SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 393 (Glazer)
Version: August 19, 2024
Hearing Date: August 28, 2024
Fiscal: No
Urgency: No
AM

PURSUANT TO SENATE RULE 29.10(d)

SUBJECT

California Environmental Quality Act: judicial challenge: identification of contributors: housing projects

DIGEST

This bill would, in actions challenging certain low- or moderate-income housing projects, shift the burden of demonstrating that posting a bond would place an undue economic hardship on the plaintiff from the defendant to the plaintiff.

EXECUTIVE SUMMARY

This bill is brought in response to a situation that occurred in the author's district. An approved housing project in the City of Livermore was challenged as being in violation of CEQA. The trial court and appellate court ultimately found for the city and noted that the case was meritless and seemed to be brought for the sole purpose of delay.[1] Under existing law, a defendant in an action challenging certain low- or moderate-income housing projects can file a motion seeking that the plaintiff post an undertaking; however, the defendant has the burden of proving that doing so will not place an undue economic hardship on the plaintiff. This bill seeks to shift that burden onto the plaintiff, under the argument that the plaintiff is the one who has the information to make such a showing.

Since this bill was originally heard in our Committee it was amended to completely change the bill's provisions on June 3, 2024. As such, only letters received since that date will be reflected in this analysis. The bill is author sponsored and supported by the California Housing Partnership Corporation and Eden Housing. No opposition was timely submitted to the Committee.

[1] *Save Livermore Downtown v. City of Livermore* (2022) 87 Cal.App.5th 1116, 1138.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Requires lead agencies with the principal responsibility for carrying out or approving a proposed discretionary project to prepare a negative declaration, mitigated declaration, or environmental impact report (EIR) for this action, unless the project is exempt from CEQA (CEQA includes various statutory exemptions, as well as categorical exemptions in the CEQA Guidelines). (Pub. Res. Code § 21100 et seq.)

2) Sets requirements relating to the preparation, review, comment, approval and certification of environmental documents, as well as procedures relating to an action or proceeding to attack, review, set aside, void, or annul various actions of a public agency on the grounds of noncompliance with CEQA. (Pub. Res. Code § 21165 et seq.)

3) Authorizes judicial review of CEQA actions taken by public agencies, following the agency's decision to carry out or approve the project, and specifies certain time periods in which an action must be instituted depending on the type of claim alleged. (Pub. Res. Code § 21167.)

4) Requires the superior court and court of appeal to provide lawsuits related CEQA preference over all other civil actions therein, in the matter of setting the same for hearing or trial, and in hearing the same, to the end that the action or proceeding is to be quickly heard and determined. (Pub. Res. Code § 21167.1(a).)

5) Provides that in all civil actions, including those brought by any plaintiff to challenge a housing development project which is a development project which meets or exceeds the requirements for low- or moderate-income housing, a defendant may apply to the court by noticed motion for an order requiring the plaintiff to furnish an undertaking as security for costs and any damages that may be incurred by the defendant by the conclusion of the action or proceeding as the result of a delay in carrying out the development project if the bringing of the action has the effect of preventing or delaying the project from being carried out. (Code of Civ. Proc. § 529.9.)

6) Provides that a plaintiff seeking a security in accordance with 5), above, must make a motion for that security on the grounds that:
    a) the action was brought in bad faith, vexatiously, for the purpose of delay, or to thwart the low- or moderate-income nature of the housing development project; and

b) the plaintiff will not suffer undue economic hardship by filing the undertaking. (*Ibid*.)

7) Authorizes a defendant, in any litigation pending in any court of this state and at any time until final judgment is entered, to move the court upon a notice and a hearing for an order requiring the plaintiff to furnish security.
   a) Provides that the motion for an order requiring the plaintiff to furnish security must be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that they will prevail in the litigation against the moving defendant. (Code of Civ. Proc. § 391.1.)

8) Defines a "vexatious litigant" as a person who does any of the following:
   a) in the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations, other than in a small claims court that have been finally determined adversely to the person or unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing;
   b) after a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined;
   c) in any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay; or
   d) has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence. (Code of Civ. Proc. § 391 (b).)

This bill:

1) Requires a motion by a defendant seeking a plaintiff to post a bond in certain actions challenging certain low- or moderate-income housing projects to additionally demonstrate that the action is without merit.

2) Authorizes a plaintiff, in response to a motion seeking an undertaking, to seek to limit the amount of the undertaking by presenting admissible evidence that filing an undertaking will cause it, and in cases where the plaintiff is an unincorporated association, its members, to suffer undue economic hardship.

3) Specifies that the court should take into consideration any admitted evidence of plaintiff's economic hardship and avoid causing the plaintiff to suffer undue economic hardship.

4) Specifies that if the court concludes, based on all of the admissible evidence presented, that a bond in any amount would cause the plaintiff undue economic hardship, the court can decline to impose a bond.

COMMENTS

1. Stated need for the bill

The author writes:

> In recent years, the California Environmental Quality Act (CEQA) has been used by some plaintiffs to challenge affordable housing projects, often resulting in costly delays and financial burdens for developers. In response to these issues and to protect developers while also maintaining environmental safeguards, this bill will help affordable housing developers recoup the costs of litigation when plaintiffs bring a CEQA lawsuit against an affordable housing project in bad faith. Currently, an affordable housing developer facing a CEQA lawsuit can ask the court to require the plaintiff to post a bond of up to $500,000. The bond helps the developer recover losses incurred from a bad faith lawsuit. However, this tool to stop gamesmanship is difficult to use because the law requires the developer to prove the plaintiff will not be financially harmed by posting the bond. Such a requirement is unrealistic since a developer cannot reasonably know the plaintiff's finances, especially if they file anonymously. In fact, a report found only one developer in California has been granted such a bond after the plaintiff accidentally admitted information about their finances. This bill balances the scales by, instead, allowing plaintiffs to show the court they would be financially harmed by the bond. The court will then consider this when deciding whether to grant the bond and the bond amount. It's a fairer, more effective solution to prevent CEQA abuse and keep essential housing projects moving forward.

2. CEQA generally

Enacted in 1970, CEQA requires state and local agencies to follow a set protocol to disclose and evaluate the significant environmental impacts of proposed projects and to adopt feasible measures to mitigate those impacts. CEQA itself applies to projects undertaken or requiring approval by public agencies, and, if more than one agency is involved, CEQA requires one of the agencies to be designated as the "lead agency." The environmental review process required by CEQA consists of: (1) determining if the activity is a project; (2) determining if the project is exempt from CEQA; and (3) performing an initial study to identify the environmental impacts and, depending on

the findings, prepare either a Negative Declaration (for projects with no significant impacts), a Mitigated Negative Declaration (for projects with significant impacts but that are revised in some form to avoid or mitigate those impacts), or an EIR (for projects with significant impacts).

An EIR must accurately describe the proposed project, identify and analyze each significant environmental impact expected to result from the proposed project, identify mitigation measures to reduce those impacts to the extent feasible, and evaluate a range of reasonable alternatives to the proposed project. Before approving any project that has received environmental review, an agency must make certain findings pertaining to the project's environmental impact and any associated mitigation measures. If mitigation measures are required or incorporated into a project, the public agency must adopt a reporting or monitoring program to ensure compliance with those measures. To enforce the requirements of CEQA, a civil action may be brought under several code sections to attack, review, set aside, void, or annul the acts or decisions of a public agency for noncompliance with the act.

Unlike other environmental laws specific to air resources, water resources, or the control of toxic substances, there is no statewide bureaucracy charged with enforcement of CEQA. Rather, it is enforced through citizen participation and litigation if necessary. Arguably, this makes the implementation of CEQA more efficient and expeditious than if a state agency were created to administer the law. Thus, CEQA litigation could more appropriately be characterized as mere enforcement.

"CEQA operates, not by dictating proenvironmental outcomes, but rather by mandating that 'decision makers and the public' study the likely environmental effects of contemplated government actions and thus make fully informed decisions regarding those actions. … In other words, CEQA does not care what decision is made as long as it is an informed one." (*Citizens Coalition Los Angeles v. City of Los Angeles* (2018) 26 Cal. App. 5th 561, 577.)

3. Bill is in response to a situation that has arisen in author's district

The author indicates this bill is in response to a situation that occurred in his district. In short, the City of Livermore approved a project that would result in 130 units of affordable housing to be built by Eden Housing, a private developer. A group opposing the project, Save Livermore Downtown (SLD), filed suit under CEQA in June 2021, alleging the city's environmental study for the project was inadequate and not in compliance with the city's downtown specific plan. According to news reports, SLD has spent over $1 million on mailers and advertising in opposition to the affordable housing project. The city and Eden Housing ultimately won at the trial court level; however, Eden Housing has stated that the delay had forced it to return $68 million in low-income housing tax credits it had received for the project. SLD appealed the trial court

decision, but their appeal was rejected. In its ruling upholding the trial court decision, the appeals court wrote:

> "With the trial court we conclude, '[t]his is not a close case.' SLD's contentions regarding the project's consistency with the Downtown Specific Plan and its CEQA arguments lack merit, so much so that the inherent weakness of these claims further supports the trial court's finding that SLD brought this action to delay the project." (*Save Livermore Downtown v. City of Livermore* (2022) 87 Cal.App.5th 1116, 1138.)

During the trial court hearing, the city and Eden made a motion under Section 529.2 of the Code of Civil Procedure seeking for SLD to post a bond. Under existing law, the defendant, in this case the city, has the burden of showing that: (1) the action was brought in bad faith, vexatiously, for the purpose of delay, or to thwart the low- or moderate-income nature of the housing development; and (2) that posting a bond will not cause the plaintiff to suffer undue economic hardship. The trial court granted the motion for a bond after reviewing evidence provided by the city showing Save Livermore Downtown's significant spending against the project. According to the author, requiring the defendant to show that the bond will not cause undue hardship is exceedingly difficult and that the only reason they were successful in this instance was due to inadvertent disclosures made by SDL publically regarding their financial situation. In light of this, the author seeks to instead place the burden on the plaintiff to show that the amount of the bond will cause the plaintiff, and in cases where the plaintiff is an unincorporated association its members, to suffer undue economic hardship. The bill also requires that defendant show that the action is without merit in addition to being brought in bad faith, vexatiously, for the purpose of delay, or to thwart the low- or moderate-income nature of the housing development. The bill would specify that if the court concludes, based on all of the admissible evidence presented, that a bond in any amount would cause the plaintiff undue economic hardship, the court may decline to impose a bond.

4. <u>First amendment implications</u>

In a recent U.S. Supreme Court Case, *Americans for Prosperity Foundation v. Bonta* ((2021) 141 S.Ct. 2373.), the Court held that the California Attorney General (AG) requirement that charities disclose their Schedule B to Form 990 when registering with the state facially violated the First Amendment. Schedule B requires non-profit organizations to disclose the names and addresses of donors who have contributed more than $5,000 in a particular tax year or, in certain cases, more than 2% of an organization's total contributions and is filed with the federal government. The Court held that the standard of review to be applied in compelled disclosure situations is an exacting scrutiny standard, and wrote that under this standard there must be a "'substantial relation between the disclosure requirement and a sufficiently important governmental interest,' and that the disclosure requirement be narrowly tailored to the interest it promotes." (*Id*. at 2383-85; internal quotation marks omitted.) The court also stated that

a law may be facially challenged and invalidated "as overbroad if a substantial number of its applications are unconstitutional." (*Id.* at 2387.)

The Court found that preventing fraud by charities was a substantial governmental interest, stating that there was "no doubt that California has an important interest in preventing wrongdoing by charitable organizations."(*Id*. at 2387.) However, the court found that the disclosure requirement was not narrowly tailored, pointing to the fact that the District Court found no concrete example of pre-investigation collection advancing the AG's enforcement efforts. (*Id*. at 2386.) The Court noted that there were other methods available to the AG to collect such information, such as a subpoena or audit letter. (*Ibid*.) The AG argued to the Court that the disclosure requirement did not result in any widespread chilling of association rights, that the disclosures were confidential, and that there were no burdens placed on the donors because tax-exempt charities already provide their Schedule B form to the Internal Revenue Service. (*Id*. at 2387-88.) The Court found these arguments unpersuasive. The Court concluded that the protections of the First Amendment as it relates to freedom of association "are triggered not only by actual restrictions" on a person's ability to join with other people to further a shared goal but also when there is a risk of a chilling effect on association. (*Id*. at 2389.)

A California appellate court recently applied the holding in *Americans for Prosperity Foundation* to a discovery request by the Public Utility Commission's (PUC) Public Advocate's Office (PAO) on Southern California Gas Company (SCG) related to whether the political activities of SCG are funded by SCG's shareholders, which is permissible, or ratepayers, which is not permissible under existing law. The court held that the discovery request violated the First Amendment as applied to SCG because it infringed upon their freedom of association rights. (*Southern California Gas Company v. Public Utilities Commission* (2023) 87 Cal.App5th 324.) The court applied the exacting scrutiny standard as laid out under *American for Prosperity Foundation* and stated that a party objecting to a discovery request based on First Amendment rights has to make a prima facie showing that the enforcement of the request will result in harassment, membership withdrawal, or discouragement of new members or other consequences that objectively indicate an impact on or "chilling" of the members' association rights. (*Id*. at 342-43.) If the petitioner can make the *prima facie* showing the burden shifts to the government to demonstrate that the disclosure serves a compelling government interest and is the least restrictive means of obtaining the requested information. (*Id*. at 343.)

The court stated that "a governmental entity seeking discovery must show that the information sought is highly relevant to the claims or defenses in the proceeding at hand" and that the information is essential to perform its duties. (*Id*. at 344-45.) Here, much like in the *American for Prosperity Foundation* case, the information to be disclosed would remain confidential but this was found unpersuasive by the court. They noted confidentiality was irrelevant to the matter because the evidence provided by SCG "demonstrates that the disclosure to the PAO itself would chill third parties from associating with the utility." (*Id*. at 344.) SCG made this demonstration by providing

evidence that disclosure would have a chilling effect on the ability of SCG to engage in activities that are lawful, and submitted declarations from organizations stating that the disclosure required by PAO would dissuade them from communicating or contracting with SCG.

It is unclear if this bill implicates the First Amendment as addressed in the cases above. It could be argued that this statute is not a compelled disclosure situation as a plaintiff is not required to provide evidence of their financials, but is merely authorized to provide that information to challenge a motion seeking an undertaking. Additionally, it could be argued that preventing frivolous litigation and stopping undue delay in the construction of affordable housing is an important state interest and that the provision is narrowly tailored. However, requiring the financials of members of an unincorporated association to be disclosed in order to challenge an undertaking may pose a risk of having a chilling effect on associations in a way that the cases above find violate the First Amendment.

5. Statements in support

The California Housing Partnership writes in support:

> […] SB 393 will provide some recourse for affordable housing providers facing these lawsuits — by amending an existing law that allows a court to require the plaintiff to post a $500,000 bond as security for costs and damages if the lawsuit was brought "in bad faith, vexatiously, for purpose of delay, or to thwart the low- or moderate-income nature of the housing development project." While the law currently requires housing developers to prove plaintiffs can afford to pay these bonds (a difficult task, since these groups are often anonymous), this bill would shift the burden of proof to require those filing a lawsuit against a housing project to show why they do not have the ability to pay, instead.
>
> This is smart policy. It will offer a small amount of redress to affordable housing providers forced to spend time and resources defending against spurious legal actions, while promoting the state's goal of promoting housing.

SUPPORT

Abundant Housing LA
California Building Industry Association
California Housing Partnership Corporation
Circulate San Diego
Eden Housing
Housing Action Coalition
Housing Trust Silicon Valley
SPUR

The Two Hundred for Homeownership
YIMBY Action

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: None known .

PRIOR VOTES

Assembly Floor (Ayes 77, Noes 0)
Assembly Judiciary Committee (Ayes 11, Noes 0)

This bill was amended on June 3, 2024, to completely change the bill's provisions. All votes prior to this date are therefore irrelevant.

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