 days without action by the City, the trust filed the lawsuit that resulted in the issuance of the

coastal development permit and demolition permit. Only on the day of issuance was the Commission notified of either the danger or reality of automatic approval. (233 Cal.App.3d at 1617 [285 Cal.Rptr. 699].) Before the Court of Appeal, the Commission argued that the coastal development permit could not have become effective for at least ten days after the City issued it, since such a period was allowed for appeal pursuant to Public Resources Code section 30603. The trust argued that no right of appeal existed at all for automatic approvals; as a fallback, though, it urged that, if such a right did exist, the 10-day appeal period would have begun to run with the expiration of the 60-day period commenced when it filed notice pursuant to Government Code section 65956, subdivision (b). (Such a period would have expired before the trust filed its lawsuit.) The Commission argued that the 10-day appeal period could commence only when an applicant successfully compels issuance of a permit (i.e., through litigation). (233 Cal.App.3d at 1614-1616 [285 Cal.Rptr. 699].)

The Court agreed with the Commission that a right to appeal exists, but agreed with the trust that the 10-day period should start on the date of automatic approval--without the need for legal action to compel issuance of the permit. Still, though, no appeal period can commence until the appellate body is *notified* of the automatic approval, as expressly required by the Commission's regulations for permits approved by delegated local agencies. In this case, the trust never provided any such notice. Thus, because the Commission first learned of the automatic approval on July 10,

1991, the appeal period continued through July 20th. (233 Cal.App.3d at 1616-1618 [285 Cal.Rptr. 699].)

In holding that even permits approved by operation of PSA remained subject to appeal to the Commission, the Court emphasized the rights of affected third parties, implicitly echoing the due process concerns addressed in Selinger:

> "Where the permit is obtained by the 'deemed approved' mechanism of the Streamlining Act, the parties in opposition are effectively prevented from presenting a case. If a provision for appeal is appropriate following the hearing and appearance procedures which attend the typical method of permit grant, it would seem even more necessary when considered in light of a 'deemed approved' permit. If appellate rights were considered extinguished as the result of the City's inaction, the City could by such inaction deprive third party contestants of all opportunity to object at a public hearing. We cannot believe this to have been the intent of the Streamlining Act."
>
> (233 Cal.App.3d at 1615 [285 Cal.Rptr. 699].)

The Court of Appeal next addressed the question of whether the trust, in issuing its public notice of imminent automatic approval absent action by the City, had adequately complied with the terms of Government Code section 65956, subdivision (b). The Court reasoned that, although the content of the notice issued by the trust was adequate, the trust should have distributed the notice to the Commission. The statute expressly requires that an applicant issuing the notice comply with the "distribution requirements under applicable provisions of law." The Court interpreted this phrase to require notice to whatever persons and entities might be entitled to notice of potential agency action on the permits in question. For the demolition permit, the applicable provisions were found in the San Diego Municipal Code. For the coastal

development permit, the Commission regulations governed. Although, according to the Court, the trust "appears to have complied with many of the requirements of the Municipal Code," it did not comply with the Commission regulations. Specifically, the Commission itself did not receive the notice. Since the Commission never received the 60-day notice, the trust never provided the "public notice required by law," which is a prerequisite for automatic approval under PSA. The coastal development permit, then, was never "deemed approved." (233 Cal.App.3d at 1618-1620 [285 Cal.Rptr. 699].)

In this last part of the opinion, the Court seemed to assume that the phrase "public notice required by law," as found in Government Code section 65956, subdivision (b), referred only to the kind of notice that an applicant can issue in order to try to force agency action within 60 days. (233 Cal.App.3d at 1609, 1618-1619 [285 Cal.Rptr. 699].) The parties apparently did not question this assumption, since there had been no City proceedings on the coastal development permit prior to which any kind of notice would have been given.

REMAINING PROBLEMS WITH PSA

The problem with PSA most relevant to AB 2223 is the possibility of automatic approval before agencies complete their environmental documents and without agencies being able to impose reasonable, feasible mitigation measures. A concrete example of the dire consequences of such occurrences is evident from the facts of a case entitled, Patterson v. City of Sausalito (1 Civil No.

A053074), currently on appeal before the Court of Appeal for the First District in San Francisco. The project in question would involve the construction of residential units on a steep hillside uphill from U.S. Highway 101, at the edge of the Golden Gate National Recreation Area.

In that case, the Superior Court held that a developer's project was "deemed approved" in precisely the form originally proposed by the applicant, despite the fact that a completed EIR showed that it would cause numerous significant environmental effects, including the following:

(1) the very real possibility of a landslide on United States Highway 101, which, according to Caltrans, could lead to loss of life it if occurs during peak commute hours;

(2) loss of habitat of a federally-listed endangered species (the Mission Blue Butterfly);

(3) potentially insoluble sewage disposal problems, since the project area is not served by sewers and is not well suited for conventional septic systems;

(4) potential for hillside erosion from storm water runoff;

(5) the risk of fire danger for new residents due to the lack of adequate water for fire protection services; and

(6) visual impacts within the GGNRA.

Without exception, these impacts could have been diminished or avoided if the Superior Court had allowed the City of Sausalito to impose mitigation measures. The trial court reasoned, though, that the project "deemed approved" was the precise project initially sought by the applicant. It is not hard to imagine other scenarios with even more absurd results.

From a policy standpoint, the major question here is whether the *environment* and *innocent third persons* should be made to pay

the price for an agency's slowness in processing an application. In the Sausalito example, the environmental impacts could even lead to the death of innocent commuters.

Another major problem with PSA is what to do when applicants and agency staff disagree as to whether proposed projects are consistent or inconsistent with applicable general plans or zoning and subdivision requirements. Sometimes reasonable minds differ as to whether projects require legislative actions (e.g., amendments to such plans, zoning ordinances, or subdivision ordinances); and applicants give themselves the benefit of the doubt by assuming that their proposals are consistent. Staff may disagree; but unless and until agency decisionmakers have the chance to resolve this conflict, the debate remains unresolved. Where projects are approved automatically prior to such resolution, they can include features inconsistent with governing local ordinances.

The next major problem with PSA is the question of whether even the 1987 amendments, made in response to Palmer, adequately protect the procedural due process rights of affected landowners. They may not; and the Legislature's eventual response may have to be to abandon the whole concept of automatic approval in favor of some other mechanism for quickening the approval process.

To understand the nature of the constitutional issues involved, a survey of relevant case law is a helpful way to begin.

The most important general statements of federal "procedural due process" principles in the context of land use decisionmaking occur in Horn v. County of Ventura (1979) 24 Cal.3d 605, 615-619 [156 Cal.Rptr. 718], which was briefly described above. In that

seminal decision, which dealt with Subdivision Map Act requirements, the California Supreme Court held that the minimal notice requirements of CEQA [5] did not adequately protect the constitutional rights of property owners who would be "substantially affected" by the approval of a proposed tentative subdivision map. [6] As a result, the Court set aside the respondent agency's approval of the map, and ordered that improved notice be given.

In so holding, the Court emphasized that affected landowners should have been given the opportunity to be heard at a "*meaningful hearing*" prior to agency action on the project. (24 Cal.3d at 618 [156 Cal.Rptr. 718] (emphasis added).) In support of the principle that a "predeprivation hearing" be "meaningful," the Court cited two landmark procedural due process cases: Beaudreau v. Superior Court (1975) 14 Cal.3d 448, 458 [121 Cal.Rptr. 585]; and Bell v. Burson (1981) 402 U.S. 535, 541 [91 S.Ct. 1586].) Although neither

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[5]/ In Horn, the defendant county's CEQA notice procedures required only the posting of notices in various locations and the mailing of notice to persons who had specifically requested such notice. From a constitutional standpoint, such notice was not "reasonably calculated to afford affected persons the realistic opportunity to protect their interests," although it may have been adequate "to encourage the generalized public participation in the environmental decision making contemplated by CEQA." (24 Cal.3d at 617-618 [156 Cal.Rptr. 718].)

[6]/ In Horn, the plaintiff adjacent landowner urged that his property would be "substantially affected" by the proposed subdivision because it would "substantially interfere with his use of the only access from his parcel to the public streets, and [would] increase both traffic congestion and air pollution." The Court held that, "[f]rom a pleading standpoint, plaintiff has thus adequately described a deprivation sufficiently 'substantial' to require procedural due process protection." (24 Cal.3d at 615 [156 Cal.Rptr. 718].)

case involved land use decisionmaking, both cases articulate standards that necessarily apply in that context.

In Beaudreau, the California Supreme Court quoted the United States Supreme Court's statement in Bell that "'[i]t is a proposition which hardly seems to need explication that a hearing which excludes consideration of an *element essential to the decision* . . . does not meet this standard.'" (14 Cal.3d at 458 [121 Cal.Rptr. 585] (emphasis added).) In another federal case, Armstrong v. Manzo (1965) 380 U.S. 545, 552 [85 S.Ct. 1187], the Supreme Court emphasized that the "opportunity to be heard" must be granted "*at a meaningful time and in a meaningful manner.*" [7]

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[7]/ In Beaudreau, the Court held that procedural due process principles were violated by former Government Code sections 947 and 951, which allowed defendant public agencies to require plaintiffs to post undertakings as security against court costs that might ultimately be awarded to the agencies. The Court explained that "a due process hearing would necessarily inquire into the merit of the plaintiff's action as well as into the reasonableness of the amount of the undertaking in light of the defendant's probable expenses." (14 Cal.3d at 460-462 [121 Cal.Rptr. 585].)

In Bell, the U.S. Supreme Court had addressed a similar issue. The Court struck down as unconstitutional a Georgia statute requiring the suspension of the driver's licenses of uninsured motorists involved in accidents unless such motorists posted undertakings during litigation filed against them. The statute was defective because it did not require a hearing on the possibility that the motorists would be held liable prior to depriving them of their licenses or requiring the undertakings. (402 U.S. at 540 [91 S.Ct. 1586].)

In Armstrong, the Court held that Texas had violated the due process rights of the natural father of a child whom the husband of his ex-wife wanted to adopt. Under the state court procedures, the natural father had been provided no notice of the pre-adoption hearing; and this defect was not cured by his ability to obtain a post-adoption hearing at which he had the burden to prove the incorrectness of the original decision. (380 U.S. at 551-552 [85 S.Ct. 1187].)

In 1986, as noted above, the Second Appellate District issued its problematic holding in Palmer v. Ojai, which concluded that, despite the reasoning of Horn, section 65956 as originally drafted was not unconstitutional even though projects could be "deemed approved" in the absence of any public hearing at which affected property owners could voice their concerns.

In 1989, in Selinger v. City Council, supra, the Fourth District, interpreting the same (now outdated) code section, reached the opposite conclusion, finding the reasoning of Palmer to be absolutely irreconcilable with that of Horn:

> "The *Palmer* court concluded, 'In the matter before us, City's failure to follow *Horn* may *not* be used by City to invalidate legislative enactments in any way inconsistent with the procedural due process considerations involved in *Horn*.' (*Id.*, at p. 292, original italics.)
>
> "The *Palmer* court relied heavily on its perception that the failure to provide notice was the fault of the local government. The *Palmer* court apparently overlooked the *Horn* court's discussion of the automatic approval provisions which appear in the Subdivision Map Act: '[T]he due process requirements discussed herein are not rooted in statute but are compelled by the stronger force of constitutional principle.' (*Horn, supra* 24 Cal.3d at p. 616.)
>
> "As in *Horn*, automatic approval of Selinger's tentative tract map could lead to substantial deprivation of property of neighboring landowners. The California Supreme Court held in *Horn* that *approval of tentative subdivision maps is unconstitutional unless adequate notice and a hearing are provided*. We see no way to reconcile *Palmer* with the *Horn* decision. We are duty bound to follow *Horn*; thus, we concluded that the Permit Streamlining Act was unconstitutional insofar as it led to approval of applications for development without provision for notice and a hearing to affected landowners."
>
> (216 Cal.App.3d at 274 [264 Cal.Rptr. 259] (emphasis added; footnoted omitted.)

Interestingly, in addressing the 1987 amendments to section 65956, the Selinger court stated, in dicta, that "the recent

amendments to the Permit Streamlining Act . . . resolve the constitutional issue for all current applications for development." (216 Cal.App.3d at 274, fn. 8 [264 Cal.Rptr. 259].) This statement, though, assumes that "the Legislature amended section 65956 to include a requirement of notice to the public and a *hearing*." (216 Cal.App.3d at 265, fn. 3 [264 Cal.Rptr. 259] (emphasis added).) Thus, to the extent that the term "public notice required by law" in section 65956, subdivision (b), can be understood to require only notice, but not a hearing, such an interpretation would be unconstitutional according to Selinger. [8]

In light of the reasoning in Horn and Selinger, the question of the whether an agency has issued the "public notice required by law" is inseparable from the question of whether the hearing for which the notice was given actually provided affected property owners' a "meaningful" opportunity "to be heard." If no such linkage is made, then an interpretation of PSA by which "automatic approval" could occur as long as mere notice by an agency, without a meaningful hearing, has been given, would clearly be unconstitutional. In other words, simple "notice" by itself cannot protect the procedural due process rights of affected landowners,

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[8]/ Unless it was just a misreading of the words of the statute, the Selinger court's reading of the 1987 amendments undoubtedly reflects the principle that "remedial" amendments (i.e., those attempting to cure a perceived defect in the original statute), "must be liberally construed so as to effectuate [their] object and purpose, and to suppress the mischief at which [they were] directed." (California State Restaurant Association v. Whitlow (1976) 58 Cal.App.3d 340, 347 [129 Cal.Rptr. 824]; see also City of San Jose v. Forsythe (1968) 261 Cal.App.2d 114, 117 [67 Cal.Rptr. 754] and Lande v. Jurisich (1943) 59 Cal.App.2d 613, 616-617 [139 P.2d 657].)

who have a right "to be heard." The notice must relate to a hearing, and the hearing must occur "at a meaningful time and in a meaningful manner," and must address every "element essential to the decision" at hand. (Armstrong, supra, 380 U.S. at 552 [85 S.Ct. 1187]; Beaudreau, supra, 14 Cal.3d at 458 [121 Cal.Rptr. 585]; Bell, supra, 402 U.S. at 542 [91 S.Ct. 1586]; see also Horn, supra, 24 Cal.3d at 618 [156 Cal.Rptr. 718].)

It is unclear whether a hearing held prior to completion of an EIR or negative declaration can be constitutionally "meaningful." Arguably, such a hearing does not occur at a "meaningful time," and cannot address all "element[s] essential to the [lead agency's] decision." In situations in which automatic approval is a realistic possibility, affected landowners should be made aware of that very danger so that they "can be heard" on the question of how such a draconian result can be avoided. In the absence of a public hearing held after this possibility becomes public knowledge, automatic approval based on "public notice required by law" issued for previous hearings is constitutionally problematic.

In other words, anything short of a hearing on the merits of a project may not be constitutionally meaningful. An affected landowner's "right to be heard" may be meaningless unless he or she is addressing decisionmakers who have the power to act on what is said. [9] That power, of course, must include the power to deny a project--even if more than six months or a year has passed since the application was "deemed complete."

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[9]/ By analogy, a defendant who can only argue his case after he has been convicted of a crime has hardly been accorded due process.

Under this analysis, PSA timelines can do little more than force agencies to hold hearings at which the agencies must be able to hear testimony and, if they desire, deny or condition the project. Any kind of *automatic* approval, which occurs without affected landowners being given a fair chance to defend their interests, may be unconstitutional.

In light of these considerations, the Legislature should abandon the concept of automatic approval in favor of an approach by which agencies are forced *to act* on projects--approving, conditioning, or denying them--within a reasonable time period. Such a reform would end the gamesmanship that often occurs currently, by which applicants often cooperate with agencies while deadlines pass (even contributing to such delay themselves), then lie in wait to demand automatic approval if local politics begin to shift against them, or if agency decisionmakers indicate a desire to impose mitigation measures the applicants do not like.

A reformed PSA without automatic approval would still serve the primary goal of the original statute: forcing agencies to reach *decisions* on projects within a reasonable time frame. The existing statute already serves this function to a degree. By providing notice of potential automatic approval pursuant to Government Code section 65956, subdivision (b), an applicant can force an agency to take final action within 60 days, as the Ciani decision held.

Under such proposed reforms, a lead agency would still maintain ultimate control over the *form* of a project, which could be approved, conditioned, or denied. What many development interests have argued for (effectively so far, at least in the

Superior Courts) is the *elimination* of that control, whereby, as *punishment* for an agency's slowness in processing an application, an applicant is *rewarded* by being given his or her ultimate wish: the project in precisely the form sought in the application. As noted above, the recent experience of the City of Sausalito demonstrates the absurd consequences of such an approach. If upheld by the Court of Appeal or Supreme Court (which appears unlikely), such a policy would require agencies to completely *surrender* their police power, regardless of the consequences, as a penalty for not moving quickly enough. The Legislature could save years of litigation by solving these problems legislatively in the near future.

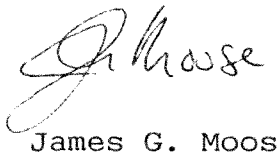
CONCLUSION

In Selinger, the Court quoted a commentator who "cogently observed" that "'[l]aid almost haphazardly upon a heap of existing rules, the changes [of the Permit Streamlining Act] set up a chain reaction of statutory conflicts that continues today.' (Wilson, *Down Stream from Streamlining* (Aug. 1987) Cal.Law. 67, 68.)" (216 Cal.App.3d at 267, fn. 5 [264 Cal.Rptr. 499].) The commentator should have added reference to "constitutional conflicts" as well.

The Legislature should begin rethinking its whole approach to forcing agency action on development projects. AB 2223 would be a big improvement to PSA, in that the bill should help to reduce the frequency of horror stories such as the one from the Sausalito litigation described above. The bill, though, would do nothing to address the existing statute's constitutional problems. In coming to grips with that more fundamental problem, the Legislature has

two choices: either to let the courts continue to interpret the Act, and then see what's left; or to go back to the drawing board to come up with a way to balance the development community's desire for quick action on projects with the myriad other considerations touched on above.

Sincerely,



James G. Moose

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COAST

COASTAL AREA SUPPORT TEAM

10 December 1991

Senate Committee on Local Government
P.O. Box 94246
Sacramento, California 94248-0001

RE: AB 2223 PERMIT STREAMLINING ACT

Honorable Ms. Marian Bergeson and Committeemembers:

COAST members and directors are concerned about the disharmony between the Permit Streamling Act and the California Environmental Quality Act.

We are a non-profit corporation comprised of activists and representatives of community associations from Santa Monica to Weschester along Lincoln Boulevard. We have witnessed the divisive effect of these conflicting statutes with the proposed Blanchard project.

On one hand, COAST recognizes the concerns of developers who risk time and money when entering into a building project. There are many uncertainties. When a municipality fails in its responsibility to act in a timely manner in approving a project, it adds an unwarranted burden. PSA gives developers some protection against this.

On the other hand, COAST sees that the public must be informed and protected from the harmful effects of proposed developments. CEQA ensures this protection.

COAST urges that these two statutes be harmonized. Developers, municipalities, and the public are partners working for positive community growth. To work together, we need to have one set of rules.

For those parties who would argue that AB 2223 is unnecessary because litigation is a remedy, COAST says "hogwash". We know from personal experience that litigation is costly and time-consuming. It is a remedy that is out of reach for most of the public. Moreover, it drives the public and developers apart, when they should be working in partnership to build the best community possible.

4777 La Villa Marina
Marina del Rey, California 90292

COAST fully supports the effort to reconcile PSA and CEQA through AB 2223.

With regard,

John Powers

John Powers,
President

Terry Conner

Terry Conner,
Treasurer

Debra L. Bowen,
Counsel

RUTH GALANTER
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December 13, 1991

Honorable Marian Bergeseon
Chair
Senate Committee on Local Government
4082 Capitol Building
State Capitol
Sacramento, CA 95814

Dear Senator Bergeson:

RE: AB 2223; December 17, 1991, hearing.

Thank you for inviting me to appear before the Senate Committee on Local Government. I regret that my City obligations that day prevent my attending. Fortunately, Frank Eberhard, Deputy Director of City Planning for the City of Los Angeles, has consented to represent the City of Los Angeles before you.

Mr. Eberhard has many years of experience with the issues before you as well as direct knowledge of the Venice-area case which led to the City's recent involvement with the Permit Streamlining Act. I am confident his contribution to the hearing will be invaluable to your deliberations.

I would like to take this opportunity to comment in writing on some of the information presented in the Committee's briefing paper. As the person who first raised this issue with Assemblywoman Moore, I hope I can add a little extra perspective to the discussion.

First, I would like to thank the legislature for the energy you have invested in this matter. The Assembly's passage of the bill and your subsequent consideration underscores the fact that a legitimate problem has been unearthed and stands ready to be addressed in a manner that will serve our citizens, property owners and governmental institutions better than does the current state of the law. It follows logically that I urge you to take an affirmative step to do so at your earliest opportunity.

Your briefing paper suggests three possible approaches to resolving the heretofore ambiguous relationship between the California Environmental Quality Act (CEQA) and the Permit Streamlining Act (PSA): requiring CEQA to be completed first, requiring adherence to the same deadlines, or tolling the deadlines until all local legislative decisions pertaining to the application are completed. My original request to Assemblywoman Moore basically supported the first of these alternatives, and I still feel it addresses the issue at hand most directly.

In my request to Assemblywoman Moore, I suggested a simple concept: complete the CEQA review and certification prior to confirmation of "deemed approved" status under the PSA. This would allow for simultaneous running of the CEQA and PSA clocks (not sequential running, as some critics feared the proposal implied), and prompt issuance of the automatic permit approvals if the PSA deadlines had expired by the time the CEQA review was completed. I believe there is still validity in this interpretation of my proposal and AB 2223, as approved by the Assembly, appears to be consistent with it.

Arguments that mandatory CEQA compliance prior to imposition of the PSA provide an opportunity for local jurisdictions to abuse the PSA could be addressed rather straightforwardly, but such an approach is not without drawbacks. By combining CEQA compliance with some absolute deadlines for completion of the CEQA process and the threat of "deemed certification," an element of certainty could be injected into the concept. For example, one possible approach would be to impose PSA's 90-day extension limit on CEQA compliance, with an automatic certification under CEQA to follow failure to complete separate CEQA certification within the 15-month period. This would then coincide with issuance of the automatic permit approval under PSA.

However, this would essentially formalize (and codify) the type of situation that gave rise to the legislation before you, in which the City failed to complete its environmental review of a controversial development. Luckily, this particular project was in the Coastal Zone, so there was another agency (the Coastal Commission) empowered to provide further scrutiny.

The basic problem with absolute deadlines for CEQA review is that schedules should not take precedence over protection of the environment.

Court decisions regarding the PSA have left the resolution of these issues to the legislative process you have undertaken. I do not believe that community interests or development interests are well served by the current ambiguous situation. Developers are not provided sufficient certainty of process and protection against costly litigation, and communities have little recourse except litigation over procedural issues which should be resolved once and for all through precise legislative action. Additionally, our overburdened courts can

do without more potentially fruitless litigation on procedural issues that they've already suggested are most appropriately handled through a legislative process.

AB 2223 should be approved retaining the first alternative outlined in the briefing paper. Its passage will permit disputes over development proposals such as 601 Ocean Front Walk to focus on the merits of the proposals. That is where the focus belongs. I hope you will move this legislation forward in that positive spirit, to the benefit of all concerned.

Thank you for considering my views.

Sincerely,

Ruth Galanter

RUTH GALANTER
Councilwoman, Sixth District

RG/jes

cc: Hon. Gwen Moore
Frank Eberhard

FRIENDS OF WESTWOOD, INC.
A Nonprofit Tax-Exempt Corporation

December 16, 1991

Senate Subcommittee on Local Government
Room 112, State Capital
Sacramento, Calif. 94248-0001

Re: Assembly Bill 2223 (Moore), Permit Streamlining Act Issues

Honorable Members of the Local Government Senate Subcommitte,

Friends of Westwood is a Los Angeles based non profit organization concerned with land issues especially as they apply to the general Westwood community. The organization is comprised of approximately 500-700 households.

Friends of Westwood supports the above referenced proposed legislation. Implementation of the proposed legislation will allow full disclosure of facts contained within environmental documentation, especially an EIR, prior to discretionary permits being granted. This will permit a much more informed decision making process. Additionally, it will allow increased possibilities for an informed public and its participation in the decision making process. Friends of Westwood has always advocated measures which will further an informed and active public.

Sincerely,

Jackie Freedman

Jackie Freedman

Laura Lake

Laura Lake

P O'B

Patricia O'Brien
Directors

1015 Gayley Ave., Suite 1063, L.A., CA 90024 ** 475-6261