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### **SECURING SCHOOL SITE ACQUISITION APPROVALS**

**By**

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In order to secure approval for a new school site, school districts are required to thoroughly investigate the proposed site. The investigation should include reviewing the history of the proposed site to determine the existence of any factors which might suggest the possibility of hazardous substances or materials on the site. In addition, a study would also be conducted to identify any risks which might constitute an actual or potential endangerment of public health to persons who attend or will be employed at the proposed school. Investigation of the site would include an environmental analysis and complying with procedures required by the Department of Toxic Substances Control (“DTSC”).

### **Environmental Analysis**

Under the California Environmental Quality Act (“CEQA”), a proposed project, which has the potential for resulting in a physical change in the environment, must be analyzed to determine its environmental effects.<sup>1</sup> Critical to the analysis of potential environmental effects is a complete description of the “project”. The description of the project provides notice to responsible agencies and the public of the scope of the project. In addition, failure to include all aspects of the project in the project description could result in the need to do a supplemental environmental proceeding.

As part of the analysis of the project, a school district would determine whether one of the exemptions to CEQA would apply. Both statutory and categorical exemptions are provided for under the CEQA Guidelines. Certain projects are exempt from CEQA and therefore, do not require an environmental analysis. In the event a school district determines that a proposed project is exempt from CEQA, the governing board should file a notice of exemption and make written findings indicating that the project is exempt and setting forth the basis for the exemption.

In analyzing the potential environmental effects of a proposed project, an initial study is utilized to consider several environmental factors. These factors include the following:

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<sup>1</sup> For a general discussion of the California Environmental Quality Act and its application to school site acquisitions, please see our paper “Complying with the California Environmental Quality Act and the California Department of Education Requirements”, October, 2000.

G Aesthetics	G Agriculture Resources	G Air Quality
G Biological Resources	G Cultural Resources	G Geology/Soils
G Hazards & Hazardous Materials	G Hydrology/Water Quality	G Land Use and Planning
G Mineral Resources	G Noise	G Population and Housing
G Public Services	G Recreation	G Transportation/Traffic
G Utilities and Service Systems	G Mandatory Findings of Significance	

In the analysis of the above-referenced factors, a determination must be made that the project will do one of the following:

1. Have a potentially significant impact on the environment;
2. Have a less than significant impact with mitigation incorporation;
3. Have a less than significant impact; or
4. Have no impact.

The basis for each of the determinations must be set forth with a brief explanation identifying the source material relied upon for the determination. If the initial study concludes that there is no substantial evidence that the project may result in a significant adverse environmental effect, a negative declaration may be prepared. When a project determines that potential environmental effects exist, but revisions or mitigation measures imposed as part of the project will avoid or reduce the impacts to a level of insignificance, a mitigated negative declaration may be prepared. The test in determining whether a negative declaration or a mitigated negative declaration was properly utilized, is whether a “fair argument” could be made that a significant impact on the environment would occur from the project. If the evidence presented on the project creates a fair argument, then it is not appropriate to utilize a negative declaration or mitigated negative declaration.

In those circumstances, when the initial study determines that there is substantial evidence that a project may result in an adverse environmental effect, an environmental impact report must be prepared. An environmental impact report is also required to analyze project alternatives, including a no-project alternative and to consider the environmental consequences of each of the alternatives.

By thoroughly analyzing the potential impacts on the environment from the proposed project, effects from the project can be mitigated or revisions to the project can be considered. In certain circumstances, impacts to the environment cannot be mitigated and the lead agency will consider whether a statement of overriding considerations should be adopted. A statement of overriding considerations balances the need for the project against the environmental effects from the project.

Although intertwined, the analysis required under CEQA, differs from the analysis used to secure approval from DTSC. While CEQA looks at the impact on the environment from the project, DTSC is looking at the prior activities at the site to determine whether factors exist which might impact the use of the site.<sup>2</sup>

Prior to approving a school construction project, the governing board is required to make certain written findings related to the environmental conditions of a proposed school site. The governing board must determine that the site is not a current or former hazardous waste disposal site or a solid waste disposal site unless the wastes have been removed. Similarly, the governing board must determine that the site is not a hazardous substance release site identified by the State Department of Health Services. Lastly, the governing board must determine that the site does not contain pipelines which carry hazardous substances, acutely hazardous materials or hazardous wastes, except for a natural gas line used to supply natural gas to that school site or the neighborhood. The governing board is also required to consult with the Air Quality Management District to determine whether facilities exist within a quarter mile of the school site which might reasonably be anticipated to emit hazardous air emissions or to handle hazardous or acutely hazardous materials, substances or waste. Written findings are also required to be made by the governing board that either no facilities exist or that corrective measures are required which will mitigate to a level that will not constitute an actual or potential endangerment of public health to persons who would attend or be employed at the proposed school.

### **Geology/Soils**

Each site under investigation should be investigated to determine if the site is located within the boundaries of any special studies zone or within an area designated

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<sup>2</sup> For a discussion of steps to be followed to secure DTSC approval, please review Tab 14 entitled “Changes to DTSC Procedures”.

as geologically hazardous in the safety element of the local general plan. The Education Code prohibits constructing a school building on the trace of a geological fault which could cause the surface to rupture. Although not required on all sites, it is recommended that a geological and soil engineering investigation be completed. The soil's test will determine the soil-bearing capacity of the property and determine if liquefaction or other factors exist which may result in structural requirements for the school construction project. (Education Code Sections 17212 and 17212.5.)

### **Title Restrictions**

A preliminary title report should be reviewed to determine if any restrictions or limitations exist which might affect the ability to construct school facilities on the proposed site. The architect should also review the preliminary title report to ensure that the proposed school facilities will fit within any proposed easements or restrictions on construction.

### **Local Agency Review**

Each site should be investigated to see if the applicable city/county zoning for the property allows for construction of a school on the proposed site. If the zoning ordinance does not allow construction of a school, the governing board of the school district, by a vote of two-thirds of its members, may render the zoning ordinance inapplicable for the proposed school site. The resolution to be adopted by the governing board must specify that the site is being used for classroom facilities. The board is also required to notify the city or county within ten (10) days following the adoption of the resolution. (Government Code Section 53094.)<sup>3</sup>

The applicable planning agency should be given written notice regarding the proposed acquisition of a site. The planning agency will investigate the proposed site and submit a written report to the governing board of the school district on the investigation and the planning agency's recommendations concerning acquisition of the site within thirty (30) days after receipt of notice. If the planning agency's report does not favor acquisition of the property for a school site, the governing board may

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<sup>3</sup> Assembly Bill 1367 (Wiggins) would increase the amount of consultation and information sharing required between school districts and local planning agencies.

not acquire title to the property until thirty (30) days after the planning agency's report is received. (Public Resources Code Section 21151.2.)

The applicable planning agency should also be asked to review the proposed site as to the conformity of the site with the adopted general plan. Included within the request should be the location, purpose and extent of the acquisition of the property. The planning agency is required to render an opinion as to the conformity with the adopted general plan within forty (40) days after the matter is submitted (and/or longer as agency may desire). (Government Code Section 65402.)

A school district is required to comply with a city's or county's ordinances which regulate 1) drainage improvements and conditions or 2) road improvements and conditions or 3) require the review and approval of grading plans which relate to the design and construction of on-site improvements which affect drainage, road conditions or grading. In addition, a school district is required to give consideration to the specific requirements and conditions of a city's or county's ordinances relating to the design and construction of off-site improvements. (Government Code Section 53097.)

In the event a school district proposes acquisition of real property for a new school site in an area designated in the local agency's general plan as agricultural and zoned for agricultural production, the governing board is required to make certain findings regarding notification and consultation with such agency and attempt to minimize any public health or safety issues. (Education Code Section 39006.)

A school district is also required to meet with local park and recreation representatives in order to review possible methods of coordinating planning, design and construction of new school facilities with recreation and park facilities. (Education Code Section 35275.)

### **Proximity to Airports**

Any school site which is located within two (2) miles of an airport or heliport, must be investigated by the Department of Transportation. The school district is required to send notification to the Department of Transportation and the Department of Transportation will investigate the site and advise the school district of its determination. In the event the Department of Transportation does not favor

acquisition of the site, no State or local funds may be apportioned or expended in connection with the site for school purposes. (Education Code Section 17215.)

### **Utilities and Infrastructure**

As part of any investigation of a proposed school site, the existence of utilities, including the availability, feasibility and proper sizing in order to obtain water, electricity, gas and sewer, must be considered. In addition to utilities, transportation and safety issues as well as potential expansion of the site should be included in any investigation of a new site.

If you have any questions regarding school site acquisition issues, please contact Wendy H. Wiles, Brian W. Smith or Tiffany Israel at Bowie, Arneson, Wiles & Giannone.

The applicability of the legal matters discussed may differ substantially in individual situations. The foregoing information has been prepared by Bowie, Arneson, Wiles & Giannone as an overview of the subjects discussed and should not be construed as individual legal advice.