SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2025-2026 Regular Session

SB 678 (Niello)
Version: February 21, 2025
Hearing Date: April 22, 2025
Fiscal: No
Urgency: Yes
AM

SUBJECT

Fire prevention activities: challenges: undertaking

DIGEST

This bill provides a mechanism for a defendant in a civil action, including under the California Environmental Quality Act (CEQA), challenging a project that engages in fire prevention activities, as defined, to seek an order requiring the plaintiff to furnish an undertaking as security for costs and damages that may be incurred by the defendant if the bringing of the action by the plaintiff would result in preventing or delaying the project.

EXECUTIVE SUMMARY

Existing law provides a mechanism for a defendant in a civil action challenging a housing project that is a project which is a development project which meets or exceeds the requirements for low- or moderate-income housing to seek an order requiring the plaintiff to furnish an undertaking as security for costs and damages that may be incurred by the defendant if the bringing of the action by the plaintiff would result in preventing or delaying the project. A plaintiff may 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. This bill seeks to enact similar provision for actions challenging a project that engages in fire prevention activities and contains an urgency clause. The bill is author-sponsored. No timely support or opposition was received by the Committee. Should this bill pass this Committee, it will next be heard in the Senate Appropriations Committee.

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(a).)

6) Provides that a defendant seeking a security in accordance with 5), above, must make a motion for that security on the grounds that the action is without merit and 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. (*Ibid*.)

7) Authorizes the plaintiff, in response to a motion for an undertaking made under 5), above, 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. (*Id* at subd. (b).)

8) Requires the court, if the court determines after a hearing that the grounds for the motion have been established, to order the plaintiff to file the undertaking in an amount specified in the court's order, taking into consideration any admitted evidence of plaintiff's economic hardship and avoiding to cause the plaintiff to suffer undue economic hardship, as security for costs and damages of the defendant.
    a) The liability of the plaintiff for the costs and damages of the defendant is not to exceed $500,000.
    b) 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 is authorized in its discretion to decline to impose a bond.
    c) If at any time after the plaintiff has filed an undertaking the housing development plan is changed by the developer in bad faith so that it fails to meet or exceed the requirements for low- or moderate-income housing, the developer is liable to the plaintiff for the cost of obtaining the undertaking. (*Ibid*.)

9) 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.)

10) 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) Provides that in all civil actions, including those brought under CEQA, by any plaintiff to challenge a project which will engage in fire prevention activities, as defined in Section 4124 of the Public Resources Code, 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.

2) Requires a defendant seeking a security in accordance with 1), above, to make a motion for that security on the grounds that the action is without merit and was brought in bad faith, vexatiously, for the purpose of delay, or to thwart the project.

3) Authorizes the plaintiff, in response to a motion for an undertaking made under 1), above, 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.

4) Requires the court, if the court determines after a hearing that the grounds for the motion have been established, to order the plaintiff to file the undertaking in an amount specified in the court's order, taking into consideration any admitted evidence of the plaintiff's economic hardship and avoiding to cause the plaintiff to suffer undue economic hardship, as security for costs and damages of the defendant. The liability of the plaintiff for the costs and damages of the defendant is not to exceed $500,000. 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 is authorized in its discretion to decline to impose a bond.

5) Declares the bill is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the California Constitution and shall go into immediate effect.

COMMENTS

1. Stated need for the bill

The author writes:

> The Legislature recognized that low and moderate-income housing projects are a priority of the state last year when it unanimously passed SB 393 (Glazer, Ch. 285, Stats. 2024) which shifted the burden of demonstrating that posting a bond would place an undue economic hardship on them from the defendant of a CEQA lawsuit to the plaintiff of a CEQA lawsuit. SB 678 extends the same provisions to fire prevention activities in recognition that those activities are also a priority; and recognizes that it's not practical for the defendant to know the financial situation of an entity challenging a fire prevention activity in detail enough to know if the posting of a bond would cause economic strain to that entity.

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. Providing a mechanism to seek an undertaking in actions challenging a project that engages in fire prevention activities

SB 393 (Glazer, Ch. 285, Stats. 2024) amended an existing provision of law (Code of Civ. Proc. § 529.2) that provided a mechanism for a defendant in a civil action challenging a housing project which is a development project that meets or exceeds the requirements for low- or moderate-income housing to seek an order requiring the plaintiff to furnish an undertaking as security for costs and damages that may be incurred by the defendant if the bringing of the action by the plaintiff would result in preventing or delaying the project. Prior to the enactment of SB 393, the defendant had the burden of making a showing that the posting of the undertaking would not place an undue hardship on the plaintiff. SB 393 shifted the burden to the plaintiff to demonstrate that posting a bond would place an undue economic hardship on the plaintiff, arguing that the plaintiff is the one who has the information to make such a showing and therefore it was more appropriate to place that burden on the plaintiff.

This bill seeks to enact a similar mechanism for a defendant in a civil action, including an action under CEQA, challenging a project that engages in fire prevention activities. This bill allows such a defendant to seek an order requiring the plaintiff to furnish an undertaking as security for costs and damages that may be incurred by the defendant if the bringing of the action by the plaintiff would result in preventing or delaying the project. "Fire prevention activities" is defined as those lawful activities that reduce the risk of wildfire in California, including, but not limited to, mechanical vegetation management, prescribed grazing, prescribed burns, creation of defensible space, and retrofitting of structures to increase fire resistance. The bill includes all the same provisions in existing Section 529.2 of the Code of Civil Procedure, including:

- requires a defendant seeking an undertaking to make a motion on the grounds that the action is without merit and was brought in bad faith, vexatiously, for the purpose of delay, or to thwart the project;
- authorizing the plaintiff, in response to a motion for 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;
- requiring the court to order the plaintiff to file an undertaking in an amount specified in the court's order as security for costs and damages of the defendant, if the court determines after a hearing that the grounds for the motion have been established and the court has taken into consideration any admitted evidence of the plaintiff's economic hardship;
- limiting the liability of the plaintiff for the costs and damages of the defendant to no more than $500,000; and
- authorizing the court, in its discretion, to decline to impose a bond if it concludes that a bond in any amount would cause the plaintiff undue economic hardship based on all of the admissible evidence presented.

The author provided several cases to Committee staff evidencing various challenges to vegetation management plans and projects under CEQA. One such case, *Claremont Canyon Conservancy v. Regents of University of California* details how the Regents of the University of California prepared and approved a plan to conduct vegetation removal projects after receiving a grant from Cal Fire to implement on-campus hazardous fire fuel reduction projects. ((2023) 92 Cal. App. 5th 474 at 479-80.) The Regents finalized the certified final EIR in 2021, and plaintiffs shorty filed suit challenging the EIR. The trial court sided with the plaintiffs, but the Regents ultimately won on appeal. (*Id*. at 481, 493.) However, it took over two years for the case to be finalized. The author argues that fire prevention activities are equally important to the state as low and moderate-income housing projects and therefore should be afforded similar treatment under existing law when being challenged.

The bill also contains an urgency clause and makes the following finding regarding the need for an urgency statute: "In order to reduce the incidences and severity of catastrophic wildfire occurring throughout the State of California due to the excessive accumulation of untreated vegetation and timber, it is necessary that this act take effect immediately."

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.

As this Committee also noted in its analysis of SB 393, 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.

SUPPORT

None received

OPPOSITION

None received

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: SB 393 (Glazer, Ch. 285, Stats. 2024) shifted the burden from the defendant to the plaintiff to demonstrate that posting a bond would place an undue economic hardship on the plaintiff in certain actions challenging certain low- or moderate-income housing projects.

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