

Testimony for Little Hoover Commission Hearing on the California Environmental Quality Act

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Thank you for inviting my testimony.

I am a professor who teaches and writes about property and land-use law, administrative law, election law, and politics.

In these written remarks, I would like to convey a few basic points about the California Environmental Quality Act (CEQA). First, CEQA's foundational assumptions are mismatched to the major environmental issues of our day. Second, the magnitude of the CEQA problem cannot be credibly quantified—but there are good reasons to suspect that it is big. Third, the politics of CEQA reform are very tough, given what we know about public opinion and interest group positions. Fixing CEQA—and I will suggest a few potential fixes—is thus likely to depend on creative improvisations by all three branches of government. The Little Hoover Commission has an important role to play too, framing public and elite narratives about the law and nudging positive action by other actors.

I. CEQA's Outdated Assumptions

CEQA presumes that approving a project that may cause a physical change in the environment is risky, whereas saying no is safe. Under well-established caselaw, if *anyone* musters a “fair argument” that *any* physical change that a project *might* cause would have *any* more-than-minor adverse effect, then the project can't proceed unless the sponsor first undertakes an exhaustive study and mitigates any physical effect that's found to be “significant.”¹ By contrast, when an agency says no to a project, environmental studies aren't required.²

This paradigm would make sense if humankind inhabited an ecological Eden in which everything was perfect until we touched it. But the world we live in today requires substantial physical changes to remain habitable. To avoid the worst of climate change, we must rapidly electrify the economy, which means large-scale development of wind and solar farms, transmission lines, and even lithium mines.³ To avoid catastrophic wildfires, we must set

¹ No Oil, Inc. v. City of Los Angeles, 118 Cal. Rptr. 34, 38 (1974); STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT § 6.37.

² PUB. RES. CODE § 21080(b)(5) (exempting “[p]rojects which a public agency rejects or disapproves”).

³ ERIC LARSON ET AL., NET-ZERO AMERICA: POTENTIAL PATHWAYS, INFRASTRUCTURE, AND IMPACTS (Oct. 29, 2021), <https://netzeroamerica.princeton.edu/the-report>.

controlled burns over millions of acres annually.⁴ To provide affordable shelter—away from wildfires and from tidelands inundated by rising seas, and near jobs and other amenities—we must build millions of new, denser homes in existing urban and suburban communities.⁵ We’ll need more transportation projects too.

Energy, fires, housing, transit: one thing these projects have in common is that they usually annoy someone who lives nearby. And thanks to CEQA, any neighbor with a lawyer can delay a project by filing suit and arguing that the government should have studied more alternatives, or provided more fulsome discussions of alleged impacts, or recirculated the CEQA document for additional public comment, or demanded further mitigation measures. This is not to belittle the neighbor’s concerns. Many of these projects do have local impacts. But local impacts need to be balanced against statewide concerns, and when permitting decisions are made by elected local governments, the permitting authority will generally be quite solicitous of local interests. It’s not clear that the most vociferous and hard-to-propitiate of local objectors should have a unilateral right to put projects on hold, as opposed to having a voice in the making of generally applicable development standards.

II. The Epistemics of CEQA Criticism

There are, of course, many impediments beyond CEQA to infill housing, electrification, and healthy management of fire-prone lands. Is CEQA a big problem, or is it a modest one in the scheme of things? The honest answer is that the true severity of the CEQA problem can’t be quantified.

Researchers don’t have any good way to approximate the counterfactual development patterns that would have occurred in California without CEQA. Nor can the costs of CEQA be reasonably evaluated by asking whether a “high” or “low” proportion of projects are required to undergo an EIR (environmental impact report, the most exhaustive form of CEQA analysis) or face litigation.⁶ Those proportions tell us nothing about the projects that weren’t proposed in the

⁴ See Scott L. Stephens, Robert E. Martin & Nicholas E. Clinton, *Prehistoric Fire Area and Emissions from California’s Forests, Woodlands, Shrublands, and Grasslands*, 251 *FOREST ECOLOGY & MGMT.* 205 (2007); Claire Ho, *This One Fact Will Completely Change How You Think About California Wildfires*, S.F. *CHRONICLE*, Oct. 15, 2022.

⁵ MAC TAYLOR, LEGISLATIVE ANALYST’S OFFICE, CALIFORNIA’S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES (Mar. 17, 2015), <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf>; Sam Khater, Len Kiefer & Venkataramana Yanamandra, *Housing Supply: A Growing Deficit* (Freddie Mac Research Note, May 7, 2021), <https://www.freddiemac.com/research/insight/20210507-housing-supply>; Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, 11(2) *AM. ECON. J.: MACROECONOMICS* 1 (2019); CAL. DEPT. OF HOUS. & COMMUNITY DEVELOPMENT, *A HOME FOR EVERY CALIFORNIAN: 2022 STATEWIDE HOUSING PLAN* (March 2022), <https://storymaps.arcgis.com/stories/94729ab1648d43b1811c1698a748c136>.

⁶ Cf. JANET SMITH-HEIMER ET AL., *CEQA: CALIFORNIA’S LIVING ENVIRONMENTAL LAW* ii-iii (Rose Foundation Report, Oct. 25, 2021) (arguing that CEQA is not a “major barrier to development” as evidenced by the fact that “[t]he number of lawsuits filed under CEQA throughout California has been low” and “[t]he rate of litigation for challenges to projects alleging noncompliance with CEQA is also very low”); MOIRA O’NEILL ET AL., *EXAMINING ENTITLEMENT IN CALIFORNIA TO INFORM POLICY AND PROCESS: ADVANCING SOCIAL EQUITY IN HOUSING*

first place because of CEQA, nor do they reveal the costs that developers incur to avoid an EIR or litigation—costs that may be buried in side deals with nondisclosure clauses, or embodied in the developer’s choice to build a smaller or more expensive project than what is nominally allowed.

To *know* whether CEQA is a big problem or a little problem, we would need to see not just the lawsuits that are filed, but the rest of the iceberg that’s hidden from public view. That we observe CEQA lawsuits against only a small fraction of approved projects is consistent with both a world in which CEQA risk isn’t much of a barrier to project approvals, and a world in which CEQA is a huge barrier.

I am also unmoved by studies from CEQA critics that demonstrate a supposedly alarming “50% win rate” for CEQA plaintiffs in published opinions.⁷ The cases that reach a final judgment—let alone a published opinion by a court of appeal—comprise a tiny, strategically selected percentage of the universe of potential cases. Under a variety of conditions, including very pro-plaintiff and very pro-defendant legal standards, the expected plaintiff win rate in observed cases is about 50%.⁸ Economists and law professors continue to debate whether anything can be learned about legal standards from win rates, but suffice it to say there are no easy lessons.⁹

Despite my skepticism about the studies on both sides, I do think that CEQA is a big problem, though I would characterize my view as not strongly held in light of the fundamental epistemic barriers I’ve just described. I base my provisional conclusion on four sets of observations.

First, legislative insiders say that the State Building and Construction Trades Council (unions), not environmentalists, is the major obstacle to CEQA reform.¹⁰ The Trades, which use CEQA as

DEVELOPMENT PATTERNS 78-83 (Final Report to the California Air Resources Board, Mar. 18, 2022) (reporting that only 2.8% of entitled projects [6.9% of units] in the authors’ approved-projects dataset faced litigation; that most of the lawsuits “did not exclusively rely on state environmental law to challenge approvals”; and that “that few project approvals within our dataset required an EIR”).

⁷ Daniel R. Golub, Jennifer L. Hernandez & Joanna L. Meldrum, *CEQA Judicial Outcomes: Fifteen Years of Reported California Appellate and Supreme Court Decisions*, HOLLAND & KNIGHT (May 2015), <https://perma.cc/PVM7-H2H8>.

⁸ The canonical paper is George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). Important extensions include Yoon-Ho Alex Lee & Daniel Klerman, *The Priest-Klein Hypotheses: Proofs and Generality*, 48 INT’L REV. OF LAW AND ECON. 59 (2016); and Daniel Klerman and Yoon-Ho Alex Lee, *Inferences from Litigated Cases*, 43 J. LEG. STUD. 209 (2014).

⁹ See the Alex Lee and Klerman papers cited in note 8, *supra*. CEQA critics have argued that the plaintiff win rate in CEQA cases is alarmingly higher than the plaintiff win rate in New York State Environmental Quality Review Act cases, and federal administrative agency cases generally, and federal tax cases specifically. Golub et al., *supra* note 7, at 3-4. I’m not sure whether this is an apples-to-apples comparison (i.e., that all of the referenced studies rely just on published appellate opinions), but even if it is, the win-rate disparities could be due to (1) differences across court systems in the norms for publishing opinions (e.g., if California appellate courts only publish their opinions in “hard” cases, one would expect a plaintiff win rate of about 50%), or (2) differences across statutes/contexts in plaintiffs’ incentive to appeal relatively weak claims, or (3) differences across statutes/contexts in defendants’ incentive to settle rather than litigate.

¹⁰ Matt Levin, *Commentary: Five Things I’ve Learned Covering California’s Housing Crisis that You Should Know*, CALMATTERS, Jan. 6, 2021, <https://calmatters.org/housing/2021/01/california-housing-crisis-lessons/>. See also STEPHANIE M. DEHERRERA, DAVID FRIEDMAN, AND JENNIFER L. HERNANDEZ, IN THE NAME OF THE ENVIRONMENT:

leverage to secure project-labor agreements, wouldn't care so much about it unless CEQA lawsuits were a broadly useful way to impose high costs on developers.¹¹

Second, lawyers who represent developers and cities tell me that CEQA is almost always their greatest worry when a client proposes a project. As the folks on the front lines negotiating project redesigns, settlements, and agreements-not-to-sue, their personal observations count for a lot in a world where independent observers can't see all the deals that get hashed out in CEQA's shadow.

Third, over the decades, the courts have construed CEQA expansively, in ways that favor plaintiffs and deviate from normal public law.¹² Ordinarily, when the Legislature has assigned a task to administrative agencies, courts defer to the agency on how to do it so long as the agency explains its thinking and provides some evidentiary support.¹³ CEQA is different. Here, the courts have converted crucial "agency questions" into "court questions," establishing legal standards that confer discretion on judges while depriving the agency of the benefit of the doubt. These questions include whether an EIR as opposed to a negative declaration must be prepared for a given project,¹⁴ and whether an EIR provides a sufficiently detailed discussion of any given impact.¹⁵ Moreover, while CEQA is supposed to guide the exercise of agency discretion, the doctrines concerning CEQA baselines and what counts as an effect of a project have become unmoored from consideration of the scope of agency discretion.¹⁶ The courts also rejected a modest effort to regularize CEQA by tying the question of whether an impact is significant to whether the project complies with regulatory standards addressed to that type of

LITIGATION ABUSE UNDER CEQA (Holland & Knight, August 2015), <https://perma.cc/SV3V-F5L2> (finding that only 13% of CEQA lawsuits during 3-year study period were filed by recognized "state and regional environmental advocacy groups").

¹¹ The extent of CEQA "greenmailing" is unknown because it is part of the underwater iceberg, but for journalistic coverage of the phenomenon, see Editorial, *CEQA Used as Legal Greenmail*, O.C. REGISTER, July 6, 2015, <https://www.ocregister.com/2015/07/06/ceqa-used-as-legal-greenmail/>; Christian Britschgi, *How California Environmental Law Makes It Easy For Labor Unions To Shake Down Developers*, REASON, Aug. 8, 2019, <https://reason.com/2019/08/21/how-california-environmental-law-makes-it-easy-for-labor-unions-to-shake-down-developers/>. See also Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENV'T'L L.J. 21, 58-67 (2018) (discussing politics of CEQA litigation anonymity and CEQA reform).

¹² Christopher S. Elmendorf & Timothy Duncheon, *When Super-Statutes Collide: CEQA, the Housing Accountability Act, and Tectonic Change in Land Use Law*, 49 ECOLOGY L.Q. (forthcoming 2023) (manuscript at 9-14).

¹³ MICHAEL ASIMOW & MARSHA N. COHEN, CALIFORNIA ADMINISTRATION LAW § 4.2 (2002).

¹⁴ *No Oil, Inc. v. City of Los Angeles*, 118 Cal. Rptr. 34 (1974) (establishing "fair argument" standard while rejecting proposition that the EIR requirement may be reserved for projects that would have an "important" or "momentous" effect of "semi-permanent duration"); KOSTKA & ZISCHKE, *supra* note 1, § 6.76 (explaining that "fair argument" is a question of law, and citing cases).

¹⁵ *Sierra Club v. Cnty. of Fresno*, 241 Cal. Rptr. 3d 508, 516-20 (2018).

¹⁶ See Elmendorf & Duncheon, *supra* note 12, manuscript at 41-49 (contrasting norms about baselines and causation under CEQA and its federal counterpart, the National Environmental Quality Act ("NEPA")).

impact.¹⁷ And in case after case, courts have construed CEQA exemptions narrowly.¹⁸ Arbitrary timing rules disqualify projects from exemptions even when there's no fair argument about environmental effects.¹⁹ I could go on. In sum, what I know of CEQA doctrine leads me to credit the lawyers in the trenches who say that CEQA is a big problem.

The final consideration informing my judgment about the severity of the CEQA problem is that the Legislature has eliminated most of the tools other than CEQA that cities formerly used to block zoning-compliant housing projects. The Housing Accountability Act (HAA) now requires cities to approve nearly all housing projects that a “reasonable person” could find to be compliant with applicable general plan and zoning standards.²⁰ The Permit Streamlining Act (PSA) requires cities to act on project applications quickly or else the project becomes automatically approved by operation of law.²¹ And the Housing Crisis Act prohibits cities from holding more than five public hearings before a project is approved or denied.²²

Yet as San Francisco recently demonstrated, a gaping CEQA loophole remains. In October of 2022, the Board of Supervisors voted down a major housing project on a valet parking lot.²³ Rather than deny the project outright, which would have violated the HAA, the supervisors rejected its clearly adequate environmental impact report, demanding additional makework studies. Housing advocates sued. The court ruled that the HAA and the PSA couldn't be violated until after a city certifies its CEQA review as complete, and, further, that courts are powerless to make a city certify the CEQA review—or even to decide whether the review conducted thus far is sufficient—so long as the city keeps asking for additional studies.²⁴ The court also held that CEQA hearings don't count toward the five-hearing limit of the Housing Crisis Act.

¹⁷ *Communities for a Better Env't v. Cal. Resources Agency*, 126 Cal. Rptr. 2d 441 (Ct. App. 2002) (invalidating CEQA Guideline that created rebuttable presumption of no significant impact in such cases). (Note that this case has been treated as disapproved since a 2015 decision of the California Supreme Court on CEQA exemptions, but it has not been formally overruled and there has been no subsequent effort to restore the rebuttable-presumption guideline. See *infra* notes 61-63 and accompanying text.)

¹⁸ This “narrow construction” rule is specific to so-called categorical exemptions, which are created through the CEQA Guidelines, rather than the statutory exemptions, which were created by the Legislature. See KOSTKA & ZISCHKE *supra* note 1, §§ 5.125, 5.126.

¹⁹ Specifically, if the project as initially proposed by the developer includes features that are designed to avoid an environmental impact that would disqualify the project from the exemption, the project can be processed with the exemption, but if the same features were added later, in response to public or agency concerns about potential impacts, they're treated as “mitigation measures” rather than components of the project design and a line of cases holds that a project cannot be “mitigated into a categorical exemption.” See KOSTKA & ZISCHKE, *supra* note 1, § 5.75.

²⁰ GOV'T CODE § 65589.5(f)(4) & (j).

²¹ GOV'T CODE §§ 65950, 65956(b).

²² GOV'T CODE § 65905.5(a).

²³ For additional background on this incident, see Elmendorf & Duncheon, *supra* note 12, manuscript at 21-23.

²⁴ Order re: Demurrer, *Yes in My Backyard v. City and County of San Francisco*, Case No. CPF-22-517661, Superior Court of Cal., County of San Francisco, Oct. 21, 2022, <https://drive.google.com/file/d/1s8xuDjXmzMhK-zRs72BsHeF2eu9EKoXO/view>.

Perhaps, someday, an appellate court will say that bad-faith demands for additional CEQA study violate the HAA.²⁵ Or perhaps the Legislature will close the loophole.²⁶ But for now, cities have one-way political discretion to delay indefinitely, through CEQA, the very projects that the Legislature has said they may not deny. Their discretion is one-way because if a city shortcuts environmental review, project opponents can sue and a court will put the project on hold, whereas if the city “longcuts” environmental review—requiring excessive study, or analysis of impacts that aren’t environmental in nature—project proponents have no legal recourse. Unchecked by law, the city’s discretion to demand the longcut is entirely political.

CEQA also politicizes environmental review even in cases where a local government would prefer a more dispassionate process. In San Francisco, permit challenges are heard by a technocratic body, the Board of Permit Appeals. Yet state law anoints the elected governing body of a city or county as its official CEQA decisionmaker.²⁷ Every environmental review must be appealable to the city’s politicians, who then get to exercise the city’s one-way political discretion to require further studies, apparently without limit.

III. Prospects for CEQA Reform

The politics of CEQA reform are tough.

CEQA empowers groups that are politically popular—self-styled environmentalists, neighborhood defenders, and unions—to impose costs on developers (who are loathed) in the name of environmental preservation, public health, and safety, also known as apple pie. In a recent study, my co-authors and I asked a nationally representative sample of respondents about which of eleven groups are most responsible “for high housing prices and rents in your area.”²⁸ Developers were blamed the most; environmentalists and anti-development activists were seen as innocents.²⁹

Ironically, the prospects for CEQA reform are probably inversely related to the need for it. If CEQA compliance was easy, there wouldn’t be much need to reform it and no one would have much to lose from reform. But if CEQA is in fact a large obstacle to project approvals whenever cities, unions, or other interest groups want it to be, then CEQA reform will be fought tooth and nail by the groups that benefit from the CEQA status quo.

²⁵ For a sketch of this argument, see Elmendorf & Duncheon, *supra* note 12, manuscript at 29-35.

²⁶ A.B. 1633 (Feb. 17, 2023), 2023-2024 Leg., Reg. Sess. (Cal. 2023), would close it for dense infill housing projects.

²⁷ PUB. RES. CODE § 21151(c).

²⁸ Clayton Nall, Christopher S. Elmendorf & Stan Oklobdzija, *Folk Economics and the Persistence of Political Opposition to New Housing* (unpublished manuscript, Nov. 15, 2022), Appendix I.2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4266459.

²⁹ *Id.* See also Paavo Monkkonen & Michael Manville, *Opposition to Development or Opposition to Developers? Experimental Evidence on Attitudes Toward New Housing*, 41.8 J. URB. AFFAIRS 1123 (2019) (finding that a frame highlighting developer profits and possible corruption had a larger, more negative impact on public support for a hypothetical housing project than frames highlighting tangible adverse effects of the project).

As noted above, I suspect that CEQA is in fact a pretty big problem, and because of that, I am not optimistic about CEQA reform. The path to reform, if there is one, is likely to be adventitious, found as much as planned, with contributions from all three branches of government and independent watchdogs, and a heaping of good luck. In that spirit, I shall close with a few suggestions for each branch of government.

My suggestions focus on housing because that's the domain I know best, but it's important that CEQA's application to green energy, electrical transmission, and fire management be revisited too.

A. The Legislative Branch

The recent history of legislative CEQA reforms consists of one-off carveouts for big projects with wealthy patrons (e.g., stadiums),³⁰ and broader reforms that trade CEQA streamlining of infill housing projects for other requirements that undermine the economic feasibility of development and have nothing to do with the environment (e.g., union labor and affordability mandates).³¹

This is roughly the pattern one would expect to see if CEQA is, in fact, a powerful tool for interest groups to impose cost willy-nilly on development projects. It's also self-undermining—at least if the state actually wants to make its urban centers affordable places to live. (In a competitive market without controls on the quantity of housing, the equilibrium price of housing is largely determined by the cost of building.³²)

In some peer states, much larger reforms are in the offing. Both chambers of the Washington state legislature recently voted by overwhelming majorities (49-0 and 94-3) to exempt housing projects within urban growth boundaries from the state's environmental review law.³³ The legislature didn't attach special labor requirements, affordability mandates, or any other conditions that raise the cost of development. This will make Washington's land-use regime

³⁰ Liam Dillon, *Which California Megaprojects Get Breaks from Complying with Environmental Law? Sometimes, It Depends on the Project*, L.A. TIMES, Sept. 25, 2017, <https://www.latimes.com/politics/la-pol-ca-environmental-law-breaks-20170925-story.html>.

³¹ See, e.g., A.B. 2011, 2021-2022 Reg., Leg. Sess. (Cal. 2022), codified as Gov't Code §§ 65912.121-.123 (requiring qualifying projects to provide 15% low-income units and to pay prevailing wages and provide health insurance to workers); S.B. 35, 2017-2018 Reg., Leg. Sess. (Cal 2017), codified as Gov't Code § 65913.4 (requiring qualifying projects to meet 10% or 50% low-income share requirement and use skilled and trained labor, depending on project size); A.B. 73, 2017-2018 Reg., Leg. Sess. (Cal 2017) (requiring qualifying projects to meet 20% low-income share requirement and use skilled and trained labor, depending on project size). See also GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, TECHNICAL ADVISORY: CEQA REVIEW OF HOUSING PROJECTS, Appendix A (Jan. 2020), <https://opr.ca.gov/ceqa/ceqa-housing.html> (comparing various CEQA streamlining options in terms of affordability requirements and other limitations).

³² Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON PERSP. 3 (2018).

³³ See <https://app.leg.wa.gov/billsummary?BillNumber=5412&Initiative=false&Year=2023>; <https://app.leg.wa.gov/billsummary?BillNumber=1293&Year=2023&Initiative=false>; <https://twitter.com/danbertolet/status/1632878419439669248>.

much more like Oregon's, which features strict urban growth boundaries but no "mini-NEPA" at all.³⁴

In New York, Governor Hochul's proposed Housing Compact also features sweeping carveouts from the state's mini-NEPA law.³⁵ It would authorize cities to raise height, density, and lot-coverage caps; to reduce minimum lot size and parking standards; to enact transit-oriented-development upzones, and to approve projects—all without environmental review.³⁶ Altogether, I count fifteen classes of housing projects and rezoning actions that the bill would exempt.

What happens in Washington or New York obviously does not change the array of interest groups that have successfully defended Big CEQA in California. But, like the recent interventions of nationally prominent liberal commentators (e.g., Ezra Klein, Jerusalem Demsas),³⁷ and reports from nonpartisan watchdogs and analysts (e.g., the Little Hoover Commission, the Legislative Analyst's Office),³⁸ large-scale reforms in other states may subtly alter California legislators' sense of whether the status quo is defensible, and thus their willingness to incur big political risks in order to change it.

I would like to see California follow Washington and exempt housing in designated urban growth areas from CEQA review, but my principal near-term hope for legislative action is more modest: stop cities from abusing CEQA to stall, indefinitely, the same housing projects that the Legislature has said they may not deny.³⁹ I think this reform may be an easier sell, politically.⁴⁰ For starters, it wouldn't curtail the rights of neighbors, unions, or environmentalists to challenge a CEQA review as legally inadequate. Further, the 469 Stevenson St. debacle, up to and including the superior court's decision, both illuminated the CEQA loophole for all to see and contributed to a narrative that's easy for laypeople to grasp. "Close the housing-

³⁴ Edward J. Sullivan, *Urbanization in Oregon: Goal 14 and the Urban Growth Boundary*, 47. URB. LAW. 165 (2015).

³⁵ <https://www.governor.ny.gov/programs/new-york-housing-compact>.

³⁶ FY 2024 NEW YORK STATE EXECUTIVE BUDGET, EDUCATION, LABOR AND FAMILY ASSISTANCE, ARTICLE VII LEGISLATION, Part F, § 2 (describing "preferred action" alternatives), Part G, § 3 (transit-oriented development provisions).

³⁷ E.g., Transcript: Ezra Klein Interviews Nicholas Bagley, N.Y. TIMES, Feb. 7, 2023; <https://www.nytimes.com/2023/02/07/podcasts/ezra-klein-show-transcript-nicholas-bagley.html>; Ezra Klein, *Government Is Flailing, in Part Because Liberals Hobbled It*, N.Y. TIMES, Mar. 13, 2022; Ezra Klein, *California Is Making Liberals Squirm*, N.Y. TIMES, Feb. 11, 2021; Jerusalem Demsas, *Not Everyone Should Have A Say*, THE ATLANTIC, Oct. 19, 2022; Jerusalem Demsas, *Community Input Is Bad, Actually*, THE ATLANTIC, Apr. 22, 2022; Transcript: Ezra Klein Interviews Jerusalem Demsas, N.Y. TIMES, July 23, 2021; Jerusalem Demsas (@JerusalemDemsas), TWITTER, Mar. 12, 2021 ("Love this article on CEQA, the nation's worst anti-environment, environmental legislation..."), <https://twitter.com/jerusalem Demsas/status/1370407406098907144?lang=en>.

³⁸ E.g., MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, CONSIDERING CHANGES TO STREAMLINE LOCAL HOUSING APPROVALS (May 18, 2016), <https://lao.ca.gov/Publications/Report/3470>.

³⁹ As explained below, I also think that California could take very big steps in the Oregon / Washington direction through an update of the CEQA Guidelines, which would not require legislative action. See *infra* Part III.B.

⁴⁰ A pending bill, A.B. 1633, would close the loophole for dense infill projects on environmentally benign sites. Disclosure: I provided pro-bono advice to the bill's author (Assemblymember Phil Ting) and sponsor (SPUR) on the drafting of the bill.

accountability loophole” is a much more politically straightforward argument than “exempt projects from environmental review for the sake of the environment.” The gobsmacking preposterousness of a world in which cities just have to mouth the words “do more studies” in order to evade the entire apparatus of state housing law speaks for itself.⁴¹

B. The Executive Branch

Though it is customary to think of law reform as a job for the Legislature, many of CEQA’s problems are probably better handled by the Governor and his team. Politically, the Governor is much better known to voters than typical state legislators. This positions him to claim credit for his administration’s actions, and it probably also makes him less dependent on interest groups for campaign cash.⁴² And, because he’s elected statewide rather than from a small territorial district, the Governor has less to fear than state legislators from groups that have organized to defend the status quo in their neighborhoods.⁴³

CEQA as written contemplates that executive-branch officials appointed by the Governor will play a large role in the law’s development. Specifically, it charges the Office of Planning and Research (OPR) and the Natural Resources Agency with issuing and periodically updating the CEQA Guidelines.

Through the Guidelines, OPR and the Resources Agency may exempt a class of projects from CEQA by “determin[ing]” that it does not “have a significant effect” on the environment.”⁴⁴ More generally, the Guidelines “shall specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a ‘significant effect on the environment.’”⁴⁵

Over the years, OPR and the Resources Agency have created a variety of exemptions through the Guidelines, known as “categorical exemptions.” But the categorical exemptions are riddled with exceptions. For example, a housing project gets bounced out of the infill exemption if

⁴¹ There are, of course, many other useful things the Legislature could do to streamline CEQA review of good-for-the-environment projects, and perhaps also to limit pretextual or otherwise frivolous CEQA litigation. I focused my legislative recommendations on the CEQA loophole in state housing law because closing it is necessary to make cities comply with any other limitation on the scope of CEQA review of housing projects that may be adopted, and because legislators will soon have to vote on whether to close it (for the class of projects covered by AB 1633).

⁴² Because he can raise a lot of money from individuals, trading on his personal brand.

⁴³ Recent studies of cities that switched between at-large and districted elections (for reasons that have nothing to do with housing) find that the adoption of districted, territorial elections causes a large reduction in housing permits, especially for multifamily housing. See Michael Hankinson & Asya Magazinnik, *The Supply–Equity Trade-off: The Effect of Spatial Representation on the Local Housing Supply*, J. POL. (forthcoming 2023), <https://doi.org/10.1086/723818>; Evan Mast, *Warding Off Development: Local Control, Housing Supply, and NIMBYs*, REV. ECON. & STATISTICS (forthcoming 2023), https://doi.org/10.1162/rest_a_01192.

⁴⁴ PUB. RES. CODE § 21084(a).

⁴⁵ PUB. RES. CODE § 21083(b). OPR and the Resources Agency have invoked this authority to establish so-called “mandatory findings of significance,” i.e., circumstances where a lead agency must prepare an EIR, see 14 CAL. CODE REGS. § 15065, but they have not undertaken to establish the converse, i.e., mandatory findings of insignificance.

there's a "fair argument" that it "may" have any locally significant effect on air quality, water quality, noise, or traffic.⁴⁶ It's also disqualified if the lead agency finds an "unusual circumstance" and then spins a fair argument about any other type of CEQA impact,⁴⁷ or if the lead agency determines that a bunch of similar projects might cumulatively impact the physical environment.⁴⁸

Practitioners have told me that the local conventions about whether to issue an infill exemption, and what must be provided in an application for it, vary a lot from place to place. San Francisco has a policy of never issuing the exemption in so-called "community plan" areas.⁴⁹ For projects in other locations, the city accepts exemption applications but requires technical studies and review by three separate teams.⁵⁰ By contrast, in Redwood City and in unincorporated San Mateo County, applications for the infill exemption can be quickly processed with a short memo and no special technical reports.⁵¹ Yet in the City of San Mateo, the same infill exemption for the same project would require technical studies that take six months and hundreds of thousands of dollars to complete.⁵²

A research team led by Moira O'Neill compiled detailed data on all recently approved housing projects in more than twenty California cities. Disaggregating the projects by "high-VMT" (above-average) and "low-VMT" (below-average) locations, they found that only 23% of the projects in low-VMT places received Class 32 exemptions, barely more than the 21% that received the exemption in high-VMT places.⁵³ So much for aligning CEQA with the state's climate goals.

If the Governor is ready to meet the moment, he could start by directing OPR and the Resources Agency to overhaul the infill exemption. More generally, it would be very helpful for OPR to prescribe methodologies and safe harbors for quantitative analyses that currently

⁴⁶ 14 CAL CODE REGS. § 15332(d).

⁴⁷ 14 CAL CODE REGS. § 15300.2(c).

⁴⁸ 14 CAL CODE REGS. § 15300.2(b).

⁴⁹ This according to leading San Francisco land-use lawyers Steve Vettel and Jim Abrams.

⁵⁰ SAN FRANCISCO HOUSING ELEMENT UPDATE 2022, Nov. 2022 Draft, Appendix C, Subattachment 3 at PDF p. 282 (Preservation Team Review, Transportation Team Review, and Archeology Team Review).

⁵¹ This according to Frank Petrilli, a partner with Coblenz, Patch, Duffy & Bass LLP, <https://www.coblenzlaw.com/attorneys/frank-petrilli/>, who has done project-entitlement work in numerous Bay Area jurisdictions. Note that the infill exemption that applies in unincorporated areas is statutory but modeled on the categorical infill exemption. See Arthur F. Coon, *Legislature Enacts New Statutory CEQA Exemption, Modeled After Class 32 Categorical Exemption, for Certain Infill Multifamily Housing Developments In Urbanized, Unincorporated County Areas*, CEQA DEVELOPMENTS, April 18, 2019, <https://www.ceqadevelopments.com/2019/04/18/legislature-enacts-new-statutory-ceqa-exemption-modeled-after-class-32-categorical-exemption-for-certain-infill-multifamily-housing-developments-in-urbanized-unincorporated-county-areas/>.

⁵² *Id.* "In many cases," Petrilli writes, "the documentation required to substantiate an exemption is just as extensive, expensive, and time-consuming as preparing a negative declaration or mitigated negative declaration." E-mail from Frank Petrilli, Partner, Coblenz, Patch, Duffy & Bass LLP to author (Mar. 11, 2023).

⁵³ Eric Biber et al., *Just Look at the Map: Bounding Environmental Review of Housing Development in California* (unpublished manuscript), tbl. 3.

require a ton of effort and have questionable informational value (e.g., greenhouse gas emissions).

A logical first step would be to revise the geographic criteria for the infill exemption. Currently, a project is geographically eligible if it's "within city limits on a project site of no more than five acres substantially surrounded by urban uses."⁵⁴ Instead, a project should be eligible if, as in Washington State, it's in an area approved by the state for urban growth.⁵⁵ Once California has determined that certain areas are environmentally and economically good for growth, the size of a project site within the good-for-growth area, and the urbanized vs. nonurbanized nature of the adjacent uses, should be irrelevant for the exemption.⁵⁶

OPR already has a terrific online "Site Check" tool that maps urbanized lands, low-VMT locations, mass-transit proximity, and many other environmental attributes.⁵⁷ Site Check is supposed to "accelerate the production of housing by facilitating planning decisions and clarifying where existing streamlining options under [CEQA] may apply."⁵⁸ Yet OPR's website also declares in red, bold-faced font, "A Site Check report cannot determine that a project is exempt from CEQA." It should—or, at least, it should establish that a project is geographically eligible, much like a zoning map allows a parcel owner to determine that their property is geographically eligible for a certain type and scale of development.

OPR could merge the various Site Check layers to create a composite map of good-for-development locations, and then revise section 15332 of the CEQA Guidelines to make projects exemption-eligible if the site is located within the mapped, good-for-development zone.

I would also encourage OPR to refashion the other requirements for (and exceptions from) the infill exemption on the model of the Housing Accountability Act. As noted, the HAA now assures developers that their project will not be denied or downsized if a reasonable person could deem it to be compliant with applicable objective standards (except in the rare case where a city shows by a preponderance of the evidence that the project would violate an objective health or safety standard).⁵⁹ Similarly, the CEQA Guidelines should assure developers and cities

⁵⁴ 14 CAL. CODE REGS. § 15332(b). An analogous statutory exemption applies in urbanized areas outside of city limits. *See* PUB. RES. CODE § 21159.25.

⁵⁵ *See supra* note 33 and accompanying text.

⁵⁶ The case for mapping CEQA's application is developed in Biber et al., *supra* note 53. *See also* RAYAN SUD, SANJAY PATNAIK & ROBERT L. GLICKSMAN, HOW TO REFORM FEDERAL PERMITTING TO ACCELERATE CLEAN ENERGY INFRASTRUCTURE: A NONPARTISAN WAY FORWARD 2, 14-19 (Brookings Research Rep., Feb. 14, 2023), <https://www.brookings.edu/research/how-to-reform-federal-permitting-to-accelerate-clean-energy-infrastructure-a-nonpartisan-way-forward/> (urging Congress to "direct federal land-management agencies to prepare national-level maps of environmental sensitivity, with corresponding pre-designated 'go-to areas' for renewable energy projects in areas of lowest environmental sensitivity," and proposing streamlined review backed by "automatic approvals" for certain projects in the low-sensitivity areas). The automatic-approval model proposed by Sud et al. is close kin to the original California Permit Streamlining Act, which was enacted in the late 1970s and subsequently gutted by the courts' expansionist construction of CEQA. *See* Elmendorf & Duncheon, *supra* note 12, manuscript at 9-11.

⁵⁷ <https://sitecheck.opr.ca.gov/> (last visited Mar. 10, 2023).

⁵⁸ *Id.*

⁵⁹ GOV'T CODE § 65589.5(f)(4) & (j)(1).

alike that an infill project's CEQA exemption will not be overturned by the courts if a reasonable person could deem the project eligible. OPR could also use its authority over "criteria for the orderly evaluation of projects" to standardize the paperwork and studies required for the exemption.⁶⁰

If OPR and the Resources Agency were to create a clean, objective infill exemption, would the courts accept it? It's hard to say. In 2002, the Court of Appeal struck down a fairly modest guideline that created a rebuttable presumption of no significant impact in cases where a project complies with a regulatory standard addressed to the type of impact at issue.⁶¹ But in 2015, the California Supreme Court cast doubt on the earlier decision,⁶² and lower courts now consider it overruled.⁶³ Several recent Court of Appeal decisions suggest that a larger judicial rethinking of CEQA may be underway.⁶⁴

In this transitional moment, when courts are getting pilloried by lawmakers and the governor for expansive CEQA decisions,⁶⁵ judges might decide give the executive branch a wider berth. Especially if the Little Hoover Commission provides a nudge.

C. The Judicial Branch

More than any other branch of government, the judiciary is responsible for CEQA as we know it. The courts took a thin, ambiguously worded statute and, by broadly construing it in case after case, fashioned Big CEQA out of it.⁶⁶

⁶⁰ PUB. RES. CODE § 21083(a).

⁶¹ *Communities for a Better Env't v. California Res. Agency*, 103 Cal. App. 4th 98, (2002), *as modified* (Nov. 21, 2002).

⁶² *Berkeley Hillside Pres. v. City of Berkeley*, 60 Cal. 4th 1086 (2015).

⁶³ *See, e.g., San Francisco Baykeeper, Inc. v. State Lands Com.*, 242 Cal. App. 4th 202, 223 (2015); *E. Sacramento Partnerships for a Livable City v. City of Sacramento*, 5 Cal. App. 5th 281, 300-01 (2016), *as modified on denial of reh'g* (Dec. 6, 2016).

⁶⁴ *See Tiburon Open Space Comm. v. Cnty. of Marin*, 78 Cal. App. 5th 700 (2022), p. 731 ("[T]he scope of environmental review must be commensurate with an agency's retained discretionary authority, including any limitations imposed by legal obligations."), and pp. 780-83 (critiquing CEQA as a statute that "has not aged well," one which is "worsening California's housing crisis" by serving as "the tool of choice for resisting change that would accommodate more people in existing communities"); *Jenkins v. Brandt-Hawley*, 86 Cal. App. 5th 1357 (2022), *reh'g denied* (Jan. 25, 2023), *review filed* (Feb. 6, 2023) (allowing malicious prosecution tort suit against one of the state's premier plaintiff-side CEQA lawyers); *Save Livermore Downtown v. City of Livermore*, 87 Cal. App. 5th 1116 (2022) (upholding trial court's order requiring \$500,000 bond from plaintiffs who mounted frivolous CEQA challenge to an affordable housing project).

⁶⁵ Sen. Scott Wiener (@ScottWiener), TWITTER (Feb. 25, 2023)

<https://twitter.com/ScottWiener/status/1629508923404460032> (lambasting *Make UC a Good Neighbor v. Regents of Univ. of California*, No. A165451, 2023 WL 2205638 (Cal. Ct. App. Feb. 24, 2023), as an "absurd and dangerous" decision); Office of the Governor (@CAGovernor) TWITTER (Feb. 25, 2023)

<https://twitter.com/CAGovernor/status/1629602373319688192> ("A few wealthy Berkeley homeowners should not be able to block desperately needed student housing for years and even decades."); Buffy Wicks (@BuffyWicks) TWITTER (Feb. 26, 2023) <https://twitter.com/BuffyWicks/status/1629925453824937985> ("Weaponizing CEQA to block much-needed housing for UC students is a grotesque misuse of the law."); Matt Haney (@MattHaneySF) TWITTER (Mar. 3, 2022) <https://twitter.com/MattHaneySF/status/1499585279086063616> (calling judicial decision capping UC Berkeley enrollment as remedy for CEQA missteps "ridiculous and wrong").

⁶⁶ Elmendorf & Duncheon, *supra* note 12, manuscript at 8-14.

The courts read CEQA expansively so as to give, they said, the “fullest possible protection” to the environment.⁶⁷ But the equation *more CEQA = a better environment* is outdated. Sometimes it is almost surely true (think of housing development in the wildland-urban interface). Other times it’s almost surely false (think of urban infill, transit, green energy, electrical transmission, and controlled burns).

In light of this complexity, probably the most helpful thing the courts could do is get out of the way of the executive branch. Let the Governor’s appointees tailor CEQA’s application across different geographies and types of projects.

To be sure, there are other ways the courts could help too. By requiring plaintiffs challenging affordable housing to post bonds,⁶⁸ by giving cities the benefit of the doubt in close cases, by resolving open questions of law in ways that reconcile CEQA with other important statutes (rather than subsuming everything to CEQA),⁶⁹ and perhaps even by dismissing some claims brought for economic leverage,⁷⁰ the courts can chip away at CEQA’s value for private economic gain. That, in turn, should make the interest groups that have defended Big CEQA so vociferously a little more amenable to legislative compromise.

But all of this depends on a new way of seeing CEQA: not as the gem in the crown of California environmental law, but as a mixed bag, a statute that’s great for the environment in some applications but terrible in others, and one which has probably persisted in its current form because it’s as useful for economic extortion and NIMBY obstructionism as it is for environmental protection. Realism, not romance, is the order of the day.

* * *

Disclosures: I have provided pro-bono advice on CEQA reform to Assemblymember Phil Ting (including helping to draft [AB 1633](#) and its precursor in 2022, [AB 2656](#)), Senator Scott Wiener, and pro-urbanization advocacy groups including SPUR, California Yimby, and the Bay Area Council. I have not accepted consulting or other payments from any interest group. I solicited feedback on drafts of this written testimony from the following individuals: Eric Biber, Rick Frank, Moira O’Neill, Gabe Ross, and Sean Hecht. Portions of this testimony were previously published as an [essay](#) in the San Francisco Chronicle.

⁶⁷ See, e.g., *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 198 (1976) (“[W]e have recognized the necessity of interpreting CEQA broadly so as to ‘afford the fullest possible protection to the environment within the reasonable scope of the statutory language.’”) (quoting *Friends of Mammoth v. Bd. of Supervisors*, 8 Cal.3d 247, 259 (1972)).

⁶⁸ *Save Livermore Downtown v. City of Livermore*, 87 Cal. App. 5th 1116 (2022) (upholding trial court’s order requiring \$500,000 bond from plaintiffs who mounted frivolous CEQA challenge to an affordable housing project).

⁶⁹ *Elmendorf & Duncheon*, *supra* note 12, Part II.C & III (proposing doctrinal ways of reconciling CEQA with the Housing Accountability Act).

⁷⁰ *Save the Plastic Bag Coal. v. City of Manhattan Beach*, 52 Cal. 4th 155, 169 (2011) (recognizing that standing to sue may be denied to a party who “attempt[s] to use CEQA to impose regulatory burdens on a business competitor, with no demonstrable concern for protecting the environment,” but rejecting categorical limitations on corporate standing).