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The CEQA Gauntlet

HOW THE CALIFORNIA ENVIRONMENTAL QUALITY
ACT CAUSED THE STATE'S CONSTRUCTION CRISIS
AND HOW TO REFORM IT

Chris Carr, Navi Dhillon, and Lucas Grunbaum

The CEQA Gauntlet:
How the California Environmental Quality Act Caused
the State's Construction Crisis and How to Reform It

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The CEQA Gauntlet

Introduction

When the *New York Times*' Ezra Klein called out California's nation-leading poverty rate and closely related housing affordability and homelessness crisis, it sent shockwaves across the California policy and political landscape. Klein wrote: "The root of the crisis is simple: It's very, very hard to build homes in California." And he pinpointed the main reason it is so difficult to build homes in the Golden State: the California Environmental Quality Act or CEQA. In recent years, CEQA has been front-and-center in an emerging national conversation about the negative consequences of hyper-regulation and related threats of litigation and, especially, its regressive effects on low-income and minority communities.

More than five decades ago, California enacted CEQA with the seemingly straightforward goal of incorporating environmental considerations into the public decision-making process. Today, CEQA threatens to grind that decision-making process to a halt at all levels of California government.

It is well past time that California lawmakers pass meaningful CEQA reform and take a stand against the weaponization of CEQA for parochial reasons or personal gain, which too often results in CEQA standing in the way of projects that California desperately needs. This report is a blueprint for that reform.

This report begins with background on CEQA's history, and a description of the current CEQA process for a typical project.

The second section provides real life examples of how the law has stymied the building of sorely needed housing and infrastructure across the State. CEQA has thwarted the construction of new and expanded health care facilities, new housing and other facilities to help the homeless, the modernization of public-school campuses, efforts to reduce California's wildfire risk and protect lives and property, and projects to ease traffic gridlock, to name a few. Moreover, CEQA has ironically set back the State's efforts to pro-

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tect the environment. “CEQA has emerged as an unexpected impediment to California’s going green,” wrote Pacific Research Institute fellow Nolan Gray in *The Atlantic*: “Across the Golden State, CEQA lawsuits have imperiled infill housing in Sacramento, solar farms in San Diego, and transit in San Francisco.”¹

The capstone of this report is a pull-out flowchart that illustrates the CEQA gauntlet – a maze of tests and trials too often frustrating construction across the State.

The report concludes with a series of realistic and reasonable reform ideas that should garner bipartisan support and form the nucleus of any CEQA reform effort.

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In addition, an appendix to this paper is available online at www.pacificresearch.org detailing significant CEQA reform legislation considered by the Legislature between 2010 and 2021. While most reform measures stalled in the legislative process, the enactment of minor reform measures throughout the decade shows promise that the legislative logjam can be broken, and reasonable and realistic reform legislation could achieve bipartisan consensus.

Over the years, CEQA has slowly but steadily transformed into a Boschian hellscape that provides project opponents with countless opportunities to delay or derail important projects, often for reasons that have nothing to do with environmental concerns. *Bloomberg News* wrote that, “California, the land of golden dreams, has become America’s worst housing nightmare.”²

The aim of the Pacific Research Institute in publishing this report (with the included flowchart) is to inspire Californians and policymakers to advocate for the changes necessary to transform California’s housing nightmare into the dream of affordable rents and home ownership, to restore the State’s aging infrastructure to support a thriving and prosperous people, and to facilitate the development of other public and private projects that State laws and policies identify as priorities for California in the 21st Century.



SECTION I. Background: The California Environmental Quality Act

First signed into law by Governor Ronald Reagan in 1970, CEQA remains California’s broadest environmental law. CEQA was enacted to ensure that California public agencies evaluate the environmental impacts of proposed projects and consider feasible alternatives and mitigation measures to reduce or avoid those impacts. The goal is to avoid unnecessary environmental degradation and maintain a high-quality environment for future generations of Californians by explicitly incorporating environmental considerations into planning decisions.³

In 1970, CEQA consisted of 13 separate code sections. More than 50 years later, CEQA now includes over 190 code sections and 250 implementing regulations (called “CEQA Guidelines”) with 14 appendices. As the number of CEQA provisions has expanded, so too has its reach. CEQA is now a major component of the planning and approval process for almost every public and private project in California, including high-priority projects like affordable housing, public schools, and transportation infrastructure. The nonpartisan California Legislative Analyst’s Office estimates that local agencies take, on average, around two and a half years to approve housing projects that require an Environmental Impact Report.⁴

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CEQA is fundamentally different from most of California’s environmental laws in two key respects. First, unlike laws that are administered and enforced by specialized State or regional agencies such as the California Department of Fish and Wildlife or the Regional Water Quality Control Boards, there is no single agency responsible for ensuring compliance with CEQA’s mandates. Instead, every state, regional, and local agency in California is responsible for complying with CEQA and ensuring that its requirements are met. The law cuts across all levels of government and all types of governmental entities.

The second key distinction is that no single agency or body is responsible for reviewing and deciding administrative appeals of alleged CEQA violations. And in many instances, no administrative appeal exists at all. Under CEQA, any person or entity satisfying minimal procedural requirements can file a lawsuit in Superior Court to challenge an agency’s compliance with CEQA. Over the years, California lawmakers have persistently ignored requests from agencies, CEQA practitioners, and expert commentators to establish an administrative body to review alleged CEQA violations to promote consistency and make it unnecessary for some disputes to be resolved in court.

As visually represented in the pull-out flowchart, the CEQA process can be separated into six distinct phases:

1. Preliminary Review

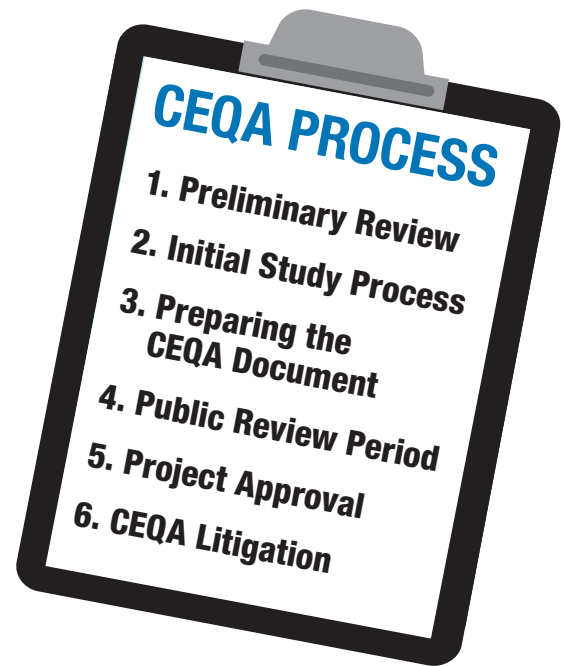
The CEQA process officially begins when a public agency: (1) decides to proceed with an action or (2) receives an application from a private developer for an approval or permit. For purposes of CEQA, this public agency is referred to as the “lead agency.” The lead agency then determines if the proposed action is a “project” subject to CEQA. A “project” is broadly defined to include any discretionary action taken by a public agency that may result in a direct or reasonably foreseeable indirect physical change in the environment.⁵

Assuming the activity under consideration is a “project,” the lead agency then evaluates whether the project qualifies for one of the 70-plus different exemptions established under CEQA or scattered throughout various other California laws and regulations. If an agency determines that an exemption applies – or that the activity is not a “project” under CEQA – the agency may approve the proposed activity or decide to proceed with it and can file a Notice of Exemption (NOE).

2. Initial Study Process

If CEQA applies to the project, the lead agency typically prepares an Initial Study to determine whether the project may have a potentially significant environmental effect. This Initial Study serves as a guide for determining which type of environmental document the agency must prepare for the project, and which resources or impact areas the lead agency needs to evaluate. CEQA provides for three main types of environmental documents:

- **Negative Declarations** – A lead agency prepares a Negative Declaration when the Initial Study determines that the project will not have a significant effect on the environment. The Negative Declaration must include: (i) a brief description of the project, (ii) a proposed finding that the project will not have a significant effect on the environment, and (iii) a copy of the Initial Study to support the agency’s findings. Negative Declarations come in all shapes and sizes. They can be as short as one or two pages for small projects that have sparked little or no public interest, to 100 pages or more for larger, more complex projects that have garnered more public attention.
- **Mitigated Negative Declarations** – A lead agency may prepare a Mitigated Negative Declaration when the Initial Study identifies potentially significant environmental effects, but the project proponent agrees to revise the project or incorporate mitigation measures to avoid all



potentially significant effects or reduce the effects to a less than significant level. A Mitigated Negative Declaration must include the same information as a Negative Declaration plus: (i) a list of all the mitigation measures that have been included in the project and (ii) a “Mitigation Monitoring and Reporting Program” (MMRP), which establishes a program for monitoring and/or reporting on the implementation of those mitigation measures.

- **Environmental Impact Reports** – Lead agencies must prepare an Environmental Impact Report (EIR) for any project that may have a potentially significant environmental effect despite the incorporation of project revisions or mitigation measures. An EIR is intended to serve as an informational document to inform public agency decision makers and the general public of the environmental effects of a project. Because of this, EIRs include in-depth information on a variety of topics, including: (i) a description of the proposed project, (ii) the project’s potentially significant environmental effects, (iii) the efficacy of potential mitigation measures, and (iv) alternatives to the project. EIRs for larger projects can be more than a thousand pages.

3. Preparing the CEQA Document

After the Initial Study has been completed, the lead agency begins preparing the appropriate CEQA document. Preparation of a Negative Declaration or Mitigated Negative Declaration for a small and uncontroversial project may be relatively straightforward and take no more than a few weeks. It may take considerably longer to prepare those documents for more complicated or controversial projects.

An EIR takes much longer to prepare than any other CEQA document. Because lead agencies often don’t have the manpower, experience, or expertise to evaluate a project’s environmental effects to the degree CEQA requires, they frequently hire outside CEQA consultants and other environmental experts to prepare draft EIRs and perform any necessary surveys and studies at the applicant’s expense. The preparation of a draft EIR for even uncontroversial projects can take a year. For more complex or controversial projects, the preparation of a draft EIR can take much longer and cost tens or hundreds of thousands of dollars.

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Despite the additional time and money it takes to prepare an EIR, many lead agencies will often insist on preparing an EIR, rather than a Negative Declaration or Mitigated Negative Declaration, in the hope of avoiding a CEQA suit entirely, or of being in a stronger position to defend its action. This “defensive” approach is encouraged by the more forgiving and deferential standard CEQA sets out for reviewing the adequacy of an EIR, as compared to the standard for reviewing a Negative Declaration or Mitigated Negative Declaration. The fact that California law provides for a successful CEQA petitioner’s fees and costs to be paid by the lead agency (while successful CEQA respondents and real parties cannot seek fees and costs from CEQA petitioners) further encourages the unnecessary preparation of EIRs.

4. Public Review Period

Once the agency (usually with its outside consultant) finishes preparing the CEQA document, the agency must make the document available to certain other agencies and the general public. During this time, members of the public and other public agencies may submit comments on the draft CEQA document to provide suggestions or identify inadequacies.

After the close of the public review period, the lead agency evaluates the comments submitted to determine if additional review is required. The agency must then respond, in writing, to any comment on an EIR that raises significant environmental issues. If the comments provide significant new information or identify major inadequacies in the document, the agency must revise the CEQA document and recirculate it for further agency and public review. Otherwise, the agency may proceed to the project approval stage.

5. Project Approval

CEQA is predominantly a procedural statute which requires public agencies to take certain actions before approving projects. It sets up a process and identifies substantive goals, but, technically, does not dictate outcomes or methods of achieving those goals. For projects where a Negative Declaration or Mitigated Negative Declaration is prepared, the lead agency must consider any comments received on the document before approving it.

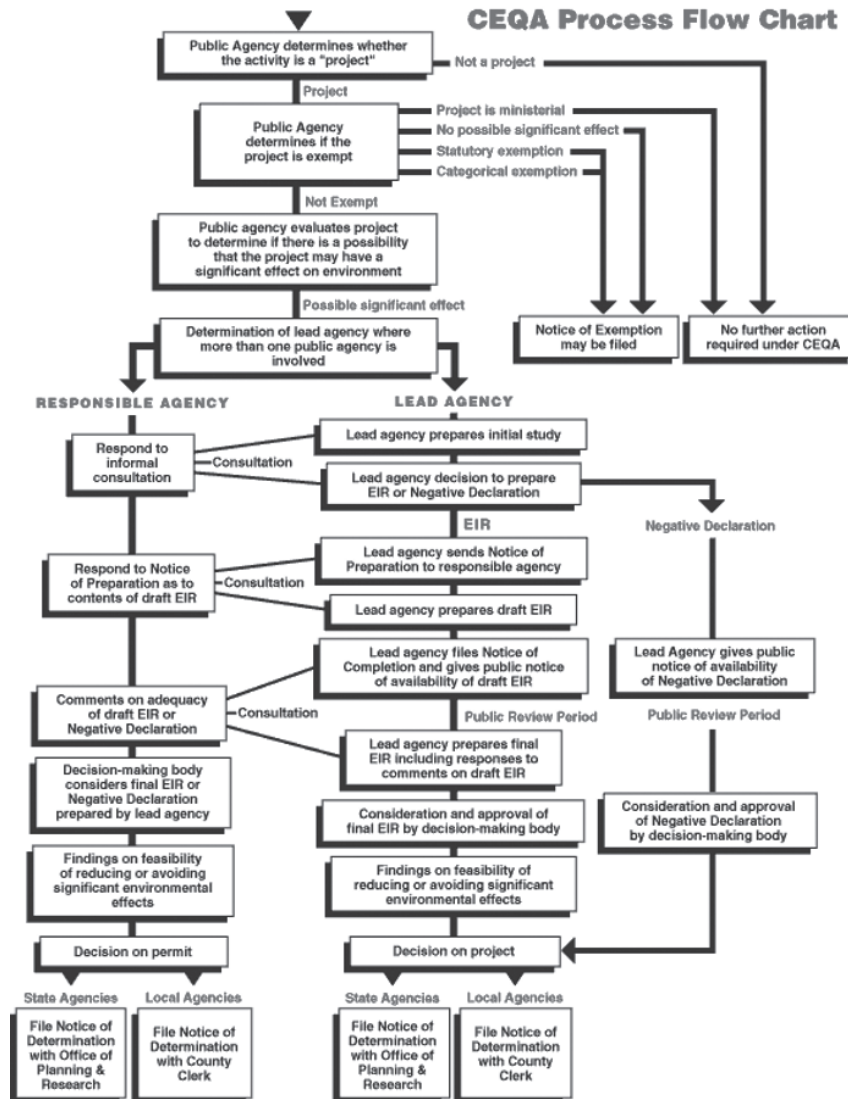
For projects where an EIR is prepared, the lead agency must “certify” the EIR was completed in compliance with CEQA and that the lead agency considered information in the EIR before approving the project. The agency must simultaneously make certain findings relating to project alternatives, mitigation measures, and any unavoidable environmental effects of the projects. Last, if the project has significant unmitigated impacts, the agency must adopt a statement of overriding considerations explaining why the project is being approved despite those impacts.

6. CEQA Litigation

Once a lead agency approves a project, CEQA allows any person to file a lawsuit challenging the lead agency’s compliance with CEQA. The time period for filing such a challenge is usually 30 days if the lead agency has provided notice of its action, and 180 days if it has not. In some situations, these periods may be extended through emergency rulemaking procedures. For example, in response to the COVID-19 pandemic, the California Judicial Council adopted an emergency rule that “tolled” (i.e., temporarily stopped) the time period for filing a CEQA action from April 6, 2020, until August 3, 2020.⁶

Overview of the CEQA Process

From the process described above, one may get the impression that for most projects, CEQA is a relatively short and simple process. But the CEQA process is anything but short and simple in practice. The Governor’s Office of Planning and Research’s CEQA Process Flow Chart⁷, while a labyrinth itself, doesn’t begin to convey the daunting reality:



This flowchart does not (and could not) reflect the myriad decisions that a lead agency faces at each step of the process as it tries to anticipate and head off potential CEQA lawsuits.

Navigating CEQA’s complex procedures can be extremely time-consuming and expensive. While precise data for CEQA processing costs are not available other than for some individual projects, a recent study estimates that, compared to projects covered by a Negative Declaration or a CEQA exemption, lead agencies take

between three to nine months longer to approve projects covered by a Mitigated Negative Declaration, and between 13 to 38 months longer to approve projects covered by an EIR.⁸ The costs of preparing these CEQA documents will vary widely based on numerous factors, including the lead agency, the complexity of the project, the type of CEQA document, the extent of any opposition to the project, the costs of environmental and planning consultants and any lawyers involved in preparing the CEQA document, and a host of other factors.⁹ It is the norm for lead agencies to require project applicants to sign “reimbursement agreements” requiring the developer to pay for such costs incurred by the lead agency; to the extent the developer seeks the assistance of its own consultants, lawyers, or other professionals to participate in the planning and environmental review process, the developer obviously is also on the hook for those costs.¹⁰

But the above timeframes and costs do not include litigation (or resolution) of any CEQA suit brought by a project opponent. Litigation to judgment in a trial court may take anywhere from eight months to two years.¹¹ Where the lead agency is not itself developing the project, the applicant for a permit or approval will be named as a real party in interest in any suit alleging the lead agency failed to comply with CEQA. As a result, such a project developer will usually (pursuant to a “reimbursement agreement”) have to pay both its own legal bills, as well as the tab the lead agency incurs in defending its CEQA document. What is more, if the CEQA document is found deficient, then the party that challenged it will usually be awarded its legal expenses (fees and costs), based on California’s “private attorney general” statute. Importantly, this statutory authorization for courts to award attorney fees and costs only applies to petitioners; neither a lead agency nor a real party can be eligible under the statute to recover its fees and costs, even where the CEQA document is upheld by a court.

While it’s a cliché to observe that in the project development world “time is money,” sophisticated project opponents exploit this truism to maximum effect in CEQA litigation by seeking delay. Speedy resolution of CEQA litigation is almost never the goal of the “petitioner” – the party bringing suit. Often, a CEQA petitioner will ask the court to issue a “stay” of the efficacy of the project approval, or an injunction, to prevent project construction from commencing. Orders delaying construction can spook lenders and investors, as well as make it difficult for the project developer to meet contractual obligations (such as delivering electricity to a utility or a commercial or industrial customer). And although CEQA provides that suits purportedly brought to enforce its requirements are entitled to “statutory preference” for speedier resolution than most other civil lawsuits, CEQA litigation provides myriad opportunities to prolong resolution of a case. CEQA petitioners win through delay.

SECTION II. Real-Life CEQA Horror Stories

The “CEQA Gauntlet” background section provided a glimpse into the CEQA permitting process. The pull-out flowchart found in the back flap of the report depicts this onerous process. But real-life examples best illustrate the crushing reality of CEQA on families, schools, and businesses across the State. This section features the negative consequences of CEQA run amok, and provides a glimpse of how, without meaningful reform, it will continue to harm Californians. Far from just hindering housing construction, there are stories of how CEQA has blocked new hospitals and clinics, new public schools, projects to reduce wildfire risk, changes to roads and freeways to add bike and HOV lanes, and even solar energy generation projects. These stories are far from isolated cases and are further proof of a well-meaning law that desperately needs reform.

CEQA and Housing Affordability

California has a persistent and severe housing affordability crisis that encompasses market-rate housing and affordable housing, and everything in between. CEQA has been a principal cause of and continues to exacerbate the State’s longstanding inability to build enough housing for people of all income levels, resulting in the sky-high costs of market-rate housing and insufficient affordable housing.

“CEQA has been a principal cause of and continues to exacerbate the State’s longstanding inability to build enough housing for people of all income levels.”

In 2015, the average California home cost 2.5 times the national average, while the average monthly rent was approximately 50 percent higher than the rest of the country.¹ Yet despite being a major focus of state and local officials, little has changed since then. In August 2020 – in the midst of a global pandemic – California’s median home price broke the \$700,000 mark for the very first time, increasing nearly 15 percent from the year before.² And, as of 2020, California ranked 49th among all states in terms of housing affordability.³ Only Hawaii – a state 20 times smaller than California – ranked lower.⁴

When it comes to “affordable housing” – meaning housing that, including utilities, costs no more than 30 percent of pretax household income – California’s production of new affordable housing has been woefully inadequate. In 2016, the McKinsey Global Institute estimated that California had a housing shortage of approximately 2 million units and that nearly half of all households found housing to be “unaffordable” in their local market.⁵ This is one reason California’s population declined in 2020 for the very first time in the State’s history.⁶ It also explains why over 60 percent of Californians believe that housing

affordability is a “big problem,” and why 43 percent of Californians have admitted that the cost of housing makes them seriously consider leaving the State.⁷

California’s housing affordability woes – for people of all incomes – result from many factors, but the increasing weaponization of CEQA has exacerbated the crisis. The circumstances surrounding two recently-proposed “affordable housing” projects illustrate the difficulties.

In 2014, Habitat for Humanity Greater San Francisco proposed a 20-unit affordable housing project in downtown Redwood City.⁸ The project is precisely the type of housing development California should be prioritizing – an urban infill project situated on an empty lot and located near major public transit lines. But to win approval from the City, Habitat for Humanity had to shrink the project to less than half the size of its initial proposal. And even this concession was not enough for some local residents. In 2017, an attorney working out of a two-story home behind the proposed project filed a CEQA lawsuit, alleging that the City failed to evaluate the project’s impacts on traffic and scenic vistas – including the view from his home’s rear windows.

The plaintiff’s public statements underscore the realities of CEQA litigation. Rather than being used to ensure consideration of environmental issues, project opponents frequently use CEQA as a cudgel to delay projects, obtain concessions, or force developers to cancel projects altogether. In fact, the same attorney admitted that he had threatened CEQA litigation against other nearby projects, forcing one apartment developer to eliminate

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an entire floor to avoid litigation, while another developer abandoned its 91-unit condominium project. Like other CEQA litigants, the plaintiff seemed to view his CEQA lawsuit as a natural extension of the project approval process: if you can’t convince local decision-makers to modify or reject a project, then a CEQA lawsuit is the logical next step.

A similar situation unfolded more recently in Los Angeles. In 2018, after years of public hearings and a contentious approval process, the City Council approved the controversial Lorena Plaza project in the city’s Boyle Heights neighborhood.⁹ According to the project’s sponsor, the nonprofit developer A Community of Friends, it would turn an empty, city-owned lot into 49 units of affordable housing, including approximately 24 units for mentally ill homeless veterans.¹⁰

The project was ultimately able to win support from city officials and the Los Angeles Chamber of Commerce, but not the owners of El Mercado, a popular family-owned local restaurant located just down the street. The restaurant’s owners consistently opposed the project, even going so far as to offer the developer another piece of land outside the city in the hope of relocating the project outside of its “backyard.”

Shortly after the project was approved, the restaurant’s owners filed a CEQA lawsuit challenging it, alleging that the city had failed to adequately consider the environmental effects associated with a plugged and abandoned oil well on the property (one of over 3,000 in Los Angeles). The family claimed that the environmental site assessment and mitigated negative declaration (MND) prepared for the project – both of which found no evidence of significant contamination risks from the abandoned well – were inadequate and that a full-blown EIR was required.

The project's sponsor claimed that the family offered to drop its opposition to the project if the sponsor abandoned any plan to house mentally ill people in the new building. The family disputes this, but in April 2018, one family member stated that locating homeless and mentally ill people "next to a high traffic business and cultural center like El Mercado" was incompatible with "the existing character of the neighborhood."

The threat of a CEQA lawsuit, with its attendant delays and costs, frequently leads developers to pull the plug on projects necessary to combat California's runaway housing prices. These threats are especially problematic for affordable housing projects, which often do not have sufficient profit margins to absorb additional costs. And, while some experts question the extent to which CEQA frustrates development of such projects, it is undeniable that it adds yet another layer of complexity and cost to the already-daunting challenge of constructing housing in California. For example, Habitat for Humanity expected the years of delay to increase the costs to develop its Redwood City project by approximately 30 percent (from \$13 million to \$17 million).

Fortunately, both of these projects were ultimately built. In 2018, Habitat for Humanity, represented pro bono by a national law firm, reached a settlement with the plaintiffs that allowed the project to proceed.¹¹ And in 2019, A Community for Friends received a favorable ruling that cleared the way for its project.¹² However, not all developers have the time and resources often required to deal with even run-of-the-mill NIMBY (not in my backyard) CEQA lawsuits. Reining in these sorts of abuses should be a top priority for legislators hoping to tackle California's long-standing housing supply and affordability crises.

CEQA and Public Health

The COVID-19 pandemic has been the greatest public health crisis in a generation. Notwithstanding the various lockdowns, mask mandates, and other restrictions intended to limit the virus' spread, our public health system has been strained to – and occasionally past – its breaking point. Given these recent challenges, it would seem that constructing new public health facilities like hospitals and clinics would be just what the doctor ordered. However, not even a global pandemic is enough to immunize a hospital project from costly and time-consuming CEQA litigation.

On January 21, 2021, the University of California, San Francisco (UCSF) approved an ambitious expansion of its iconic Parnassus campus.¹³ The project will replace and renovate various portions of the century-old campus, including construction of the new 560,000 square foot Helen Diller Medical Center.¹⁴ This new medical center will increase the campus' in-patient bed capacity by almost 60 percent and allow UCSF to serve thousands of new patients every year, including many who would be turned away in the absence of any expansion. According to UCSF, the project will ensure that its oldest and largest campus can meet increasing demands for health care services and strengthen its position as a world-class clinical, research, and training hospital.¹⁵

“Not even a global pandemic is enough to immunize a hospital project from costly and time-consuming CEQA litigation.”

Of course, it is not surprising that a project of this magnitude would evoke strong public reactions. This is part of the reason UCSF engaged in extensive public outreach efforts during the planning and environmental review processes, including more than 25 community meetings and various discussions with local community groups.¹⁶ But, despite building “broad community support” for the project, UCSF was unable to satisfy all critics.

In February 2021, three organizations filed separate lawsuits in an effort to stop the UCSF project.¹⁷ These lawsuits illustrate the CEQA impediments to major development in California. Indeed, while each of the opposing organizations claims that UCSF violated CEQA, they disagree about what should be done to remedy the situation. For example, one group claims that UCSF should abandon the Parnassus campus project and instead expand its facilities in the Mission Bay neighborhood several miles to the east. Of course, nothing prevents any such project from facing similar litigation from unsatisfied residents and community groups in the Mission Bay neighborhood. On the other hand, another opponent appears to favor renovating the Parnassus campus, assuming UCSF takes additional steps to address its specific concerns. According to this litigant, “The aim of these lawsuits is not to stop this project, but to make it work for all of us.”¹⁸

It remains to be seen whether any of these three lawsuits will successfully challenge the project's compliance with CEQA. However, it is certain that the lawsuits will increase the costs associated with the project—costs which must ultimately be borne by patients and state taxpayers. The litigation will also lead to significant project delays, a situation that will deprive thousands of patients of the opportunity to obtain the world-class care offered at UCSF. Unfortunately, for those patients, not even a global pandemic is enough to stop abusive CEQA litigation.

CEQA and Los Angeles' Measure HHH to Address Homelessness

In 2016, Los Angeles voters approved a \$1.2 billion bond measure known as Measure HHH, the Homelessness Reduction and Prevention, Housing and Facilities Bond. Sponsors, including Mayor Eric Garcetti, proposed the bond measure to combat the city's growing homelessness crisis and fund supportive housing developments for the more than 30,000 Angelinos living on city streets or in shelters.¹⁹ Funds raised from Measure HHH were intended to triple Los Angeles' annual production of supportive housing units and help build approximately 10,000 units across the city.²⁰

Following Measure HHH's passage, the Los Angeles City Council began formulating policies and strategies to ensure prompt deployment of HHH funds. One such strategy was the creation of the Permanent Supportive Housing ordinance to streamline CEQA review for projects meeting certain zoning criteria.²¹ The city spent considerable time and effort evaluating the ordinance to understand how development of supportive housing could affect property values, community safety, and the environment. The City Council prepared a Mitigated Negative Declaration (MND) for the ordinance in 2017 and, after extensive community outreach, adopted the ordinance in April 2018.²²

The city's attempt to cut administrative red tape for these projects was immediately challenged as community groups filed CEQA lawsuits challenging the environmental review undertaken for the ordinance. The groups alleged the MND underestimated the number of units the ordinance will facilitate and failed to consider potential increases in crime and environmental impacts from reduced property values. Measure HHH supporters were understandably skeptical of the litigants' motives. The *Los Angeles Times* editorial board observed that “[a]s with so many CEQA suits, the real motive here appears to be plain old NIMBYism.”²³

Of course, these CEQA suits threw a wrench in the city's plans to accelerate development of supportive housing. Faced with uncertainty about the ordinance's future, many proposed developments – especially those that required a streamlined environmental review to ensure financial feasibility – were put on hold. City leaders expressed concern that a small group of residents who didn't want to see supportive housing built in their neighborhoods were frustrating voters' overwhelming support for Measure HHH.

As the CEQA suits dragged into 2019, Los Angeles officials tried to achieve their goals another way: working with the California Legislature to carve out a narrow exemption to CEQA that applies to Measure HHH-funded transitional housing projects. Assembly Bill (AB) 1197, which was passed by the Legislature and signed by Governor Newsom in late 2019, exempts from CEQA any homeless shelter or housing project funded through certain sources, including Measure HHH. While applauding the bill's passage, Mayor Garcetti noted that “often one or two loud voices can trip up a project” through CEQA litigation.²⁴

AB 1197 is certainly a boon for Los Angeles and Measure HHH projects, but carving out narrow, project-specific exemptions from CEQA is not a sustainable solution. California legislators must begin devising measures that remove unnecessary CEQA obstacles for *all* projects – not just those that have the support of powerful state lawmakers.

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CEQA and the “Historic Laundromat” of San Francisco

Project opponents have long used CEQA to delay and obstruct proposed development. Today, the scope of CEQA is so broad that project opponents can almost always find some basis for arguing that further analysis of the project’s “environmental” impacts is required. That many of these challenges are clearly meritless never seems to matter.

A recent absurd CEQA challenge comes from San Francisco. The project at issue was a new eight-story, 75-unit mixed-use development located on a site containing a coin-operated laundromat. To an outside observer, the project seemed to be exactly what the city (and the State) needs as California grapples with a growing housing crisis (of which homelessness is one painfully patent part): the project is close to public transit and zoned residential, it meets state requirements for affordable housing, and it doesn’t displace existing residents. But instead of cruising through the approval process, the project was tied up in permit processing and environmental review for over five years, a process that cost the developer over \$1 million.

Fearing the new development would lead to “gentrification,” local groups immediately came out against the project when it was first proposed in 2014. They argued that any new development should be entirely affordable

housing (*i.e.*, no market-rate units) – approximately 80 percent more than state and local law required at that time.²⁵ When these policy arguments failed to carry the day before the Planning Commission and it approved the project, the groups took steps to set up CEQA litigation.

“ Their appeal argued that the City’s environmental review of the project was inadequate because . . . it never considered the possibility that the laundromat – one of three within a 100-yard radius – was an historic resource.”

In 2018, they appealed the Planning Commission’s approval to the Board of Supervisors. Their appeal argued that the City’s environmental review of the project was inadequate because (1) it failed to consider the project’s impacts on the “cultural character” of the neighborhood, and (2) it never considered the possibility that the laundromat – one of three within a 100-yard radius – was an historic resource.

While the “historic laundromat” argument immediately drew jeers from project supporters and outside observers, the city delayed its approvals and ordered the developer to evaluate the issue. The city apparently was unpersuaded by its own 2011 determination that the laundromat had no historical significance. Approximately five months, thousands of dollars, and one 123-page report later, the city finally concluded what most observers had long known: “that the building is not a historic resource.”²⁶

Undeterred by the city’s finding, the groups immediately raised new CEQA arguments with the Board of Supervisors. Aided by sympathetic politicians, they demanded that the city require additional environmental review because the new building would cast shadows over a nearby schoolyard, “disrupting” the children’s educational and recreational opportunities. The groups made this argument even though two separate shadow studies had already been prepared for the project and presented to the Planning Commission. Yet again, the Board of Supervisors reversed course and demanded additional studies to evaluate the issue.²⁷

Fed up with the city's four-year-long approval process and never-ending CEQA review, the project developer filed a \$17 million suit against the city in August 2018.²⁸ The suit alleged the city's excessive environmental review requirements violated CEQA and the developer's Fifth Amendment due process rights. Less than two months later, the Planning Commission determined that it had "independently" studied the shadow issue and determined that the building would not pose a significant negative impact. The Commission scheduled a new hearing in October 2018 and quickly re-approved the project.²⁹

This saga illustrates the absurd lengths that are sometimes required to shepherd a project through the CEQA review process. And, if recent developments are any indication, there is no relief in sight for project developers in San Francisco.

CEQA and No Place for Common Sense in San Francisco

The San Francisco Board of Supervisors seems determined to distinguish itself for using CEQA to discourage housing development. According to one commentator, its recent actions have “demonstrated that, ideologically, progressivism is now officially, unambiguously at odds with the provision of housing.”³⁰

In May 2021 – in the midst of a construction downturn that saw California construct only 20 percent of its annual statewide housing goal – the San Francisco Board of Supervisors adopted an ordinance that would make thousands of residential projects ineligible for CEQA’s “common sense” exemption.³¹ When it comes to CEQA, “common sense” seems increasingly less common.

Several months later, in fall 2021, San Francisco’s housing follies reached new heights (from an already dizzying altitude), and CEQA was, as is so often the case, at the center of the absurdity. At issue was a planned 495-unit apartment complex in downtown San Francisco that would include a mere 4,000 square feet of retail in 535,000 square feet of total floor area.³² Its 495 apartments would include a mixture of housing – 192 studios, 149 one-bedrooms, 96 two-bedrooms, and 50 three-bedrooms – 28 of which would be designated affordable, with another 45 affordable units to be built off-site.³³ The project would be built on a parking lot zoned for housing, listed as a residential development site on the City’s Housing Element, surrounded by tall buildings, and located near public transit.³⁴ In sum, the project appeared to be the perfect fit for a city in the midst of a severe housing shortage and affordability crisis.

On October 26, 2021, the Board of Supervisors, in an 8-3 vote, sent the project back to the drawing board, directing City Planning and the developer to redo the project’s 1,129 page EIR.³⁵ In so doing, the Board overturned the Planning Commission’s approval of the project, and rejected the Planning staff’s recommendation.

Observers promptly condemned the Board of Supervisors from all directions. Mayor London Breed blasted the decision, calling it a “perfect example” of “how San Francisco got into this housing crisis.”³⁶ San Francisco’s State Senator Scott Wiener joined in the criticism, observing that “[w]hen San Francisco acts like this, it sends a very negative message to the rest of the region.”³⁷

The Board’s rejection of the project, which would have generated hundreds of jobs for a two-year construction period, also drew the ire of Rudy Gonzalez, the secretary-treasurer of the San Francisco Building and Construction Trades Council, who remarked that if the project opponents “or anyone else want to buy the parcel and build 100% affordable housing, good on them, but hurry, because I’ve got families with kids to feed.”³⁸ The vote drew the attention of Sacramento, with various state legislators decrying the Board’s action.³⁹ Meanwhile, the California Department of Housing and Community Development announced it was opening an investigation into whether the action violated the Housing Accountability Act or CEQA.⁴⁰ And housing advocates appear ready to challenge the Board of Supervisors’ recent decision in court, announcing they intend to sue the City for violating CEQA in connection with the Board’s denial of the project.⁴¹

CEQA and Public Schools

In 2006, California’s State Architect found Portola Middle School in the Bay Area City of El Cerrito to be seismically unsafe and irreparable. The school district determined that the middle school would need to be relocated and decided that the least disruptive option was to renovate the nearby Castro Elementary School. The district would then relocate the elementary school students at Castro Elementary to other local elementary schools.

In February 2008, the district started preparing an EIR for the Castro Elementary renovation project. The district began by gathering input from the public and local agencies and coordinating public outreach efforts. After preparing the draft EIR, circulating the draft EIR for public review, and responding to comments, the district voted to certify the final EIR and approve the project in December 2008.

Unfortunately, the district’s extensive community outreach campaign, thorough environmental review, and commitment to a wide variety of mitigation measures did not protect the project from a CEQA lawsuit. In January 2009, a local community group filed suit against the school district seeking to overturn the district’s certification of the EIR and associated project approval. The group’s lawsuit raised numerous “environmental” concerns with the project but seemed most troubled by the prospect of bringing middle school-aged children to their neighborhood.⁴²

“ The group’s lawsuit raised numerous ‘environmental’ concerns with the project but seemed most troubled by the prospect of bringing middle school-aged children to their neighborhood.”

The CEQA lawsuit put the renovation project on hold and left the school district scrambling to find alternative accommodations for the Portola Middle School students. The school district ultimately decided to relocate some students to other schools and set up temporary trailers on the Portola campus’ playground for the remaining students. The middle school students would stay in those “temporary” trailers for almost four years. Meanwhile, the Castro Elementary School was closed in 2009 and its students sent to other schools in the district. The Castro Elementary School then sat idle for almost three years.

In 2011, after two full years of CEQA litigation, the Superior Court determined the group’s CEQA challenges lacked merit and dismissed the case. Not to be deterred, the group appealed that decision to the Court of Appeal, adding another year and half of delays to the project. Finally, in August 2012, the Court of Appeal upheld the district’s approval of the project and allowed the school district to proceed with the project.

In total, the local community group’s meritless CEQA lawsuit delayed this publicly-funded school renovation project by nearly four years, cost the school district—and therefore local taxpayers—more than \$10 million in construction delays and litigation costs, and displaced hundreds of middle school students.⁴³

CEQA and Wildfire Risk Reduction

In 2004, the County of San Diego established the Fire Safety and Fuels Reduction Program to complete over \$47 million in “fuels reduction activities” such as clearing out dead vegetation and identifying areas to create fire breaks (strips of cleared land used to check the spread of forest or grass fires). Following a particularly bad wildfire season in the summer of 2007, the County decided to expand the program’s fuel management activities in the unincorporated areas of San Diego County.⁴⁴

In 2009, the Board of Supervisors accepted a \$7 million grant from the USDA to perform additional wildfire fuel reduction work, with the funds earmarked for removal of dead, dying, and diseased trees. Citing recent deaths and property destruction from wildfires, the county relied upon the CEQA exemption for emergency projects when accepting the USDA grant and approving the project.⁴⁵

The Chaparral Institute, which claimed to be a local community group (but which was comprised of and funded primarily by one individual), filed a CEQA lawsuit. It argued the county improperly relied upon CEQA’s emergency project exemption because the risk of wildfire was not sufficiently imminent to be considered an “emergency.” The court agreed and vacated the board’s approval of the project.

“ Nearly four and a half years after it was awarded funding from the USDA—the county certified the EIR for the wildfire fuel reduction work and approved the project.”

In 2010, after coordinating its CEQA review with the Chaparral Institute, the county prepared a Negative Declaration finding that the project would not have a significant environmental impact. However, the Chaparral Institute and others submitted comments on the Negative Declaration arguably raising new environmental issues. Wary of another CEQA lawsuit, the county went back to the drawing board and prepared an EIR for the project.

In November 2011, the county circulated the draft EIR for public comment. Finally, in February 2012 – nearly four and a half years after it was awarded funding from the USDA – the county certified the EIR for the wildfire fuel reduction work and approved the project.⁴⁶

Following years of devastating wildfire seasons, California has taken steps to accelerate the pace and scale of wildfire risk reduction projects undertaken throughout the State. Three such measures are intended to exempt these projects from CEQA entirely or to provide streamlined compliance methods. The first is Executive Order N-05-19, which exempts 35 high priority wildfire risk reduction projects from CEQA.⁴⁷ Second, in 2018 the California Natural Resources Agency updated section 15236 of the CEQA Guidelines – the “emergency project” categorical exemption – to clarify how “imminent” the threat of an emergency must be for projects to qualify for this exemption.⁴⁸ Under the revised guideline, wildfire risk reduction projects are categorically exempt if they are undertaken “in response to an emergency at a similar existing facility.” Last, state agencies such as the Department of Forestry and Fire Protection (CAL FIRE) have begun preparing Program EIRs in support of statewide programs like the California Vegetation Treatment Program, which is intended to drastically expand the use of vegetation treatments (*e.g.*, fuel reduction, fuel breaks, and ecological restoration activities) throughout the State (from 33,000 acres/year to 250,000 acres/year).⁴⁹ These program EIRs can then be used to streamline CEQA review for later site-specific projects undertaken by state or local agencies.

CEQA and Traffic

California is home to three of the top five most congested cities in the nation – Los Angeles (#1), San Francisco (#2), and San Jose (#5).⁵⁰ Add in air quality concerns and statewide goals to reduce carbon emissions, and it seems obvious that California should be taking concerted efforts to incentivize carpooling, mass-transit and bikes. But CEQA often stands in the way of doing that.

Litigation surrounding the San Francisco Bike Plan illustrates how CEQA can be used to thwart these projects. First approved in 2005, the Bike Plan called for adding 34 miles of new bike lanes, nearly doubling the city’s number at the time.⁵¹ Yet community and business groups were unhappy that the bike lanes might affect traffic and reduce parking, so they sued the city over the Bike Plan, arguing that the Plan’s traffic and parking impacts warranted preparation of an EIR. The Superior Court agreed and enjoined the city from undertaking any aspect of the Bike Plan until it prepared an EIR.⁵²

More than two years later, the city certified the EIR and re-approved the Bike Plan with no substantial changes. Community groups then challenged the EIR on the basis that it failed to adequately mitigate traffic impacts and properly evaluate project alternatives.⁵³ That litigation dragged on for nearly a year until, in June 2010 – over four years after the Bike Plan was first approved – the Superior Court dismissed the CEQA suit and lifted the injunction.⁵⁴

San Francisco Municipal Transportation Authority (SFMTA) Chief Nat Ford heralded the court’s decision as “the beginning of a new era for bicycling in San Francisco,” noting that “SFMTA Bike Program staff has been working tirelessly to prepare for this day and we are committed to doing the work needed to keep the number of bicyclists growing in the years ahead.”⁵⁵

Many cities have faced CEQA lawsuits after announcing plans to expand bike lanes or create new bike lanes.⁵⁶ In fact, Oakland officials abandoned a plan to narrow a wide road near a major transit station and add two bike lanes after realizing it was too difficult to comply with CEQA.⁵⁷

Similar issues have plagued attempts to expand the use of HOV or carpool lanes, which promote ride-sharing, reduce the number of vehicles on the road, and ease traffic congestion. For example, in 2014 Caltrans and the Santa Barbara County Association of Government (SBCAG) proposed to widen a 16-mile stretch of Highway 101 and add a car-pool lane to the existing two-lane highway.⁵⁸

Opponents quickly filed a CEQA lawsuit claiming that Caltrans failed to perform studies necessary to evaluate the traffic and circulation impacts of the project at various intersections.⁵⁹ The court agreed with the petitioners, vacating the project approvals and ordering Caltrans to perform additional studies to assess the project’s impacts on city intersections.⁶⁰

Once Caltrans completed the requisite studies and re-certified the EIR, local community groups filed a second lawsuit on similar grounds. This time the court denied the CEQA suit, explaining that just because further study “may be helpful does not make it necessary.”⁶¹ But despite the relatively swift victory in the second round of CEQA litigation, it came at a substantial cost. Caltrans stated that the lawsuits cost more than two years of design and coastal permit work, while SBCAG estimated that the delays cost taxpayers \$20 to \$30 million per year plus “legal costs, technical studies, and staff resources.”⁶² In other words, the litigation costs accounted for approximately 30 to 40 percent of the \$140 million in bond funding that was allocated to this project.

CEQA and California's Renewable Energy Goals

California has one of the most aggressive Renewable Portfolio Standard (RPS) programs in the world. First established in 2002, California's RPS program has been periodically updated to accelerate the development of renewable energy generation and the transition to a carbon-free electricity grid. In 2018, California once again increased the RPS to require 60 percent of electricity retail sales to be served by renewable sources by 2030, and all the State's electricity to come from carbon-free sources by 2045.⁶³

Understandably, California's aggressive RPS program has been a boon to renewable energy developers. But it has also led to unexpected windfalls for CEQA petitioners.⁶⁴ Well aware of the schedule and financial constraints facing developers as they seek to commence and complete construction of projects in time to meet their contractual deadlines for generating electricity, Petitioners have filed lawsuits to leverage settlements as developers fold in order to avoid expensive, and potentially fatal, project delays. These CEQA lawsuits, when combined with California's extensive land use and permitting laws, help explain why it costs between 15 to 20 percent more to construct wind projects in California than in other areas of the country.⁶⁵

One example of this CEQA abuse involved two environmental nonprofits that, between 2012 and 2015, filed over eight lawsuits challenging various wind and solar projects in San Diego and Imperial counties.⁶⁶ None of these lawsuits resulted in any of the challenged projects being modified to lessen environmental impacts, let alone scrapped.⁶⁷ Instead, the petitioners received massive settlements – over \$17.2 million in total.⁶⁸ And, in those rare instances where the developer didn't settle, the lawsuits were usually rejected by the courts.⁶⁹

We can expect to see more of these sue-and-settle CEQA lawsuits as California continues its drive to a carbon-free grid. When compared to other types of industrial or utility projects, CEQA “is now used most frequently to challenge solar and wind renewable energy projects – precisely the ‘green’ projects that are most critical to meeting California's climate change reduction mandates.”⁷⁰ This creates an uncomfortable situation where the State's foundational environmental law serves as a tool to delay and increase the costs of achieving California's ambitious renewable energy goals.

SECTION III. CEQA Reform: Bringing California's Premier Environmental Law into the 21st Century

The California Environmental Quality Act (CEQA) is California's foundational environmental law. Under CEQA, every state and local agency is required to disclose – and avoid or “mitigate” – the environmental impacts of every public and private project for which it makes a “discretionary” decision. CEQA has largely proven a tremendous success. It remains, appropriately, at the center of California's planning and project development process, guiding agencies and developers to build projects that reduce environmental impacts and conserve California's breathtaking natural resources for current and future generations.

Nonetheless, the Legislature has failed to adapt CEQA to meet the needs of the moment. All are on board with CEQA's fundamental policy objectives – to prove to “an apprehensive citizenry that the [approving] agency has in fact analyzed and considered the ecological implications of its action[s],” and prevent agencies “from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects.”¹

But implementation of CEQA too often adds unnecessary delays and costs to projects, sometimes making development of much-needed, publicly beneficial projects infeasible. As we saw in the prior section with examples ranging from a 20-unit Habitat for Humanity project and a new middle school campus to massive efforts to improve regional wildfire protection, projects big and small require preparation of complex, time-consuming, and expensive reports that often do little to advance the public's understanding of a project's impacts, help an agency make informed decisions, or reduce and mitigate environmental impacts practically and effectively.

The law's ever-increasing complexities, distortions, and abuses support a wide range of cottage industries, from CEQA consultants to planning experts to lawyers to NIMBY “community groups.” For any given project, some combination of them will help developers and agencies navigate the CEQA process, make the CEQA route as stormy and protracted as possible, or, often, both.

Over the last decade, the Legislature has, in fits and starts, reformed CEQA around its edges. With the exception of some legislation intended to facilitate development of affordable and infill housing, the Legislature has consistently failed to pass meaningful proposals to reform CEQA and stem its weaponization. Its refusal to lead

“ The law's ever-increasing complexities, distortions, and abuses support a wide range of cottage industries, from CEQA consultants to planning experts to lawyers to NIMBY ‘community groups.’ ”

on this score inspired former Governor Jerry Brown to famously remark that: “Reforming CEQA is the Lord’s work. But the Lord’s work doesn’t always get done.”²

Instead of enacting the reforms needed to address the real-life problems identified in this paper and elsewhere, lawmakers have largely limited themselves to passing narrow CEQA exemptions or streamlined procedures

“ Instead of enacting the reforms needed to address the real-life problems identified in this paper and elsewhere, lawmakers have largely limited themselves to passing narrow CEQA exemptions.”

designed to benefit individual mega-projects or specific categories of favored high-profile projects such as sports arenas and shopping centers. While these efforts have benefited a handful of projects (and campaign fund coffers), they have not alleviated the negative impacts of CEQA on the vast number of developers, public agencies, and the public at-large. (Descriptions of CEQA-reform legislation proposed between 2010 and 2021 can be found in an appendix to this report at www.pacificresearch.org).

Simply put, there has been little political appetite from elected officials to pursue the types of fundamental reforms needed to bring CEQA into the 21st century. Yet hope springs eternal that, despite former Governor Brown’s observation, the Legislature will not await

divine intervention to undertake CEQA reform in earnest. And, it is equally to be hoped that further intensification of the numerous crises facing California — from housing and homelessness to droughts and wildfires — will not be needed for the Legislature to address and alleviate many of CEQA’s unintended consequences in a concerted and comprehensive manner.

Following is a brief summary of a number of different approaches the Legislature could take to reforming CEQA (including some measures which were previously proposed in bills that failed to pass the Legislature). These approaches include: the Legislature discouraging itself from merely nibbling around the edges of CEQA; streamlining CEQA review; expanding and clarifying CEQA exemptions; improving the negative declaration and EIR processes; improving administrative appeals; averting unnecessary and pretextual CEQA litigation; and streamlining CEQA litigation.

Moratorium on Narrow Exemptions and Public Transparency Requirements

To date, the Legislature has been either unwilling or unable to push through comprehensive reforms. As one editorial board recently put it: “CEQA appears to have become a tool of central planning for the state government, with exemptions doled out depending on whether a project or types of developments are favored by Sacramento.”³

In light of this well-established practice — not much different from the granting of royal dispensations — perhaps the best way to focus the Legislature’s attention on systemic (rather than one-off) CEQA reform is to take the narrow exemption option off the table. For example, while projects to address homelessness in Los Angeles under Measure HHH benefitted from the enactment of Assembly Bill 1197 (2019), the law did not help tackle homelessness or improve housing affordability beyond Los Angeles. Other examples of such “spot” exemptions abound.

One way the Legislature could bring itself to devote attention to comprehensive reform is by passing legislation imposing a temporary (two- to four-year) moratorium on establishing further narrow statutory CEQA exemptions. While subsequent legislation to establish an exemption could simply override the moratorium, the “shaming” involved could prompt lawmakers to think twice about doing so and inspire them to start working on the systemic CEQA reform needed to benefit the general public.

“ Greater transparency regarding the costs and benefits of any new statutory exemption would also discourage the Legislature’s reliance on narrow exemptions, instead of systemic reform.”

Greater transparency regarding the costs and benefits of any new statutory exemption would also discourage the Legislature’s reliance on narrow exemptions, instead of systemic reform. Specifically, for any exemption bill the Legislature could require the preparation of a “study” that identifies the bill’s sponsors and their largest donors, the benighted project(s) the exemption is expected to benefit, the costs and benefits of the project, and a brief explanation of the need for the exemption. The study would be available online for public review and comment before the bill goes to any committee, and the committee would be required to address any public comments before taking action on the bill. This type of “sunshine” law would promote political accountability and improve the public’s understanding of the CEQA exemption process. It would also provide baseline information for later measuring the efficacy of proposed exemptions and assessing whether they should be expanded or eliminated.

Streamlining CEQA Review

CEQA applies to every project requiring a discretionary approval from a public agency. This is an exceedingly broad scope given the myriad permits, entitlements, licenses, and other approvals needed to build a project in California. Indeed, many jurisdictions intentionally weave discretion into their permitting and approval processes to provide themselves greater control over future development and reserve the ability to kill any project they don’t support.

This discretion reserved by local agencies serves the important purpose of local control, but it comes at a hefty price. For example, developers often devote substantial time and resources to projects that are consistent with applicable planning documents and existing uses only for the county or city to change its mind and deny the project after the developer underwrites an expensive and time-consuming CEQA review process.

“ Many jurisdictions intentionally weave discretion into their permitting and approval processes to provide themselves greater control over future development and reserve the ability to kill any project they don’t support.”

Similarly, a long-planned-for project can, far along in the CEQA process, suddenly face stiff opposition from an influential NIMBY group or well-financed competitor looking to kill the project. An example of this is the UCSF Parnassus campus expansion project, which despite holding more than 25 community meetings and attracting broad community support, still faced CEQA lawsuits from three separate organizations, each with different agendas.

To be fair, the first scenario (having the proverbial rug pulled out from under a project) may be an unavoidable feature of vesting local government decision-making with elected officials, while the second (opposition emerging only late in the process) may reflect the fact that a project's effects are too diffuse to inspire early, focused opposition. Nevertheless, these situations are important drivers of the astronomical costs of development in California and the underproduction of much-needed housing, infrastructure, and other projects identified as priorities by California's laws and policies.

To reduce the time and costs associated with CEQA review, lawmakers should consider reforms to:

- Expand existing streamlining procedures beyond “affordable housing” to other kinds of housing (and even market-rate housing) to address the severe housing shortage at all income levels.
- Require cities and counties to establish minimum design and building requirements for high-priority projects beyond affordable multi-family housing (for which such streamlining was already provided by Senate Bill 35 (2017)), exempt the adoption of those requirements from CEQA, and require a department-level (i.e., ministerial) approval process for those projects.
- Allow projects consistent with a General Plan for which an EIR has been prepared within the last five or ten years to forego cumulative impact analyses.
- Require a department-level approval process for projects that are consistent with various comprehensive planning documents – such as a Sustainable Communities Strategy – for which an EIR was prepared.
- Require California cities and counties to update their General Plan housing element every five years to satisfy regional housing goals and needs, and to prepare an EIR for each such update. The Legislature can then mandate a department-level approval process for projects that are consistent with the updated housing element to ensure those jurisdictions achieve their housing goals.
- Expand the Jobs and Economic Improvement Through Environmental Leadership Act (re-enacted in 2021) to cover additional categories of high-priority projects (some affordable housing projects were added in 2021) such as public transportation, and eliminate or loosen requirements that currently limit the pool of eligible projects (e.g., the requirement that “residential, retail, commercial, sports, cultural, [and] entertainment” projects “be located on an infill site”).

Expanding and Clarifying CEQA Exemptions

As noted above, the Legislature should wean itself from the practice of passing narrow CEQA exemptions and undertake comprehensive CEQA reform. Short of that, expanding and clarifying CEQA's exemption provisions can streamline the CEQA process for a large number of projects.

The “categorical exemptions” provided by the CEQA Guidelines are intended to cover projects that are unlikely to cause any significant effects on the environment. However, the Legislature has crafted a number of statutory exemptions for projects that are just as likely as any other to cause significant effects. In so doing, a majority of lawmakers agreed that countervailing policies warranted exempting these projects from the costs, delays, and potential litigation that CEQA entails. This is standard legislative action, and simply reflects the reality that CEQA can hinder other policy priorities, such as promoting public health and safety or ensuring adequate and affordable housing.

“ Why should a multi-billion dollar sports arena receive streamlined environmental review, while renovation of the local little league field can be held up in CEQA review for years?”

But exemptions enacted in the last decade have been too narrow, idiosyncratic, and contingent upon the support of influential lawmakers. Why should a multi-billion dollar sports arena receive streamlined environmental review, while renovation of the local little league field can be held up in CEQA review for years?

It is past time for the Legislature to expand CEQA's exemption process to facilitate projects meeting critical needs, such as housing (from affordable to market rate) and public transit and renewable energy infrastructure. Lawmakers should consider reforms to:

- Expand existing statutory exemptions limited to narrow categories of projects to cover all projects that meet the specified criteria.
- Exempt replacement or renovation projects that do not increase existing capacity or uses by some appropriate percentage.
- Currently, a project may not rely on a categorical exemption if it may have a significant effect on the environment due to “unusual circumstances.” (CEQA Guidelines § 15300.2(c).) The Legislature could eliminate this exception to the use of a categorical exemption or provide a specific definition for what qualifies as an “unusual circumstance.”

Improving the Negative Declaration (ND) Process

CEQA requires agencies to prepare an EIR any time there is substantial evidence supporting a “fair argument” that a project may have a potentially significant effect on the environment. While it may make sense that an agency should always err on the side of greater environmental analysis and disclosure, the “fair argument” standard is a remarkably low bar in practice.

For example, a project opponent can claim that a project consistent with applicable design and building requirements may nevertheless have a substantial impact on aesthetic resources because the project will not fit the “character” of the surrounding neighborhood. Courts have held an EIR is required under these circumstances.⁴ Preparing an EIR to eliminate the risk of litigation based on the “fair argument” standard can have major ramifications on a project’s schedule and costs, including many months to years of delay while an EIR is prepared and hundreds of thousands of dollars in additional costs.

One way to improve upon CEQA without sacrificing its core policies would be to expand the universe of projects that are eligible for a ND or Mitigated Negative Declaration (MND) (i.e., that do not require an EIR). Such potential reforms include:

- Allow agencies to prepare a ND or MND so long as there is substantial evidence that the project will not have a significant impact on the environment with mitigation incorporated. Currently, agencies must prepare an EIR if there is substantial evidence to support a “fair argument” the project may have a significant effect on the environment. Under this proposal, the agency’s decision to prepare a ND or MND would be upheld even if other evidence shows the project may have a significant effect despite mitigation. In essence, it would invert the fair argument standard.

This reform would address the issue faced by the Boyle Heights affordable housing project challenged by a neighborhood restaurant, as the MND had already analyzed the contamination concerns raised by the restaurant and had substantial evidence to support its finding that contamination risks were not significant. If the proposed reform had been on the books, the City of Los Angeles could have avoided this and many other wasteful CEQA lawsuits.

- Require all state and regional agencies to develop significance thresholds and mitigation measures for specified impact categories, such as air quality, traffic, greenhouse gases (GHGs), aesthetics, etc. The Legislature could then allow local agencies to prepare a MND, rather than an EIR, for projects where (i) the proponent agrees to implement any and all applicable mitigation measures, and (ii) the project does not involve any potentially significant impacts in other impact categories.
- Require agencies to prepare a Negative Declaration (rather than an EIR) for a project if its potentially significant impacts are reduced to less-than-significant levels by applicable permitting regulations designed to reduce or avoid those types of impacts.
- Allow agencies to prepare a ND or MND for projects whose only potentially significant impacts are cumulative impacts, so long as the project’s contribution to those impacts is minimal.

Improving the Environmental Impact Report (EIR) Process

Preparing an EIR is a time-consuming and expensive process, made even more so by CEQA's lax procedural requirements for those opposing a project. For example, CEQA allows project opponents to wait until the final hearing on the project – and often long after the Draft EIR public review period – to lodge comments criticizing the agency's environmental review process and analysis. This type of “sandbagging” is common under CEQA.

In some cases, the agency can promptly respond to an opponent's comments before acting on the project, even if the comments are “dropped” (i.e., presented) at the approval hearing itself. However, far too often, litigation-averse agencies, in an abundance of caution, go back and revise the EIR or engage in additional technical analysis, ostensibly to address those last-minute concerns – a process that often requires recirculating the EIR and re-starting the public review period. Moreover, savvy project opponents may even hold additional comments in reserve to deploy at the next approval hearing in the hopes of starting the whole process over again.

Consider the example of the developer of the 75-unit, mixed-use development in San Francisco on the site with a coin-op laundromat. That project faced opposition every step of the way and opponents raised increasingly ridiculous arguments at further government hearings, including claims that the laundromat was “historic.”

Then there is the example of the 495-unit apartment complex recently put on ice by the San Francisco Board of Supervisors when it directed City Planning and the developer to redo the project's 1,129 page EIR.

It did so notwithstanding the facts that the project site – a parking lot – is zoned for housing, listed as a residential development site on the City's Housing Element, surrounded by tall buildings, and located near transit.

The Legislature could improve the EIR process in a number of ways, including:

- Require agencies to limit the scope of an EIR's environmental impact analysis to only those issues for which a “fair argument” can be made that the project will have a significant impact. All other impact areas can be evaluated at the level of detail required by an Initial Study.
- Allow agencies to release a Final EIR up to 45 days before a public hearing and require comments on the Final EIR to be submitted at least 15 days before the hearing on the project to allow the agency adequate time to review and respond to those comments. Any comments submitted after that time could not be raised in an administrative appeal or a CEQA lawsuit.
- Require agencies to limit their CEQA analysis to site- or project-specific impacts for projects that, in the absence of such impacts, would qualify for department-level approval under existing laws.

“ CEQA allows project opponents to wait until the final hearing on the project – and often long after the Draft EIR public review period – to lodge comments criticizing the agency's environmental review process and analysis. This type of ‘sandbagging’ is common under CEQA.”

Improving Administrative Appeals

CEQA requires California public agencies to provide project opponents an opportunity to appeal the agency's adoption of a ND or MND or certification of an EIR to the agency's ultimate decision-making body. (See CEQA Guidelines §§ 15074(f), 15090(b).) This administrative appeals process serves an important function, especially when a subordinate body like a local Planning Commission issues the initial CEQA approval.

“ Courts have generally interpreted CEQA's procedural requirements in ways that have been relatively forgiving to CEQA petitioners' failures to meet public comment deadlines.”

Unfortunately, administrative appeals are subject to the same types of gaming described above, such as submitting new comments or evidence long after CEQA's public review period or the initial hearing on the project. Indeed, it is not uncommon for opponents to raise new challenges focused on mitigation measures or project revisions that are adopted specifically to address concerns raised during the CEQA review process. This type of conduct seems especially perverse because it can dramatically increase litigation risks for those agencies that are most responsive to public concerns. Yet, courts have generally interpreted CEQA's procedural requirements in ways that have been relatively forgiving to CEQA petitioners' failures to meet public comment deadlines.

Administrative appeals are a routine component of the public decision-making process. Yet there are clear steps the Legislature can take to improve administrative appeals when it comes to CEQA. Such measures include:

- Prohibit administrative appeals (and litigation) based on issues raised or information presented after the public review and comment period on the CEQA document when those issues could have been raised during the public comment process with the exercise of reasonable diligence.
- Establish a state-level administrative body to review appeals of agency CEQA determinations.
- Establish strict deadlines for local agencies to resolve administrative appeals.

Averting Unnecessary and Pretextual CEQA Litigation

CEQA litigation reform is not an all-or-nothing proposition. The process can be reformed to both preserve meritorious suits and crack down on frivolous or otherwise unnecessary actions. Examples of such potential reforms include:

- Require that all CEQA petitioners disclose any person or entity that contributes more than \$500 to the costs or fees of the litigation.
- Institute a state-level review process by an administrative agency to ensure that CEQA litigants are motivated by environmental concerns, rather than personal or economic interests.
- Require that litigants post an appropriate bond before bringing a lawsuit against certain types of projects, such as urban infill or affordable housing projects.

- Require that a petitioner identify, at the time a lawsuit is filed, the specific actions (aside from rejecting the project) that the respondent agency can take to address petitioner’s concerns and avoid litigation. Any recovery of attorney’s fees would be contingent upon the petitioner making a good-faith and reasonable settlement demand.
- Forbid settlements from including any monetary payments except for reasonable attorney’s fees and litigation costs, and funds to undertake specific actions designed to avoid or mitigate the project’s environmental effects.
- Forbid settlements from including any monetary payments or other economic benefits except for reasonable attorney’s fees, litigation costs, or payments to state-managed funds that seek to avoid or mitigate environmental effects.
- Require litigants to identify every person or entity receiving any benefit under a settlement involving a monetary payment and require all such settlements to be approved by the California Attorney General. All approved settlement agreements would be permanently posted to the Attorney General’s website for public review.
- Limit the total amount that a prevailing party can recover in attorney’s fees and disallow recovery of attorney’s fees above certain rates.
- Allow public agencies to recover attorney’s fees and litigation costs if they prevail in CEQA litigation.
- Tighten the requirements for “public interest” standing in CEQA suits, for example by requiring a petitioner show the lawsuit advances the interests of the general public and that the petitioner will adequately represent those interests on behalf of the general public.
- Allow lead agencies and real parties to bring abuse of process claims against parties that use CEQA to obtain an improper economic advantage.
- Require CEQA litigants to provide agencies and real parties with notice at least 14 calendar days prior to filing a lawsuit.

“ The process can be reformed to both preserve meritorious suits and crack down on frivolous or otherwise unnecessary actions.”

Streamlining CEQA Litigation

CEQA already contains provisions intended to streamline litigation. For example, CEQA lawsuits must be given “preference over all other civil actions,” and must be “quickly heard and determined.” (Public Resources Code § 21167.1.) But these provisions are generally toothless, and it is not uncommon for CEQA lawsuits to drag on for two or three years or more. Such prolonged litigation results in unnecessarily high costs to the parties and significant project delays.

Examples of CEQA litigation inefficiencies abound. A common one is preparation of the administrative record, which is supposed to consist of, generally speaking, those documents considered by the agency in analyzing the environmental effects of the project. In CEQA litigation, a court is generally limited to the administrative record in deciding whether the agency complied with the law. Too often, though, CEQA petitioners insist that other materials and documents – such as e-mails between agency staff – be included in the administrative record, giving rise to costly and time-consuming disputes and satellite litigation over the contents of the record.

Fortunately, the Legislature could immediately implement many common-sense reforms to streamline the CEQA litigation process and eliminate some of the inefficiencies. Such potential reforms include:

- Narrow the categories of documents included in the administrative record.⁵
- Allow agencies to prepare a limited administrative record that contains only those documents that are before the final decision-making body at the time it takes final action on the project.
- Allow applicants to require agencies to prepare the administrative record during the EIR and local approval process and certify the record upon issuance of any approvals.⁶
- Expressly authorize agencies to execute tolling agreements with project opponents so that parties have sufficient time (statutes of limitations expire) to settle potential disputes.⁷
- Require a case management conference within 30 days of filing a CEQA lawsuit so the parties can address issues that frequently result in litigation delays, such as record disputes, briefing schedules, and whether the parties wish to pursue settlement or mediation.⁸
- Require a second settlement conference before the reply brief is filed, or no fewer than 45 days before the final hearing on a CEQA lawsuit.
- Require consolidation of all CEQA challenges against a project into a single proceeding.
- Require all Superior Courts to appoint CEQA judges at the rate of at least one (1) CEQA judge per 500,000 residents.⁹ All CEQA judges in counties with less than one (1) CEQA judge per 500,000 residents would receive automatic term extensions.
- Require all hearings to be before a CEQA judge and grant any party the right to transfer litigation out of any county with no CEQA judges.
- Forbid courts from invalidating or setting aside approvals for certain categories of projects (e.g., affordable housing, infrastructure, and climate resiliency projects) prior to, during, or after litigation.
- Establish original jurisdiction in the Courts of Appeal for all CEQA challenges.¹⁰

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- 4 *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358.
- 5 See Pub. Resources Code § 21167.6(e) (identifying required contents of a CEQA administrative record).
- 6 See Pub. Resources Code § 21186 (requiring the lead agency for a project certified by the Governor as an “environmental leadership development project” to prepare the administrative record during the administrative process),
- 7 See *Save Lafayette Trees v. East Bay Regional Park Dist.* (2021) 66 Cal.App.5th 21 (holding that tolling agreement between lead agency and petitioner was ineffective because the project proponent and real party was not a party to the agreement).
- 8 See California Rule of Court 3.2226(a) (recommending that courts “should hold an initial case management conference within 30 days of the filing of the [CEQA] petition or complaint”).
- 9 See Pub. Resources Code § 21167.1(b) (requiring all superior courts in counties with a population of more than 200,000 to designate one or more CEQA judges).
- 10 While a California Superior Court ruled a law vesting original jurisdiction in CEQA suits in the Court of Appeal was invalid, neither a Court of Appeal nor the Supreme Court has so held.

Authors

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Chris Carr is a partner in the San Francisco office of Paul Hastings LLP and chairs the firm's Environment and Energy Practice. He is widely regarded as one of the leading infrastructure development, environmental, and energy lawyers in the United States. Drawing on his experience with the U.S. Department of the Interior and the U.S. Department of State, Mr. Carr represents businesses, landowners, public agencies, and nonprofits in all areas of environmental and natural resources law, including energy and infrastructure, water, forestry, agriculture, mining, and coastal and marine resources.

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Mr. Carr frequently defends permits, approvals, and environmental review documents for energy and other infrastructure projects in federal and state courts, and defends against "citizen suits" brought under federal and state environmental statutes for all manner of land and resources development.

Mr. Carr is Chair of Paul Hastings' Environment and Energy Practice. He was Chair of Morrison and Foerster's Global Energy & Environment Practice and Co-chair of its Cleantech Practice Group from 2010 – 2017. He also co-chaired its Autonomous Vehicle and Drone Practice group from 2015 – 2017. He is a regular speaker at Berkeley Law and Stanford Law School.

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- Chris Carr and Robert Miller, *Wall Street Journal*, Bird Nests and Kit Foxes vs. Renewable Energy (Apr. 9, 2014), available at: <https://www.wsj.com/articles/SB10001424052702303802104579453872700416560>.
- NPR's Marketplace, interviewed about Offshore Wind Auction at minute 5:30, 7:05 (Dec. 12, 2017), available at: https://archive.org/details/KCLU_1340_AM_20181217_230000?start=297.
- Keith Goldberg, Law360, Energy Litigation to Watch In 2022 (Jan. 3, 2022), available at: <https://www.law360.com/articles/1444375/energy-litigation-to-watch-in-2022>.

For a representative matters list, recognitions, and additional publications and speaking engagements please see: <https://www.paulhastings.com/professionals/chris carr>

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Navi Dhillon is a partner in the San Francisco office of Paul Hastings LLP and is recognized as one of the leading lawyers under 40 in the United States. He is a trusted advisor to diverse clients ranging from investment funds (private equity, hedge funds) to infrastructure, renewable energy, agriculture, timber, mining and technology companies. Navi combines deep knowledge of complex regulatory schemes and elite litigation experience with keen business judgment to help businesses solve their most important problems. He has served as lead counsel in matters with an aggregate amount at stake in excess of \$15 billion.

Mr. Dhillon regularly advises clients on a range of sensitive business concerns, from securities, corporate governance, and water pollution, to class actions, fraud, and land use. He handles all aspects of civil litigation in federal and state courts across the United States for prominent and controversial matters. Outside the courtroom, Navi is a highly-skilled negotiator and regularly handles complex transactions for clients seeking to create and expand business opportunities in emerging areas. As lead counsel, he has defended multiple high-stakes preliminary injunction proceedings and litigated a range of cases to judgment.

Navi is a go-to lawyer for clients seeking difficult regulatory approvals for large-scale projects, including utility-scale renewable energy, utility-scale desalination, a “new town” and other major infrastructure projects around the globe.

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Lucas Grunbaum is an attorney in the San Francisco office of Paul Hastings LLP and a member of the firm’s Real Estate Department and Environment and Energy Practice. His practice focuses on complex regulatory matters involving natural resources, renewable energy, air quality, infrastructure development, land use, and more. In addition to regulatory and transactional counseling, Mr. Grunbaum has experience handling litigation under the federal Endangered Species Act and Freedom of Information Act, as well as mandamus proceedings under various state laws.

Among other environmental laws, Mr. Grunbaum has deep knowledge of the California Environmental Quality Act (CEQA), the California Coastal Act, the Porter-Cologne Act, and the Clean Air Act. Drawing on that knowledge, he has helped clients obtain important regulatory approvals, navigate complex entitlement processes, and defend against enforcement actions.

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About PRI

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