PRI CAPITAL *ideas*
Volume 5, No. 3
February 2019

CEQA: How To Mend It Since You Can't End It

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It is no coincidence that California's housing prices began to diverge from the rest of the country in 1970 – the very year that the California Environmental Quality Act ("CEQA") was enacted.

According to California's nonpartisan Legislative Analyst, "Between 1970 and 1980, California home prices went from 30 percent above U.S. levels to more than 80 percent higher."[1] By 2015, the average California house cost around *250%* of the average U.S. home.[2]

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Granted, California's unaffordable housing crisis is not the result of any one cause. Instead, inflated real estate prices, high construction costs, substantial government fees, permitting delays, and zoning restrictions all contribute to California's affordability problem. But one of the culprits behind California's high cost of housing is CEQA because it not only adds significant costs but also causes significant delay, which, in turn, escalates the costs of construction.

CEQA requires an environmental impact report, known as an EIR, whenever a government agency proposes to approve a project (including housing projects) that may have a significant effect on the environment.[3] Even organizations sympathetic to CEQA acknowledge that the costs of an EIR can range from $200,000 to millions of dollars, depending upon the project's scope.[4] And the obligation to assemble such a report also delays the approval of the project. California's Legislative Analyst estimates that California's ten largest cities averaged 2 ½ years to approve housing

projects that required an EIR.[5] Naturally, by the time a project is approved, the costs of construction have significantly increased.

On top of these costs and delays, project opponents have used CEQA as a weapon to further delay or even thwart beneficial projects through prolonged litigation that challenges purported omissions or inaccuracies in the EIRs' highly technical descriptions of the project's environmental impacts – descriptions that can exceed 5,000 pages for major projects, offering a fertile field for sprouting litigation.

Such litigation can both add hundreds of thousands of dollars in attorneys' fees to a project and cause multi-year delays, which, in turn, result in even higher building costs than obtainable when the project was originally planned. Moreover, a project need not be enjoined by a CEQA lawsuit in order to delay it: The CEQA lawsuit itself acts as a de facto injunction because financing for the project is generally not available until the litigation is resolved.

To be sure, CEQA's purpose is laudable: It provides the public and the government agency responsible for a project with detailed information regarding the proposed project's likely environmental impacts and the ways in which its estimated impacts might be minimized.[6]

Nonetheless, CEQA is one of the contributors to the expenses and delays that contribute to the high cost of housing projects. And higher costs make construction of affordable housing less profitable, which, in turn, makes it less attractive to develop, reducing its supply. As a result, between 2005 and 2014, California built fewer houses per person than New York and Texas.[7] This creates a mismatch between opportunity and housing: Whereas the Bay Area added 722,000 jobs since 2010, it only added 106,000 housing units.[8]

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However, there are some reasonable reforms that could mitigate these costs without undermining CEQA's purpose:

Eliminate the Automatic Right of Appeal for Meritless Cases.

Every CEQA suit involves a trial and an appellate stage. And the appellate stage can last longer than the trial proceedings.

Recently, the California Legislature attempted to address litigation-induced delays by directing the courts to complete their adjudication of the trial and appellate stages of CEQA litigation within 270 days, but only for a limited pool of large-scale projects that commit to greenhouse gas neutrality and other goals. In any event, this time period is too tight for the courts to apply it to more than a few projects.

A better approach, which could cut by half the length and cost of CEQA litigation, while reducing the burden on the courts, would substitute the right to appeal with a right to writ review. Under California law, the California courts of appeal can deny review of a meritless writ petition without extensive briefing, oral argument, or an opinion, thereby streamlining the appellate review of a meritless case. This approach would allow a meritless appeal to be addressed within a few months, rather than a year or more, reducing the delay and cost of the litigation. And to protect a party that has a valid appeal, the reform could provide that the appellate court *must* grant writ review, allowing

for full briefing and oral argument, with respect to any issues in which the complaining party has demonstrated at least a 50% chance of prevailing.

If the Legislature is unwilling to give all cases the benefit of this cost reduction, it could eliminate the automatic right to appeal for at least those projects that add housing, thereby reducing the delay and cost of such projects. Keep in mind that under this reform, the EIR would still have to be prepared, the public could still evaluate and comment on it, and litigation could be brought. But the cost and delay of the litigation would be significantly reduced except for appeals deemed to have some merit.

Prevent Ambushes.

Under CEQA, no party may challenge an EIR as inadequate unless that particular claim was presented (by somebody) before the relevant governmental agency's final approval of the project. This is not a burden since ordinarily, there are several opportunities to raise such claims before the project's approval: The government agency considering a project first arranges for a draft of the EIR to be circulated to the public for comment and then circulates a revised draft for further public comment. There may even be a further round of comments in some cases.

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But some claimants raise issues late in the process, such as on the *final* day of the *final* governmental approval, leaving no time to adequately address the issue without starting part of the process all over, causing significant delay on top of the typical multi-year review.

The Legislature could condition the right to litigate an issue upon that issue having been raised before the close of the public comment period on the EIR – and certainly before the EIR has been certified (that is, approved) – and could forbid litigation of any issue that could have been raised, but was not, in response to an earlier draft of the EIR. In short, this reform encourages diligence and avoids ambushes.

Significantly, the Legislature took steps to institute such a reform for one large-scale project in 2018. It needs only extend this reform to other projects.

Limit the Attorney General to Challenges Raised during the Administrative Process.

A handful of judicial opinions have ruled that the California Attorney General is exempt from the rule that a challenge cannot be brought in CEQA litigation unless it was raised during the administrative process before the project's approval. These rulings have been based on a statutory provision that purports to exempt the Attorney General from such a requirement. But a review of the statute's legislative history indicates that the Legislature never intended to create such an exemption.

Furthermore, such an exemption is fundamentally unfair because it does not give the project proponent notice of the purported deficiency and an opportunity to correct it during the administrative process. Clarifying that no party, including the Attorney General, may challenge a report for a deficiency not raised during the administrative process, would avoid this unfairness. And if the project is important enough for the Attorney General to bring litigation, it is important enough for the Attorney General to participate in the multi-year administrative process and timely raise his or her concerns at that time, not years later in a lawsuit – well after government has approved the project.

Make Clear that Any Deficiency Must Be Substantial in order to Reverse the Approval of a Project.

EIRs can run thousands of pages, addressing highly technical measurements of environmental impacts, such as various types of air quality emissions, noise, and traffic patterns, extrapolated for future decades, based on complicated analytic models. In such a massive document, oversights and mistakes can easily occur. And even where the EIR is accurate, courts have faulted it for not providing sufficient detail regarding the *accurately described* impact. In short, EIRs have morphed into a high-priced speed trap.

Some judicial decisions recognize that courts have discretion to dismiss claims of error in the EIR if they are insubstantial. But the Legislature could codify a standard that prevents the courts from overturning a project's approval where the omitted information would not have likely affected the project's approval *and* did not significantly affect the general public's ability to evaluate the project's overall impacts.

Conclusion

It is time for the Legislature to take some reasonable steps to reduce the high cost of constructing new housing in California. The typical approach of adding, but never reducing, costs for housing, and instead subsidizing affordable housing not only ignores California's middle class, but cannot solve the problem. As the California Legislative Analyst has observed, the number of low-income households in need of assistance greatly exceeds existing federal, state, *and* local resources: Building housing for low-income households in California's coastal urban areas would alone cost over $250 billion[9] – a sum that is nearly double California's general fund budget for 2018-2019! It's time to tackle the problem by addressing the cost culprits one by one. The fertile field of CEQA offers some low-hanging fruit if the Legislature would only care to pluck it.

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Endnotes

1 Legislative Analyst, "California's High Housing Costs: Causes and Consequences" (March 17, 2015), p. 3.

2 *Id*., pp. 3, 7.

3 California Public Resources Code, §§ 21100, 21151.

4 See Report of the Rose Foundation for Communities and the Environment, prepared by BAE Urban Economics (Aug. 2016), pp. 29, 35, 38.

5 Collins, "Do California Environmental Rules Drive Up Home Prices," Orange County Register (Aug. 29, 2016)

6 California Public Resources Code, § 21061.

7 KQED report, May 4, 2018.

8 Swan, "Proposal to increase housing passes amid heavy criticism." San Francisco Chronicle (Dec. 20, 2018) A1.

9 "Perspectives on Helping Low-Income Californians Afford Housing," Legislative Analyst (Feb. 9, 2016), pp. 3-4.