From: Matt Brezina
To: Board of Supervisors, (BOS)
Subject: Please stop blocking housing on ofarrel and Stevenson!
Date: Tuesday, December 14, 2021 7:24:53 AM

Your position is not defensible. Your votes expose the decades of grift and political support you've received from well-housed millionaires like Tod Eberling of TODCO.

Thankful the state is taking this all out of your hands. But please don't give them another reason to sue our city. Approve both of these housing projects post haste and let 800 families have a home!

https://docs.google.com/document/d/1sEx64nq310LfjfyJJjzmkkgMKsXA02BmMPnEdOoGt98/edit?usp=sharing

Sent from my iPhone

Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
Three Embarcadero Center, 12th Floor | San Francisco, CA 94111-4074
Telephone: 415.837.1515 | Facsimile: 415.837.1516
www.allenmatkins.com

David H. Blackwell
E-mail: dblackwell@allenmatkins.com
Direct Dial: 415.273.7463 File Number: 377032.00001/4822-5523-2483.2

Via Electronic Mail

December 14, 2021

Shamann Walton, President
and the San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, Ca 94102-4689

Re: 469 Stevenson FEIR Certification Disapproval Findings
(File No. 211278)
December 14, 2021 Hearing: Agenda Item 44

Dear President Walton and Supervisors:

This letter is submitted on behalf of 469 Stevenson Property Owner, LLC ("Applicant") with regard to the above-referenced Agenda Item. The purpose of this correspondence is to exhaust Applicant's administrative remedies with regard to this item, and Applicant therefore incorporates by reference all written and oral objections to the proposed Board Motion, including but not limited to correspondence submitted on December 13 by YIMBY Law and on December 14 by CaRLA.

As set forth therein, the Motion fails to comply with CEQA, the Housing Accountability Act (HAA), and the Density Bonus Law. The effect of the Motion is to disapprove a project that is subject to the HAA's statutory protections without making the requisite findings. As set forth in the materials attached hereto, the Board cannot evade the HAA's requirements by cloaking the disapproval with bogus CEQA findings. Moreover, the findings do not support the Motion, and the evidence in the record does not support the findings, which constitutes an abuse of discretion.

Very truly yours,

David H. Blackwell

DHB:kem

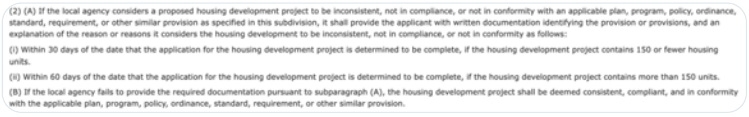
Chris Elmendorf @CSElmendorf

Dec 13, 2021 · 25 tweets · CSElmendorf/status/1470467853287522304

Here are eight questions I'd like San Francisco's Bd of Supervisors to ask before tomorrow night's vote to "paper" the denials of 469 Stevenson & 450-474 O'Farrell projects (~800 homes).
Bd is skating on thin legal ice. It will fall through if there aren't good answers. 1/n

Question No. 1: "Did city provide developer of either project w/ written notice of any general plan or zoning standards the project allegedly violates, & was this notice provided w/in 60 days of date on which project application was determined or deemed complete?" 2/n

State law (HAA) says city may not deny or reduce density of project on basis of zoning / general plan standards unless city provides this timely written notice. Gov't Code 65589.5(j)(2). 3/n



(2) (A) If the local agency considers a proposed housing development project to be inconsistent, not in compliance, or not in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision as specified in this subdivision, it shall provide the applicant with written documentation identifying the provision or provisions, and an explanation of the reason or reasons it considers the housing development to be inconsistent, not in compliance, or not in conformity as follows:

(i) Within 30 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains 150 or fewer housing units.

(ii) Within 60 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains more than 150 units.

(B) If the local agency fails to provide the required documentation pursuant to subparagraph (A), the housing development project shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision.

As best I can tell, the admin records provided to Bd for these projects don't include the HAA-required notice, or even a representation about the applications' determined-to-be-complete dates. 4/n

In fact, based on @ONeillMoiraK's data + convos w/ current & former city officials, I think SF's practice is not to make official determinations of completeness or to record dates on which applications are "deemed" complete by operation of state law. 5/n

(Which means that when SF officials deny a permit for noncompliance w/ zoning or plan standards, they're often in the dark about whether they even have authority to do so. 6/n)

Assuming Bd doesn't discover & establish timeliness of notice-of-noncompliance letters for either project, the only remaining ground on which to deny or downsize the project is that it would have a "quantifiable and unavoidable" adverse impact on ... 7/n

"public health or safety," in violation of "written, objective" standards "as they existed on the date the application was deemed complete." (That pesky unknown date, again!) Gov't Code 65589.5(j)(1). 8/n


(j) (1) When a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete, but the local agency proposes to disapprove the project or to impose a condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:

(A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

(B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

Such violations are not run-of-mill events; the Legislature made this much clear by declaring that they "arise infrequently." Gov't Code 65589.5(a)(3). 9/n


(3) It is the intent of the Legislature that the conditions that would have a specific, adverse impact upon the public health and safety, as described in paragraph (2) of subdivision (d) and paragraph (1) of subdivision (j), arise infrequently.

So, Question No. 2: "Why doesn't draft motion w/ findings for denial of O'Farrell project (a) cite a quantification of health / safety impact, (b) cite standard this violates, (c) show standard is objective, & (d) show standard existed on application's completeness date?" 10/n

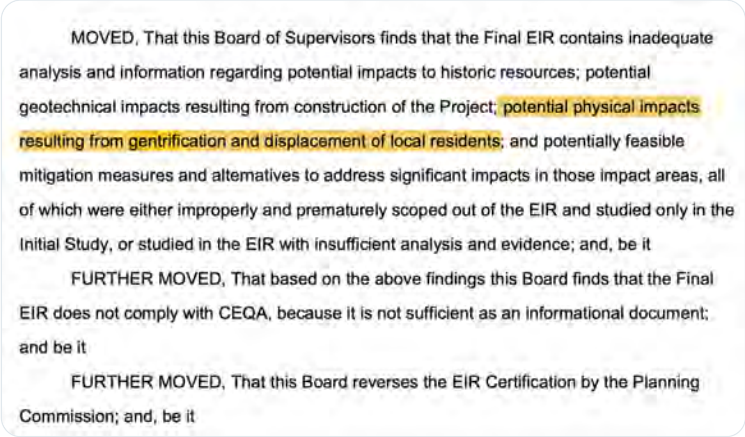
The stuff that's in the motion now may be good for comedy or ridicule (⬇️), but it's beside the point under state law.

A vote to pass the O'Farrell motion is a vote to violate the Housing Accountability Act. 11/n

My remaining questions concern the Stevenson St. project. This one's trickier, since formally the motion before the Board is to adopt findings justifying reversal of certification of enviro impact report, not denial of a use permit. 12/n

The draft motion gives three reasons to justify reversal: that EIR failed to study potentially significant gentrification, historic preservation, & geotech (seismic safety) impacts.
Read on for the question to be asked about each one. 13/n

Gentrification. Bd says project may cause gentrification, which in turn may cause adverse impact on "physical env't" (the CEQA trigger). 14/n



MOVED, That this Board of Supervisors finds that the Final EIR contains inadequate analysis and information regarding potential impacts to historic resources; potential geotechnical impacts resulting from construction of the Project; potential physical impacts resulting from gentrification and displacement of local residents; and potentially feasible mitigation measures and alternatives to address significant impacts in those impact areas, all of which were either improperly and prematurely scoped out of the EIR and studied only in the Initial Study, or studied in the EIR with insufficient analysis and evidence; and, be it

FURTHER MOVED, That based on the above findings this Board finds that the Final EIR does not comply with CEQA, because it is not sufficient as an informational document; and be it

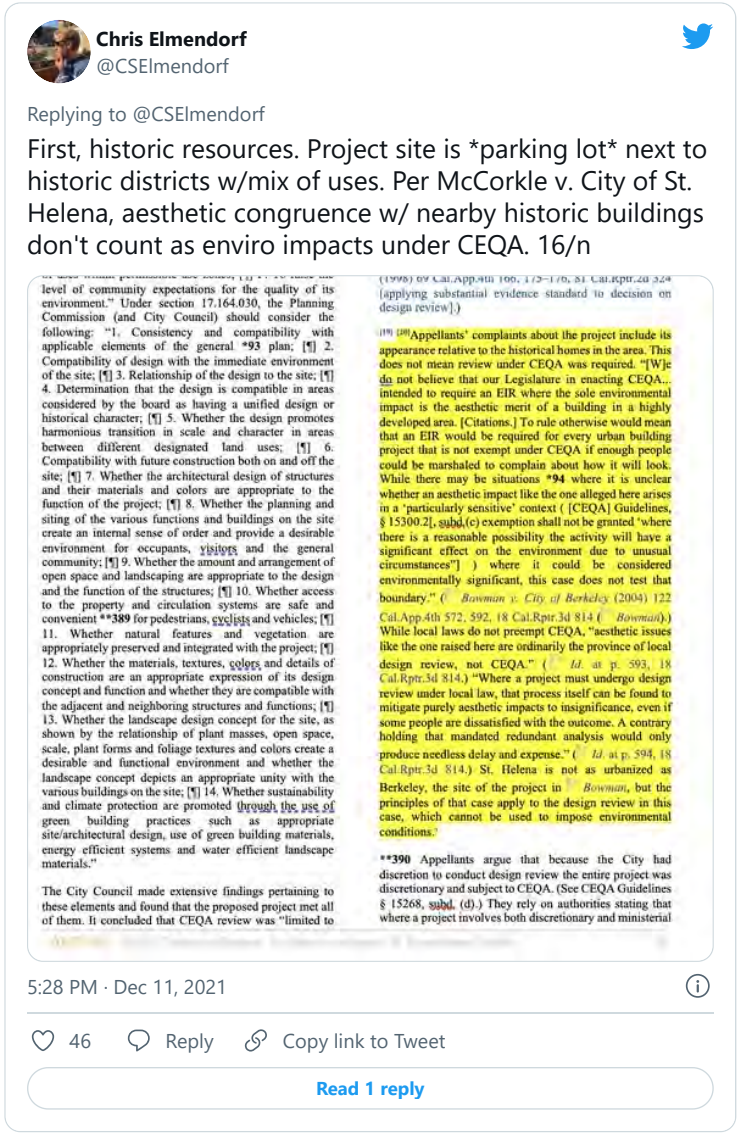
FURTHER MOVED, That this Board reverses the EIR Certification by the Planning Commission; and, be it

Question No. 3: "What exactly is the feared 'physical environmental impact' of gentrification, & where in the admin record is the 'substantial evidence' (a) that this project would cause gentrification, & (b) that gentrification would cause this physical impact?" 15/n

In thinking through Question No. 3, bear in mind that [u]nsubstantiated fears about potential economic effects ... are not environmental impacts that may be considered under CEQA." 16/n

https://casetext.com/case/porterville-citizens-v-porterville

Historic preservation. Project would replace a parking lot, which is not historic. Project does adjoin historic districts, but per McCorkle, aesthetic incongruence w/ nearby historic structures is not a CEQA impact. 17/n

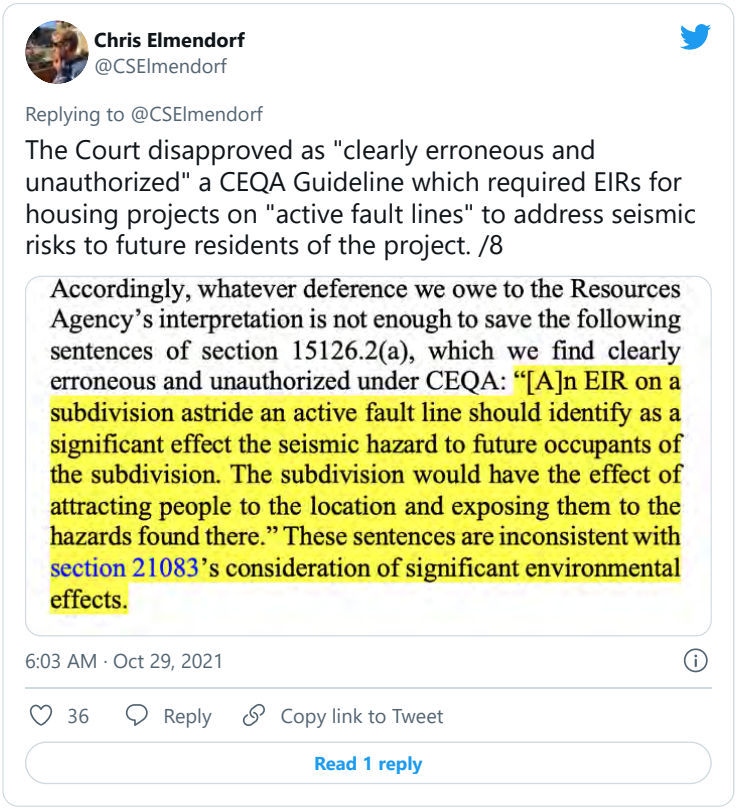


So, Question No. 4: "In what concrete way could this project have a significant, tangible adverse impact on nearby historic structures or districts?"

"Ugly" or "too tall" won't cut it. 18/n

Seismic & geo-tech. City until now has treated this as covered by building codes & engineering peer review, and thus outside scope of CEQA review. Supes' draft findings would make it a CEQA issue. 19/n

Question No. 5: "Why isn't requiring CEQA analysis of foundation seismic safety foreclosed by CA Supreme Court holding that impacts of env't on project aren't a CEQA issue?" (A holding made in rejecting guideline requiring seismic-safety analysis!) 20/n



Question No. 6: "To extent you think project might 'exacerbate' seismic risks to other buildings, where in admin record is the 'substantial evidence' supporting this conjecture?" 21/n

Question No. 7: "If you were to win on your 'foundations are a CEQA issue theory,' how would you answer the former leader of SF's own CEQA team, who says it'll mean EIRs -- & NIMBY delays -- for every project that supes actually want to approve?"
22/n

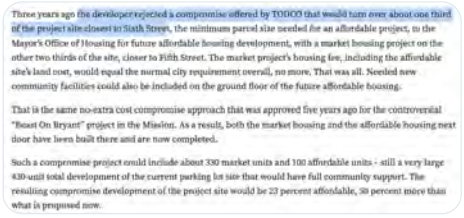
Next: the draft motion says EIR failed to analyze "potentially feasible mitigation measures" w.r.t. gentrification, historic, & foundation. But since project is HAA-protected, city may not consider mitigation measures that would reduce its density. 23/n

Question No. 8: "Where in admin record is there substantial evidence that project could be feasibly 'mitigated' in some way that would reduce gentrification or historic impacts w/o reducing density." 24/n

Finally: Appellant says real reason for appeal is to reduce project size & make developer donate 1/3 of lot. The HAA prevents this "condition of approval" & harshly penalizes bad faith. @California_HCD has warned you that CEQA reversal may violate HAA.

Watch out!

25/end


Three years ago the developer rejected a compromise offered by TODCO that would turn over about one third of the project site closest to Sixth Street, the minimum parcel size needed for an affordable project, to the Mayor's Office of Housing for future affordable housing development, with a market housing project on the other two thirds of the site, closer to Fifth Street. The market project's housing fee, including the affordable site's land cost, would equal the normal city requirement overall, no more. That was all. Needed new community facilities could also be included on the ground floor of the future affordable housing.

That is the same no-extra cost compromise approach that was approved five years ago for the controversial "Beast On Bryant" project in the Mission. As a result, both the market housing and the affordable housing next door have been built there and are now completed.

Such a compromise project could include about 330 market units and 100 affordable units - still a very large 430-unit total development of the current parking lot site that would have full community support. The resulting compromise development of the project site would be 23 percent affordable, 50 percent more than what is proposed now.

• • •

Chris Elmendorf @CSElmendorf

Dec 11, 2021 · 24 tweets · CSElmendorf/status/1469720638411526147

San Francisco has posted its doozy of a draft response to warning letter from @GavinNewsom's new housing accountability team.
(Is city's mission to bridge the partisan divide by proving itself a laughingstock to @nytimes & Fox News alike?)
1/n

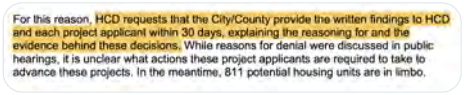
https://sfgov.legistar.com/View.ashx?M=A&ID=914226&GUID=3E6E4960-F5DA-44E1-B425-3B9EC23A44AC

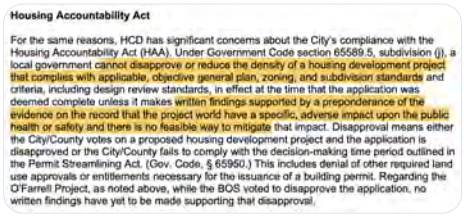
Context: state called out Board of Supes for voting down two large infill housing projects (800+ homes), in apparent violation of state's Housing Accountability Act.
2/n

sfrSanFrancisco-LOI-TA-112221.pdf

https://drive.google.com/file/d/12XIn5yhUdp487MROIBtE1B8T…

State then asked city to provide "written findings" explaining city's "reasoning and evidence," in light of state law. 3/n

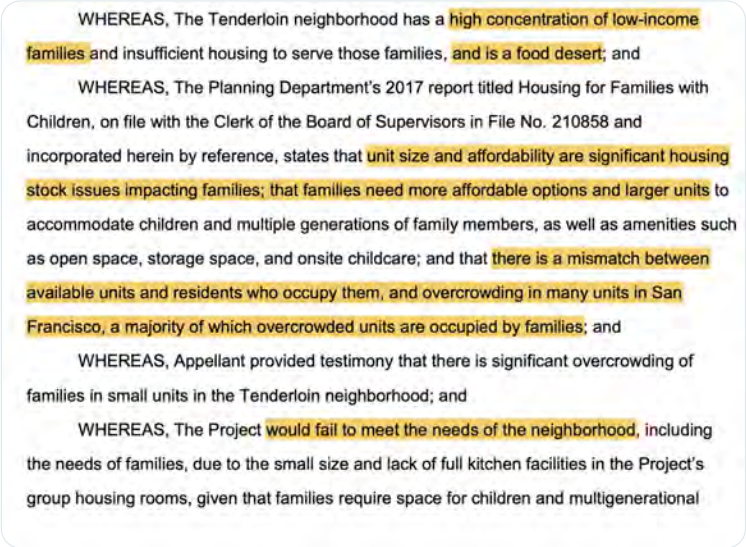

For this reason, HCD requests that the City/County provide the written findings to HCD and each project applicant within 30 days, explaining the reasoning for and the evidence behind these decisions. While reasons for denial were discussed in public hearings, it is unclear what actions these project applicants are required to take to advance these projects. In the meantime, 811 potential housing units are in limbo.


Housing Accountability Act

For the same reasons, HCD has significant concerns about the City's compliance with the Housing Accountability Act (HAA). Under Government Code section 65589.5, subdivision (j), a local government cannot disapprove or reduce the density of a housing development project that complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete unless it makes written findings supported by a preponderance of the evidence on the record that the project world have a specific, adverse impact upon the public health or safety and there is no feasible way to mitigate that impact. Disapproval means either the City/County votes on a proposed housing development project and the application is disapproved or the City/County fails to comply with the decision-making time period outlined in the Permit Streamlining Act. (Gov. Code, § 65950.) This includes denial of other required land use approvals or entitlements necessary for the issuance of a building permit. Regarding the O'Farrell Project, as noted above, while the BOS voted to disapprove the application, no written findings have yet to be made supporting that disapproval.

The city's response is a pair of draft resolutions, which supes will vote on next Tuesday. The resolutions affirm the supes' previous votes w/o even acknowledging the HAA or the state's letter. 4/n

Regarding the O'Farrell St. project, the resolution justifies denial on ground that units would be small, w/minimal kitchens--& thus not in interest of "the neighborhood." But HAA allows denial of zoning-compliant projects only on basis *objective*... 5/n



WHEREAS, The Tenderloin neighborhood has a high concentration of low-income families and insufficient housing to serve those families, and is a food desert; and

WHEREAS, The Planning Department's 2017 report titled Housing for Families with Children, on file with the Clerk of the Board of Supervisors in File No. 210858 and incorporated herein by reference, states that unit size and affordability are significant housing stock issues impacting families; that families need more affordable options and larger units to accommodate children and multiple generations of family members, as well as amenities such as open space, storage space, and onsite childcare; and that there is a mismatch between available units and residents who occupy them, and overcrowding in many units in San Francisco, a majority of which overcrowded units are occupied by families; and

WHEREAS, Appellant provided testimony that there is significant overcrowding of families in small units in the Tenderloin neighborhood; and

WHEREAS, The Project would fail to meet the needs of the neighborhood, including the needs of families, due to the small size and lack of full kitchen facilities in the Project's group housing rooms, given that families require space for children and multigenerational

health or safety standards, and city resolution identifies no such standard requiring larger units or fuller kitchens.
And let's not lose sight of big picture... 6/n

Chris Elmendorf
@CSElmendorf

Major decision from Court of Appeal interpreting California's Housing Accountability Act. Read @carla_org's thread below for highlights, or continue with this one if you want the legal nitty gritty. /1

> **CaRLA** @carla_org
> Last Friday, we scored a major victory for housing by winning our appeal in CaRLA v. San Mateo. This victory leaves no doubt as to the power and effectiveness of the Housing Accountability Act, and solidifies the legitimacy of statewide limits on local control of housing. twitter.com/carla_org/stat...

1:38 AM · Sep 14, 2021

Read the full conversation on Twitter

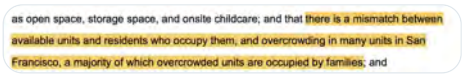
57 Reply Copy link to Tweet

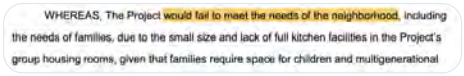
Read 1 reply

As cities across California are licensing tent encampments, providing sheds as shelters, & wracking all available brains to find tolerable housing options between tent-on-sidewalk and a $750k "affordable" unit, SF is... 7/n

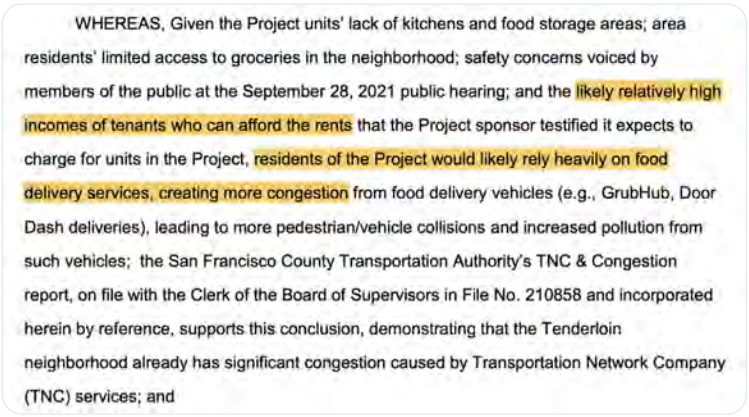
denying this microunit project b/c "families are overcrowded."

Might it be that families are overcrowded b/c they're outbid for family-sized homes by groups of young tech workers who share a lease? Workers who'd happily rent a berth in an O'Farrell St "tech dorm"? 8/n


as open space, storage space, and onsite childcare; and that there is a mismatch between available units and residents who occupy them, and overcrowding in many units in San Francisco, a majority of which overcrowded units are occupied by families; and

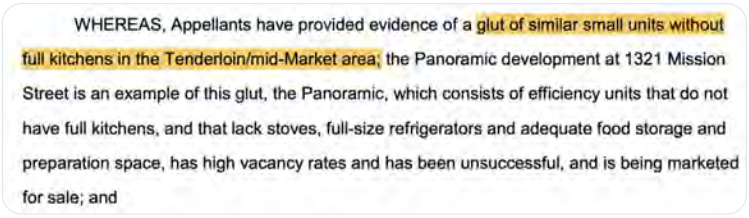

WHEREAS, The Project would fail to meet the needs of the neighborhood, including the needs of families, due to the small size and lack of full kitchen facilities in the Project's group housing rooms, given that families require space for children and multigenerational

Alternative grounds for denial: city says residents of this car-free project might use Uber when they're not walking or taking transit, causing congestion, pollution, and "increased pedestrian/vehicle collisions." 9/n


WHEREAS, Given the Project units' lack of kitchens and food storage areas; area residents' limited access to groceries in the neighborhood; safety concerns voiced by members of the public at the September 28, 2021 public hearing; and the likely relatively high incomes of tenants who can afford the rents that the Project sponsor testified it expects to charge for units in the Project, residents of the Project would likely rely heavily on food delivery services, creating more congestion from food delivery vehicles (e.g., GrubHub, Door Dash deliveries), leading to more pedestrian/vehicle collisions and increased pollution from such vehicles; the San Francisco County Transportation Authority's TNC & Congestion report, on file with the Clerk of the Board of Supervisors in File No. 210858 and incorporated herein by reference, supports this conclusion, demonstrating that the Tenderloin neighborhood already has significant congestion caused by Transportation Network Company (TNC) services; and

Oh, and best of all, city says there is a "glut" of small housing units in the Tenderloin and along Market Street.

10/n


WHEREAS, Appellants have provided evidence of a glut of similar small units without full kitchens in the Tenderloin/mid-Market area; the Panoramic development at 1321 Mission Street is an example of this glut, the Panoramic, which consists of efficiency units that do not have full kitchens, and that lack stoves, full-size refrigerators and adequate food storage and preparation space, has high vacancy rates and has been unsuccessful, and is being marketed for sale; and

Yes: at moment when CA is spending $22B for homeless & low-income housing, when SF has ~8000 homeless on streets, & when SF is *buying up other microunit projects to use as shelters*, city wants to deny this one b/c of "glut" of small dwelling units. 11/n

YIMBY Law
@Yimby_Law

Replying to @Yimby_Law

And who bought the Panoramic?

hoodline.com/2021/10/supes-...

San Francisco.

Supes approve Panoramic Apartments for homeless housing, despite co...
In a quick rubber-stamp vote with no discussion, the supervisors approved the $87 million purchase of the Panoramic, adding 160 units o...
hoodline.com

7:23 PM · Dec 10, 2021

45 Reply Copy link to Tweet

Read 2 replies

What about the other project, 469 Stevenson? Here SF is doing its damnedest to provide every other city in the state w/ a roadmap for using enviro review (CEQA) to kill housing projects that state law (HAA) protects. 12/n

How an outdated environmental law is sabotaging California's new ho…
San Francisco's infamous 469 Stevenson project was a case study in California legal...

https://www.sfchronicle.com/opinion/openforum/article/How-an-outdated-environmenta…

The draft resolution justifies reversal of Stevenson St. EIR on ground that the initial scoping document improperly determined that foundation safety, gentrification, & nearby historic resources were not potentially "significant" enviro impacts. 13/n

WHEREAS, With regards to historic resources, the Initial Study acknowledged that the Project would include the construction of a building that is directly adjacent to the National Register-eligible Market Street Theatre and Loft Historic District, National and California-Register eligible Sixth Street Lodging House Historic District, and the Mint-Mission article 11 Conservation District, and a property within the Pacific Gas and Electric (PG&E) City Beautiful Substations Discontinuous Thematic Historic District; however, the EIR included no further analysis of the impacts of the 27-story Project on adjacent historic districts as required by CEQA, in light of substantial record evidence of potentially significant impacts; absent that analysis, the Final EIR's conclusions that the Project's setbacks would avoid significant impacts on adjacent districts were premature and were inadequately supported by evidence; and

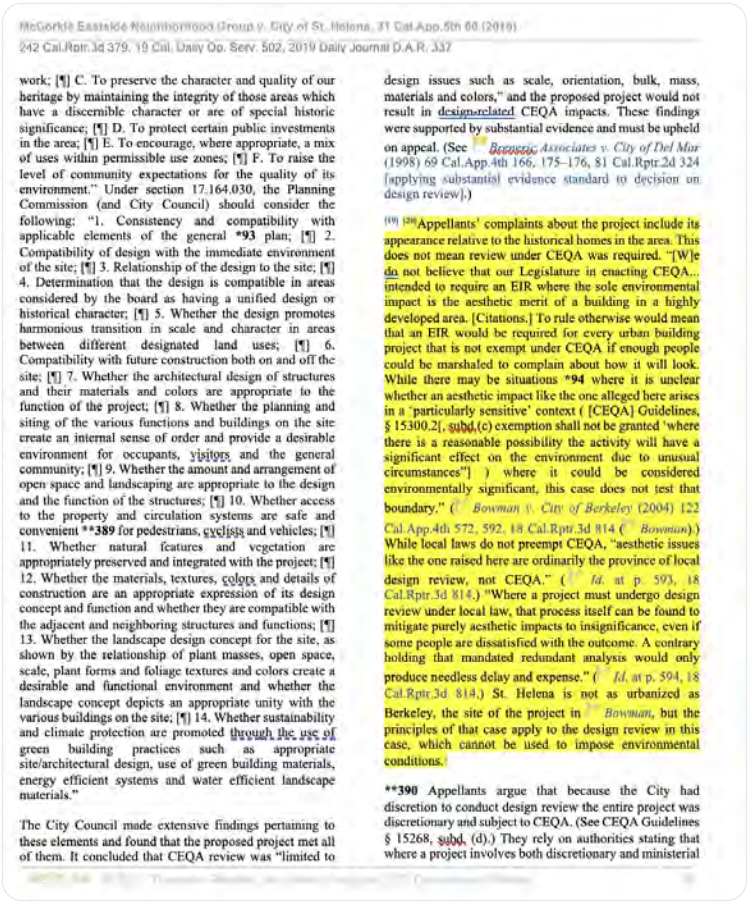
WHEREAS, In the area of geotechnical impacts, the EIR did not conduct adequate analysis, as the Initial Study concluded that the Project would not result in any impacts to geology and soils and relied on future compliance with the California and San Francisco Building Codes as a basis to reach its conclusion; CEQA requires that the EIR analyze and determine whether the Project would have significant geotechnical impacts, beyond those conclusory statements; and

WHEREAS, The Project's physical effects relating to gentrification of the surrounding area and displacement of current residents were not studied in the EIR; the Final EIR (in the RTC) acknowledged that these socio-economic effects, in themselves, are not considered environmental impacts under CEQA, absent a related physical change in the environment. The Final EIR noted that "some displacement may occur," but without benefit of study or explanation, concluded that "the proposed project is not likely to result in residential displacement and gentrification" and therefore improperly dismissed any potential physical environmental impacts that may result from gentrification or displacement; and

As @TDuncheon & I explain in a series of @SlogLawBlog posts and now a law review paper, this raises a host of thorny legal questions, including bad faith, enforceability of CEQA deadlines (SF decision is overdue), & CEQA baselines / causation. 14/n

Even if one (wrongly) accepts a conventional CEQA baseline for gauging impact of an HAA-protected project, the supes are pushing a radical expansion of CEQA, against statutory text & precedent. 15/n

First, historic resources. Project site is *parking lot* next to historic districts w/mix of uses. Per McCorkle v. City of St. Helena, aesthetic congruence w/ nearby historic buildings don't count as enviro impacts under CEQA. 16/n



McCorkle Eastside Neighborhood Group v. City of St. Helena, 31 Cal.App.5th 80 (2018)
242 Cal.Rptr.3d 379, 19 Cal. Daily Op. Serv. 502, 2019 Daily Journal D.A.R. 337

work; [¶] C. To preserve the character and quality of our heritage by maintaining the integrity of those areas which have a discernible character or are of special historic significance; [¶] D. To protect certain public investments in the area; [¶] E. To encourage, where appropriate, a mix of uses within permissible use zones; [¶] F. To raise the level of community expectations for the quality of its environment." Under section 17.164.030, the Planning Commission (and City Council) should consider the following: "1. Consistency and compatibility with applicable elements of the general **93 plan; [¶] 2. Compatibility of design with the immediate environment of the site; [¶] 3. Relationship of the design to the site; [¶] 4. Determination that the design is compatible in areas considered by the board as having a unified design or historical character; [¶] 5. Whether the design promotes harmonious transition in scale and character in areas between different designated land uses; [¶] 6. Compatibility with future construction both on and off the site; [¶] 7. Whether the architectural design of structures and their materials and colors are appropriate to the function of the project; [¶] 8. Whether the planning and siting of the various functions and buildings on the site create an internal sense of order and provide a desirable environment for occupants, visitors and the general community; [¶] 9. Whether the amount and arrangement of open space and landscaping are appropriate to the design and the function of the structures; [¶] 10. Whether access to the property and circulation systems are safe and convenient **389 for pedestrians, cyclists and vehicles; [¶] 11. Whether natural features and vegetation are appropriately preserved and integrated with the project; [¶] 12. Whether the materials, textures, colors and details of construction are an appropriate expression of its design concept and function and whether they are compatible with the adjacent and neighboring structures and functions; [¶] 13. Whether the landscape design concept for the site, as shown by the relationship of plant masses, open space, scale, plant forms and foliage textures and colors create a desirable and functional environment and whether the landscape concept depicts an appropriate unity with the various buildings on the site; [¶] 14. Whether sustainability and climate protection are promoted through the use of green building practices such as appropriate site/architectural design, use of green building materials, energy efficient systems and water efficient landscape materials."

The City Council made extensive findings pertaining to these elements and found that the proposed project met all of them. It concluded that CEQA review was "limited to design issues such as scale, orientation, bulk, mass, materials and colors," and the proposed project would not result in design-related CEQA impacts. These findings were supported by substantial evidence and must be upheld on appeal. (See Bowman Associates v. City of Del Mar (1998) 69 Cal.App.4th 166, 175–176, 81 Cal.Rptr.2d 324 [applying substantial evidence standard to decision on design review].)

[19] [20]Appellants' complaints about the project include its appearance relative to the historical homes in the area. This does not mean review under CEQA was required. "[W]e do not believe that our Legislature in enacting CEQA... intended to require an EIR where the sole environmental impact is the aesthetic merit of a building in a highly developed area. [Citations.] To rule otherwise would mean that an EIR would be required for every urban building project that is not exempt under CEQA if enough people could be marshaled to complain about how it will look. While there may be situations **94 where it is unclear whether an aesthetic impact like the one alleged here arises in a 'particularly sensitive' context ([CEQA] Guidelines, § 15300.2[, subd.](c) exemption shall not be granted 'where there is a reasonable possibility the activity will have a significant effect on the environment due to unusual circumstances"]) where it could be considered environmentally significant, this case does not test that boundary." (Bowman v. City of Berkeley (2004) 122 Cal.App.4th 572, 592, 18 Cal.Rptr.3d 814 (Bowman).) While local laws do not preempt CEQA, "aesthetic issues like the one raised here are ordinarily the province of local design review, not CEQA." (Id. at p. 593, 18 Cal.Rptr.3d 814.) "Where a project must undergo design review under local law, that process itself can be found to mitigate purely aesthetic impacts to insignificance, even if some people are dissatisfied with the outcome. A contrary holding that mandated redundant analysis would only produce needless delay and expense." (Id. at p. 594, 18 Cal.Rptr.3d 814.) St. Helena is not as urbanized as Berkeley, the site of the project in Bowman, but the principles of that case apply to the design review in this case, which cannot be used to impose environmental conditions.

**390 Appellants argue that because the City had discretion to conduct design review the entire project was discretionary and subject to CEQA. (See CEQA Guidelines § 15268, subd. (d).) They rely on authorities stating that where a project involves both discretionary and ministerial

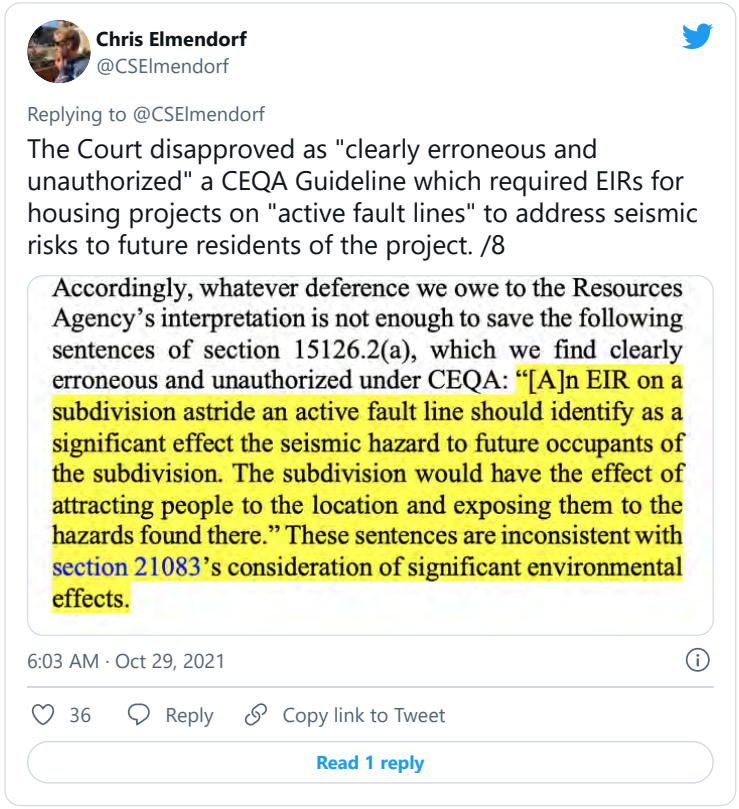
As the McCorkle court said (presaging the 469 Stevenson debacle): "To rule otherwise would mean that an EIR would be required for every urban building project ... if enough people could be marshaled to complain about how it will look." 17/n

Second, gentrification. "Unsubstantiated fears about potential economic effects resulting from a proposed project are not environmental impacts that may be considered under CEQA." So said Court of Appeal in Porterville Citizens v. Porterville (2007). 18/n
https://casetext.com/case/porterville-citizens-v-porterville

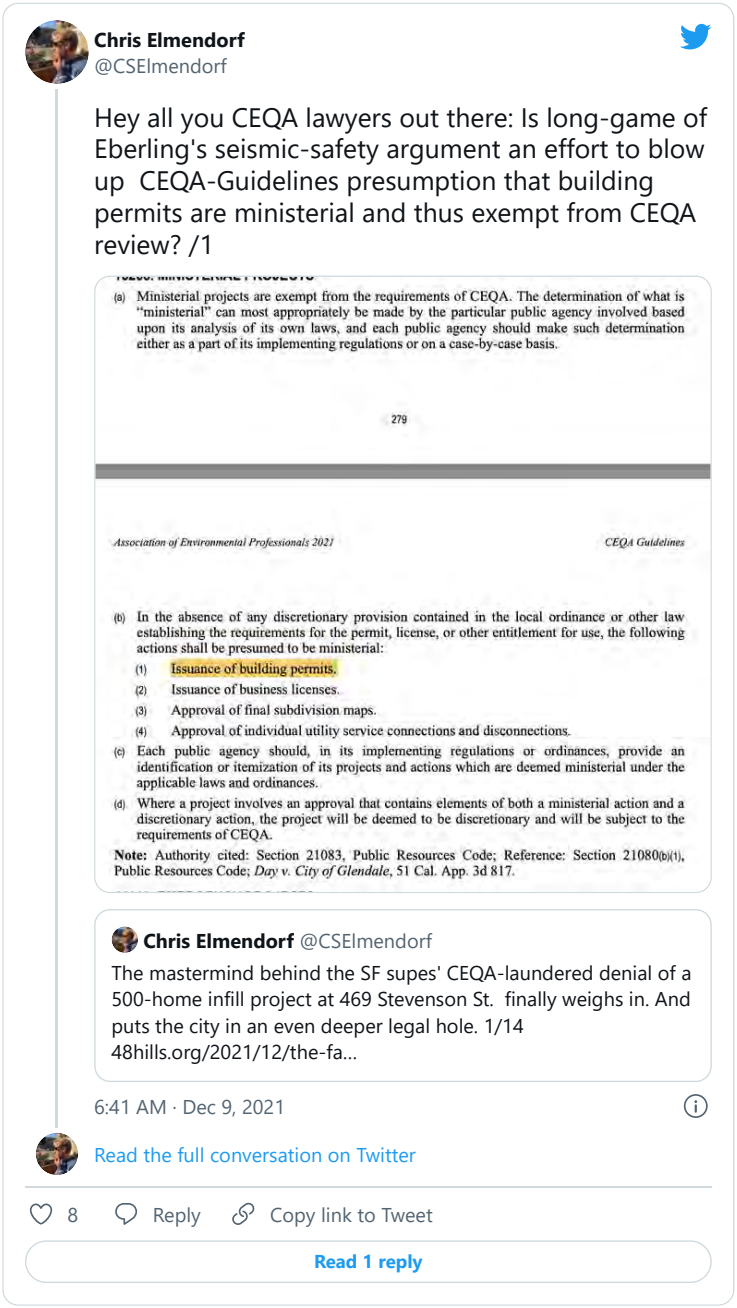
CEQA is concerned w/ "physical environment," not social impacts. Supes' resolution asserts that gentrification may impact phys. env't, but it doesn't (1) specify any such physical impact, or (2) provide evidence beyond "unsubstantiated fears." 19/n

https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PRC&sectionNum=21060.5#:~:text=21060.5.,of%20historic%20or%20aesthetic%20significance.

Lastly, we have supes' demand for analysis of alternative foundations, which EIR excluded on ground that foundation safety is covered by building code. This runs against CA Supreme Court holding that seismic risk to project isn't a CEQA impact. 20/n



It also upends CEQA's presumption that "building code issues" are ministerial and thus outside scope of CEQA review. 21/n



And, if sustained, it might well crush the business model of development in San Francisco, where one set of firms specialize in entitlement and another in construction. 22/n

SF's insane entitlement process (way worse than any other city studied by @ONeillMoiraK) would become even costlier under supes' logic, since all engineering work would have to be done before proponent learns whether city will even accept project's size & appearance. 23/n

This a moment of truth for @GavinNewsom @GVelasquez72 @AGRobBonta @CaHousingGuy & @ShannanWestCA: Are you serious about housing accountability, or are denials just fine if topped w/cherry of progressive rhetoric? 24/end

@ezraklein @JerusalemDemsas

Opinion | California Is Making Liberals Squirm

If progressivism can't work there, why should the country believe it can work anywhere else?

https://www.nytimes.com/2021/02/11/opinion/california-san-francisco-schools.html

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Christopher S. Elmendorf & Tim Duncheon Nov 28 5 min read

A Seismic Shift in Land Use Law?

Late last month, observers erupted in fury when San Francisco's Board of Supervisors voted down a proposal to build nearly 500 new homes -- many affordable -- on a downtown site now being used for valet parking. The Board's vote came short on the heels of a major Court of Appeal decision upholding the state's Housing Accountability Act (HAA), which the Legislature has greatly strengthened in recent years. The HAA usually requires cities to approve housing projects that a reasonable person *could* deem compliant with applicable standards, even if other reasonable people might disagree.

San Francisco evaded the HAA by using a different law, the California Environmental Quality Act (CEQA), to put the downtown project on ice. Oakland and Sonoma have also used the same maneuver, albeit to much less fanfare. This presages an epic legal clash, which we shall explore in a four-post series for SLoG and a forthcoming law review essay. This post is the appetizer.

The HAA and the CEQA both have fair claims to being what legal scholars Bill Eskridge and John Ferejohn call "super-statutes." As Eskridge and Ferejohn define it, a super-statute is a law that:

(1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.

As we'll explain in our next post, CEQA became super in the 1970s, thanks to a run of California Supreme Court decisions that construed it broadly so as to give, as the Court saw it, "the fullest possible protection" to the environment. The HAA began earning its stripes much more recently. The turning point came in 2017, when the Legislature dramatically strengthened the law and codified that it "be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."

The ostensible super-ness of the two statutes creates a predicament for courts and other actors, because CEQA and the HAA could not be more different in their basic institutional and normative principles. Consider this:

- CEQA's working premise is that "new construction" is bad for the environment. "Current environmental conditions" in the vicinity of a proposed project should be preserved if at all possible. By contrast, the HAA regards the construction of housing in urbanized areas as presumptively good for the environment. It opens with a legislative finding that local barriers to housing development cause "urban sprawl, excessive commuting, and air quality deterioration," "undermining the state's environmental and climate objectives."

- CEQA privileges slow, careful, deliberative evaluation of every possible environmental impact. If there is a "fair argument" that a project "may" have any significant local environmental impact, CEQA compels the preparation of an exhaustive environmental impact report (EIR). The HAA calls for speed. It requires cities to notify developers of any general plan or zoning standards a project violates soon after the project is submitted, and it stipulates that violations of the state's Permit Streamlining Act shall be deemed violations of the HAA.

- Courts in CEQA cases presume that cities act in good faith (unless the city shortcuts environmental review). When pertinent facts and empirical inferences are disputed, courts give deference to the city's judgment. The HAA distrusts cities. It eliminates the traditional deference that courts gave to cities regarding a housing project's compliance with local standards; it prevents cities from using discretionary standards to deny or reduce the density of a project; and it authorizes courts to order the approval of projects that were denied in bad faith.

So how will the HAA and CEQA fit together? On one view, CEQA must reign supreme, because a longstanding provision of the HAA states, "Nothing in this section shall be construed to relieve the local agency from complying with … the California Environmental Quality Act."

But, as noted, the Legislature more recently proclaimed that the HAA "shall be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." Later posts in this series will argue that to achieve its stated purpose – to "meaningfully and effectively curb[] the capability of local governments to deny, reduce the density for, or render infeasible housing development projects" – the HAA must exert gravitational pull on CEQA. The alternative is a world in which cities would have virtually unfettered discretion to use CEQA to delay projects indefinitely, to force project proponents to pay for round after round of expensive environmental studies, and to encumber projects with costly "mitigation" requirements even if the project would be a big environmental win.

* * *

Our next piece in this series will recount the evolution of CEQA and the HAA, illustrating their respective claims to super-statute status. We will see that CEQA's super-ness was revealed in part by its crushing of a pro-development precursor to the HAA, the Permit Streamlining Act.

Our third post will delve into the problem one of us has dubbed "CEQA-laundered project denial," now exemplified by 469 Stevenson St. in San Francisco. The municipal strategy of using CEQA to evade the HAA exploits soft spots in CEQA and background principles of administrative law. We'll argue, however, that the "super" HAA can provide a remedy, either directly or through its gravitational pull on CEQA and administrative law.

Our final piece will argue that the HAA ought to shape environmental impact analysis itself. Because CEQA only applies to discretionary governmental acts, environmental review for HAA-protected housing projects should consider only impacts caused by discretionary conditions of approval imposed by the city, not all of the impacts that result from adding new dwelling units to the site. This only makes sense: the latter are caused by state law (the HAA), not municipal discretion. Our HAA-informed gloss on the scope of CEQA review would eliminate substantial environmental reviews for the mine run of zoning-compliant housing projects.

Our scope-of-review proposal is consistent with CEQA's first principles, but it would require jettisoning or substantially circumscribing several judicial precedents which have been incorporated into the official CEQA Guidelines. It's up to the Governor and his appointees at the Office of Planning of Planning and Research and the Natural Resources Agency to decide whether to revise the Guidelines. If they do, and if the Legislature acquiesces, then the HAA will truly merit the moniker, "superstatute." It will have "stuck in the public culture" and exerted "a broad effect on the law."

But that is only one possible future. Another is that CEQA swallows the HAA, expelling more fodder for critics who've lampooned California's symbolically liberal but operationally conservative politics. Stay tuned.
The authors write in their personal capacity. Nothing in these posts represent a position of the University of California or the U.S. District Court for the Northern District of California.

Christopher S. Elmendorf & Tim Duncheon Nov 30 9 min read

How CEQA and the HAA Became "Super"

In yesterday's post, we asserted that the recent denial of a downtown housing project in San Francisco portends a generational clash of super-statutes, with the California Environmental Quality Act (CEQA) facing off against the state's Housing Accountability Act (HAA). In subsequent posts, we will explore the particulars of the CEQA-HAA conflict, as illustrated by the saga of the San Francisco project. Today, however, our goal is simply to show that CEQA and the HAA both have plausible claims to being super-statutes, which is what makes the clash between them so arresting.

Recall Eskridge and Ferejohn's definition. A super-statute is a law that:

(1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.

The first half of today's post explains how CEQA became a superstatute in the 1970s, and muscled a precursor of the HAA into near-oblivion. The second half takes up the HAA and shows how it's becoming "super" today.

The California Environmental Quality Act

Enacted in 1970, a year after Congress passed the National Environmental Policy Act, CEQA heralded a transition from Governor Pat Brown's California -- a land of burgeoning highways, dams, and suburbs – to the slow-growth California that his son, Jerry, would preside over. Whether the Legislature intended CEQA to be a super-statute is open to debate, but, looking back, it's clear that CEQA did "establish[] a new normative [and] institutional framework for state policy," and that the framework "stuck in the public culture" and had "a broad effect on the law."

Two early judicial decisions launched CEQA on its path to super-ness. In *Friends of Mammoth v. Bd. of Supervisors*, the California Supreme Court gave a "broad interpretation to the act's operative language" and extended CEQA to cover private activities (such as homebuilding) that require public permits. Next came *No Oil, Inc. v. City of Los Angeles*, which held that CEQA requires preparation of a full environmental impact report "whenever it *can be fairly argued* … that the project *may* have a significant environmental impact," not just where the project is likely to have "important" or "momentous" impacts.

Beyond their immediate holdings, *Friends of Mammoth* and *No Oil* stood for a larger principle: that CEQA should be construed broadly and purposefully to give "the fullest possible protection" to the environment. Although the Legislature has often tinkered with CEQA, it hasn't challenged this foundational maxim, which courts continue to invoke to this day.

CEQA has certainly had a "broad effect on the law--including an effect beyond the four corners of the statute." The best example is the courts' reliance on CEQA to disembowel the Permit Streamlining Act of 1977 (PSA), which was something of a precursor to the Housing Accountability Act.

The PSA originally required cities to approve or deny applications for a "development project" within one year of receiving a complete application, on pain of the project being "deemed approved" as a matter of law. The Act did not expressly state that an agency's failure to complete environmental review within the one-year period would

result in the project’s constructive approval, but everything about the statute suggests that this was the Legislature’s intention.

Yet when courts confronted the question of whether a development project could be deemed approved by operation of the PSA notwithstanding the agency’s failure to complete and certify an environmental impact report, they answered with a perfunctory no. Automatic approval in such circumstances would be an unthinkably “drastic” result, the Court of Appeal said, and because the Legislature “did not mention EIR certification in the [PSA’s] automatic approval provisions,” the court refused to countenance it. The gravitational pull of the superstatute, CEQA, overwhelmed what should have been a fairly easy inference from the text and structure of the PSA.

In a later case, the Court of Appeal held that CEQA’s time limits could be enforced by mandamus -- if a city sits for years on a completed environmental impact report without taking official action to certify or disapprove it. But this gesture at the enforceability of the one-year deadline for completing EIRs was gravely undermined by another Court of Appeal decision, *Schellinger Bros. v. City of Sebastopol*. *Schellinger* held that courts may not order a city to certify an environmental impact report (as opposed to ordering the city to make up its mind about whether to certify it). Even more damningly, *Schellinger* held that the project applicant had, by cooperating with the city well past the one-year deadline, forfeited its right to enforce CEQA’s deadlines.

Nowhere did *Schelleinger* acknowledge that developers have an obvious economic incentive to cooperate with cities that exercise discretionary authority over their projects. That the court’s decision had the practical effect of nullifying the PSA for any project that requires an environmental impact report also went unmentioned. The pull of the superstatute had sucked the guts out of the PSA.

The Housing Accountability Act

The HAA was far from super as enacted in 1982. It originally consisted of just two short paragraphs telling local governments to approve zoning-compliant housing projects unless the project would injure public health or safety. A 1990 amendment added additional protections for affordable projects (today defined as 20% low-income or 100% moderate income). Among other things, the amendment stipulated that a city may rely on its general plan or zoning to deny an affordable project only if the city has adopted a state-approved “housing element” to accommodate regionally needed housing.

Subsequent tweaks to the HAA (1) disallowed local governments from denying zoning-compliant projects except on the basis of written health or safety standards; (2) defined projects as zoning-compliant if they satisfy the objective standards found in the city’s zoning code and general plan as of the date of the developer’s project application; (3) cracked down on certain obvious ruses, such as cities defining zoning-code violations as a health-and-safety violation; (4) required cities that wrongfully deny an affordable project to pay the prevailing party’s legal fees; (5) authorized courts to compel cities to take action on a wrongfully denied project within 60 days; and (6) authorized courts to fine cities that deny projects in bad faith and continue dilly-dallying after the court’s order.

All of this sounds pretty super, but if the test for a superstatute is that it “sticks” in “the public culture” and “has a broad effect on the law,” then the HAA did not become a serious superstatute candidate until 2016-2017. There had been very few reported cases under the statute, most likely because developers who hope to do business with a city in the future are generally reluctant to sue it. In 2015, however, a ragtag bunch of self-described “Yimbys” coalesced in San Francisco, discovered the HAA, and started suing suburbs for denying regionally needed housing. It wasn’t entirely clear whether they even had standing, but the Legislature answered their call and authorized HAA enforcement by “housing organizations.”

A year later, in 2017, the Legislature enacted a pair of bills that dramatically strengthened the HAA and declared it to be super. Assembly Bill 1515 took up the question of what it means for a housing project to comply with general plan, zoning, and design standards. The courts had long given deference to cities on such matters, refusing to set aside municipal determinations that a project is noncompliant if any reasonable person could agree with the city’s conclusion. AB 1515 turned that doctrine on its head, defining projects as compliant as a matter of law if any reasonable person could deem the project to comply on the record before the city – notwithstanding reasonable or even strong arguments going the other way.

A companion bill, SB 167, required cities to give prompt written notice to developers of any zoning, general plan, or design standard that the proposed project violates, on pain of the project being deemed to comply as a matter of law. SB 167 also narrowed the HAA’s carveout for health and safety standards, requiring cities to show by a preponderance of the evidence that the health or safety standard in question would in fact be violated by the project. Finally, SB 167 codified numerous Legislative findings, include this:

The Legislature’s intent in enacting [the HAA] in 1982 and in expanding its provisions since then was to significantly increase the approval and construction of new housing … by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects…. That intent has not been fulfilled.

And this:

It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.

A year later, the Legislature added this:

It is the intent of the Legislature that the conditions that would have a specific, adverse impact upon the public health and safety [within the meaning of the HAA] arise infrequently.

In 2019, the Legislature codified a preliminary application process, allowing developers to quickly establish the date on which the zoning, general plan, and health and safety standards applicable to their project would be locked. The Legislature also spelled out what it means for a standard to qualify as objective, such that it may be used to deny or reduce the density of a housing project.

All of this certainly evinces a legislative intent to forge a superstatute, but whether the HAA “‘stick[s]’ in the public culture such that … its institutional or normative principles have a broad effect on the law” ultimately depends on how other actors respond to it. Will the courts, the executive branch, and local governments also treat the HAA as super?

In September of 2021, the pumped-up HAA passed its first judicial test with flying colors. The City of San Mateo had denied a small condo project on the basis of the city’s Multi-Family Design Guidelines, which prescribe “a transition or step in height” between new multifamily buildings and adjoining single-family homes. When a nonprofit housing organization challenged the project denial in court, San Mateo argued that the HAA violated its right to “home rule” under California’s constitution and the prohibition against delegation of municipal authority. In the alternative, the city asserted that the HAA’s definition of project compliance left intact the tradition of judicial deference to cities on

questions about the meaning of local ordinances, and that the city in denying the project had plausibly “interpreted” its Design Guidelines to require setbacks the project lacked. A trial court accepted the city’s home-rule and statutory arguments, but the Court of Appeal would have none of it.

Before the appellate court, San Mateo and local government *amici* mustered new constitutional attacks on the HAA -- not just home rule and private delegation, but due process too. It would have been easy for the Court of Appeal to dodge the new issues, but the court reached out and decided all the constitutional questions – against the city – thereby securing the HAA’s footing going forward. The appellate court also carefully traced the evolution of the HAA, juxtaposing it against the seeming intractability of California’s housing shortage. It concluded, “The HAA is today strong medicine precisely because the Legislature has diagnosed a sick patient.”

The Legislature’s instruction that the HAA “be interpreted and implemented in a manner to afford the fullest possible weight to … housing” was reiterated three times in the court’s opinion.

As for San Mateo’s design guidelines, the Court of Appeal held that they were not objective, and, in the alternative, that a reasonable person could deem the project at issue to comply with them. Hard-eyed independent judicial review, not deference, was the order of the day. “It [would be] inappropriate to defer to the City’s interpretation of the Guidelines,” the court explained, lest the City “circumvent[] what was intended to be a strict limitation on its authority.”

CaRLA v. City of San Mateo is only one case, of course, but other actors in California’s legal-political establishment are also embracing the HAA and signaling that they want it to have “a broad effect on the law.” After the trial court in *CaRLA v. San Mateo* struck down the HAA, Attorney General Becerra announced that his office would intervene on appeal. When the Court of Appeal’s decision came down, new AG Bonta put out a press release trumpeting the big win.

Last summer, the Governor requested and the Legislature authorized funding for a new Housing Accountability Unit within the Department of Housing and Community Development. Fully staffed, the HAU will be a 25-person team that investigates alleged violations of state housing law, sends warning letters to cities, and makes referrals to the AG’s new “housing strike force.” The HAA is not the only housing law the HAU and the strike force will enforce, but it is the capstone, and the fact that these new enforcement capabilities came together in the shadow of *CaRLA v. City of San Mateo* suggests that the HAA is in fact bringing about “a new normative [and] institutional framework for state policy,” one which will “stick[] in the public culture” and have “a broad effect on the law.”

The acid test is now at hand. A day after San Francisco’s Board of Supervisors stalled the 469 Stevenson St. project – voting to require further environmental study while treating the vote as a project denial – the director of the state housing department announced that the Housing Accountability Unit had launched an investigation. Is the HAA super enough to stand up to CEQA? Or will it tumble like its precursor, the Permit Streamlining Act? That is the subject of our next post.

Christopher S. Elmendorf & Tim Duncheon Dec 1 16 min read

Does the HAA (or anything else) Provide a Remedy CEQA-Laundered Project Denials?

Here is Part 3 or this four-part series:

The HAA prevents cities from denying or reducing the density of housing projects, but it doesn't exempt projects from environmental review under CEQA. CEQA spells out time limits for the completion of environmental reviews, but as yesterday's post explained, those limits have proven illusory in court. So if a city wants to deny a project that the HAA protects, what's to keep the city from laundering the denial, as it were, through CEQA? Can the city keep asking the developer for additional environmental studies until, after squandering years and fortunes, the developer cries uncle and walks away?

That's the million-dollar question raised by our running example, the San Francisco Board of Supervisors' recent 8:3 vote sustaining a local gadfly's appeal of the 469 Stevenson St. project. Rather than deny the project outright or reduce its density (likely HAA violations), the Board reversed the planning commission's certification of the project's Environmental Impact Report and directed the clerk to prepare findings that the EIR was inadequate.

Yet in view of what the Supervisors said at the hearing and afterwards, it's pretty clear that the Board's real objective was not to air out and mitigate specific environmental impacts but to nix the project. Most of the Supervisors who voted "No" argued that the project was not affordable enough and would cause gentrification – which is not an environmental impact and which is exceedingly unlikely to be caused by the project in any event. Supervisor Mandelman told a reporter that he'd "feel very good about this vote" if the site "become[s] a 100% affordable project," but that if "15 years from now it's still a parking lot, then I will not feel good." That's an explanation for a vote to deny, not a vote for further environmental study. Supervisor Melgar said the problem was that the developer hadn't "negotiated a deal" with TODCO, a politically powerful nonprofit. That of course has no bearing on the adequacy of the EIR.

The supervisors who voted "No" also knotted themselves up with self-contradictory objections. For example, Ronen and Mandelman stressed that the developer didn't have financing and that the project probably wasn't economically viable (the implication being: "don't blame us for blocking housing"), yet they also demanded that the developer reserve more units for low-income households – which would make the project even *more* difficult to finance.

The supervisor who came closest to voicing an environmental objection was Supervisor Ronen, who expressed concern that the project's foundation might be inadequate. She pointed to another downtown project, the Millennium Tower, that had required an expensive retrofit, and she argued that the EIR for Stevenson St. should have fleshed out the seismic issues in detail. (The Initial Study treated these issues as "insignificant" because they're addressed by the building code and an engineering peer-review required of all large buildings. Accordingly, the EIR did not further address them.) However, no one put any evidence in the record suggesting that a code-compliant, peer-reviewed project on the site would be an earthquake hazard to people or buildings nearby. Nor, as

best we can tell, had Ronen or any other supervisor objected to previous EIRs that treated seismic impacts as adequately addressed through the building code and engineering peer review. In any case, contrary to Ronen's claims to the press, the impact of an earthquake on the proposed building is not an "environmental impact" under CEQA.

All of this suggests that that the seismic safety issue – the only plausibly legitimate justification for the Board's decision to reverse the CEQA certification – was pretextual. It was a fig leaf to cover up what the Board intended but was not allowed by law to do: to disapprove the project because it's too big or not affordable enough.

Capitalizing on Administrative Law's Achilles Heel

The strategy of laundering project denials through CEQA is nothing if not clever, for it takes advantage of two soft spots in administrative law: agency delay and agency bad faith.

Delay

The Board of Supervisors' vote to reverse certification of the Stevenson St. EIR was tantamount to saying, "We haven't made up our mind about this project, and we need more information before we can make up our mind." When agencies say they need more time to gather information and make up their mind, courts normally let them have it. If an antsy plaintiff sues, the court will say that the suit is premature because there's not yet a "final" agency decision, or because the plaintiff hasn't "exhausted her administrative remedies," or because the case isn't yet "ripe." After all, it would be a waste of judicial resources and a big practical problem for governance if anyone waiting in line for an agency decision could ask a judge to let him jump the queue.

The legal doctrines that prevent plaintiffs from attacking agency delay have exceptions, but the exceptions are very narrow. For example, California courts excuse plaintiffs from exhaustion when further agency proceedings would be "futile" – but only if the plaintiff can "positively state" what the agency has decided (thus rendering further proceedings pointless). The courts have also waived exhaustion when the agency has no legal authority to conduct the proceeding at issue and when pursuit of further proceedings would result in irreparable harm. None of these exceptions fits the Stevenson St. scenario. The Board of Supervisors has carefully avoided "positively stating" its decision; there's no question that the Board is authorized by law to be the city's ultimate decider about the CEQA review; and the irreparable harm exception is applied "only in the clearest of cases."

It's also true that if the Legislature prescribes clear-cut timelines for an agency decision, a plaintiff can, in theory, use "traditional mandamus" to get a court order requiring the agency to act. But as we illustrated in yesterday's discussion of *Schellinger* and the CEQA timelines, these cases make courts uncomfortable. At most, a court will order the agency *to make a decision*, as opposed to telling the agency *what to decide*. And if there's an available equitable doctrine like laches that would let the agency off the hook, the courts will gladly invoke it.

Bad Faith

The other formidable barrier to a judicial fix for CEQA-laundered project denials is the principle that courts should review agency decisions solely on the basis of the reasons stated by the agency at the time of the decision, rather than probing to figure out the agency's real reason and setting the decision aside if the real reason was not authorized by law.

To the extent that the Board's decision to require further CEQA study of the 469 Stevenson project is reviewable at all, a court would normally uphold the decision so long as the "findings" prepared by the clerk include *some* legitimate reason for additional CEQA study. The stated rationale must also draw *some* support from the record of materials before the Board, but the evidentiary demand is lax. If a reasonable person could agree with the Board's decision in light of the evidence in the record, courts generally will accept it.

In federal administrative law, there is a narrow exception to these general precepts. Upon a "strong showing of bad faith," a court may peer behind the agency's rationale and the record of contemporaneous materials the agency assembled to justify it. If the court concludes from this investigation that the agency's stated reasons were pretextual, the court may set aside the agency's decision – even if the stated reasons, if real, would have sufficed to justify it. This obscure doctrine enjoyed a moment of renaissance when Chief Justice Roberts invoked it to invalidate the Trump Administration's addition of a citizenship question to the U.S. Census. But even as the Chief Justice insisted that courts "are 'not required to exhibit a naivete from which ordinary citizens are free,'" he was at pains to limit the bad-faith exception.

It is for very good reasons that the bad-faith exception is narrow. Much like aggressive judicial review of agency delay, courtroom trials focused on the "real reasons" for agency action would gum up the work of government. Discovery requests and depositions would divert public officials from their primary charge. Courts would struggle to disentangle the mix of political and policy-minded considerations that shape agency decisionmaking – especially when the leaders of the agency in question (a city council) are elected officials who inevitably pay attention to politics even when acting in a quasi-judicial capacity (hearing a CEQA appeal).

Finally, it's black-letter law that when an agency messes up, the judicial remedy is to vacate the agency's decision and remand for a do-over. Even in the Census case, the Court *did not* strike the citizenship question from the Census: it just told the Commerce Department to try again. But what does this achieve if the agency is in bad faith? A court order telling San Francisco's Board of Supervisors to rehear the 469 Stevenson St. CEQA appeal would be an invitation to re-launder the denial, minus the revealing tweets.

But the HAA's a Game Changer, Right?

The foregoing ought to douse any hope one might have about using general legal principles to curtail CEQA-laundered project denials. But when the project getting laundered is a *housing project*, a court must consider the Housing Accountability Act as well. And the HAA gives the general principles of administrative law a real shakeup, reworking some and tossing others in the garbage:

- The HAA expressly authorizes judicial inquiry into bad faith. "Bad faith" as defined by the Act includes "an action that is frivolous or otherwise entirely without merit." This means that a court can find bad faith without subpoenas, depositions, or other searching inquiry into the mental processes of city council members. If the denial of a project was objectively frivolous, that's enough.

- In cases where a court finds bad faith, the HAA supplants the traditional do-over remedy. It authorizes courts to order the project approved--and to retain jurisdiction to ensure that this order is carried out.

- The HAA provides at least a partial remedy for delay, by defining "[d]isapprove the housing development project" to include "[f]ail[ing] to comply with the time periods [for project review] specified in [the Permit Streamlining Act]."

- The HAA eliminates judicial deference to local governments on all questions about whether a housing development project complies with applicable standards.

The HAA's stance is one of extreme distrust toward local governments. In 1982, the Legislature stated that "the excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing." But as the Legislature noted in 2017, when it strengthened various provisions, "[t]he Legislature's intent in enacting this section in 1982 . . . has not been fulfilled." Hence the new policy going forward: "that [the HAA] be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."

But there's a catch. While the HAA provides a powerful remedy for a bad-faith project denials, its only explicit remedy for delay is tied to the Permit Streamlining Act. Yet as noted in our previous post, the PSA clock doesn't start to run until CEQA review has been completed, and another provision of the HAA states that the statute shall not "be construed to relieve [a city] from making … findings required [by CEQA] or otherwise complying with [CEQA]."

How can a court make sense of these conflicting directives? In the rest of this post, we sketch three possible solutions.

Solution #1: Bad-Faith Delay Through CEQA Reversal as HAA "Disapproval"

A court following the Legislature's command to "interpret[] and implement[]" the HAA "to afford the fullest possible weight to the interest of … housing" could hold that a city's delaying of a project in bad faith amounts to "disapproval" within the meaning of the HAA, at least if the delay occurs through a negative vote on a formal approval that a developer needs to reach the finish line.

The HAA's definition of "disapproval" is broad. It includes "any instance in which a local agency . . . votes on a proposed housing development project application and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit." The certification of an EIR or other CEQA clearance is one of many "approval[s]" or "entitlement[s]" which a developer must obtain before eventually landing a building permit. And it is an approval that a city council reversing a CEQA clearance "votes" to deny.

The HAA's remedial provisions imply that the statute may be violated other than by final denial of an application for a project entitlement or building permit. A court that finds a violation "shall issue an order … compelling compliance with this section within 60 days, including, but not limited to, an order that the local agency take action on the housing development project." The "but not limited to" proviso suggests that a city may violate the HAA by taking unlawful action (or inaction) on ancillary matters necessary for the project to go forward, and it instructs courts to use their powers flexibly to remedy whatever violations a court finds.

On the other hand, the fact that the HAA doesn't expressly list "legally inadequate CEQA analysis" as a permissible ground for disapproval of a housing development project suggests that the Legislature may not have thought that a city council's reversal of a CEQA certification would qualify as a housing-project disapproval. But the HAA in its current incarnation is meant to be a super-statute, "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." This interpretive instruction, together with the parallel legislative finding that local governments have for too long managed to evade the Legislature's intent to "meaningfully and effectively curb[] [their] capability … to deny, reduce the density for, or render infeasible

housing development projects," suggests that the Legislature wants courts to read the statute flexibly as may be necessary to countermand evasive local tactics the Legislature did not anticipate.

A line-drawing problem remains: it can't be true that every city council vote sustaining a CEQA appeal is a "disapproval" within the meaning of the HAA. Some appeals are meritorious. In other cases, a city council may reasonably believe that an appeal has merit, even if some judges would disagree. At what point does a city council's reversal of a legally sufficient CEQA clearance become an HAA "disapproval'? The HAA's remedial provisions point toward an answer: when the CEQA reversal is in bad faith. Like the party to a contract who commits anticipatory breach, the city that denies a CEQA clearance in bad faith signals that it has no intention of performing its legal obligation under the HAA.

If a court reads "disapproval" to include bad-faith denial of a CEQA clearance, and finds that San Francisco's Board of Supervisors pretextually reversed the EIR certification for 469 Stevenson St., the court could order the project approved, because the HAA supplants the conventional do-over remedy in cases where a city has denied a project in bad faith.

One might object that this gloss on HAA "disapproval" would "relieve[]" the city of compliance with CEQA. Not so. San Francisco's planning department prepared a full EIR for 469 Stevenson St., which the planning commission certified as complete. So long as the court concludes that the EIR was in fact legally sufficient, an order directing the city to approve the project would do no violence to the HAA's CEQA-preservation clause. The court could also allow the Board of Supervisors a brief window of time to decide whether to impose any additional mitigation requirements on the project, in light of the findings of the EIR. This would honor CEQA's policy that elected officials bear final responsibility for deciding what to do about identified environmental impacts.

Another counterargument is that the Board in voting to reverse the EIR certification didn't actually determine whether the project could go forward or what its density would be. It just said it wanted more information. This argument would be a strong counter under general administrative law principles. But in taking a practical, real-world approach to "disapproval," the HAA undercuts it. For example, delay beyond the time limits of the Permit Streamlining Act is explicitly an HAA disapproval, even though such delay doesn't entail any concrete act or statement of reasons by the city. A formal vote reversing a CEQA clearance is much closer to the conventional paradigm of a discrete, reviewable agency action.

In its first letter to San Francisco after starting to investigate the 469 Stevenson St. debacle, the Department of Housing and Community Development signaled support for reading "HAA disapproval" to include pretextual CEQA-clearance reversals. If an agency that the Legislature has authorized to enforce the HAA concludes that bad-faith denials of CEQA clearances are "disapprovals within the meaning of the HAA, a court need not go out of its way to conclude the same.

Solution #2: Enforcing CEQA Timelines in Light of the HAA

Without reaching the question of whether bad-faith denial of a CEQA clearance is "disapproval" within the meaning of the HAA, a court could hold that the Legislature's refashioning of the HAA as a super-statute warrants revisiting – and limiting or rejecting – the Court of Appeal's decision in *Schellinger Brothers v. City of Sebastopol*. Burying *Schellinger* is necessary to give practical effect to the HAA's incorporation of the Permit Streamlining Act's timelines into the definition of disapproval.

As we explained in yesterday's post, *Schellinger* held that judges may not order a city to certify an environmental impact report (as opposed to ordering the city to make up its mind about whether to certify it). The court also said

that the project applicant had, by cooperating with the city and making revisions well past CEQA's deadline, forfeited its right to enforce the deadline.

The most basic problem with *Schellinger* is that it makes a hash of the statute's definition of "disapproval." As noted, the HAA defines disapproval to include noncompliance with the PSA deadlines, but the PSA clock only starts to run after CEQA review is done. So if there's no practical way of forcing cities to comply with CEQA's deadlines, then the delay-oriented piece of the HAA's definition of disapproval is a dead letter. That doesn't befit any statute, let alone one which the Legislature has declared to be super.

As for *Schellinger*'s "equitable" holding (that the developer who cooperates past a deadline forfeits her right to enforce it), equitable doctrines are not supposed to be used in ways that "nullify an important policy adopted for the benefit of the public." Whatever might have been said about the HAA when *Schellinger* was decided in 2009, there is no gainsaying that, today, the Act's policy of expeditious permitting is "important" and inures to the "benefit of the public."

CEQA allows one year for completion of an EIR. A recent study of housing project entitlements in twenty California cities found that the median project in San Francisco took 27 months to entitle; only 5% were entitled in under a year. 469 Stevenson St. is more of the same. The final EIR for the project wasn't certified by the planning commission until nearly three years after the developer's submission of the project application. And then came the appeal to the Board of Supervisors, resulting in further delay.

Bearing these facts in mind, and reading CEQA in light of the newly "super" policy of the HAA, a court might reasonably hold (1) that the CEQA deadlines are enforceable regardless of whether the developer has cooperated with the city past the deadline (contra *Schellinger*), and (2) that if the CEQA deadline has passed and a legally sufficient environmental review document has been prepared, the city must certify it.

The second holding might seem to depart from the background norm that a court can only order an agency to act, rather than telling it how to act. But sometimes only one course of action is available to the agency, in which case a court may direct the agency to do what the law requires it to do. And what we're proposing is that courts read the CEQA deadlines, in light of the HAA, as creating a ministerial duty to certify any legally sufficient environmental review document once the deadline for completing CEQA review has passed.

The courts could also give cities a brief window to decide what changes to the project or other mitigation should be required in view of the environmental study. This splitting of the baby – letting the politicians choose mitigation but not legally unnecessary environmental study past the CEQA deadline – would go a good distance toward reconciling CEQA with the HAA. It would breathe some life into the PSA deadlines (which the HAA incorporates into its definition of disapproval), without impinging on municipal authority to impose mitigation conditions on development approvals (which the HAA countenances so long as they don't reduce the project's density).

Solution #3: Levering "Pretext" for Judicial Review of the City Council's CEQA Reversal

Our third solution is inspired by Chief Justice Roberts's opinion in *Department of Commerce v. New York*. Instead of putting an expansive gloss on HAA "disapproval," or battling *Schellinger* to make the CEQA deadlines judicially enforceable, a court would hold that CEQA reversals are reviewable for pretext in limited circumstances.

Specifically, a plaintiff's "strong showing of bad faith" would render a city council's CEQA reversal reviewable, and, if the court determines that the city council acted in bad faith, the court would hold the council's decision unlawful.

This solution invites a number of questions. First, is it even available in California? Second, once the door has been opened to pretext inquiries in this context, what's to keep them from spreading across all of state administrative law, at a high cost to courts and agencies alike?
Third, would this solution make a difference, given that the standard remedy in CEQA cases is a remand for a do-over – which is basically an invitation for the bad-faith agency to better cover its tracks?

As to the first question: The solution is available in the sense that it hasn't been ruled out by California Supreme Court. Although there's a pretty strong norm against looking behind the official record assembled by an agency, the Court has reserved the question of whether there might be a "limited" exception for "agency misconduct."

The second question – whether pretext claims can be cabined – is serious but not hard to answer. The HAA and the institutions now being erected to enforce it offer guardrails. For example, a court could hold that the HAA's concerns about municipal good faith warrant recognizing "CEQA pretext" claims vis-a-vis HAA-protected projects, if not otherwise. Going a step further, it could hold that the pretext claim is available only if HCD or the Attorney General makes the preliminary "strong showing of bad faith," or otherwise raises serious concerns about the city's development-review processes.

The remedy question concerns us more. If a court finds that a city's CEQA reversal was pretextual, must it send the whole thing back and give the city another chance to dress up its decision, exactly as the U.S. Supreme Court did with the Census case? Not necessarily. The California Supreme Court has endorsed the "inherent power" of a trial court to send only part of a decision back to the agency, while retaining jurisdiction to issue judgment later. Perhaps a court in a pretext case could treat a CEQA certification as mostly complete (and valid), retain jurisdiction, and give the city a short period of time to address any legitimate concerns identified by the court on a limited remand. This would light a fire under the city and ensure that the case comes back to the same judge.

As motivation for this or another nonstandard remedy, consider what courts do when a decision-maker is found to have prejudged the facts or otherwise manifested bias in violation of due process. Normally the court disqualifies the biased arbiter and remands for a fair hearing before another hearing officer. The Court of Appeal has said that a city's "malicious[] or arbitrar[y]" refusal to certify a CEQA document violates the developer's right to due process. If that's right, a city council's bad-faith reversal of a CEQA certification violates due process too, and the biased decision-maker should be disqualified on remand. But a court generally cannot disqualify the whole decision-making body that must decide the case (as is true under CEQA), so there is no analogous remedy if a quorum of the council has shown bad faith. Hence the need for innovation beyond the usual do-over remedy.

All that said, the judicial norm against telling agencies what they must do is very strong, and without specific textual authorization – e.g., the HAA directing courts to order projects approved, or CEQA specifying deadlines for completion of environmental review – we fear that judges would be reluctant to deviate from the standard remedy, even in a pretext case.

One more point about remedies is worth mentioning. A bad-faith CEQA reversal that violates due process would make the city liable for damages. The prospect of having to compensate a developer for holding costs, and for the expense of the additional environmental studies, might be enough to discourage some cities from trying to launder housing denials through CEQA.

* * *

After a forty-year saga, the HAA is at a moment of truth. Will courts nodding to background principles of administrative law stand by while city councils deny 500-home projects on frivolous environmental grounds? Or will courts wake up to the HAA's ditching of the old ways and appreciate – finally – that housing is the rare domain in which city councils are not to be trusted at all?

Christopher S. Elmendorf & Tim Duncheon Dec 2 11 min read

Calibrating Environmental Review to the Scope of Municipal Discretion Under the HAA

This is the last in a four part series. SLoGLaw thanks Chris Elmendorf and Tim Duncheon for this timely treatment of the important issue of affordable housing for California, and urban regions around the country--Ed.

The California Environmental Quality Act (CEQA) requires state and local agencies that have discretion to choose among possible options to study environmental effects before making their choice. In theory, this leads to better agency decisions. (A contestable claim – but that's for another day.) But when other laws require an agency to select a particular option, CEQA doesn't apply. There's no reason to write a detailed list of the pros and cons of different options if you know from the start exactly which choice you have to make.

When a developer submits a housing proposal, the Housing Accountability Act (HAA) substantially limits the choices open to the city. So you would think that review under CEQA would be limited accordingly. You would, unfortunately, be wrong – at least as revealed by current practice.

So it is that a proposal to build 500 apartments on a downtown San Francisco parking lot, a block from the subway, in a designated "priority development area" under the region's climate plan, ended up mired for years in the most extensive and costly form of environmental review required by CEQA: the Environmental Impact Report (EIR).

And why? Because San Francisco's planning department had concluded, on the basis of a 342-page Initial Study, that a "fair argument" could be made that the Stevenson St. project may have a significant local environmental impact in the form of shadows, wind, or (during construction) noise and air pollution. The Initial Study evaluated the project's potential impact relative to current environmental conditions nearby. It did not ask whether the project would have a significant marginal impact, relative to any other project of the size that the HAA entitles the developer to build on the site.

If the Stevenson St. project's marginal impact would be close to nil (as we think likely), then the EIR was an environmentally pointless exercise. Its real function, apparently, was to give local activists and city officials a way to tie up the project until the developer either walked away or paid off TODCO, the politically connected nonprofit that led the charge against it.

The argument of this post is that the scope of CEQA review of housing development projects should be tailored to the scope of municipal discretion. A housing project should require an EIR only if the city exercises discretion to shape the project in some way that generates a significant marginal impact, relative to what the HAA compels the city to approve.

Our approach would not "relieve local governments from complying with" CEQA. But it would require overturning or significantly limiting several judicial precedents that have been incorporated into the official CEQA Guidelines. As such, our proposal poses a stark test of whether the HAA really is a super-statute, one that "sticks in the public culture" and exerts "a broad effect on the law." If courts and the gubernatorial appointees responsible for the CEQA Guidelines get behind our approach, then the HAA will in fact "meaningfully and effectively curb[] the capability of local governments" to hobble housing development projects. If they do not, there can be little doubt that NIMBY cities will become ever more expert at exploiting CEQA to undermine the HAA.

"Effect" Relative to What?

We begin with an elementary point about causation. It is senseless to try to characterize the environmental effect of a proposed housing project without comparing it to some alternative use of the site. Consider an analogy: What is the effect of a new drug or medical device? The answer depends on what you're comparing it to. Relative to a placebo, the effect of the new drug may be large. Compared to the best treatment currently in use, the effect of the very same drug could be small or even negative.

The same goes for housing projects. They have effects only when they're compared to some alternative. Let's call the point of comparison the reference alternative. What is conventionally labeled "the baseline" in an environmental impacts study is, properly understood, a compound of two things: an alternative use of the site (the "reference alternative") and a projection of environmental conditions in and around the site conditional on that use of it.

CEQA analyses, relying on CEQA caselaw, usually elide this fundamental point. By convention, they purport to measure the "effect" of a project relative to "current environmental conditions" on the site and in its vicinity. This is a misleading point of reference if current environmental conditions would change absent the project. No medical researcher would measure the "effect" of an experimental treatment by comparing the health status several years in the future of elderly patients who received the treatment with their health at the time the treatment was administered. That comparison would obscure the effect of the treatment, because old people tend to decline as they age.

The CEQA analyst's conceptual mistake about baselines is not a problem in contexts where the permitting agency has authority to deny the project and doing so would maintain current environmental conditions. In such circumstances, the current-environmental-conditions baseline is equivalent to treating the "no-action alternative" as the reference alternative. This is like a placebo reference condition in a drug trial.

But the current-environmental-conditions baseline is nonsensical when the public decisionmaker lacks legal authority to maintain it. This is precisely the situation that cities face when developers propose HAA-protected housing projects. Cities may place discretionary conditions of approval on such projects, but they may not deny the project or reduce its density. Accordingly, the environmental impact of the project should be gauged relative to a reference-alternative project of the scale the city is required by law to approve.

An HAA-Informed Protocol for CEQA Review of Housing Projects

The first step in CEQA review is preparation of the Initial Study, which seeks to determine whether there is a "fair argument" that the proposed project "may" have a significant impact on the environment. If the answer is "Yes," then the project proponent must pay for an EIR that fully analyzes the potential effects identified in the Initial Study.

The policies of the HAA and the policies of CEQA can be reconciled, to some extent, by asking the threshold HAA question at the outset of the Initial Study: Does the project as proposed comply with applicable, objective general plan, zoning and development standards, as defined in the HAA? If it does, the city may deny or downsize the project only if it violates a written, objective health or safety standard within the meaning of the HAA. So for zoning-compliant projects, the Initial Study should gather information about potential health / safety violations and determine whether a preponderance of the evidence establishes a violation. A conventional CEQA review is in order only if such a violation is established (because the city may deny the project).

For projects that comply with general plan and zoning standards, and that don't violate health or safety standards, it's meaningless to conduct an environmental review that benchmarks the project against a no-action alternative or "current environmental conditions" in the vicinity of the site. The city's discretion is limited to altering the project with conditions of approval that do not reduce its density, and the CEQA baseline should be defined accordingly.

There are two plausible reference alternatives in this circumstance. First, the analysis could proceed using a project-as-proposed benchmark. The reviewer would inventory any discretionary conditions of approval that the city is considering imposing on the project, and then benchmark (1) environmental conditions if the project goes forward with the discretionary condition(s) imposed, against (2) environmental conditions if the project goes forward in the form it was proposed. The difference represents the environmental effect of the city's exercise of discretion.

To illustrate, if the city were considering a discretionary condition of approval that would require rooftop solar panels, and concerns were raised about glare from the panels, the Initial Study would undertake to determine whether there is a fair argument that the rooftop solar condition may cause a significant environmental impact in the form of glare, relative to the scenario in which the city approves the project in the form it was proposed.

Alternatively, the city could posit a green-reference benchmark, measuring the impact of an HAA-protected project relative to a model "green" project of the same density on the same site. The green-reference alternative might be defined as a project that provides the minimum number of on-site parking spaces; that uses low-energy building materials; and that minimizes impermeable ground cover (insofar as the city has authority to impose such conditions). The key point is that the green reference alternative would be a legally available option, and as such represents an informative benchmark against which to compare the proposed project.

Under either model, it would be the rare HAA-protected project that requires an EIR. Cities do not often impose conditions that reduce environmental amenities in the vicinity of a project, so the project-as-proposed benchmark would yield *pro forma* negative declarations in most cases. As for the green-reference benchmark, developers who anticipate opposition from neighbors, unions, or other interest groups would likely conform their proposal to the benchmark. If the project as proposed is HAA-protected and uses the green-reference design, then by construction it would have no environmental effects for CEQA purposes.

Does CEQA Allow It?

The idea of tailoring the scope of environmental review to the scope of agency discretion has precedent under statutory analogues to CEQA at the national level and in New York. Review under the National Environmental Policy Act (NEPA) is limited to "effects" that are proximately caused by the agency's discretionary choices. Thus, in *Department of Transportation v. Public Citizen*, the U.S. Supreme Court held that an environmental impact study prepared by the Department in connection with the North American Free Trade Agreement need not analyze pollution resulting from an increase in Mexican truck traffic, because the Department had no legal authority to exclude Mexican trucks. To date, no California court has ruled on whether CEQA incorporates the proximate-

causation theory of *Public Citizen*, but California courts do seek guidance from NEPA precedents when tough questions arise under CEQA.

In New York, courts got to a similar place by rejecting the "no-build baseline" in cases where the project proponent may build something as of right. Specifically, if a developer proposes an office or residential building that would require rezoning, on a site where a smaller building is allowed as of right, the effect of the proposed project is analyzed relative to the "as-of-right alternative" rather than the "no-build alternative" or "current environmental conditions." Because the city lacks authority to deny the smaller project, it would be uninformative to conduct an environmental review using a no-project baseline.

Like the National Environmental Policy Act and New York's State Environmental Quality and Review Act, CEQA exempts "ministerial" permits from environmental review. Discretion is always the trigger. However, the Court of Appeal has held in several cases that if a city has any discretion to shape a project, the city must analyze and mitigate the impact of project "as a whole" relative to a current-environmental-conditions baseline. Projects whose permitting is "not wholly ministerial and not entirely discretionary but a compound of both" have been treated as entirely discretionary for CEQA purposes. In one case, an EIR was produced using a zoning-complaint project baseline, similar to New York practice, and the California Court of Appeal rejected it out of hand. The court faulted the EIR for not "present[ing] a clear or a complete description of the project's impacts compared with the effects of leaving the land in its existing state."

This line of cases is rooted in CEQA's traditional premises: that new construction is bad for the environment, and that CEQA should be construed broadly to give "the fullest possible protection" to the environment. The working assumption is that requiring more environmental review and mitigation is the greener way. But as we've seen, the HAA inverts this premise when it comes to housing. The HAA declares new construction of zoning-compliant housing projects to be presumptively good for the environment, and it aims to "meaningfully and effectively curb[] the capability of local governments to deny, reduce the density for, or render infeasible housing development projects." A reading of CEQA that leaves cities with open-ended discretion to require time-consuming studies and costly mitigation of so-called "impacts" that are not even proximately caused by the city's exercise of discretion would do pointless violence to the policy of the HAA.

In the near term, however, any effort to use the HAA to put a limiting gloss on misbegotten CEQA-baseline precedents would be complicated by the fact that those precedents are now codified in the official CEQA Guidelines. The Guidelines stipulate that "the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation [of the EIR] is published . . . will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." This "existing conditions baseline" "shall not include hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans."

The only exception that the Guidelines presently recognize is that an agency may use a "projected future conditions ... baseline ... if it demonstrates ... that use of existing conditions would be either misleading or without informative value to decision-makers and the public." This exception codifies a practice that developed around very long-term projects, such as railways. Neither the Guidelines nor any published case approves the use of a "future-conditions baseline" where the future in question is a build-out of the project site under an alternative development scenario. Then again, neither the Guidelines nor any published case has considered the implications of the HAA for CEQA baselines or causation.

Though it wasn't written for the HAA problem, the Guidelines' narrow allowance for "future conditions" baselines at least recognizes that circumstances may arise where the conventional baseline is inappropriate. And the crux of our argument is that it is misleading and uninformative – and a colossal waste of resources, and a serious threat to the environmental and housing policies of the HAA – to require developers to engage in a multi-year analysis of putative environmental "effects" that are the byproduct of a nondiscretionary statutory mandate, not the discretionary choices of the local permitting authority itself.

The Governor's Role

Courts are conservative creatures. It's not in their nature to upend long-established precedents just because those precedents are at odds with another statute the Legislature has declared to be super, but which also preserves the statute that spawned the bad precedents.

But courts don't implement CEQA by themselves. CEQA authorizes the Governor's Office of Planning and Research and the Natural Resources Agency to issue implementing guidelines. The CEQA Guidelines codify judicial precedent, but they also embody policy choices, and the courts give measured deference to such choices. If environmental review is to be reshaped by an HAA-informed theory of causation, the Guidelines are the best tool at hand.

The Guidelines are a good tool for this purpose not only because making policy and changing direction is, by tradition, more squarely in the agency wheelhouse than the judicial wheelhouse, but also because of politics. Through his appointments and directives, the Governor can shape the Guidelines. And, presently, the Governor is better positioned than any other state-level actor to navigate the politically treacherous waters of CEQA reform.

Though it was a noble environmentalism that made CEQA super in the 1970s, the continued strength of CEQA today has much to do with the constellation of interest groups – first and foremost the building-trades unions – that have mastered the art of using CEQA to extract costly concessions from developers. In expensive housing markets, the threat of CEQA litigation and delay can be used to make developers sign project-labor and "community benefit" agreements with influential unions and nonprofits. The building trades wield a lot of power in Sacramento, and in recent years they've derailed every legislative proposal for CEQA reform or streamlining except those that require qualifying projects to use union labor. Not even a trivial bill that would let churches build affordable housing without CEQA review could escape Labor's grip.

But Governor Newsom is riding high. He was elected by a twenty-four point margin. He defeated the recall attempt by the same margin. The California Republican Party is all but dead, and the odds that the Governor will face a strong Democratic challenger when he's up for reelection in 2022 are remote. A tussle with the building trades wouldn't derail his career.

Of course, no Governor can single-handedly make the HAA "stick" in a manner that limits abusive use of CEQA. If there were a legislative consensus that project-labor agreements are more important than housing production, the Legislature could quickly abrogate any reformist CEQA Guidelines and then override a gubernatorial veto. But it's a fair hope that no such veto-proof consensus exists. The Republican minority is no fan of CEQA, and Democratic legislators are loathe to override their co-partisan Governor. Moreover, politically vulnerable legislators, who wouldn't dare cast a roll call vote against the trades, may acquiesce in the appointment of pro-housing committee chairs, who in turn could block any bill that would reverse the Governor's reform of the CEQA Guidelines. It's also possible that a transparent, public debate about CEQA abuse – a debate that would probably accompany any

legislative effort to roll back the reformed Guidelines – might itself subtly alter the politics of CEQA reform, in a way that gives the HAA the upper hand.

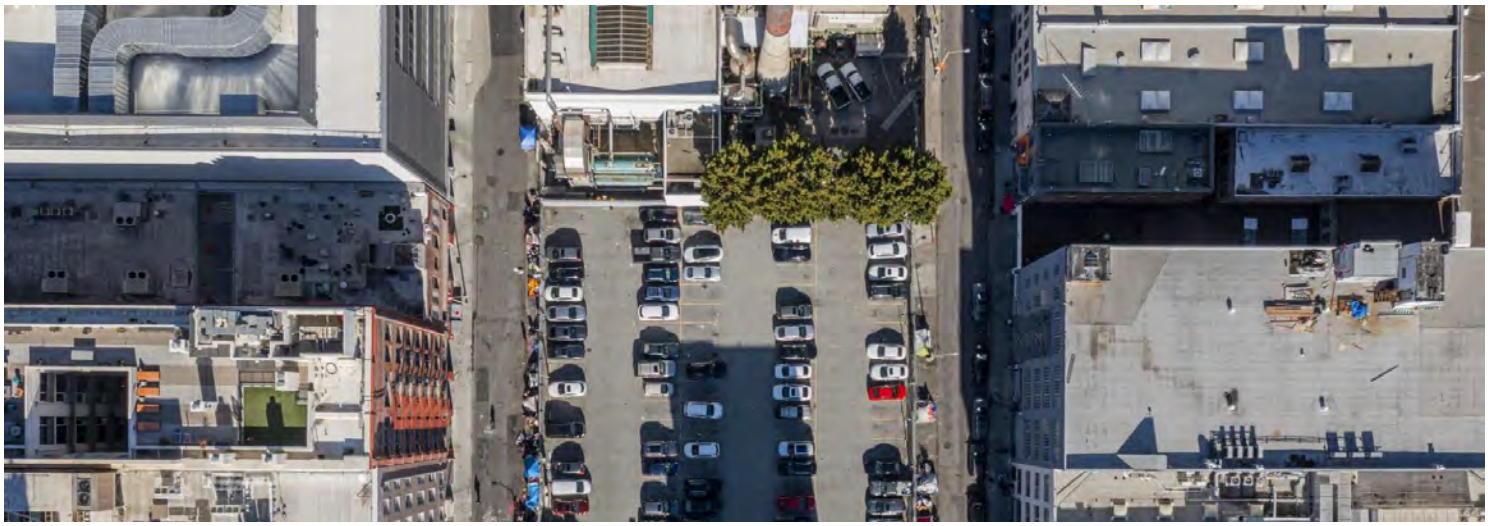
Although super-statutes on Eskridge and Ferejohn's telling embody great normative principles, it appears that CEQA's continued potency owes much to a small number of rent-seeking interest groups that depend on it. The generational clash between the HAA and CEQA is about power as much as principle.

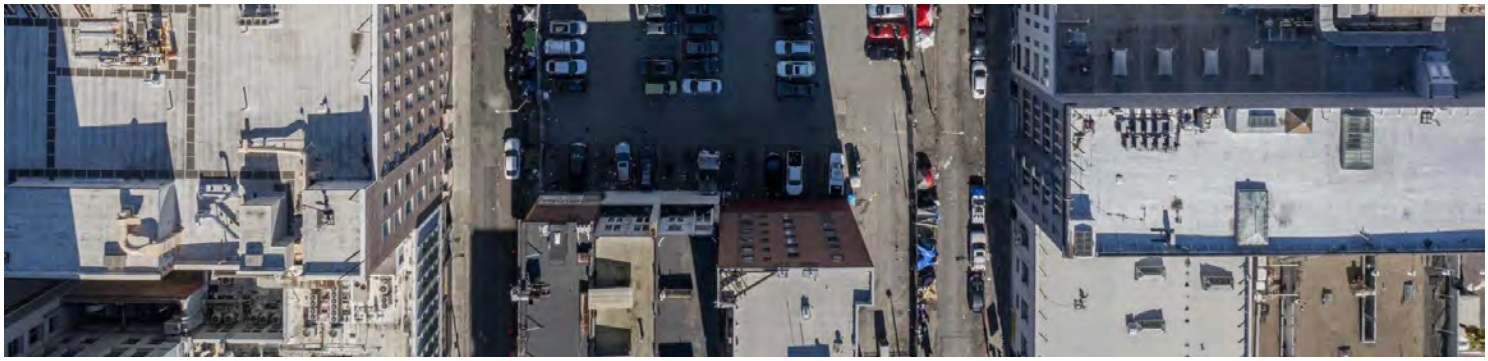
OPINION // OPEN FORUM

How an outdated environmental law is sabotaging California's new housing rules

Christopher S. Elmendorf and Tim Duncheon

Dec. 4, 2021





The parking lot at 469 Stevenson St. on Oct. 28, in San Francisco, Calif. The site is currently used as a service parking lot for Nordstrom.

Santiago Mejia/The Chronicle

In October, outrage erupted when San Francisco's Board of Supervisors voted down a proposal to build nearly 500 new homes — many affordable — on a downtown site at 469 Stevenson St. now being used for valet parking.

Of course, these same supervisors reject housing developments all the time. And yet this denial was especially brazen.

It came short on the heels of a major Court of Appeal decision upholding the state's powerful Housing Accountability Act, which requires cities to approve housing projects if a reasonable person *could* deem the project compliant with applicable

standards. Yet the supervisors who voted "no" didn't even try to argue that the project was noncompliant.

Instead, they attempted to evade the HAA by using a different law, the California Environmental Quality Act.

Technically, the board voted to reverse the city planning commission's certification of the project's environmental impact report—a report that took over two years to complete and certify in the first place. Board members demanded additional environmental studies, even as they openly admitted that their objections to the project — too big, not enough affordable units, risk of gentrification — had nothing to do with the environment. Oakland and Sonoma have also used similar CEQA maneuvers to hold up housing projects, too, albeit to much less fanfare.

The immediate question this raises is whether cities will be allowed to keep using CEQA to launder denials of housing that state law protects. Can bad-faith cities keep getting away with demanding round after round of ever more elaborate environmental studies, until developers cry uncle and walk away?

But there's also a deeper question. Why is a housing project that a city can't legally deny — because it is protected by state law — required to undergo an exhaustive environmental study in the first place?

CEQA requires local governments to carefully consider environmental concerns whenever they make discretionary decisions. For example, it requires cities to do environmental studies when they change their zoning ordinances.

San Francisco's city charter subjects all development projects to "discretionary review," making them all potentially subject to CEQA, even if they conform to zoning. But that doesn't mean every single project in San Francisco is put through the wringer of a multiyear environmental impact report. A report is required only if the development may have a "significant impact" on the environment.

But significant relative to what?

The developer of the Stevenson Street project had to complete an environmental

impact report because San Francisco's Planning Department concluded (after its own yearlong, 342-page study) that the building might have a significant local environmental impact in the form of shadows, wind, or (during construction) noise and air pollution, relative to leaving the site as a parking lot.

This is nuts.

After all, this was a proposal to put dense housing a block from a BART station, in a designated "priority development area" under the region's climate plan. Few projects could be more environmentally friendly.

Also, critically, California law doesn't allow the city to retain the site as a parking lot once a developer applies to build housing there.

There was no reason to require an environmental impact report for the Stevenson Street project unless it would have a significant larger impact than *any other* project of the size that state law authorizes and encourages developers to build on the site. If the impact of the 500-home building the developer proposed would be about the same as the impact of any other 500-home building on the site, then requiring the developer to prepare an environmental impact report was a colossal waste of time (two years and counting) and money. In the midst of a worsening housing crisis.

It doesn't have to be like this.

Under the federal statute on which CEQA was modeled, environmental review is limited to effects that are proximately caused by a government agency's discretionary decisions. Because California law prohibits San Francisco from downsizing the Stevenson Street project, the project's size isn't caused by the city's permitting discretion. And so the Stevenson Street project wouldn't require environmental analysis.

Or consider New York, where if a developer proposes a 10-story development on a site where the zoning currently allows a five-story building, the effect of the larger project is analyzed relative to a smaller one the zoning allows.

The bottom line is that there's an urgent need for fresh thinking about how to fit CEQA and the HAA together in a sensible way. Ideally, California's Legislature would do it, with clarifying amendments to one or both laws. But achieving meaningful CEQA reform through the Legislature has proven to be a Sisyphean task due to the powerful interest groups — first and foremost the building trades unions — that have mastered the art of using CEQA litigation to hold developers hostage until the unions secure a side-deal, thereby making housing harder to build — and more expensive when it is built.

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Action on this issue will require a full-court press by other actors: the courts, the Attorney General, and most importantly Gov. Newsom, who is riding high after crushing the recall attempt.

The governor has tools at his disposal to get the job done. He oversees the Department of Housing and Community Development, which is tasked with enforcing the HAA and other state housing laws. He also appoints the directors of the Natural Resources Agency and the Office of Planning and Research, who in

turn issue the official CEQA Guidelines, which spell out the nitty-gritty of environmental review.

The governor's housing department has launched an investigation of the 469 Stevenson St. debacle. A few days before Thanksgiving, the department delivered a strongly worded letter to San Francisco. This letter suggested that bad faith demands for superfluous environmental studies may violate the HAA. This interpretation — which is plausible but not open-and-shut — would greatly curtail

CEQA-laundered project denials. And it's an interpretation that courts are more likely to accept now that the executive branch of state government endorses it.

The letter is great, but it's just a start.

CEQA guidelines must be revisited, too. They don't even mention the HAA. Worse, they arguably call for full environmental impact reports even when a city has limited discretion over a project.

Stevenson St. is a case in point.

This is no way to run the show in a world where, as the HAA puts it, the lack of abundant infill housing is "undermining [California's] environmental and climate objectives" by causing "urban sprawl, excessive commuting, and air quality deterioration."

The housing shortage gets worse with each passing month that is wasted on irrelevant environmental review.

One of Newsom's first official acts after trouncing the recall was to sign a spate of new housing bills. Next in line for the governor's signature should be an executive order directing a revision of the CEQA Guidelines in light of the HAA. There's no

time to waste.

Christopher S. Elmendorf is a professor of law at UC Davis. Tim Duncheon is a lawyer based in San Francisco. Portions of this commentary were published on the State and Local Government Law Blog.

Written By
Christopher S. Elmendorf and Tim Duncheon

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BY CATHERINE HO

School of Law

University of California, Davis

400 Mrak Hall Drive

Davis, CA 95616

530.752.0243

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When Super-Statutes Collide: CEQA, the Housing Accountability Act, and Tectonic Change in Land Use Law

December 7, 2021

Christopher S. Elmendorf, Martin Luther King, Jr. Professor of Law, UC Davis
Timothy G. Duncheon, Law Clerk, U.S. District Court, the Northern District of California

When Super-Statutes Collide

CEQA, the Housing Accountability Act, and Tectonic Change in Land Use Law

Christopher S. Elmendorf, Martin Luther King, Jr. Professor of Law, UC Davis
Timothy G. Duncheon, Law Clerk, U.S. District Court, the Northern District of California*

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Abstract. This Essay explores the slow-motion collision between two statutes at the center of California's housing crisis: the California Environmental Quality Act (CEQA) and the state's Housing Accountability Act (HAA). Each statute has a bona-fide claim to being a "super-statute," one which exerts a "broad effect on the law." Yet the two statutes came of age in different eras—CEQA in the 1970s and the HAA in the 2010s—and have fundamentally different institutional and normative premises. After tracing the evolution of the statutes, we explore two problems at their intersection: (1) cities' use of endless CEQA review to launder the denial of housing projects that the HAA means to protect; and (2) analytical disarray as to the correct reference alternative to use in determining whether a city's approval of an HAA-protected project would cause a "significant" effect on the environment (the statutory trigger for an environmental impact report under CEQA). We propose solutions to these problems that harmonize the two laws – remaining faithful to the text and purpose of CEQA while fulfilling the HAA's instruction that it be interpreted "to afford the fullest possible weight to the interest of … housing." But our solutions are not inevitable. If courts and other actors are not thoughtful about these questions, CEQA may run roughshod over the HAA, crippling California's efforts to provide more housing and, ironically, to respond to the threat of climate change as well.

* The authors write in their personal capacity and do not represent any position of the University of California or the U.S. District Court of the Northern District of California. We thank Paul Campos, Meryl Chertoff, Sheila Foster, Dan Golub, Rick Frank, Sarah Jones, Moira O'Neill, David Schleicher, and Bryan Wenter for helpful feedback. Portions of this Essay were previously published in blog format at the State and Local Government Law Blog.

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Introduction

Observers erupted in fury when San Francisco's Board of Supervisors voted down a proposal to build nearly 500 new homes -- many affordable -- on an empty downtown lot used for valet parking.[1] The Board's October 2021 vote came short on the heels of a major Court of Appeal decision upholding the state's Housing Accountability Act (HAA), which the Legislature has greatly strengthened in recent years.[2] The HAA usually requires cities to approve housing projects that a reasonable person *could* deem compliant with applicable standards, even if other reasonable people might disagree.[3]

San Francisco evaded the HAA by using a different law, the California Environmental Quality Act (CEQA), to put the downtown project on ice. Oakland and Sonoma have also used the same maneuver, albeit to much less fanfare.[4] This presages an epic legal clash, which we explore in this Essay.

The HAA and the CEQA both have fair claims to being what professors Bill Eskridge and John Ferejohn call "super-statutes."[5] As Eskridge and Ferejohn define it, a super-statute is a law that

> (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.[6]

As we'll explain in Part I, CEQA became super in the 1970s, thanks to a run of California Supreme Court decisions that construed it broadly so as to give, as the Court saw it, "the fullest possible protection" to the environment.[7] The HAA began earning its stripes much more recently. The turning point came in 2017, when the Legislature dramatically strengthened the

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[1] Annie Gaus, *Supervisors Under Fire: Vote Against Proposed SOMA Apartment Building Sparks Furor, May Violate State Law*, S.F. STANDARD, Oct. 28, 2021; *Editorial: S.F. Supervisors Have Lost Their Minds on Housing. Here's What Mayor Breed Can Do About It*, S.F. CHRONICLE, Oct. 29, 2021; Gil Durand, *'Absurdity': San Francisco Leaders Stall SOMA Housing Project to Preserve Parking Lot*, S.F. EXAMINER, Oct. 29, 2021; Heather K. Knight, *S.F.'s Real Housing Crisis: Supervisors Who Took a Wrecking Ball to Plans for 800 Units*, S.F. CHRONICLE, Oct. 30, 2021; Alexis Kosoff, *Why State Lawmakers Are Fired Up over a Derailed S.F. Housing Project*, S.F. CHRONICLE, Nov. 2, 2021; Diana Ionescu, *San Francisco Supes Reject Proposal To Turn Parking Lot Into Housing*, PLANETIZEN, Nov. 23, 2021, https://www.planetizen.com/news/2021/11/115376-san-francisco-supes-reject-proposal-turn-parking-lot-housing.

[2] Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo, 68 Cal. App. 5th 820 (2021).

[3] CAL. GOV'T CODE § 65589.5(f)(4) & (j)

[4] *See* Letter from Daniel R. Golub on behalf of the Housing Action Coalition to the Hon. Barbara J. Parker, Oakland City Attorney, re: 1396 Fifth Street, Oct. 21, 2021 (on file with authors) (challenging city council's decision to sustain an appeal of the planning commission's unanimous determination that the housing project was exempt from CEQA); *Sonoma - 149 Fourth St*., CARLA BLOG, https://carlaef.org/legal-case/149-fourth-st-sonoma/ (stating that housing organization had settled their HAA claim after "r[unning] into an unfriendly judge who decided that nothing could overrule a city's CEQA decision").

[5] William N. Eskridge Jr & John Ferejohn, *Super-statutes*, 50 DUKE L.J. 1215 (2000).

[6] *Id*. at 1216.

[7] Friends of Mammoth v. Bd. of Supervisors, 8 Cal. 3d 247, 259 (1972); No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 75, (1974); Wildlife Alive v. Chickering, 18 Cal. 3d 190, 198 (1976).

law and codified that it "be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."[8]

The ostensible super-ness of the two statutes creates a real predicament for courts and other actors, because CEQA and the HAA could not be more different in their basic institutional and normative principles. Consider this:

- CEQA's working premise is that "new construction" is bad for the environment.[9] "Current environmental conditions" in the vicinity of a proposed project should be preserved if at all possible.[10] By contrast, the HAA regards the construction of housing in urbanized areas as presumptively good for the environment. It opens with a legislative finding that local barriers to housing development cause "urban sprawl, excessive commuting, and air quality deterioration," "undermining the state's environmental and climate objectives."[11]

- CEQA privileges slow, careful, deliberative evaluation of every possible environmental impact. If there is a "fair argument" that a project "may" have any significant local environmental impact, CEQA compels the preparation of an exhaustive environmental impact report (EIR).[12] And if a lawsuit is filed attacking a project's CEQA clearance, this usually suffices blocks construction while the litigation crawls along.[13] The HAA calls for speed. It requires cities to notify developers of any general plan or zoning standards a project violates within 30-60 days after receiving the complete project application,[14] and

[8] S.B. 167, 2017–2018 Reg., Leg. Sess. (Cal. 2017).
[9] *See*, *e.g.*, Friends of Westwood, Inc. v. City of Los Angeles, 191 Cal. App. 3d 259, 269 (1987) ("the purpose of CEQA is to minimize the adverse effects of new construction on the environment"). This premise is laid bare by the fact that CEQA requires no analysis before a government agency denies a project, see Cal. Pub. Res. Code § 21080(b)(5) (exempting "[p]rojects which a public agency rejects or disapproves"), whereas a full environmental impact report is required if there's a "fair argument" that the approval of a project "may" have a significant environmental effect on any aspect of the physical environment, no matter how large the project's countervailing environmental benefits. *See* No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68 (1974). Although CEQA codifies a legislative intent that agencies in regulating private activities give "major consideration … to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian," Cal. Pub. Res. Code § 21000(g), the proviso about "a decent home … for every Californian" has to date had no apparent effect on the courts' CEQA jurisprudence.
[10] *See* CAL. PUB. RES. CODE § 21002 (declaring "the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects"); 14 CAL. CODE REGS § 15125 (stating that an EIR shall describe existing environmental conditions in the vicinity of the project, and that this description of existing conditions shall normally serve as the baseline for evaluating potential environmental effects of the project).
[11] CAL. GOV'T CODE § 65589.5(a). See also CAL. GOV'T CODE § 65589.5(b) ("It is the policy of the state that a local government not reject or make infeasible housing development projects ... without a thorough analysis of the economic, social, and environmental effects of the action").
[12] No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 75 (1974).
[13] STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT § 23.92 (CEB 2021) ("PRACTICE TIP: Injunctions are often not necessary to prevent work on the project from proceeding. Although the project applicant may start construction while litigation is pending, the applicant proceeds at its own risk. Because an adverse ruling on the merits by the trial court may result in an order enjoining construction, the project applicant may not be willing to start construction before the trial court decides the case.") (citations omitted)
[14] CAL. GOV'T CODE § 65589.5(j)(2).

it stipulates that violations of the state's Permit Streamlining Act shall be deemed violations of the HAA.[15]

- Courts in CEQA cases presume that cities act in good faith (unless the city shortcuts environmental review).[16] When pertinent facts and empirical inferences are disputed, courts give deference to the city's judgment.[17] The HAA distrusts cities. It eliminates the traditional deference courts gave to cities regarding a housing project's compliance with local standards;[18] it prevents cities from using discretionary standards to deny or reduce the density of a project;[19] and it authorizes courts to order the approval of projects that were denied in bad faith.[20]

So how will the HAA and CEQA fit together? On one view, CEQA must reign supreme, because a longstanding provision of the HAA states, "Nothing in this section shall be construed to relieve the local agency from complying with … the California Environmental Quality Act."[21] California courts have sometimes (less than carefully) concluded that such a clause entirely subordinates one statute to another.[22]

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[15] CAL. GOV'T CODE §§ 65589.5(j) & (h)(6).

[16] This presumption manifests doctrinally as a distinction between *de novo* or "independent judgment" and deferential "substantial evidence" review. On questions where cities are considered trustworthy, the courts review the city's decision deferentially ("substantial evidence"); on questions where cities' competence or good faith is doubted, courts review the city's decision de novo. The principal CEQA issues that get *de novo* / independent judgment review are about shortcutting of environmental review, specifically (1) determinations that a project does not require an environmental impact report because there's no "fair argument" that the project may have a significant environmental effect, see STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT § 6.76 (CEB 2021) (citing and discussing cases); (2) whether an EIR sufficiently discussed a potential environmental impact, see *Sierra Club v. County of Fresno*, 6 Cal. 5th 502, 511 - 16 (2018); and (3) whether the agency complied with the procedural requirements of CEQA, *id.* at 512. Conversely, cities' factual determinations and empirical inferences are reviewed deferentially. *Sierra Club*, 6 Cal. 5th at 511-16.

[17] *Sierra Club*, 6 Cal. 5th at 511-16.

[18] CAL. GOV'T CODE § 65589.5(f)(4); Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo, 68 Cal. App. 5th 820, 283 Cal. Rptr. 3d 877, 892-95 (2021) (rejecting city's argument for deference on meaning of its design guidelines. and applying HAA's "reasonable person" standard to determine project's compliance).

[19] CAL. GOV'T CODE § 65589.5(h)(8) & (j); Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo, 68 Cal. App. 5th 820, 283 Cal. Rptr. 3d 877, 890-94 (2021) (reversing city's denial of project because city relied on design guidelines that were not objective).

[20] CAL. GOV'T CODE § 65589.5(k)(1) (A)(ii).

[21] CAL. GOV'T CODE § 65589.5(e).

[22] For an illustration of how "reigning supreme" works in practice, consider the Court of Appeal's treatment of the relationship between a different environmental statute (the Coastal Act) and a different housing statute (the Density Bonus Law) in *Kalnel Gardens, LLC v. City of Los Angeles*, 3 Cal. App. 5th 927, 208 Cal. Rptr. 3d 114 (2016). Like the HAA, the Density Bonus Law states that it shall not be construed in derogation of the Coastal Act. *Compare* Cal. Gov't Code 65589.5(e), *with* Cal. Gov't Code 65915(m). However, the Coastal Act provides that the agency in charge of coastal development permits "may not require measures that reduce residential densities below the density sought by the applicant if the density sought is within the permitted density [under local zoning plus state density bonus law], unless the issuing agency ... makes a finding, based on substantial evidence in the record, that the density sought by the applicant cannot feasibly be accommodated on the site in a manner that is in conformity with [the Coastal Act]." Cal. Pub. Res. Code § 30604(f). In *Kalnel Gardens*, the agency denied the housing project on aesthetic grounds without making this infeasibility finding. The court excused the agency from the finding requirement on the theory that an outright denial of a housing project is not a "density reduction." 3 Cal.App.5th at 947. This wordplay move was textually unnecessary (surely reducing density to zero can be described as a "reduction in density") and had the effect of categorically elevating the Coastal Act over the Density Bonus Law,

But, as noted, the Legislature more recently proclaimed that the HAA "shall be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."[23] To achieve its stated purpose – to "meaningfully and effectively curb[] the capability of local governments to deny, reduce the density for, or render infeasible housing development projects"[24] – the HAA must exert gravitational pull on CEQA. The alternative is a world in which cities would have virtually unfettered discretion to use CEQA to delay projects indefinitely, to force project proponents to pay for round after round of expensive environmental studies, and to encumber projects with costly "mitigation" requirements even if the project would be a big environmental win.[25]

California's housing and climate goals hang in the balance. Because CEQA focuses government decisionmakers on local environmental issues, it effectively deemphasizes climate concerns, which occur on a longer time horizon and in a more geographically dispersed way.[26] Building dense housing in urban areas dramatically reduces vehicle emissions,[27] as the HAA recognizes, and alleviates pressure to build in the state's wildfire-prone "wildland-urban interface."[28] Harmonizing CEQA and the HAA is no mere academic exercise.

* * *

This Essay runs as follows. Part I recounts the evolution of CEQA and the HAA, illustrating their respective claims to super-statute status. We will see that CEQA's super-ness was revealed in part by its crushing of a pro-development precursor to the HAA, the Permit Streamlining Act.[29]

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notwithstanding pretty clear textual indications that the Legislature wanted the two laws to be integrated with one another. *See* Cal. Pub. Res. Code § 30604(f); Cal. Gov't Code § 65915(f)(5) & (j).

[23] S.B. 167, 2017–2018 Reg., Leg. Sess. (Cal. 2017); CAL. GOV'T CODE § 65589.5(a)(2)(L).

[24] CAL. GOV'T CODE § 65589.5(a)(2)(K).

[25] *See infra* Parts II & III.

[26] *See* J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laws?*, 44 VT. L. REV. 693, 718 (2020) ("Laws like the NEPA [the federal analogue to CEQA] and the ESA empower environmental protection interests to demand renewable energy projects meet stringent short-term goals--the 'kill zero bats' standard--when doing so may jeopardize the long-term goal of saving all the bats, so to speak.") CEQA also excuses decisionmakers from any obligation to analyze the environmental consequences of maintaining the status quo, see CAL. PUB. RES. CODE § 21080(b)(5) (excluding "[p]rojects which a public agency rejects or disapproves"). This leaves cities free to lock in a low-density status quo (or even valet parking lots!) near transit stations, notwithstanding the central importance of infill development for reducing vehicular greenhouse gas emissions.

[27] *See* Christopher M. Jones et al., *Carbon Footprint Planning Quantifying Local and State Mitigation Opportunities for 700 California Cities*, 3 URB. PLAN. 35 (2018); NATHANIEL DECKER ET AL., TERNER CTR. FOR HOUSING INNOVATION, RIGHT TIME, RIGHT PLACE: ASSESSING THE ENVIRONMENTAL AND ECONOMIC IMPACTS OF INFILL RESIDENTIAL DEVELOPMENT THROUGH 2030, at 27-29 (2018).

[28] By 2050, at the current rate of growth and under current growth patterns, an additional 645,000 housing units will be developed in very high fire-hazard severity zones. KAREN CHAPPLE ET AL., NEXT 10 & UC BERKELEY CTR. FOR COMM. INNOVATION, REBUILDING FOR A RESILIENT RECOVERY: PLANNING IN CALIFORNIA'S WILDLAND URBAN INTERFACE 7 (2021); *see* Greg Rosalsky, *How A Blistering Housing Market Could Be Making Wildfires Even More Dangerous*, NPR, Sept. 14, 2021https://www.npr.org/sections/money/2021/09/14/1036085807/how-a-blistering-housing-market-could-be-making-wildfires-even-more-dangerous.

[29] CAL. GOV'T CODE § 65920 et seq.

Part II delves into the problem one of us has dubbed "CEQA-laundered project denials," now exemplified by 469 Stevenson St. project in San Francisco.[30] The municipal strategy of using CEQA to evade the HAA exploits soft spots in CEQA and background principles of administrative law. But we shall argue that the "super" HAA can provide a remedy, either directly or through its gravitational pull on CEQA and administrative law.

Part III contends that the HAA ought to shape environmental impact analysis itself. Because CEQA only applies to discretionary governmental acts,[31] environmental review for HAA-protected housing projects should consider only impacts caused by discretionary conditions of approval imposed by the city, not all of the impacts that result from adding new dwelling units to the site. This only makes sense: the latter are caused by state law (the HAA), not municipal discretion. Our HAA-informed gloss on the scope of CEQA review would eliminate substantial environmental reviews for the mine run of zoning-compliant housing projects.[32]

Our scope-of-review proposal is consistent with CEQA's first principles, but it would require jettisoning or substantially circumscribing several judicial precedents which have been incorporated into the official CEQA Guidelines.[33] It's up to the Governor and his appointees at the Office of Planning of Planning and Research and the Natural Resources Agency to decide whether to revise the Guidelines. If they do, and if the Legislature acquiesces, then the HAA will truly merit the moniker, "super-statute." It will have "stuck in the public culture" and exerted "a broad effect on the law."[34]

But that is only one possible future. Another is that CEQA swallows the HAA, expelling more fodder for critics who've lampooned California's symbolically liberal but operationally conservative politics.[35] Stay tuned.

[30] https://twitter.com/CSElmendorf/status/1454460433671229443.
[31] CAL. PUB. RES. CODE § 21080.
[32] It's important to recognize that CEQA does not itself confer discretion on municipal decisionmakers. *See* CAL. PUB. RES. CODE § 21004 ("In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division").
[33] *See infra* notes 230-242 and accompanying text.
[34] Eskridge & Ferejohn, *supra* note 5, at 1216.
[35] Ezra Klein, *California Is Making Liberals Squirm*, N.Y. TIMES, Feb. 11, 2021.

I. How CEQA and the HAA Became "Super"

Recall Eskridge and Ferejohn's definition. A super-statute is a law that:

> (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.[36]

Below, in Section A, we explain how CEQA became a super-statute in the 1970s and then muscled a precursor of the HAA into near-oblivion. Section B takes up the HAA and shows how it's becoming super today.

A. The California Environmental Quality Act

Enacted in 1970, a year after Congress passed the National Environmental Policy Act, CEQA heralded a transition from Governor Pat Brown's California -- a land of burgeoning suburbs and massive water and highway construction projects – to the slow-growth California that his son, Jerry, would preside over.[37] Whether the Legislature intended CEQA to be a super-statute is open to debate, but, looking back, it's clear that CEQA did "establish[] a new normative [and] institutional framework for state policy," and that the framework "stuck in the public culture" and had "a broad effect on the law."[38]

Two early judicial decisions launched CEQA on its path to super-ness. In *Friends of Mammoth v. Board of Supervisors*, the California Supreme Court gave a "broad interpretation to the act's operative language" and extended CEQA to cover private activities (such as homebuilding) that require public permits.[39] Next came *No Oil, Inc. v. City of Los Angeles*, which held that CEQA requires preparation of a full environmental impact report "whenever it *can be fairly argued* ... that the project *may* have *a* significant environmental impact," not just where the project is likely to have "important" or "momentous" impacts.[40]

Beyond their immediate holdings, *Friends of Mammoth* and *No Oil* stood for a larger principle: that CEQA should be construed broadly and purposefully to give "the fullest possible protection"

[36] Eskridge & Ferejohn, *supra* note 5.
[37] For an in-depth look at how this transition played out in the California Supreme Court, see Joseph F. DiMento et al., *Land Development and Environmntal Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 UCLA L. REV. 859 (1980)
[38] Eskridge & Ferejohn, *supra* note 5, at 1216.
[39] 8 Cal. 3d 247, 259 (1972).
[40] 13 Cal. 3d 68, 75, (1974).

to the environment.[41] Although the Legislature has repeatedly tinkered with CEQA,[42] it hasn't challenged this foundational maxim, which courts continue to invoke to this day.[43]

CEQA has also had "an effect beyond the four corners of the statute."[44] The best example is the courts' reliance on CEQA to disembowel the Permit Streamlining Act of 1977 (PSA),[45] which was something of a precursor to the Housing Accountability Act.

The PSA originally required cities to approve or deny applications for a "development project" within one year of receiving a complete application, on pain of the project being "deemed approved" as a matter of law.[46] The Act did not expressly state that an agency's failure to complete environmental review within the one-year period would result in the project's constructive approval, but everything about the statute suggests that this was the Legislature's intention.

Consider, first, that the bill that created the PSA also established time limits for completing and certifying CEQA reviews, the longest of which corresponds to the PSA's one-year limit for approving or denying a development application.[47] The statute also stated that the PSA's one-year limit for project approval may be waived if the lead agency prepares an environmental impact statement under the National Environmental Policy Act (NEPA), the federal analogue to California's CEQA.[48] This implies that if a project only requires review under CEQA, it is subject to the PSA's usual one-year limit and constructive approval penalty. Finally, the opening article of the PSA declared, "To the extent that the provisions of this chapter conflict with any other provision of law, the provisions of this chapter shall prevail."[49] No carveout for CEQA was provided.

Yet when courts confronted the question of whether a development project could be deemed approved by operation of the PSA notwithstanding the agency's failure to complete and certify an environmental impact report, they answered with a perfunctory no.[50] Automatic approval in such circumstances would be an unthinkably "drastic" result, the Court of Appeal said, and because the Legislature "did not mention EIR certification in the [PSA's] automatic approval

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[41] *See*, *e.g.*, *Wildlife Alive v. Chickering*, 18 Cal. 3d 190, 198 (1976) (relying on *Friends of Mammoth* and *No Oil* for the proposition, "[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") (internal quotations omitted).

[42] KOSTKA & ZISCHKE, *supra* note 16, §§ 1.24 - 1.26.

[43] *See*, *e.g.*, *Sierra Club v. Cty. of Fresno*, 6 Cal. 5th 502, 511 (2018) ("The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.") (internal citations and quotations omitted); *Mountain Lion Foundation v. Fish & Game Com*., 16 Cal.4th 105, 125 (1997) (holding that CEQA exemptions are to be construed narrowly).

[44] Eskridge & Ferejohn, *supra* note 5, at 1216.

[45] Cal. Stats. 1977 ch. 1200.

[46] Cal. Stats. 1977 ch. 1200, § 1, p. 3995-96.

[47] Cal. Stats. 1977 c. 1200, § 10, p. 4001.

[48] In this circumstance, the PSA's time limit for project approval is 60 days following certification of a "combined environmental impact report [CEQA]-environmental impact statement [NEPA]." Cal. Stats.1977 ch. 1200, § 1, p. 3996.

[49] Cal. Stats.1977 ch. 1200, § 1, art. 1, p. 3993 (emphasis added).

[50] Land Waste Mgmt. v. Contra Costa Cnty. Bd. of Supervisors, 222 Cal. App. 3d 950 (1990).

provisions," the court refused to countenance it.[51] The gravitational pull of the super-statute, CEQA, overwhelmed what should have been a fairly easy inference from the text and structure of the PSA.

In a later case, the Court of Appeal held that CEQA's time limits could be enforced by mandamus -- if a city sits for years on a completed environmental impact report without taking official action to certify or disapprove it.[52] But this gesture at the enforceability of the one-year deadline for EIRs was gravely undermined by another Court of Appeal decision, *Schellinger Brothers v. City of Sebastopol*.[53] *Schellinger* held that courts may not order a city to certify an environmental impact report (as opposed to ordering the city to make up its mind about whether to certify it).[54] Even more damningly, *Schellinger* held that the project applicant had, by cooperating with the city well past the one-year deadline, forfeited its right to enforce CEQA's deadlines.[55]

Nowhere did *Schellinger* acknowledge that developers have an obvious economic incentive to cooperate with cities that exercise discretionary authority over their projects. That the court's decision had the practical effect of nullifying the PSA for any project that requires an environmental impact report also went unmentioned. The pull of the super-statute had sucked the guts out of the PSA.

B. The Housing Accountability Act

The HAA was far from super as enacted in 1982, though even then it had becomeclear that cities were putting the breaks on housing production..[56] The law originally consisted of just two short paragraphs telling local governments to approve zoning-compliant housing projects unless the project would injure public health or safety.[57] A 1990 amendment added additional protections for affordable projects (today defined as 20% low-income or 100% moderate income).[58] Among other things, the amendment stipulated that a city may rely on its general plan or zoning to deny

[51] *Id.* at 961-62.
[52] Sunset Drive Corp. v. City of Redlands, 73 Cal.App.4th 215 (1999).
[53] 179 Cal.App.4th 1245 (2009).
[54] *Id.* at 1262-66.
[55] *Id.* at 1267-70.
[56] Cal. Legislative Analyst's Office, California's High Housing Costs: Causes and Consequences 7 (2015), https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf (noting that California home prices were 80% higher than the national average by 1980, compared to just 30% higher than the national average in 1970). Since then, there has been extensive literature exploring the political economy and public choice explanations for why so few American cities are pro-development. *See, e.g.*, William A. Fischel, The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies 1 (2001) (describing the organizing power of local incumbent homeowners); David Schleicher, *City Unplanning*, 122 Yale L.J. 1670, 1676-78 (2013) (emphasizing the power individual local legislators have over their districts in the absence of differentiated party competition); Roderick M. Hills, Jr. & David Schleicher, *Balancing the "Zoning Budget"*, 63 Case West. L. Rev. 81 (2011) (emphasizing the difficulty of mobilization by developers against seriatim downzonings).
[57] Cal. Stats. 1982 ch. 1438.
[58] Cal. Stats. 1990 ch. 1439 (S.B. 2011).

an affordable project only if the city has adopted a state-approved "housing element" to accommodate regionally needed housing.[59]

Subsequent tweaks to the HAA (1) disallowed local governments from denying zoning-compliant projects except on the basis of written health or safety standards;[60] (2) defined projects as zoning-compliant if they satisfy the objective standards found in the city's zoning code and general plan as of the date of the developer's project application;[61] (3) cracked down on certain obvious ruses, such as cities defining zoning-code violations as a health-and-safety violation;[62] (4) required cities that wrongfully deny an affordable project to pay the prevailing party's legal fees;[63] (5) authorized courts to compel cities to take action on a wrongfully denied project within 60 days;[64] and (6) authorized courts to fine cities that deny projects in bad faith and continue dilly-dallying after the court's order.[65]

All of this sounds pretty super, but if the test for a super-statute is that it "sticks" in "the public culture" and "has a broad effect on the law,"[66] then the HAA did not become a serious candidate until 2016-2017. There had been very few reported cases under the statute, most likely because developers who hope to do business with a city in the future are naturally reluctant to sue it. In 2015, however, a ragtag bunch of self-described "Yimbys" coalesced in San Francisco, discovered the HAA, and started suing suburbs for denying regionally needed housing.[67] It wasn't entirely clear whether they even had standing, but the Legislature answered their call and authorized HAA enforcement by "housing organizations."[68]

A year later, in 2017, the Legislature enacted a trio of bills that dramatically strengthened the HAA and declared it to be super.[69] Assembly Bill 1515 took up the question of what it means for a housing project to comply with general plan, zoning, and design standards.[70] The courts had long given deference to cities on such matters, refusing to set aside municipal determinations that a project is noncompliant if any reasonable person could agree with the city's conclusion.[71] AB 1515 turned that doctrine on its head, defining projects as compliant as a matter of law if any reasonable person could deem the project to comply on the record before the city – notwithstanding reasonable or even strong arguments going the other way.[72]

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[59] CAL. GOV'T CODE § 65589.5(d)(5).
[60] S.B. 1711, 1991-1992 Reg., Leg Sess. (Cal. 1992), now codified as CAL. GOV'T CODE § 65589.5(d)(2) & (j)(1).
[61] S.B. 748, 1999-2000 Reg., Leg Sess. (Cal. 1999); now codified as CAL. GOV'T CODE § 65589.5(j)(1).
[62] S.B. 575, 2005-2006 Reg., Leg Sess. (Cal. 2005), now codified as CAL. GOV'T CODE § 65589.5(d)(2)(A) (declaring that an affordable housing project's inconsistency with the city's general plan or zoning ordinance is not, per se, a "specific adverse impact" on health or safety violation of a written health or safety standard).
[63] A.B. 369, 2001-2022 Reg., Leg Sess. (Cal. 2001), now codified as CAL. GOV'T CODE § 65589.5(k)(1)(A)(ii).
[64] S.B. 748, 1999-2000 Reg., Leg Sess. (Cal. 1999), now codified as CAL. GOV'T CODE § 65589.5(k)(1)(A)(ii).
[65] S.B. 575 (2005). S.B. 575, 2005-2006 Reg., Leg Sess. (Cal. 2005), now codified as CAL. GOV'T CODE § 65589.5(k)(1)(B).
[66] Eskridge & Ferejohn, *supra* note 5, at 1216.
[67] CONNOR DOUGHERTY, GOLDEN GATES 93-116 (2020).
[68] A.B. 2584, 2015-2016 Reg., Leg Sess. (Cal. 2016), now codified as CAL. GOV'T CODE 65589.5 § (k)(1)(A)(i).
[69] A.B. 678, 2017-2018 Reg., Leg. Sess. (Cal. 2017); A.B. 1515, 2017–2018 Reg., Leg. Sess. (Cal. 2017); S.B. 167, 2017–2018 Reg., Leg. Sess. (Cal. 2017).
[70] A.B. 1515, 2017–2018 Reg., Leg. Sess. (Cal. 2017).
[71] *See* No Oil, Inc. v. City of Los Angeles, 196 Cal. App. 3d 223, 243 (1987); CECILY TALBERT BARCLAY & MATTHEW S. GRAY, CALIFORNIA LAND USE & PLANNING LAW 538-40 (36th ed. 2018).
[72] The new standard is codified as CAL. GOV'T CODE § 65589.5(f)(4).

A companion bill, SB 167, required cities to give prompt written notice to developers of any zoning, general plan, or design standard that the proposed project violates, on pain of the project being deemed to comply as a matter of law.[73] SB 167 also narrowed the HAA's carveout for health and safety standards by requiring cities to show by a preponderance of the evidence that the project would in fact violate a specific health or safety standard.[74] (The previous evidentiary standard gave cities a lot of slack.) Finally, SB 167 codified numerous Legislative findings, including this:

> The Legislature's intent in enacting [the HAA] in 1982 and in expanding its provisions since then was to significantly increase the approval and construction of new housing … by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects.... That intent has not been fulfilled.[75]

And this:

> It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.[76]

A year later, the Legislature added this:

> It is the intent of the Legislature that the conditions that would have a specific, adverse impact upon the public health and safety [within the meaning of the HAA] arise infrequently.[77]

In 2019, the Legislature codified a preliminary application process, allowing developers to quickly establish the date on which the zoning, general plan, and health and safety standards applicable to their project would be locked.[78] The Legislature also spelled out what it means for a standard to qualify as objective, such that it may be used to deny or reduce the density of a housing project.[79]

All of this certainly evinces a legislative intent to forge a super-statute, but whether the HAA "'stick[s]' in the public culture such that ... its institutional or normative principles have a broad

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[73] S.B. 167, 2017–2018 Reg., Leg. Sess. (Cal. 2017), now codified as CAL. GOV'T CODE § 65589.5(j)(2).
[74] CAL. GOV'T CODE § 65589.5(j)(1).
[75] CAL. GOV'T CODE § 65589.5(a)(2)(K).
[76] CAL. GOV'T CODE § 65589.5(a)(2)(L).
[77] A.B. 3194, 2017–2018 Reg., Leg. Sess. (Cal. 2018), now codified as CAL. GOV'T CODE § 65589.5(a)(3).
[78] S.B. 330, 2019-2020 Reg., Leg. Sess. (Cal. 2019); CAL. GOV'T CODE §§ 65943 & 65589.5(h)(5). Originally slated to expire after 5 years, S.B. 330 was extended for another half decade by S.B. 8, 2021-2022 Reg., Leg. Sess. (Cal. 2021).
[79] CAL. GOV'T CODE § 65589.5(h)(8) ("'[O]bjective' means involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official.").

effect on the law"[80] ultimately depends on how other actors respond to it. Will the courts, the executive branch, and local governments also treat the HAA as super?

In September of 2021, the pumped-up HAA passed its first judicial test with flying colors.[81] The City of San Mateo had denied a small condo project on the basis of the city's Multi-Family Design Guidelines, which prescribe "a transition or step in height" between new multifamily buildings and adjoining single-family homes.[82] When a nonprofit housing organization challenged the project denial in court, San Mateo argued that the HAA violated both its right to "home rule" under California's constitution and the prohibition against delegation of municipal authority. In the alternative, the city asserted that the HAA's definition of project compliance left intact the tradition of judicial deference to cities on questions about the meaning of local ordinances and that the city in denying the project had plausibly "interpreted" its design guidelines to require setbacks the project lacked. A trial court accepted the city's constitutional and statutory arguments,[83] but the Court of Appeal would have none of it.

Before the appellate court, San Mateo and local government *amici* mustered new constitutional attacks on the HAA -- not just home rule and private delegation, but due process too.[84] It would have been easy for the Court of Appeal to dodge the new issues, but the court reached out and decided all of the constitutional questions – against the city – thereby securing the HAA's footing going forward.[85] The appellate court also carefully traced the evolution of the HAA, juxtaposing it against the seeming intractability of California's housing shortage. It concluded, "The HAA is today strong medicine precisely because the Legislature has diagnosed a sick patient."[86]

The Legislature's instruction that the HAA "be interpreted and implemented in a manner to afford the fullest possible weight to … housing" was reiterated three times in the court's opinion.[87]

As for San Mateo's design guidelines, the Court of Appeal held that they were not objective, and, in the alternative, that a reasonable person could deem the project at issue to comply with them.[88] Hard-eyed independent judicial review, not deference, was the order of the day. "[It would be] inappropriate for us to defer to the City's interpretation of the Guidelines," the court

[80] Eskridge & Ferejohn, *supra* note 5, at 1216.
[81] Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo, 68 Cal. App. 5th 820, 283 Cal.Rptr.3d 877 (2021).
[82] 283 Cal.Rptr.3d at 883-85.
[83] Order Denying Petition for Writ of Administrative Mandate at 3-4, Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo (San Mateo Superior Court, Nov. 7, 2019).
[84] Respondents' Brief in Opposition to Petitioners' Opening Brief, California Renters Legal Advocacy & Educ. Fund v. City of San Mateo, 68 Cal.App.5th 820 (2021); Amicus Curiae Brief of the Cal. State Ass'n of Counties in Support of Respondent City of San Mateo et al., California Renters Legal Advocacy & Educ. Fund v. City of San Mateo, 68 Cal.App.5th 820 (2021).
[85] 283 Cal.Rptr.3d at 895-902.
[86] 283 Cal.Rptr.3d at 902.
[87] 283 Cal.Rptr.3d at 887, 894, 902.
[88] 283 Cal.Rptr.3d at 889-95.

explained, lest the City "'circumvent[] what was intended to be a strict limitation on its authority.'"[89]

CaRLA v. City of San Mateo is only one case,[90] of course, but other actors in California's legal-political establishment are also embracing the HAA and signaling that they want it to have "a broad effect on the law."[91] After the trial court in *CaRLA v. San Mateo* struck down the HAA, Attorney General Becerra announced that his office would intervene on appeal.[92] When the Court of Appeal's decision came down, new AG Bonta put out a press release trumpeting the big win.[93]

While *CaRLA v. City of San Mateo* was pending, the Governor requested and the Legislature authorized funding for a new Housing Accountability Unit within the Department of Housing and Community Development.[94] Fully staffed, the HAU will be a 25-person team that investigates alleged violations of state housing law, sends warning letters to cities, and makes referrals to the AG's new "housing strike force."[95] The HAA is not the only housing law the HAU and the strike force will enforce, but it is the capstone, and the fact that these new enforcement capacities came together in the shadow of *CaRLA v. City of San Mateo* suggests that the HAA is in fact bringing about "a new normative [and] institutional framework for state policy," one which will "stick[] in the public culture" and have "a broad effect on the law."[96]

The acid test is now at hand. Two days after San Francisco's Board of Supervisors stalled the 469 Stevenson St. project – voting to require further environmental study while treating the vote as a project denial[97] – the director of the state housing department announced that the Housing Accountability Unit had launched an investigation.[98] Is the HAA super enough to stand up to

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[89] 283 Cal.Rptr.3d at 893-94 (quoting Ruegg & Ellsworth v. City of Berkeley, 63 Cal.App.5th 277, 299 (2021)). *Ruegg* is an important case that takes a similar no-deference stance in the context of SB 35, a recently enacted bill that requires cities that are not making adequate progress toward their share of the regional housing target to permit certain projects ministerially. *See* S.B. 35, 2017–2018 Reg., Leg. Sess. (Cal. 2017); CAL. GOV'T CODE § 65913.4.

[90] Though *Ruegg & Ellsworth v. City of Berkeley*, *supra* note 89, is similar in spirit.

[91] Eskridge & Ferejohn, *supra* note 5, at 1216.

[92] Emily Durey, *State Intervenes in San Mateo Housing Case that Could Have Major Implications*, MERCURY NEWS, Jan. 15, 2020.

[93] Press Release, *Attorney General Bonta Hails Appellate Court Ruling Upholding Key California Affordable Housing Law*, Sept. 13, 2021, https://oag.ca.gov/news/press-releases/attorney-general-bonta-hails-appellate-court-ruling-upholding-key-california.

[94] Conor Dougherty, *California Housing Is a Crisis Newsom Can Take Into His Own Hands*, N.Y. TIMES, Sept. 16, 2021; Press Release, *Governor Newsom Signs Legislation to Increase Affordable Housing Supply and Strengthen Accountability, Highlights Comprehensive Strategy to Tackle Housing Crisis*, Sept. 28, 2021, https://www.gov.ca.gov/2021/09/28/governor-newsom-signs-legislation-to-increase-affordable-housing-supply-and-strengthen-accountability-highlights-comprehensive-strategy-to-tackle-housing-crisis/.

[95] *What Local Governments Need to Know About the New Housing Accountability Unit*, CALIFORNIACITYNEWS.ORG, Nov. 4, 2021, https://www.californiacitynews.org/2021/11/what-local-governments-need-know-about-new-housing-accountability-unit.html; Press Release, *Attorney General Bonta Launches Housing Strike Force, Announces Convening of Tenant Roundtables Across the State*, Nov. 3, 2021, https://oag.ca.gov/news/press-releases/attorney-general-bonta-launches-housing-strike-force-announces-convening-tenant.

[96] Eskridge & Ferejohn, *supra* note 5, at 1216.

[97] *See infra* notes 101-114 and accompanying text.

[98] J.K. Dineen, *State Investigating S.F.'s Decision to Reject Turning Parking Lot into 500 Housing Units*, S.F. CHRONICLE, Oct. 28, 2021.

CEQA? Or will it tumble like its precursor, the Permit Streamlining Act? That is the subject of the next Part.

II. Does the HAA (or anything else) Provide a Remedy CEQA-Laundered Project Denials?

The HAA prevents cities from denying or reducing the density of housing projects, but it doesn't exempt projects from environmental review under CEQA.[99] CEQA spells out time limits for the completion of environmental reviews, but as Part I explained, those limits have proven illusory in court.[100] So if a city wants to deny a project that the HAA protects, what's to keep the city from laundering the denial, as it were, through CEQA? Can the city keep asking the developer for additional environmental studies until, after squandering years and fortunes, the developer cries uncle and walks away?

That's the million-dollar question raised by our running example, the San Francisco Board of Supervisors' divided vote sustaining a local gadfly's appeal of the 469 Stevenson St. project. Rather than deny the project outright or reduce its density (likely HAA violations), the Board reversed the planning commission's certification of the project's Environmental Impact Report and directed the clerk to prepare findings that the EIR was inadequate.[101]

Yet in view of what the Supervisors said at the hearing and afterwards, it's pretty clear that the Board's real objective was not to air out and mitigate specific environmental impacts but to nix the project. Most of the Supervisors who voted "No" argued that the project was not affordable enough and would cause gentrification[102] – which is not an environmental impact,[103] and which is exceedingly unlikely to be caused by the project in any event.[104] Supervisor Mandelman told a

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[99] CAL. GOV'T CODE § 65589.5(e).

[100] *See supra* notes 44-55 and accompanying text.

[101] San Francisco Bd. of Supervisors, Meeting Minutes – Draft, Tues, Oct. 26, 2021, https://sfbos.org/sites/default/files/bag102621_minutes.pdf.

[102] Supervisor Walton argued that the new housing would "have a very significant displacement and social economic impact on the Sixth Street corridor." Joe Kukura, *Supes Shoot Down 27-Story SoMa Residential Tower Over Seismic, Displacement Concerns*, SFIST, Oct. 27, 2021, https://sfist.com/2021/10/27/supes-shoot-down-27-story-soma-residential-tower-over-earthquake-displacement-concerns/. Supervisor Preston stated he was "baffled" that the city did not get independent guidance in analyzing impacts of gentrification and displacement. Tim Redmond, *In Dramatic Move, Supes Block Huge Luxury Housing Project in Soma*, 48HILLS, Oct. 27, 2021, https://48hills.org/2021/10/in-dramatic-move-supes-block-huge-luxury-housing-project-in-soma/ Supervisor Chan commented that it was "interesting" that the Planning Commission did not "broaden its analysis" to include gentrification impacts. *Id.*

[103] *See* Porterville Citizens for Responsible Hillside Dev. v. City of Porterville, 157 Cal. App. 4th 885, 905–06 (2007) ("Unsubstantiated fears about potential economic effects resulting from a proposed project are not environmental impacts that may be considered under CEQA."). CEQA focuses on impacts on the "physical environment," see Cal. Pub. Res. Code § 21065, 4 Cal Code Regs §§ 15060(c)(2), (3), 15378(a), not social impacts. However, one envelope-pushing trial court recently required CEQA analysis of potential "displacement effects" from a university's decision to increase enrollment without providing a commensurate increase in student housing. *See* Save Berkeley's Neighborhoods v. Regents of Univ. of Cal., No. RG19022887, Alameda Sup. Ct., Aug. 23, 2021; Eric Biber, *CEQA and Socioeconomic Impacts*, LEGAL PLANET, Sept. 24, 2021, https://legal-planet.org/2021/09/26/ceqa-and-socioeconomic-impacts/.

[104] The vast majority studies with a plausible strategy for identifying the causal effect of new housing development on nearby rents have found that the effect is negative. For a review, see SHANE PHILLIPS ET AL., RESEARCH ROUNDUP: THE EFFECT OF MARKET-RATE DEVELOPMENT ON NEIGHBORHOOD RENTS (UCLA Lewis Center, Feb. 17, 2021), https://www.lewis.ucla.edu/research/market-rate-development-impacts/. Adverse gentrification effects

reporter that he'd "feel very good about this vote" if the site "become[s] a 100% affordable project," but that if "15 years from now it's still a parking lot, then I will not feel good."[105] That's an explanation for a vote to deny, not a vote for further environmental study. Supervisor Melgar said the problem was that the developer hadn't "negotiated a deal" with TODCO, a politically powerful nonprofit.[106] That of course has no bearing on the adequacy of the EIR.

The supervisors who voted "No" also knotted themselves up with self-contradictory objections. For example, Ronen and Mandelman stressed that the developer didn't have financing and that the project probably wasn't economically viable (the implication being: "don't blame us for blocking housing"),[107] yet they also demanded that the developer reserve more units for low-income households[108] – which would make the project even more difficult to finance.

The representative who came closest to voicing an environmental objection was Supervisor Ronen, who expressed concern that the project's foundation might be inadequate.[109] She pointed to another downtown project, the Millennium Tower, that had required an expensive retrofit, and she argued that the EIR for Stevenson St. should have fleshed out the seismic issues in detail.[110] (The Initial Study treated these issues as "insignificant" because they're addressed by the building code and an engineering peer-review required of all large buildings.[111] Accordingly, the EIR did not further address them.[112]) However, no one put any evidence in the record suggesting that a code-compliant, peer-reviewed project on the site would be an earthquake hazard to people or buildings nearby. Nor, as best we can tell, had Ronen or any other supervisor objected to previous EIRs that treated seismic impacts as adequately addressed through the building code and engineering peer review. In any case, contrary to Ronen's claims to the press, the impact of an earthquake on the proposed building is not an "environmental impact" under CEQA.[113]

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near the 469 Stevenson project are particularly unlikely because the low-income residents nearby live in protected single-room occupancy hotels, subsidized housing projects, and rent-controlled apartments. See Randy Shaw, *What Drives SF's Gentrification? It's Not What Many Think*, BEYONDCHRON, Nov. 2, 2021, https://beyondchron.org/what-drives-gentrification-its-not-what-many-think/.

[105] Heather Knight, *S.F.'s Real Housing Crisis: Supervisors Who Took a Wrecking Ball to Plans for 800 Units*, S.F. CHRONICLE, Oct. 30, 2021, https://www.sfchronicle.com/sf/bayarea/heatherknight/article/S-F-supervisors-complain-about-our-housing-16576412.php.

[106] *Id.*

[107] https://twitter.com/HillaryRonen/status/1455214820454637570; https://twitter.com/RafaelMandelman/status/1455285482468691968.

[108] See Twitter threads cited in note 107, *supra*.

[109] J.K. Dineen, *State Investigating S.F.'s Decision to Reject Turning Parking Lot into 500 Housing Units*, S.F. CHRONICLE, Oct. 28, 2021.

[110] *Id.*

[111] S.F. Planning Dep't. Notice of Preparation of Environmental Impact Report 185-88, Case No. 2017-014833ENV, Oct. 2, 2019, https://sfplanning.org/environmental-review-documents?field_environmental_review_categ_target_id=212&page=2&order=title&sort=asc.

[112] S.F. Planning Dep't, Draft Environmental Impact Report, 469 Stevenson St. Project, Case No. 2017-014833ENV, available at https://sfplanning.org/environmental-review-documents?field_environmental_review_categ_target_id=212&page=2&order=title&sort=asc.

[113] See Dineen, *supra* note 109 (quoting Supervisor Ronen). CEQA requires analysis of the impact of the building on the environment, not the environment on the building. *See* Cal. Bldg. Industry Ass'n v. Bay Area Air Quality Mgmt. Dist., 362 P.2d 792, 803 (Cal. 2015) (holding that CEQA Guideline which provided that "an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision," was "clearly erroneous and unauthorized under CEQA").

All of this suggests that that the seismic safety issue – the only plausibly legitimate justification for the Board's decision to reverse the CEQA certification[114] – was pretextual. It was a fig leaf to cover up what the Board intended but was not allowed by law to do: to disapprove the project because it's too big or not affordable enough.

A. Capitalizing on Administrative Law's Achilles Heel

The strategy of laundering project denials through CEQA is nothing if not clever, for it takes advantage of two soft spots in administrative law: agency delay and agency bad faith.

1. Delay

The Board of Supervisors' vote to reverse certification of the Stevenson St. EIR was tantamount to saying, "We haven't made up our mind about this project, and we need more information before we can make up our mind." When agencies say they need more time to gather information and make up their mind, courts normally let them have it.[115] If an antsy plaintiff sues, the court will say that the suit is premature because there's not yet a "final" agency decision, or because the plaintiff hasn't "exhausted her administrative remedies," or because the case isn't yet "ripe."[116] After all, it would be a waste of judicial resources and a big practical problem for governance if anyone waiting in line for an agency decision could ask a judge to let her jump the queue.[117]

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[114] To be clear, this justification would be legitimate only if there were a "fair argument" that the building itself may cause significant damage to the physical environment in the vicinity of the site, in the event of an earthquake. *Cf.* California Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist., 362 P.3d 792, 802 (Cal. 2015) (holding that CEQA analysis should consider "exacerbating effect" of new construction on existing environmental hazards, but not the effect of the hazard on the new construction or its occupants).

[115] We have found only one case in which a court reviewed a city's demand for more information in the context of a CEQA review: *Oro Fino Gold Mining Corp. v. Cty. of El Dorado*, 225 Cal. App. 3d 872, 274 Cal. Rptr. 720 (Ct. App. 1990). The Planning Commission and the County Board of Supervisors voted to require an EIR for the mining company's application for an exploration permit, rejecting the planning staff's recommendation of a mitigated negative declaration. *Id.* at 876-77. The mining company challenged the decision to require an EIR, and the court reached the merits (sustaining the city's decision) without addressing finality or exhaustion of administrative remedies. *Id.* at 880-85. By contrast, in *Schellinger Bros. v. City of Sebastopol*, 179 Cal. App. 4th 1245, 102 Cal. Rptr. 3d 394 (2009), the trial court held that courts don't "have the authority to review the appropriateness of" a city's decision to require additional environmental study and another round of public comment subsequent following circulation of an initial EIR. *Id.* at 1256. As noted previously, the Court of Appeal sustained the trial court's decision on other grounds (laches), without addressing the trial court's holding on reviewability.

[116] *See*, *e.g.*, AIDS Healthcare Found. v. State Dep't of Health Care Servs., 241 Cal. App. 4th 1327, 194 Cal. Rptr. 3d 425 (2015) (holding that decision of administrative agency reversing order of ALJ and remanding for additional proceedings before the ALJ is unreviewable).

[117] The exhaustion doctrine is "principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary)." Farmers Ins. Exch. v. Superior Ct., 826 P.2d 730, 739 (Cal. 1992). California courts often treat these three doctrines -- exhaustion, finality, and ripeness -- as more or less interchangeable. *See, e.g.*, California Water Impact Network v. Newhall Cty. Water Dist., 161 Cal. App. 4th 1464, 1489 (2008) (describing exhaustion as "closely related" to finality); O.W.L. Found. v. City of Rohnert Park, 168 Cal. App. 4th 568, 584 (2008) (stating that finality is an "outgrowth" of ripeness). See also *Ticor Title Ins. Co. v. F.T.C.*, 814 F.2d 731 (D.C. Cir. 1987), in

The legal doctrines that prevent plaintiffs from attacking agency delay have exceptions, but the exceptions are very narrow. For example, California courts excuse plaintiffs from exhaustion when further agency proceedings would be "futile" – but only if the plaintiff can "positively state" what the agency has decided (thus rendering further proceedings pointless).[118] The courts have also waived exhaustion when the agency has no legal authority to conduct the proceeding at issue,[119] and when pursuit of further proceedings would Cresult in irreparable harm."[120] None of these exceptions fits the Stevenson St. scenario. The Board of Supervisors carefully avoided "positively stating" its decision; there's no question that the Board is authorized by law to be the city's ultimate decider about the CEQA review; and the irreparable harm" exception is "applied rarely and only in the clearest of cases."[121]

It's also true that if the Legislature prescribes clear-cut timelines for an agency decision, a plaintiff can, in theory, use "traditional mandamus" to get a court order requiring the agency to act.[122] But as we illustrated in Part I's discussion of *Schellinger* and the CEQA timelines, these cases make courts uncomfortable.[123] At most, a court will order the agency *to make a decision*, as opposed to telling the agency *what to decide*.[124] And if there's an available equitable doctrine like laches that would let the agency off the hook, the courts will gladly invoke it.

2. Bad Faith

The other formidable barrier to a judicial fix for CEQA-laundered project denials is the principle that courts should review agency decisions solely on the basis of the reasons stated by the agency at the time of the decision, rather than probing to figure out the agency's real reason and setting the decision aside if the real reason was not authorized by law.

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which the three judges each issued their own opinion explaining why the case was untimely, relying on the same facts and normative considerations but using different doctrinal labels: exhaustion per Judge Edwards, finality per Judge Williams, and ripeness per Judge Green.

[118] Jonathan Neil & Assoc., Inc. v. Jones, 94 P.3d 1055, 1067 (Cal. 2004) (*quoting* Sea & Sage Audubon Soc'y, Inc. v. Plan. Com., 668 P.2d 664, 667 (Cal. 1983)).

[119] Coachella Valley Mosquito & Vector Control Dist. v. California Pub. Emp. Rels. Bd., 112 P.3d 623, 629 (Cal. 2005) (noting that the exception turns on a three-factor test involving "[1] the injury or burden that exhaustion will impose, [2] the strength of the legal argument that the agency lacks jurisdiction, and [3] the extent to which administrative expertise may aid in resolving the jurisdictional issue").

[120] Kaiser Found. Hosps. v. Superior Ct., 128 Cal. App. 4th 85, 105 (2005).

[121] City & Cty. of San Francisco v. Int'l Union of Operating Engineers, Loc. 39, 151 Cal. App. 4th 938, 948 (2007).

[122] CAL. CIV. PROC. CODE § 1085(a) (authorizing a writ of mandate "to compel the performance of an act which the law specially enjoins"); *e.g.*, Sunset Drive Corp. v. City of Redlands, 73 Cal. App. 4th 215, 221 (1999) (holding that, under section 1085, a court may compel a city to make its decision in the time period required under CEQA); *see also* Norton v. S. Utah Wilderness All., 542 U.S. 55, 65 (2004) (explaining that, under the federal APA, "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be").

[123] *See supra* text accompanying notes 54-55.

[124] *Schellinger Bros.*, 179 Cal. App. 4th at 1265 (noting that a section 1085 (traditional mandamus) remedy "issues to compel the performance of a ministerial duty, and even then it will not compel the exercise of such a duty in a particular fashion").

To the extent that the Board's decision to require further CEQA study of the 469 Stevenson project is reviewable at all, a court would normally uphold the decision so long as the "findings" prepared by the clerk include *some* legitimate reason for additional CEQA study.[125] The stated rationale must also draw some support from the record of materials before the Board, but the evidentiary demand is lax.[126] If a reasonable person could agree with the Board's decision in light of the evidence in the record, courts generally will accept it.[127]

In federal administrative law, there is a narrow exception to these general precepts. Upon a "strong showing of bad faith," a court may peer behind the agency's rationale and the record of contemporaneous materials the agency assembled to justify it.[128] If the court concludes from this investigation that the agency's stated reasons were pretextual, the court may set aside the agency's decision – even if the stated reasons (if real) would have sufficed to justify it. This obscure doctrine enjoyed a moment of renaissance when Chief Justice Roberts invoked it to invalidate the Trump Administration's addition of a citizenship question to the U.S. Census. But even as the Chief Justice insisted that courts "are 'not required to exhibit a naivete from which ordinary citizens are free,'"[129] he was at pains to limit the bad-faith exception. The Census dispute was not "a typical case in which an agency may have both stated and unstated reasons for a decision," but rather the "rare" one in which the agency's "sole stated reason" "seems to have been contrived."[130]

It is for very good reasons that the bad-faith exception is very narrow. Much like aggressive judicial review of agency delay, courtroom trials focused on the "real reasons" for agency action would gum up the work of government.[131] Discovery requests and depositions would divert

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[125] Judicial review in CEQA cases is usually limited to the record of the agency proceeding. *See* KOSTKA & ZISCHKE, *supra* note 16, §§ 23.48 - 23.56; *cf.* MITCHELL E. ABBOTT ET AL., CALIFORNIA ADMINISTRATIVE MANDAMUS § 6.119 (CEB 2021) ("Whether the scope of review is the substantial evidence test or the independent judgment test, the trial court cannot substitute its own findings to cure the agency's inadequate findings as an alternative to remanding the case to the agency....") (internal citations omitted). The deferential "substantial evidence" standard governs judicial review of "the agency's conclusions, findings and determinations, the scope of the EIR's analysis, the amount or type of information contained in the EIR, the methodology used to assess impacts, and the reliability or accuracy of the data supporting the EIR's conclusions." KOSTKA & ZISCHKE, *supra* note 16, § 23.34.

[126] Nominally, the city's decision must be supported by "substantial evidence" in the record, but this standard is not demanding. It requires only "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." 14 CAL CODE REGS § 15384(a). See also *Laurel Heights Improvement Ass'n v Regents of Univ. of Cal*., 47 Cal. 3d 376, 393 (1988); KOSTKA & ZISCHKE, *supra* note 16, § 23.34.

[127] *See supra* note 126.

[128] Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) (noting that "inquiry into the mental processes of administrative decisionmakers is usually to be avoided," but it may be permitted upon "a strong showing of bad faith or improper behavior"); SEC v. Chenery Corp., 318 U.S. 80 (1943) (stating the general rule that agency action may only be upheld on the contemporaneous record).

[129] *Id.* at 2575 (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977).

[130] Dep't of Com. v. New York, 139 S. Ct. 2551, 2575, 204 L. Ed. 2d 978 (2019)

[131] *See* Gavoor & Platt, *Administrative Records After* Department of Commerce v. New York, 72 ADMIN. L. REV. 87, 98 (2020) (predicting that extra-record review in the federal context will "divert resources from agencies' core missions, compulsorily draw the attention of officers of the United States who should otherwise be engaging in the executive function of running the government, and cause long delays with more bet-the-agency litigation"); *see also* Jennifer Nou, *Census Symposium: A Place for Pretext in Administrative Law?*, SCOTUSBLOG, June 28, 2019,

public officials from their primary charge.[132] Courts would struggle to disentangle the mix of political and policy-minded considerations that shape agency decisionmaking – especially when the leaders of the agency in question (a city council) are elected officials who inevitably pay attention to politics even when acting in a quasi-judicial capacity (hearing a CEQA appeal).

Finally, it's black-letter law that when an agency messes up, the judicial remedy is to vacate the agency's decision and remand for a do-over.[133] Even in the Census case, the Court did not strike the citizenship question from the Census: it just told the Commerce Department to try again.[134] But what does this achieve if the agency is in bad faith? A court order telling San Francisco's Board of Supervisors to rehear the 469 Stevenson St. CEQA appeal would be an invitation to re-launder the denial, minus the revealing tweets. The pointlessness of the remedy strongly reinforces the argument for not engaging the pretext question in the first place.[135]

B. But the HAA's a Game Changer, Right?[136]

The foregoing ought to douse any hope one might have about using general legal principles to curtail CEQA-laundered project denials. But when the project getting laundered is a *housing project*, a court must consider the Housing Accountability Act as well. And the HAA gives the general principles of administrative law a real shakeup, reworking some and tossing others in the garbage:[137]

- The HAA expressly authorizes judicial inquiry into bad faith.[138] "Bad faith" as defined by the Act "includes ... an action that is frivolous or otherwise entirely without merit."[139] This means that a court can find bad faith without subpoenas, depositions, or other searching inquiry into the mental processes of city council members. If the denial of a project was objectively frivolous, that's enough.

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https://www.scotusblog.com/2019/06/census-symposium-a-place-for-pretext-in-administrative-law/ (voicing similar concerns).

[132] *Dep't of Commerce*, 139 S. Ct. at 2583 (Thomas, J., concurring in part and dissenting in part) (predicting that the majority's application of the exception will "enable[] partisans to use the courts to harangue executive officers through depositions, discovery, delay, and distraction").

[133] CEQA codifies this principle. CAL. PUB. RES. CODE § 21168.9(c) ("Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way."). *See also* KOSTKA & ZISCHKE, *supra* note 16, § 23.125 ("The requirement in Pub Res C § 21168.9(b) that a peremptory writ of mandate specify what action by the agency is necessary to comply with CEQA is limited by the provision in § 21168.9(c) that the statute does not authorize a court `to direct any public agency to exercise its discretion in any particular way.'").

[134] *Dep't of Commerce*, 139 S. Ct. at 2576.

[135] While the *Department of Commerce* remand resulted in the Census going forward without a citizenship question, this was a happenstance of timing: by the time the Supreme Court's decision came down in June 2019, it was too late for the Census Bureau to redo its decision before the 2020 Census. But where there is no impending deadline, a remand is very unlikely to result in a different outcome.

[136] *Cf.* Sen. Comm. on Transportation and Housing, analysis of AB 3194, as amended June 20, 2018, p. 3 (describing the HAA's standard for determining whether a project is consistent with local land-use rules as a "game changer").

[137] *See* Nestor M. Davidson, *Localist Administrative Law*, 126 Yale L.J. 564, 614 (2017) (arguing that "courts should resist false parallels to higher levels of government, where structural realities may be very different").

[138] CAL. GOV'T CODE § 65589.5(l).

[139] CAL. GOV'T CODE § 65589.5(l).

- In cases where a court finds bad faith, the HAA supplants the traditional do-over remedy. It authorizes courts to order the project approved and to retain jurisdiction to ensure that this order is carried out.[140] (Even if there's no finding of bad faith, the HAA provides that courts shall issue an order compelling compliance within 60 days and fine the city if it misses the deadline.[141])

- The HAA provides at least a partial remedy for delay, by defining "[d]isapprove the housing development project" to include "[f]ail[ing] to comply with the time periods [for project review] specified in [the Permit Streamlining Act]."[142]

- The HAA eliminates judicial deference to local governments on all questions about whether a housing development project complies with applicable standards.[143]

The HAA's stance is one of extreme distrust toward local governments. In 1982, the Legislature stated that "the excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing."[144] But as the Legislature noted in 2017, when it strengthened various provisions, "[t]he Legislature's intent in enacting this section in 1982 . . . has not been fulfilled."[145] Hence the new policy going forward: "that [the HAA] be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."[146]

But there's a catch. While the HAA provides a powerful remedy for a bad-faith project denials, it's only explicit remedy for delay is tied to the Permit Streamlining Act. Yet as noted in Part I, the PSA clock doesn't start to run until CEQA review has been completed,[147] and another provision of the HAA states that the statute shall not "be construed to relieve [a city] from making ... findings required [by CEQA] or otherwise complying with [CEQA]."[148]

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[140] CAL. GOV'T CODE § 65589.5(k)(1)(A)(ii).
[141] CAL. GOV'T CODE § 65589.5(k)(1)(A)(ii).
[142] CAL. GOV'T CODE § 65589.5(h)(6).
[143] CAL. GOV'T CODE § 65589.5(f)(4) ("[A] housing development project or emergency shelter shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity."); CAL. GOV'T CODE § 65589.5(j)(1) (requiring local government that would disapprove or reduce density of project that is consistent within meaning of (f)(4) to make "written findings supported by a preponderance of the evidence on the record" that the project "would have a ... significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete" and that "[t]here is no feasible method to satisfactorily mitigate or avoid the adverse impact ... other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density").
[144] Cal. Stats. 1982 ch. 1438; CAL. GOV'T CODE § 65589.5(a)(1)(B).
[145] S.B. 167, 2017–2018 Reg., Leg. Sess. (Cal. 2017); CAL. GOV'T CODE § 65589.5(a)(2)(K). For an argument that increased interregional competition in contemporary America further justifies state-level legislative efforts to promote regionalism in land use, see Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. Davis L. Rev. 63, 69 (2013).
[146] CAL. GOV'T CODE § 65589.5(a)(2)(L).
[147] See *supra* text accompanying notes 50-51.
[148] CAL. GOV'T CODE § 65589.5(e).

How can a court make sense of these conflicting directives? In the rest of this Part, we sketch three possible solutions.

C. Solutions

1. Bad-Faith Delay Through CEQA Reversal as HAA "Disapproval"

A court following the Legislature's command to "interpret[] and implement[]" the HAA "to afford the fullest possible weight to the interest of ... housing"[149] could hold that a city's delaying of a project in bad faith amounts to "disapproval" within the meaning of the HAA, at least if the delay occurs through a negative vote on a formal approval the developer needs to reach the finish line.

The HAA's definition of "disapproval" is broad. It includes "any instance in which a local agency . . . votes on a proposed housing development project application and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit."[150] The certification of an EIR or other CEQA clearance is one of many "approval[s]" or "entitlement[s]" which a developer must obtain before eventually landing a building permit. And it is an approval that a city council reversing a CEQA clearance "votes" to deny.[151]

The HAA's remedial provisions imply that the statute may be violated other than by final denial of an application for a project entitlement or building permit. A court that finds a violation "shall issue an order ... compelling compliance with this section within 60 days, including, but not limited to, an order that the local agency take action on the housing development project."[152] The "but not limited to" proviso suggests that a city may violate the HAA by taking unlawful action (or inaction) on ancillary matters necessary for the project to go forward, and it instructs courts to use their powers flexibly to remedy whatever violations a court finds.

On the other hand, the fact that the HAA doesn't expressly list "legally inadequate CEQA analysis" as a permissible ground for disapproval of a housing development project suggests that the Legislature may not have thought that a city council's reversal of a CEQA certification would qualify as a housing-project disapproval.[153] Were the HAA an ordinary statute, this

[149] CAL. GOV'T CODE § 65589.5(a)(2)(L).
[150] CAL. GOV'T CODE § 65589.5(h)(6) (emphasis added).
[151] The same reasoning would apply with equal force to any bad-faith denial of a CEQA clearance, such a decision by a planning commission or city council to deny an exemption or to refuse to certify a negative declaration or environmental impact report.
[152] CAL. GOV'T CODE § 65589.5(k)(1)(A)(ii).
[153] *See* CAL. GOV'T CODE 65589.5(j)(1) (stating that a local agency which "proposes to disapprove [an HAA-protected] project or to impose a condition that the project be developed at a lower density" "shall base its decision ... upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist": (A) that the project "would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density"; and (B) that "[t]here is no feasible method to satisfactorily mitigate or avoid the adverse impact ... other than the disapproval

missing affirmative defense would cut pretty strongly against reading "disapproval" to include even bad-faith reversals of CEQA clearances. But the HAA in its current incarnation is meant to be a super-statute, "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."[154] This interpretive instruction, together with the parallel legislative finding that local governments have for too long managed to evade the Legislature's intent to "meaningfully and effectively curb[] [their] capability ... to deny, reduce the density for, or render infeasible housing development projects,"[155] suggests that the Legislature wants courts to read the statute flexibly as may be necessary to countermand evasive local tactics the Legislature did not anticipate.

But a line-drawing problem remains: it can't be true that every city council vote sustaining a CEQA appeal is a "disapproval" within the meaning of the HAA.[156] Some appeals are meritorious. In other cases, a city council may reasonably believe that an appeal has merit, even if some judges would disagree. At what point does a city council's reversal of a legally sufficient CEQA clearance become an HAA "disapproval'? The HAA's remedial provisions point toward an answer: when the CEQA reversal is in bad faith.[157] Like the party to a contract who commits anticipatory breach, the city that denies a CEQA clearance in bad faith signals that it has no intention of performing its legal obligation under state law, namely, to approve the HAA-protected project unless the project violates an objective health or safety standard.[158] That the HAA singles out bad-faith conduct by cities provides a justification for, and a limitation upon, expansive readings of "disapproval."[159]

If a court reads "disapproval" to include bad-faith denial of a CEQA clearance, and finds that San Francisco's Board of Supervisors pretextually reversed the EIR certification for 469 Stevenson St., the court could order the project approved, because the HAA supplants the conventional do-over remedy in cases where a city has denied a project in bad faith.[160]

One might object that this gloss on HAA "disapproval" would "relieve[]" the city of compliance with CEQA.[161] Not so. San Francisco's planning department prepared a full EIR for 469

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of the housing development project or the approval of the project upon the condition that it be developed at a lower density").

[154] S.B. 167, 2017–2018 Reg., Leg. Sess. (Cal. 2017)

[155] CAL. GOV'T CODE § 65589.5(a)(2)(K).

[156] For example, if the CEQA review was legally inadequate, surely a city council's reversal of the planning commission's certification of the CEQA review would not constitute a "disapproval" of the project. And even if some judges might consider the CEQA review legally sufficient, a city council that had a good-faith and well-substantiated belief that the review was legally inadequate probably should not be regarded as "disapproving" the project just because the council voted to reverse the CEQA clearance.

[157] CAL. GOV'T CODE § 65589.5(l).

[158] The analogy to anticipatory breach is not exact, because traditionally anticipatory breach is found only if the breach is express or the repudiating party "puts it out of his power to perform so as to make substantial performance of his promise impossible." Taylor v. Johnston, 15 Cal. 3d 130, 137, 539 P.2d 425, 430 (1975).

[159] Note that the HAA's findings also evince special concern about municipal bad faith. *See*, *e.g.*, CAL. GOV'T CODE § 65589.5(a)(2)(K) ("The Legislature's intent in enacting this section in 1982 and in expanding its provisions since then was to ... meaningfully and effectively curb[] the capability of local governments to deny, reduce the density for, or render infeasible housing development projects and emergency shelters. That intent has not been fulfilled.").

[160] CAL. GOV'T CODE § 65589.5(k)(1)(A)(i).

[161] CAL. GOV'T CODE § 65589.5(e).

Stevenson St., which the planning commission certified as complete.[162] So long as the court concludes that the EIR was in fact legally sufficient, an order directing the city to approve the project would do no violence to the HAA's CEQA-savings clause. The court could also allow the Board of Supervisors a brief window of time to decide whether to impose any additional mitigation requirements on the project, in light of the findings of the EIR.[163] This would honor CEQA's policy that elected officials bear final responsibility for deciding what to do about identified environmental impacts.[164]

Another counterargument is that the Board in voting to reverse the EIR certification didn't actually determine whether the project could go forward or what its density would be. It just said it wanted more information. This finality argument would be a strong counter under general administrative law principles. But in taking a practical, real-world approach to "disapproval," the HAA undercuts it. For example, delay beyond the time limits of the Permit Streamlining Act is explicitly an HAA disapproval,[165]even though such delay doesn't entail any *de jure* act or statement of reasons by the city. A formal vote reversing a CEQA clearance looks considerably *more* final and at least has the trappings of an agency action.

It's also worth emphasizing that while the terms "finality" and "exhaustion" connote on-off switches – a decision is either final or not, a plaintiff has either exhausted their administrative remedies or not – finality and exhaustion in the permitting context are always matters of degree. Thus, courts have long treated a city council's vote to deny a development proposal as final enough for judicial review, despite the fact that the developer could return to the city with a different proposal, with more public benefits, which the council *might* find satisfactory. This reflects a practical judgment that requiring developers to suffer two or three rounds of defeat at the city council before gaining access to the courts would strike the wrong balance between conservation of judicial resources and municipal autonomy, on the one hand, and protection for the rights of property owners, on the other.

The HAA tips the balance toward earlier judicial review. It emphasizes that the state's public interest, rather than mere property rights, are at stake when a city thwarts a housing development project. The HAA's judgment about the public interest, and its warning about municipal bad faith, ought to inform judicial thinking about finality and exhaustion in the housing context.

In its first formal letter to San Francisco after starting to investigate the 469 Stevenson St. debacle, the Department of Housing and Community Development signaled support for reading

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[162] S.F. Planning Com'n Motions Nos. 20960 & 20961 (July 29, 2021), available at https://sfbos.org/sites/default/files/bag102621_agenda.pdf.

[163] The HAA specifies that a court which finds a violation "shall issue an order ... compelling compliance with this section within 60 days, including, but not limited to, an order that the local agency take action on the housing development project or emergency shelter." CAL. GOV'T CODE § 65589.5(k)(1)(A)(ii).

[164] *See* Cal. Pub. Res. Code § 21151(c) (providing that if a nonelected decision-making body of a local lead agency certifies a final EIR, the agency must allow the certification to be appealed to the agency's elected decision-making body, if one exists); 14 CAL. CODE REGS § 15090(b) (same). It might also be argued that a court must give the Board an opportunity to specify further mitigation conditions, in view of the CEQA provision stating, "Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way." CAL. PUB. RES. CODE § 21168.9(c). We disagree. The court order we're contemplating would be an order issued pursuant to the HAA, not pursuant to CEQA, so the limitations on judicial remedial authority under CEQA would not apply to it.

[165] CAL. GOV'T CODE § 65589.5(h)(6)(B).

"HAA disapproval" to include pretextual CEQA-clearance reversals.[166] The Department called the Board of Supervisor's vote an "effective denial" and asked the city to explain its rationale within 30 days.[167] The letter emphasized, as we do, that disapproval includes "denial of other required land use approvals or entitlements necessary for the issuance of a building permit."[168] And it noted that, in light of the Board's "various vague concerns" with the project, it was "unclear what actions these project applicants are required to take to advance these projects."[169] If an agency that the Legislature has authorized to enforce the HAA concludes that bad-faith denials of CEQA clearances are "disapprovals within the meaning of the HAA,[170] a court need not go out of its way to conclude the same.

2. Enforcing CEQA Timelines in Light of the HAA

Without reaching the question of whether bad-faith denial of a CEQA clearance is a "disapproval" within the meaning of the HAA, a court could hold that the Legislature's refashioning of the HAA as a super-statute warrants revisiting – and limiting or rejecting – the Court of Appeal's decision in *Schellinger Brothers v. City of Sebastopol*.[171] Burying *Schellinger* is necessary to give practical effect to the HAA's incorporation of the Permit Streamlining Act's timelines into the definition of disapproval.[172]

As we explained in Part I, *Schellinger* held that judges may not order a city to certify an environmental impact report (as opposed to ordering the city to make up its mind about whether to certify it).[173] The court also said that the project applicant had, by cooperating with the city and making revisions well past CEQA's deadline, forfeited its right to enforce the deadline.[174]

The most basic problem with *Schellinger* is that it makes a hash of the statute's definition of "disapproval." As noted, the HAA defines disapproval to include noncompliance with the PSA deadlines, but the PSA clock only starts to run after CEQA review is done.[175] So if there's no practical way of forcing cities to comply with CEQA's deadlines, then the delay-oriented piece of the HAA's definition of disapproval is a dead letter. That doesn't befit any statute, let alone one which the Legislature has declared to be super.

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[166] Letter from Shannan West, Housing Accountability Unit Chief, Dep't of Hous. & Cmty. Dev., to Kate Conner, LEED AP, Manager, Priority Projects and Process, San Francisco Planning Dep't, Nov. 22, 2021 (on file with authors).
[167] *Id.* at 1.
[168] *Id.* at 3.
[169] *Id.* at 1-2.
[170] CAL. GOV'T CODE § 65585(j)(1) (authorizing Department to notify the local government and, as appropriate, the Attorney General, when it finds "that any local government has taken an action in violation of [enumerated statutes]," the first of which is the HAA).
[171] 179 Cal. App. 4th 1245 (2009).
[172] CAL. GOV'T CODE § 65589.5(h)(6).
[173] *See supra* text accompanying notes 53-55.
[174] 179 Cal. App. 4th 1245, 1267–70. A future court might distinguish *Schellinger* on the ground that the project proposal at issue morphed considerably during the long period of CEQA review. *See id.* at 1250-53. On the other hand, cities should not be able to evade the CEQA deadlines by pressuring developers into revising their project proposals.
[175] CAL. GOV'T CODE § 65950.

As for *Schellinger*'s laches holding (that the developer who cooperates past a deadline forfeits her right to enforce it), equitable doctrines are not supposed to be used in ways that "nullify an important policy adopted for the benefit of the public."[176] Whatever might have been said about the HAA when *Schellinger* was decided in 2009, there is no gainsaying that, today, the Act's policy of expeditious permitting is "important" and inures to the "benefit of the public.[177]

CEQA allows one year for completion of an EIR.[178] A recent study of housing project entitlements in twenty California cities found that the median project in San Francisco took 27 months to entitle; only 5% were entitled in under a year.[179] 469 Stevenson St. is more of the same. The project application was submitted on October 3, 2018.[180] The Initial Study, which determined that an EIR was required, was completed almost a year later.[181] By statute, however, an Initial Study is supposed to be completed within a *month*, not a *year*.[182] The planning department released its draft EIR for public comment not too long after the Initial Study (Mar. 11, 2020), but the department took ages compiling its response to comments, and the final EIR wasn't certified by the planning commission until July 29, 2021.[183] This was nearly three years after the developer's submission of the project application. And then came the appeal to the Board of Supervisors, resulting in further delay.

Bearing these facts in mind, and reading CEQA in light of the newly "super" policy of the HAA, a court might reasonably hold (1) that the CEQA deadlines are enforceable by mandamus regardless of whether the developer has cooperated with the city past the deadline (contra *Schellinger*), and (2) that if the CEQA deadline has passed and a legally sufficient environmental review document has been prepared, the city must certify it.

The second holding might seem to depart from the background administrative law norm (which CEQA incorporates) that a court can only order an agency to act, rather than telling it how to

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[176] Golden Gate Water Ski Club v. Cty. of Contra Costa, 165 Cal. App. 4th 249, 263 (2008) (holding that laches is unavailable for this reason); Feduniak v. California Coastal Com., 148 Cal. App. 4th 1346, 1381 (2007) (same).
[177] The laches holding of *Schellinger* is also suspect on traditional equitable grounds. First, the doctrine of laches is only supposed to penalize plaintiffs who "unreasonabl[y]*"* delay bringing suit. Conti v. Bd. of Civ. Serv. Commissioners, 461 P.2d 617, 622 (Cal. 1969). *Schellinger* failed to ask whether it's reasonable for a developer whose business depends on securing discretionary permits from a city to cooperate with the city's review process well past any statutory deadline (bringing suit only as a last resort). Second, as an equitable doctrine, the laches defense should have no currency when the city acts in bad faith (has "unclean hands"), as San Francisco appears to have done in reversing the EIR certification for 469 Stevenson. *See* Prang v. Los Angeles Cty. Assessment Appeals Bd. No. 2, 54 Cal. App. 5th 1, 18 (2020) ("Factually, laches, as an equitable doctrine, is not available to a party with unclean hands.").
[178] CAL. PUB. RES. CODE § 21151.5(a).
[179] Moira K. O'Neill et al., Examining Entitlement in California to Inform Policy and Process: Advancing Social Equity in Housing Development Patterns 93 (Nov. 8, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956250.
[180] San Francisco Planning Com'n Motion No. 20961 (hearing date: July 29, 2021).
[181] Notice of Preparation of Environmental Impact Report, Case No. 2017-014833ENV, San Francisco Planning Department, Oct. 2, 2019.
[182] CAL. PUB. RES. CODE §§ 21080.1, 21080.2 (requiring lead agency to make "final" determination of whether to prepare an environmental impact report, negative declaration, or mitigated negative declaration within 30 days of project application being determined to be or deemed complete).
[183] S.F. Planning Com'n Motions Nos. 20960 & 20961 (July 29, 2021), available at https://sfbos.org/sites/default/files/bag102621_agenda.pdf.

act.[184] But sometimes only one course of action is available to the agency, in which case a court may direct the agency to do what the law requires it to do.[185] What we're proposing is that courts read the CEQA deadlines, in light of the HAA, as creating a ministerial duty to certify any legally sufficient environmental review document once the deadline for completing CEQA review has passed.[186]

The courts could also give cities a brief window to decide what changes to the project or other mitigation should be required in view of the environmental study. This splitting of the baby – letting the politicians choose mitigation but not legally unnecessary environmental study past the CEQA deadline – would go a good distance toward reconciling CEQA with the HAA. It would breathe some life into the PSA deadlines (which the HAA incorporates into its definition of disapproval[187]) without impinging on municipal authority to impose mitigation conditions on development approvals (which the HAA countenances so long as they don't reduce the project's density[188]).

3. Levering "Pretext" for Judicial Review of CEQA-Clearance Denials

Our third solution is inspired by Chief Justice Roberts's opinion in *Department of Commerce v. New York.*[189] Instead of putting an expansive gloss on HAA "disapproval," or battling *Schellinger* to make the CEQA deadlines judicially enforceable, a court would hold that city council or planning commission's vote to deny a CEQA clearance is reviewable for pretext in limited circumstances.[190] Specifically, a plaintiff's "strong showing of bad faith" would render the decision to require further environmental study reviewable (notwithstanding the usual exhaustion requirement), and, if the court determines that the city acted in bad faith, the court would hold the city's decision unlawful.

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[184] CEQA's remedial provisions authorize courts to order "specific action as may be necessary to bring the [an agency] decision into compliance with" the statute, CAL. PUB. RES. CODE § 21168.9(a)(1), (3), but also declare, "Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way," CAL. PUB. RES. CODE § 21168.9(c).

[185] Berkeley Hillside Pres. v. City of Berkeley, 60 Cal. 4th 1086, 1122, 343 P.3d 834, 858 (2015), as modified (May 27, 2015) (stating that lower court on remand "may order preparation of an EIR only if, under the circumstances, the City would lack discretion to apply [an] exemption or to issue a negative declaration").

[186] A possible counterargument might be that this would only incentivize an anti-housing city council to put maximal pressure on the planning department so that it rejects the EIR of any large housing project in the first instance. That way, a city would avoid ever having a "legally sufficient EIR" for the court to order the city to approve. However, this work-around might be difficult. Because the developer is paying for the EIR and hiring the consultants, a planning department will have trouble disguising unusually slow processing, and it cannot altogether refuse to consider a complete EIR. Yet, at least in some cities, there is still probably some risk of political pressure down the chain. *Cf.* David J. Barron, *From Takeover to Merger: Reforming Administrative Law in an Age of Agency Polarization*, 76 GEO. WASH. L. REV. 1095, 1096 (2008) (noting that, in the federal context, agency officials often want to align their actions with the preferences of their political overseers).

[187] CAL. GOV'T CODE § 65589.5(h)(6).

[188] CAL. GOV'T CODE § 65589.5(j)(1).

[189] 139 S.Ct. 2551 (2019).

[190] By "vote to deny a CEQA clearance," we mean an official determination that a project is not entitled, at the time of the decision, to the CEQA approval sought by the developer. This would include a vote to deny a CEQA exemption, a vote to require an EIR instead of approving the negative declaration sought by the developer, a vote against certifying an EIR, or, as in the case of the Stevenson St. project in San Francisco, a vote to reverse a certification of an EIR.

This solution invites a number of questions. First, is it even available in California? Second, once the door has been opened to pretext inquiries in this context, what's to keep them from spreading across all of state administrative law, at a high cost to courts and agencies alike?[191]
Third, would this solution be meaningful as a practical matter, given that the standard judicial remedy in CEQA cases is a remand for a do-over – which is basically an invitation for the bad-faith agency to better cover its tracks?

As to the first question: The solution is available in the sense that it hasn't been ruled out by California Supreme Court. Although there's a pretty strong norm against looking behind the official record assembled by an agency, the Court has reserved the question of whether there might be a "limited" exception for "agency misconduct."[192] The Court has also allowed extra-record evidence in challenges to "ministerial or informal administrative actions," on the theory that they merit less deference.[193]

The second question – whether pretext claims can be cabined – is serious[194] but not hard to answer. The HAA and the institutions now being erected to enforce it offer guardrails. In light of the HAA's skepticism about municipal good faith, a court could hold that "CEQA pretext" claims are only available if the environmental clearance concerns an HAA-protected project. Or, going a step further, a court could hold that pretext claims are available only if HCD or the Attorney General makes the preliminary "strong showing of bad faith," or otherwise raises serious concerns about the city's development-review processes.[195] This would limit pretext litigation to cases where a coordinate branch of state government has balanced the benefits and costs and deemed the inquiry worthwhile.

The remedy question concerns us more.[196] If a court finds that a city's CEQA reversal was pretextual, must it send the whole thing back and give the city another chance to dress up its decision, exactly as the U.S. Supreme Court did with the Census case? Not necessarily. The California Supreme Court has endorsed the "inherent power" of a trial court to send only *part* of a decision back to the agency, while retaining jurisdiction to issue judgment later.[197] Perhaps a court in a pretext case could treat a CEQA certification as mostly complete (and valid), retain

[191] See sources cited in note 131, *supra.*
[192] Western States Petroleum Ass'n v. Superior Court, 888 P.2d 1268, 1276 n.5 (Cal. 1995); *see id.* at 1278 (leaving open the possibility that such evidence may be admissible "under unusual circumstances or for very limited purposes not presented in the case now before us").
[193] *Id.* at 1277; *see* Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. Rev. 1157, 1234-37 (1995) (discussing and critiquing the use of an "open record" in these cases).
[194] *See supra* Part II.A (discussing reasons why courts generally abjure inquiry into pretext).
[195] *Cf.* Letter from Shannan West, Housing Accountability Unit Chief, Dep't of Hous. & Cmty. Dev., to Kate Conner, LEED AP, Manager, Priority Projects and Process, San Francisco Planning Dep't, Nov. 22, 2021 (on file with authors) (concluding, "HCD is concerned specifically that the Stevenson Project and O'Farrell Project that have been effectively denied without written findings as well as larger trends in the City/County's review of housing") (emphasis added).
[196] *See supra* text accompanying notes 133-135.
[197] Voices of the Wetlands v. State Water Res. Control Bd., 257 P.3d 81, 98-99 (Cal. 2011) (stating that administrative mandamus "impose[s] no absolute bar on the use of prejudgment limited remand procedures such as the one employed here").

jurisdiction, and give the city a short period of time to address any legitimate concerns identified by the court on a limited remand. This would light a fire under the city and ensure that the case comes back to the same judge.[198]

As motivation for this or another nonstandard remedy, consider what courts do when a decision-maker is found to have prejudged the facts or otherwise manifested bias in violation of due process. Normally the court disqualifies the biased arbiter and remands for a fair hearing before another hearing officer. The Court of Appeal has said that a city's "malicious[] or arbitrar[y]" refusal to certify a CEQA document violates the developer's right to due process.[199] If that's right, a city council's bad-faith reversal of a CEQA certification violates due process too, and the biased decision-maker should be disqualified on remand. If just a few councilmembers were found to be biased, a court could disqualify them and remand for a do-over by the rest of the council (if a quorum remains).[200] But a court generally cannot disqualify the whole decision-making body that must decide the case (as is true under CEQA), so there is no analogous remedy if a quorum of the council has shown bad faith.[201] Hence the need for innovation beyond the usual do-over remedy.[202]

Yet the judicial norm against telling agencies what they must do is very strong, and without specific textual authorization – e.g., the HAA directing courts to order projects approved, or CEQA specifying deadlines for completion of environmental review – we fear that judges would be reluctant to deviate from the standard remedy, even in a pretext case.

One more point about remedies is worth mentioning. A bad-faith CEQA reversal that violates due process would make the city liable for damages.[203] The prospect of having to compensate a developer for holding costs, and for the expense of the additional environmental studies, might be enough to discourage some cities from trying to launder housing denials through CEQA.

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[198] Although the traditional remedy is to give the city another chance to rationalize its pretextual decision to require further environmental studies, the administrative mandamus statute also allows a court to order a city to "take such further action as is specially enjoined upon it by law." CAL. CIV. PROC. CODE § 1094.5(f). This provision therefore may authorize a stronger remedy, when read in light of the HAA's definition of disapproval or the synergism of PSA and the CEQA time limits.

[199] Sunset Drive Corp. v. City of Redlands, 73 Cal. App. 4th 215, 225, 86 Cal. Rptr. 2d 209, 217 (1999).

[200] Nasha v. City of Los Angeles, 125 Cal. App. 4th 470, 484, 22 Cal. Rptr. 3d 772, 781 (2004) (vacating a decision where the outcome was determined by the vote of a council member who was not a "reasonably impartial, noninvolved reviewer").

[201] Caminetti v. Pac. Mut. Life Ins. Co. of Cal., 139 P.2d 908, 920 (1943). But in at least one case, this rule did not apply where there was a legally sufficient underlying decision that the court could let stand. S*ee* Mennig v. City Council, 86 Cal. App. 3d 341, 351–52 (1978) (disqualifying the city council because it was "embroiled" in the dispute and letting stand the civil service commission's earlier decision).

[202] Consider the following thought experiment: what if a court, after concluding that an entire city council must be disqualified, remanded to a *different* city council? For example, what if the court disqualified the San Francisco Board of Supervisors from certifying the EIR as to 469 Stevenson St. and remanded to the Oakland City Council? (No doubt Oakland would have considerably less hesitation in helpfully approving a legally sufficient EIR on behalf its neighbor...while also getting to bill its time!). This solution strikes us as promising, but it would probably require explicit legislative authorization.

[203] 73 Cal. App. 4th 215, 225, 86 Cal. Rptr. 2d 209, 217 (1999).

After a forty-year saga, the HAA is at a moment of truth. Will courts nodding to background principles of administrative law stand by while city councils deny 500-home projects on frivolous environmental grounds? Or will courts wake up to the HAA's ditching of the old ways and appreciate – finally – that housing is the rare domain in which city councils are not to be trusted at all?

III. Calibrating Environmental Review to the Scope of Municipal Discretion Under the HAA

CEQA requires state and local agencies that have discretion to choose among possible options to study environmental effects before making their choice.[204] In theory, this leads to better agency decisions.[205] But when other laws require an agency to select a particular option, CEQA doesn't apply.[206] There's no reason to write a detailed list of the pros and cons of different options if you know from the start exactly which choice you have to make.

When a developer submits a housing proposal, the HAA substantially limits the choices open to the city. So you would think that review under CEQA would be limited accordingly. You would, unfortunately, be wrong – at least as a description of current practice.[207]

So it is that a proposal to build 500 apartments on a downtown San Francisco parking lot, a block from the subway, in a designated "priority development area" under the region's climate plan, ended up mired for years in the most extensive and costly form of environmental review required by CEQA: the Environmental Impact Report (EIR).

And why? Because San Francisco's planning department had concluded, on the basis of a 342-page Initial Study, that a "fair argument" could be made that the Stevenson St. project may have a significant local environmental impact in the form of shadows, wind, or (during construction) noise and air pollution.[208] The Initial Study evaluated the project's potential impact relative to current environmental conditions nearby.[209] It did not ask whether the project would have a significant marginal impact, relative to any other project of the size that the HAA entitles the developer to build on the site.

If the Stevenson St. project's marginal impact would be close to nil (as we think likely), then the EIR was an environmentally pointless exercise. Its real function, apparently, was to give local activists and city officials a way to tie up the project until the developer either walked away or paid off the politically connected nonprofit that led the charge against it.[210]

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[204] CAL. PUB. RES. CODE § 21080(a) (CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies").
[205] A contestable claim – but that's for another day.
[206] KOSTKA & ZISCHKE, *supra* note 16, §§ 4.24 - 4.26A.
[207] *See infra* notes 208-210 and 222 (explaining course of environmental review for Stevenson St. project in San Francisco). Discussions with leading CEQA practitioners have persuaded us that the Stevenson Street project's EIR is representative of current practice.
[208] Notice of Preparation of Environmental Impact Report, Case No. 2017-014833ENV, San Francisco Planning Department, Oct. 2, 2019.
[209] *Id.* at 2-3, 73-218.
[210] *See* Heather K. Knight, *S.F.'s Real Housing Crisis: Supervisors Who Took a Wrecking Ball to Plans for 800 Units*, S.F. CHRONICLE, Oct. 30, 2021 (quoting one supervisor who said he'd "feel very good about this vote" if the project site becomes "a 100% affordable housing project," and another who complained that the developer hadn't struck a deal with a local nonprofit, TODCO); J.K. Dineen, *'You Don't Mess with Him': How an S.F. Housing Advocate Wields Power by Funding Ballot Measures*, S.F. CHRONICLE, Nov. 18, 2021 (profiling the head of TODCO).

The argument of this Part is that the scope of CEQA review of housing development projects should be tailored to the scope of municipal discretion. A housing project should require an EIR only if the city exercises discretion to shape the project in some way that generates a significant marginal impact, relative to what the HAA compels the city to approve.[211]

Our approach would not "relieve local governments from complying with" CEQA.[212] But it would require overturning or significantly limiting several judicial precedents that have been incorporated into the official CEQA Guidelines.[213] As such, our proposal poses a stark test of whether the HAA really is a super-statute, one which "sticks in the public culture" and exerts "a broad effect on the law."[214] If courts and the gubernatorial appointees responsible for the CEQA Guidelines get behind our approach, then the HAA will in fact "meaningfully and effectively curb[] the capability of local governments" to hobble housing development projects.[215] If they do not, there can be little doubt that NIMBY cities will become ever more expert at exploiting CEQA to undermine the HAA.

A. "Effect" Relative to What?

We begin with an elementary point about causation. It is senseless to try to characterize the environmental effect of a proposed housing project without comparing it to some alternative use of the site. Consider an analogy: What is the effect of a new drug or medical device? The answer depends on what you're comparing it to. Relative to a placebo, the effect of the new drug may be large. Compared to the best treatment currently in use, the effect of the very same drug could be small or even negative.[216]

The same goes for housing projects. They have effects only when they're compared to some alternative. Let's call the point of comparison the reference alternative. What is conventionally labeled "the baseline" in an environmental impacts study is, properly understood, a compound of two things: an alternative use of the site (the "reference alternative") and a projection of environmental conditions in and around the site conditional on that use of it.

CEQA analyses, relying on CEQA caselaw, usually elide this fundamental point. By convention, they purport to measure the "effect" of a project relative to "current environmental conditions" on the site and in its vicinity.[217] This is a misleading point of reference if current environmental conditions would change absent the project. No medical researcher would measure the "effect"

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[211] CEQA is not an independent source of municipal discretion. CAL. PUB. RES. CODE § 21004 ("In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division.").
[212] CAL. GOV'T CODE § 65589.5(e).
[213] *See infra* notes 238-244 and accompanying text.
[214] Eskridge & Ferejohn, *supra* note 5, at 1216.
[215] CAL. GOV'T CODE § 65589.5(a)(2)(K).
[216] These points follow from what is now called the "potential outcomes" framework for causal inference. *See generally* Donald B. Rubin, *Causal Inference Using Potential Outcomes: Design, Modeling, Decisions*, 100 J. AM. STATISTICAL ASS'N 322 (2005).
[217] *See generally* KOSTKA & ZISCHKE, *supra* note 16, §§ 12.16 - 12.20 (summarizing CEQA caselaw and guidelines about baselines).

of an experimental treatment by comparing the health status several years in the future of elderly patients who received the treatment with their health at the time the treatment was administered. That comparison would obscure the effect of the treatment, because old people tend to decline as they age.

The CEQA analyst's conceptual mistake about baselines is not a problem in contexts where the permitting agency has authority to deny the project and doing so would maintain current environmental conditions. In such circumstances, the current-environmental-conditions baseline is equivalent to treating the "no-action alternative" as the reference alternative. This is like a placebo reference condition in a drug trial.

But the current-environmental-conditions baseline is nonsensical when the public decisionmaker lacks legal authority to maintain it. This is precisely the situation that cities face when developers propose HAA-protected housing projects. Cities may place discretionary conditions of approval on such projects, but they may not deny the project or reduce its density.[218] Accordingly, the environmental impact of the project should be gauged relative to a reference-alternative project of the scale the city is required by law to approve.

B. An HAA-Informed Protocol for CEQA Review of Housing Projects

The first step in CEQA review is preparation of the Initial Study, which seeks to determine whether there is a "fair argument" that the proposed project "may" have a significant impact on the environment.[219] If the answer is "Yes," then the project proponent must pay for an EIR that fully analyzes the potential effects identified in the Initial Study.[220]

The policies of the HAA and the policies of CEQA can be reconciled, to some extent, by asking the threshold HAA question at the outset of the Initial Study: Does the project as proposed comply with applicable, objective general plan, zoning and development standards, as defined in the HAA?[221] If it does, the city may deny or downsize the project only if it violates a written, objective health or safety standard within the meaning of the HAA. So for zoning-compliant projects, the Initial Study should gather information about potential health / safety violations and determine whether a preponderance of the evidence establishes a violation. A conventional CEQA review is in order only if such a violation is established (because the city may deny the project).

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[218] CAL. GOV'T CODE § 65589.5(j)(1). Again, CEQA is not an independent source of discretion—"a public agency may exercise only those express or implied powers provided by law other than this division." CAL. PUB. RES. CODE § 21004.

[219] KOSTKA & ZISCHKE, *supra* note 16, §§ 6.1 - 6.80.

[220] KOSTKA & ZISCHKE, *supra* note 16, §§ 6.4, 6.37 - 6.59.

[221] Cal. Gov't Code 65589.5(f)(4). This inquiry should address only those standards of which the city gave proper notice to the developer of noncompliance, as specified in Cal. Gov't Code 65589.5(j)(2). Note also that if the project qualifies for a density bonus under state law, this will render some local development standards inapplicable. *See generally* JON GOETZ & TOM SAKAI, GUIDE TO THE CALIFORNIA DENSITY BONUS LAW (rev'd Jan. 2021).

For projects that comply with general plan and zoning standards, and that don't violate health or safety standards, it's meaningless to conduct an environmental review that benchmarks the project against a no-action alternative or "current environmental conditions" in the vicinity of the site. The city's discretion is limited to altering the project with conditions of approval that do not reduce its density, and the CEQA baseline should be defined accordingly.

There are two plausible reference alternatives in this circumstance. First, the analysis could proceed using a project-as-proposed benchmark. The reviewer would inventory any discretionary conditions of approval that the city is considering imposing on the project, and then benchmark (1) environmental conditions if the project goes forward with the discretionary condition(s) imposed, against (2) environmental conditions if the project goes forward in the form it was proposed. The difference represents the environmental effect of the city's exercise of discretion.

To illustrate, if the city were considering a discretionary condition of approval that would require rooftop solar panels, and concerns were raised about glare from the panels, the Initial Study would undertake to determine whether there is a fair argument that the rooftop solar condition may cause a significant environmental impact in the form of glare, relative to the scenario in which the city approves the project in the form it was proposed.

Alternatively, the city could posit a green-reference benchmark, measuring the impact of an HAA-protected project relative to a model "green" project of the same density on the same site. The green-reference alternative might be defined as a project that provides the minimum number of on-site parking spaces; that uses low-energy building materials; and that minimizes impermeable ground cover (insofar as the city has authority to impose such conditions). The key point is that the green reference alternative would be a legally available option, and as such represents an informative benchmark against which to compare the proposed project.

Under either model, it would be the rare HAA-protected project that requires an EIR. Cities do not often impose conditions that reduce environmental amenities in the vicinity of a project, so the project-as-proposed benchmark would yield *pro forma* negative declarations in most cases. As for the green-reference benchmark, developers who anticipate opposition from neighbors, unions, or other interest groups would likely conform their proposal to the benchmark. If the project as proposed is HAA-protected and uses the green-reference design, then by construction it would have no environmental effects for CEQA purposes.[222]

[222] Needless to say, the environmental studies prepared for 469 Stevenson project in San Francisco did not hew to these principles. The HAA was nowhere mentioned in the Initial Study. The study did briefly discuss general plan and zoning standards, noting one potential violation, but it did not distinguish objective from subjective standards or explain whether the city had provided the developer with timely written notice of noncompliance. Notice of Preparation of Environmental Impact Report 67-71, Case No. 2017-014833ENV, San Francisco Planning Department, Oct. 2, 2019. Putative effects were assessed relative to current conditions on the site and in the vicinity. *See id*. at 2-3, 59-67, 73-218. Had the analysis proceeded as we recommend, the Initial Study probably would have concluded that no EIR was required, since the city had not proposed (so far as we can tell) any discretionary condition of approval that would damage the environment; since nothing in the Initial Study identified any respects in which the proposed design and materials fell short of any green-design norm; and since the study did not identify an objective, properly noticed general plan or zoning standard, or health or safety standard, that the project arguably violated.
The Initial Study did note that the project relied on waivers of several local development regulations, pursuant to state density bonus law. *Id.* at 67-68. However, the HAA protects projects that rely on state density bonus law. CAL.

C. Does CEQA Allow It?

The idea of tailoring the scope of environmental review to the scope of agency discretion has precedent under statutory analogues to CEQA at the national level and in New York. Review under the National Environmental Policy Act (NEPA) is limited to "effects" that are proximately caused by the agency's discretionary choices.[223] Thus, in *U.S. Department of Transportation v. Public Citizen*, the U.S. Supreme Court held that an environmental impact study prepared by the Department in connection with the North American Free Trade Agreement need not analyze pollution resulting from an increase in Mexican truck traffic, because the Department had no legal authority to exclude Mexican trucks.[224] To date, no California court has ruled on whether CEQA incorporates the proximate-causation theory of *Public Citizen*, but California courts do seek guidance from NEPA precedents when tough questions arise under CEQA.[225]

In New York, courts got to a similar place by rejecting the "no-build baseline" in cases where the project proponent may build something as of right.[226] Specifically, if a developer proposes an office or residential building that would require rezoning, on a site where a smaller building is allowed as of right, the effect of the proposed project is analyzed relative to the "as-of-right alternative" rather than the "no-build alternative" or "current environmental conditions."[227] Because the city lacks authority to deny the smaller project, it would be uninformative to conduct an environmental review using a no-project baseline.

Like the National Environmental Policy Act and New York's State Environmental Quality and Review Act, CEQA exempts "ministerial" permits from environmental review.[228] Discretion is

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GOV'T CODE § 65589.5(j)(3) ("For purposes of this section, the receipt of a density bonus pursuant to Section 65915 shall not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision specified in this subdivision.").

[223] *U.S. Dep't of Trans. v. Public Citizen*, 541 U.S. 752, 767 (2004). ("NEPA requires a reasonably close causal relationship between the environmental effect and the alleged cause[, akin] to the familiar doctrine of proximate cause from tort law.") (internal quotations and citations omitted).

[224] *Id.* at 770 ("We hold that where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect.... Because the President, not [the agency], could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because [the agency] has no discretion to prevent the entry of Mexican trucks, its [NEPA study] did not need to consider the environmental effects arising from the entry.").

[225] KOSTKA & ZISCHKE, *supra* note 16, § 22.4 (observing that "NEPA cases continue to play an important role in adjudication of CEQA cases, *especially when a concept developed in NEPA decisions has not yet been applied in CEQA cases"*) (emphasis added).

[226] MICHAEL B. GERRARD ET AL., ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 8A.04 (2021).

[227] *Id.*; NYC MAYOR'S OFFICE OF ENV. COORDINATION, CEQR TECHNICAL MANUAL § 2.7 (Nov. 2020), https://www1.nyc.gov/assets/oec/technical-manual/2020_ceqr_technical_manual.pdf ("Sometimes, private applicants state an intention to develop their property in the future, with or without approval of a proposed project.... If the lead agency determines it is reasonable to assume that the applicant's stated No Action scenario would occur in the future without the proposed project, the scenario would constitute the No-Action scenario for analysis purposes.").

[228] CAL. PUB. RES. CODE § 21080(b)(1),

always the trigger.[229] However, the Court of Appeal has held in several cases that if a city has any discretion to shape a project, the city must analyze and mitigate the impact of project "as a whole" relative to a current-environmental-conditions baseline.[230] Projects whose permitting is "not wholly ministerial and not entirely discretionary but a compound of both" have been treated as entirely discretionary for CEQA purposes.[231] In one case, an EIR was produced using a zoning-complaint-project baseline, similar to New York practice, and the California Court of Appeal rejected it out of hand.[232] The court faulted the EIR for not "present[ing] a clear or a complete description of the project's impacts compared with the effects of leaving the land in its existing state."[233]

This line of cases is rooted in CEQA's traditional premises: that new construction is bad for the environment,[234] and that CEQA should be construed broadly to give "the fullest possible protection" to the environment.[235] The working assumption is that requiring more environmental review and mitigation is the greener way. But as we've seen, the HAA inverts this premise when it comes to housing. The HAA declares new construction of zoning-compliant housing projects to be presumptively good for the environment,[236] and it aims to "meaningfully and effectively curb[] the capability of local governments to deny, reduce the density for, or render infeasible housing development projects."[237] A reading of CEQA that leaves cities with open-ended discretion to require time-consuming studies and costly mitigation of so-called "impacts" that are not even proximately caused by the city's exercise of discretion would do pointless violence to the policy of the HAA.

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[229] CAL. PUB. RES. CODE § 21080(a),

[230] People v. Dep't of Hous. & Cmty. Dev., 45 Cal. App. 3d 185 (1975); Friends of Westwood, Inc. v. City of Los Angeles, 191 Cal. App. 3d 259 (1987); Friends of Juana Briones House v. City of Palo Alto, 190 Cal. App. 4th 286 (2010). *See also* KOSTKA & ZISCHKE, *supra* note 16, § 4.27. *But see* McCorkle Eastside Neighborhood Group v. City of St. Helena, 31 Cal. App. 5th 80 (2018) (holding that limited discretion conferred by city's design review ordinance does not trigger CEQA review, because the type of aesthetic changes authorized by the code could not mitigate environmental impacts within the meaning of CEQA). Note also that the CEQA Guidelines define "effect" and "impact" (synonymously) to mean "effects which are caused by the project." 14 CAL. CODE REGS § 15358. Future environmental conditions not caused by the discretionary project are not impacts within the meaning of CEQA. It follows that a CEQA analysis ought to reflect some choice of a reference alternative (as opposed to the "current environmental conditions" baseline), for, as we have seen, it is nonsensical to speak of the "effect" of a course of action without comparing outcomes under that scenario to outcomes under an alternative course of action.

[231] People v. Dep't of Hous. & Cmty. Dev., 45 Cal. App. 3d at 193.

[232] Woodward Park Homeowners Assn., Inc. v. City of Fresno, 150 Cal. App. 4th 683, 707-09 (2007) (rejecting EIR whose "bottom-line conclusions ... emphasized the marginally increased impacts of the proposed project over build-out under existing zoning"). See also City of Carmel–by–the–Sea v. Board of Supervisors, 183 Cal.App.3d 229, 246 (1986) (holding that county must consider impacts of rezoning on existing physical environment; comparison of project possible under old zoning with project possible under proposed new zoning "bears no relation to real conditions on the ground").

[233] *Woodward Park*, 150 Cal. App. 4th at 708. Left unaddressed was the question of whether the city had legal authority to choose a project alternative that would leave the land in that state.

[234] See, e.g., *Friends of Westwood*, 191 Cal.App.3d at 266-67 ("As applied to private projects, the purpose of CEQA is to *minimize the adverse effects of new construction* on the environment. … Thus the touchstone is whether the approval process involved allows the government to shape the project *in any way* which could respond to any of the concerns which might be identified in an environmental impact report.") (emphasis added).

[235] *Id*. at 267 ("doubt whether a project is ministerial or discretionary should be resolved in favor of the latter characterization").

[236] CAL. GOV'T CODE § 65589.5(a)(1)(C) & (a)(2)(A).

[237] CAL. GOV'T CODE § 65589.5(a)(2)(K).

In the near term, however, any effort to use the HAA to put a limiting gloss on misbegotten CEQA-baseline precedents would be complicated by the fact that those precedents have been incorporated into the official CEQA Guidelines.[238] The Guidelines stipulate that "the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation [of the EIR] is published . . . will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant."[239] This "existing conditions baseline" "shall not include hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans."[240]

The only exception that the Guidelines presently recognize is that an agency may use a "projected future conditions ... baseline ... if it demonstrates ... that use of existing conditions would be either misleading or without informative value to decision-makers and the public."[241] This exception codifies a practice that developed around very long-term projects, such as railways.[242] Neither the Guidelines nor any published case approves the use of a "future-conditions baseline" where the future in question is a build-out of the project site under an alternative development scenario. Then again, neither the Guidelines nor any published case has considered the implications of the HAA for CEQA baselines or causation.

Though it wasn't written for the HAA problem, the Guidelines' narrow allowance for "future conditions" baselines at least recognizes that circumstances may arise where the conventional baseline is inappropriate. And the crux of our argument is that it is misleading and uninformative – and a colossal waste of resources, and a serious threat to the environmental and housing policies of the HAA – to require developers to engage in a multi-year analysis of putative environmental "effects" that are the byproduct of a nondiscretionary statutory mandate, not the discretionary choices of the local permitting authority itself.

We have found only one case in which a court considered the relationship between the HAA and CEQA. *Sequoyah Hills Homeowners Assn. v. City of Oakland*[243] concerned a housing development on vacant land in the Oakland Hills. The zoning of the site allowed up to 88 single-family homes, but the developer "'pre-mitigated' by proposing to build only 46 homes."[244] The city ordered an EIR using a current-conditions baseline and evaluated several alternatives, including one with only 36 homes.[245] Neighboring homeowners sued, arguing that the EIR was insufficient because it failed to analyze additional lower-density alternatives as a way of mitigating the visual impact of the project.[246] The Court of Appeal held that the city did not abuse its discretion.[247] CEQA only requires consideration of "feasible" alternatives,[248] the court

[238] 14 CAL. CODE REGS. § 15369 & 15125(a) (citing cases).
[239] 14 CAL. CODE REGS. § 15125(a).
[240] 14 CAL. CODE REGS. § 15125(a)(3).
[241] 14 CAL. CODE REGS. § 15125(a)(2).
[242] *See*, *e.g.*, Neighbors for Smart Rail v. Exposition Metro Line Construction Auth. 57 Cal. 4th 439 (2013).
[243] 23 Cal.App.4th 704 (1993).
[244] *Id.* at 709.
[245] *Id.* at 710.
[246] *Id.* at 715.
[247] *Id.* at 714-16.
[248] *Id.* at 715-16.

emphasized, and the reduced-density alternatives urged by the neighbors were foreclosed by the HAA and therefore infeasible as a matter of law.[249]

What the court did not point out (perhaps because no one challenged the city's use of a current conditions baseline) is that an EIR focused on the visual impacts of the Sequoyah Hills project was a huge waste of time and money. No one disputed that the project "would stand out because of its relatively higher density and its location on a prominent hillside overlooking the existing residential development."[250] But the city didn't have discretion to make the developer choose an alternative with fewer homes, so the impact of the project should not have been characterized as "significant" unless it was shown that a significantly less obtrusive project of the same density could have been built on the site.[251]

Oakland's determination that the Sequoyah Hills project could have a significant visual impact, followed by an EIR analyzing that impact and justifying it with a finding of overriding considerations ("our hands are tied by the HAA"), was a convoluted resolution of a CEQA problem that should have been handled with a simple finding about causation in the Initial Study. Something like this:

> The developer proposes to build 46 single-family homes on vacant land whose zoning allows 88 such homes. The project would not violate any health or safety standards, and the HAA therefore forecloses denial or reduction in density. Any other project with 46 homes on the same site would mar the now-undeveloped vista to a substantially similar extent. The visual impact of the project relative to current conditions results from the Legislature's creation of an entitlement to build zoning-compliant projects. It is not caused by the city's exercise of its residual discretion. Accordingly, the asserted aesthetic impacts of the project do not provide grounds for preparation of an EIR. Cf. *U.S. Dep't of Trans. v. Public Citizen*, 541 U.S. 752 (2004).

D. The Governor's Role

Courts are conservative creatures. It's rare that they upend long-established precedents. Although the newly-super HAA provides a very good rationale for courts to revisit— and limit—the dubious CEQA-baseline precedents, other actors also have important roles to play.

Courts don't implement CEQA by themselves. CEQA authorizes the Governor's Office of Planning and Research and the Natural Resources Agency to issue implementing guidelines.[252] At least once every two years, the Office of Planning and Research "shall recommend proposed changes or amendments" to the Guidelines, which the Natural Resources Agency then can certify

[249] *Id.* at 715-16.
[250] *Id.* at 711.
[251] And even that's a stretch, as nothing in the *Sequoyah Hills* opinion suggests that Oakland had open-space-visual-impact guidelines, from which a least-intrusive project design (i.e., the green-reference benchmark) might be adduced. Absent such guidelines, the CEQA review should have used a project-as-proposed benchmark.
[252] CAL. PUB. RES. CODE § 21083.

and adopt.[253] [254] If environmental review is to be reshaped by an HAA-informed theory of causation, the Guidelines are an excellent tool with which to do it.

The Guidelines are a good tool for this purpose not only because making policy and changing direction is, by tradition, more squarely in the agency wheelhouse than the judicial wheelhouse, but also because of politics.[255] Through his appointments and directives, the Governor can shape the Guidelines.[256] And, presently, the Governor is better positioned than any other state-level actor to navigate the politically treacherous waters of CEQA reform.

Though it was a noble environmentalism that made CEQA super in the 1970s, the continued strength of CEQA today has much to do with the constellation of interest groups—first and foremost the building-trades unions—that have mastered the art of using CEQA to extract costly concessions from developers.[257] In expensive housing markets, the threat of CEQA litigation and delay can be used to make developers sign project-labor and "community benefit" agreements with influential unions and nonprofits.[258] The building trades wield a lot of power in Sacramento,

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[253] *Id.* § 21083(f).

[254] *See* California Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist., 62 Cal. 4th 369, 381, 362 P.3d 792, 797 (2015) ("Whether the Guidelines are binding or merely reflect the Resources Agency's interpretation of the statute, we should afford great weight to the Guidelines when interpreting CEQA, unless a provision is clearly unauthorized or erroneous under the statute."); *id.* at 389-90 (stating that the Guidelines are owed "weight" because of the Resource Agency's "expertise and technical knowledge," and because they are adopted "pursuant to the California Administrative Procedure Act (APA).")

[255] A further point: risk-averse developers will not push the CEQA envelope without a strong basis for thinking that the courts will accept their innovations. If the Governor doesn't use the Guidelines to invite HAA-tailored CEQA analysis of housing projects, the courts may never have an occasion to consider whether this type of analysis is legally sufficient. By contrast, if the Governor does use the Guidelines as we suggest, the interest groups that benefit from the status quo are sure to sue right away, and the courts have held that facial challenges to a new CEQA Guideline may be brought as soon as the Guideline takes effect. *See* Communities for a Better Env't v. Cal. Res. Agency, 103 Cal. App. 4th 98, 106, 126 Cal. Rptr. 2d 441, 446 (2002), as modified (Nov. 21, 2002) ("At issue in this case is whether the subject Guidelines, which public agencies must follow to implement CEQA, facially violate CEQA statutes and case law. As such, the matter presents a concrete legal dispute ripe for our consideration.").

[256] The Governor has the power to appoint the Director of Planning and Research. Cal. Gov't Code § 65038; *see id.* § 65037 (stating that the Director "shall be responsible to the Governor"). The Secretary of the Natural Resources Agency is appointed by the Governor, subject to Senate confirmation, and "hold[s] office at the pleasure of[] the Governor." Cal. Gov't Code § 12801. *See also* Miriam Seifter, *Gubernatorial Administration*, 131 Harv. L. Rev. 483, 527 (2017) (noting the "substantial control governors possess over the majority of state agencies that have no constitutional status").

[257] The extent of what is sometimes called "CEQA greenmailing" is impossible to quantify because of nondisclosure agreements, but anecdotal evidence of the practice and, especially, the vehemence with which the building trades lobby against CEQA reform suggest that the problem is substantial. *See generally* Manuela Tobias, *What One Thing Do Republican Recall Candidates Blame for California's Housing Crisis?*, CalMatters, Sept. 7, 2021 (canvassing the debate over CEQA); Christian Britschgi, *How California Environmental Law Makes It Easy For Labor Unions To Shake Down Developers*, Reason, Aug. 21, 2019, https://reason.com/2019/08/21/how-california-environmental-law-makes-it-easy-for-labor-unions-to-shake-down-developers/ (discussing mechanisms and reviewing evidence of CEQA greenmailing); Matt Levin, *Commentary: Five Things I've Learned Covering California's Housing Crisis that You Should Know*, CALMATTERS, Jan. 6, 2021 (stating, as "Lesson 4," that "[t]he state construction workers' union has way more influence than you think it does," and detailing union's central role in killing bills that would create CEQA exemptions for housing development); Manuela Tobias, *Is Union Labor Requirement in the Way of Easing California's Affordable Housing Crisis?*, CALMATTERS, June 16, 2021 (reporting on unions' success in blocking any housing bill that does not include a "skilled and trained" labor requirement).

[258] Britschgi, *supra* note 257.

and in recent years they've derailed every legislative proposal for CEQA reform or streamlining unless it requires qualifying projects to use union labor.[259] Not even a trivial bill that would let churches build affordable housing without CEQA review could escape Labor's grip.

But Governor Newsom is riding high. He was elected by a twenty-four point margin.[260] He defeated a recall attempt by the same margin.[261] The California Republican Party is all but dead,[262] and the odds that the Governor will face a strong Democratic challenger when he's up for reelection in 2022 are remote.[263] A tussle with the building trades wouldn't derail his career.

Of course, no Governor can single-handedly make the HAA "stick" in a manner that limits abusive use of CEQA. If there were a legislative consensus that project-labor agreements are more important than housing production, the Legislature could quickly abrogate any reformist CEQA Guidelines and then override a gubernatorial veto. But it's a fair hope that no such veto-proof consensus exists. The Republican minority is no fan of CEQA,[264] and Democratic legislators are loathe to override their co-partisan Governor.[265] Moreover, politically vulnerable legislators, who wouldn't dare cast a roll call vote against the trades, may acquiesce in the appointment of pro-housing committee chairs, who in turn could block any bill that would reverse the Governor's reform of the CEQA Guidelines. It's also possible that a transparent, public debate about CEQA abuse – a debate that would probably accompany any legislative effort to roll back the reformed Guidelines – might itself subtly alter the politics of CEQA reform, in a way that gives the HAA the upper hand.[266]

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[259] *See* Tobias, *supra* note 257, Levin, *supra* note 257; *see generally* Miriam Seifter, *Further from the People: The Puzzle of State Administration*, 93 N.Y.U. L. Rev. 107, 135-36 (2018) (noting a dramatic increase in state-level lobbying over the last 15 years).

[260] https://ballotpedia.org/California_gubernatorial_election,_2018.

[261] https://ballotpedia.org/Gavin_Newsom_recall,_Governor_of_California_(2019-2021).

[262] A.B. Block, *Battered, California GOP Struggles to Maintain Toehold*, CAPITOL WEEKLY, Jan. 5, 2021, https://capitolweekly.net/battered-california-gop-struggles-to-maintain-toehold/.

[263] Tiffany Stecker, *Newsom's Easy Win in California Recall a Boost for 2022 Race*, BLOOMBERG NEWS, Sept. 15, 2021 (quoting a Democratic insider calling him "really sort of unbeatable").

[264] Tobias, *supra* note 257.

[265] Joe Garofoli, *Why Lawmakers Won't Override a Veto from Newsom, or Any Other Governor, S.F. Chronicle*, Oct. 15, 2021.

[266] A side note: Given the constellation of interests with a stake in the CEQA-and-housing fight, one might worry that an unexpectedly broad reading of the HAA, or of CEQA, would undermine future legislative reform by making it harder for swing voters in the Legislature to have confidence in the compromises they might secure. Professors Rodriguez and Weingast have argued that "expansionist" judicial interpretation of progressive federal statutes passed in the 1960s and early 1970s had exactly this effect vis-a-vis later Congresses. Daniel B. Rodriguez & Barry R. Weingast. *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U.L. REV. 1207 (2007). Their argument has a lot of force in cases where an expansionist reading of the statute would disrupt a discernable legislative bargain. But where the statute being read expansively features a codified Legislative instruction to read it expansively (like that in the HAA), and where the expansive reading concerns a question the Legislature did not even debate (baselines and causation for CEQA analysis of HAA protected projects), it can't be said that the judiciary or the executive branch is undermining legislative compromise by giving effect to the codified interpretive instruction. Indeed, it's possible that when the Legislature added the interpretive instruction to the HAA in 2017, it did so because lawmakers wanted judges to interpret the statute in ways that would achieve prohousing objectives while saving lawmakers from taking politically "tough" votes against the trades. We don't know whether this is the case, any more than we know whether the CEQA-savings clause was added to the HAA in 1990 to propitiate the trades. But in the absence of any information about this, it would be odd for courts to refrain from fitting CEQA and

Although super-statutes on Eskridge and Ferejohn's telling embody great normative principles,[267] it appears that CEQA's continued potency owes much to a small number of rent-seeking interest groups that depend on it. The generational clash between the HAA and CEQA is about power as much as principle.

IV. Conclusion

Most legal scholarship on administrative law and statutory interpretation focuses on federal law and seeks to reach trans-substantive answers to the Big Questions. Questions like, "When is an agency decision final for purposes of judicial review?," "What does exhaustion of administrative remedies require?," "In what circumstances may a court look behind the stated reasons for agency action?," and "When should the policies of one statute inform the interpretation of another?" Yet trans-substantive answers are often disappointingly elusive.

In exploring this family of questions in the context of one state (California) and one area of law (land use), we hope to open some eyes to the world beyond the federal paradigm, a world in which the Big Questions take on different and sometimes surprising hues. For example, the "pretext" inquiry, which can seem intractable, pointless, or even illegitimate in the context of federal administrative law (where the Administrative Procedures Act offers no textual support for it, and where the agency head is usually the alter ego of the President),[268] looks much more appropriate when the agency is an elected city council, the domain is land use, and the council is constrained by a state law whose central premise is that city councils are not to be trusted in development permitting.

We also hope this Essay serves as a useful reminder that super-statutes aren't "super" for all time. In 1970, in the wake of massive construction projects and rapid development across the state, it was reasonable to believe that slowing construction down would help the environment. The foundational CEQA cases were decided accordingly. But today, slow construction of housing in developed, high-demand places has made housing wildly unaffordable where people want to live. Worse, it has undermined today's environmental goals: the little housing that is built tends to be in inland areas with increased fire risk and that often requires residents to commute for hours to work in carbon-spewing cars.[269] Of course, the recent amendments to HAA didn't exempt housing from CEQA. But they strongly suggest that, at least in the context of housing, the Legislature has rejected some of CEQA's normative and institutional suppositions.

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the HAA together in a way that honors the policies of both statutes because of some remote possibility that doing so would unravel a secret legislative bargain.

[267] Eskridge & Ferejohn, *supra* note 5, at 1216-17 (stating that super-statutes "occupy the legal terrain once called 'fundamental law,' foundational principles against which people presume their obligations and rights are set," and that such statutes "are both principled and deliberative and, for those reasons, have attracted special deference and respect").

[268] *See* Gavoor & Platt, *supra* note 131; Nou, *supra* note 131.

[269] Jones et al., *supra* note 27, at 35.

When an older super-statute has been undermined by more recent enactments that the Legislature declares to be super, it's incumbent on courts and other actors to reassess how the older law should be applied, rather than mindlessly following the protocols of the earlier era.

From:	Dylan Casey
To:	BOS Legislation, (BOS)
Cc:	Victoria Fierce; Gregory Magofña
Subject:	Comment on 469 Stevenson (Agenda Item 44) and 450 O"Farrell (Agenda Item 42)
Date:	Tuesday, December 14, 2021 10:45:09 AM
Attachments:	SF 450 O"Farrell HAA Letter.pdf SF 469 Stevenson HAA Letter.pdf

Dear Clerk of the Board,

I am submitting the two attached comment letters on behalf of California Renters Legal Advocacy and Education Fund, for agenda items 42 and 44 at this afternoon's meeting.

Sincerely,

Dylan Casey

Executive Director, California Renters Legal Advocacy and Education Fund
443-223-8231 | www.carlaef.org

California Renters Legal Advocacy and Education Fund
360 Grand Ave, #323
Oakland, CA 94612
hi@carlaef.org

December 14, 2021

San Francisco Board of Supervisors
City Hall, 1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

Re: 450-474 O'Farrell Street Denial

Dear San Francisco Board of Supervisors,

The California Renters Legal Advocacy and Education Fund (CaRLA) submits this letter to inform the San Francisco Board of Supervisors that they have an obligation to abide by all relevant state housing laws when evaluating the 450-474 O'Farrell Street development. The Housing Accountability Act requires approval of zoning and general plan compliant projects, such as this one, unless the city finds that the project would cause an impact on health and safety that is unavoidable and unmitigatable. These findings must be supported by a preponderance of evidence on the record, and be based on objective, written health and safety standards.

The proposed findings set forth in the motion under consideration fail to identify any standards with which this development fails to comply, and show no evidence of any health and safety impacts created by the development. Instead, the findings focus on the proposed group housing with limited kitchen facilities. The proposed resolution finds that there is a "glut" of smaller units in the neighborhood, and a greater need for larger units to house low-income families. This is not an objective standard, nor a health and safety finding.

There is undoubtedly a need for larger affordable units in San Francisco, but there is clearly a need for all sizes of housing at all affordability levels. Not all housing developments need to serve every population, and this particular one would not only provide flexible, more affordable housing, it would also provide 48 income-restricted homes as well. If the Board views the need for larger units to be so great that developments with smaller units should not be built, the place to enact this policy is through an ordinance to establish development standards that would require larger units. Reversing an approval of a project that has spent years in the permitting process does nothing for families in San Francisco.

Further, if this Board were truly concerned about the need for larger units in the area, it would not also be denying a separate project with 154 larger homes at this meeting. The 469 Stevenson Street development is less than a half-mile away from this project, yet the desperate need for larger affordable homes in the area has not deterred this Board from also denying that development. If San Francisco has any

hope of addressing its housing shortage, it needs both of these projects, and many more after that. It also needs the same type of high density housing in the majority of the city where this city continues to ban it. Instead, the Board is making up subjective reasons to unlawfully deny high-density housing in the small area of the city where it supposedly allows for it.

As you are well aware, California remains in the throes of a statewide crisis-level housing shortage. New housing such as this is a public benefit. It will bring increased tax revenue, new customers to local businesses, decarbonization in the face of the climate crisis, but most importantly, it will reduce the displacement of existing residents into homelessness or carbon-heavy car commutes. The laws cited in this letter are designed to allow and require cities to approve of new homes over the objection of a small minority of neighbors. Research indicates that the anti-housing voices frequent in public hearings are disproportionately white, higher-income, and homeowners.[1] These voices do not represent the best interests of San Francisco or the broader community. Approving developments like this one over these vocal objections is a step towards racial, economic, environmental, and social justice. We urge San Francisco to deny this appeal, and approve of this project because it is the right decision for the City and is required by state law.

CaRLA is a 501(c)3 non-profit corporation whose mission includes advocating for increased access to housing for Californians at all income levels, including low-income households. While no one project will solve the regional housing crisis, the proposed development is the kind of housing San Francisco needs to mitigate displacement, provide shelter for its growing population, and arrest unsustainable housing price appreciation. You may learn more about CaRLA at www.carlaef.org.

Sincerely,

Dylan Casey
Executive Director
California Renters Legal Advocacy and Education Fund

[1] Einstein, Palmer, and Glick, *Who Participates in Local Government? Evidence from Meeting Minutes*, Perspectives on Politics , Volume 17 , Issue 1 , March 2019 https://www.dropbox.com/s/k4kzph3ynal3xai/ZoningParticipation_Perspectives_Final.pdf?dl=0

California Renters Legal Advocacy and Education Fund
360 Grand Ave, #323
Oakland, CA 94612
hi@carlaef.org

December 14, 2021

San Francisco Board of Supervisors
City Hall, 1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4689

Re: 469 Stevenson Street Appeal of Environmental Review

Dear San Francisco Board of Supervisors,

The California Renters Legal Advocacy and Education Fund (CaRLA) submits this letter to inform the San Francisco Board of Supervisors that they have an obligation to abide by all relevant state housing laws when evaluating the 469 Stevenson Street development. The Housing Accountability Act requires approval of zoning and general plan compliant projects, such as this one, unless the city finds that the project would cause an impact on health and safety that is unavoidable and unmitigatable. These findings must be supported by a preponderance of evidence on the record, and be based on objective, written health and safety standards.

The proposed findings set forth in the motion under consideration fail to identify any objective standards with which this development fails to comply, and show no evidence of any health and safety impacts created by the development. Instead, the findings take issue with the analysis of environmental impacts (EIR). Specifically, the proposed resolution raises concerns with the EIR's analysis of residential displacement, geotechnical impacts, and impacts on surrounding historic resources. None of these concerns are legitimate reasons to indefinitely delay this project, and deny hundreds of families much needed homes.

First, concerns raised about the geotechnical impacts of the project are unfounded and premature. Under the city's owner standards, review of the soundness and adequacy of a building foundation takes place after entitlement approval, during the city's ministerial consideration of building permits. Furthermore, these concerns seem to be pure speculation, since the record of the project contains no evidence of seismic safety concerns. The California Supreme Court has ruled that seismic dangers to new buildings are not impacts under CEQA, and are therefore beyond the scope of the EIR for this project.[1] Any concerns relating to seismic safety should be addressed by the city's building permit process, not used as a pretext for indefinite delay.

Second, the presence of a newer building next to some older buildings is not an "impact" on historic resources. If this were the case, no building would be built in any

[1] California Building Industry Assn. v. Bay Area Air Quality Management Dist. (2015) 62 Cal.4th 369.

city without impacting historic resources. The concerns raised by the proposed resolution and during the previous hearing fail to identify any specific impact on historic resources in the surrounding area, and offer no evidence of these impacts other than the presence and scale of the proposed building. Again, this is not a legitimate concern with the existing EIR analysis.

Lastly, the findings point to potential displacement of existing residents that would somehow result from the "large number of market-rate units" in the development. Other than conclusory statements from some commenters at the previous hearing on this project, there is again no evidence of this impact. Nearly every study on the issue concludes that the development of market-rate units reduces surrounding residential rents, thereby reducing displacement pressures.[2] Furthermore, the Board would be completely ignoring the 73 onsite affordable units and affordable housing fees generated by the development. These homes represent hundreds of low income families that would have stable housing and not be at risk of displacement if the development is approved. There can be little doubt that the development proposed here would do far more to prevent displacement than cause it. The fact that this Board is willing to delay this type of development indefinitely for little or no reason shows why San Francisco continues to push out its lower income residents. The policies and processes maintained by this Board are the main drivers of displacement of San Fraciscan families. Until San Francisco is able to approve and build enough housing to keep pace with its job growth, this displacement will continue.

The Board today is considering requesting additional environmental analysis, but fails to show how the existing analysis is inadequate. Voting in favor of this resolution today will likely not shed any light on the supposed impacts identified, instead it will lead to months or years of delay, and most likely the failure of this project to ever be developed. Voting in favor of this resolution will effectively deny hundreds of families new homes in San Francisco.

As you are well aware, California remains in the throes of a statewide crisis-level housing shortage. New housing such as this is a public benefit. It will bring increased tax revenue, new customers to local businesses, decarbonization in the face of the climate crisis, but most importantly, it will reduce the displacement of existing residents into homelessness or carbon-heavy car commutes. The laws cited in this letter are designed to allow and require cities to approve of new homes over the objection of a small minority of neighbors. Research indicates that the anti-housing voices frequent in public hearings are disproportionately white, higher-income, and homeowners.[3] These voices do not represent the best interests of San Francisco or the broader community. Approving developments like this one over these vocal objections

[2] https://research.upjohn.org/cgi/viewcontent.cgi?article=1334&context=up_workingpapers
[3] Einstein, Palmer, and Glick, *Who Participates in Local Government? Evidence from Meeting Minutes,* Perspectives on Politics , Volume 17 , Issue 1 , March 2019 https://www.dropbox.com/s/k4kzph3ynal3xai/ZoningParticipation_Perspectives_Final.pdf?dl=0

is a step towards racial, economic, environmental, and social justice. We urge San Francisco to deny this appeal, and approve of this project because it is the right decision for the City and is required by state law.

CaRLA is a 501(c)3 non-profit corporation whose mission includes advocating for increased access to housing for Californians at all income levels, including low-income households. While no one project will solve the regional housing crisis, the proposed development is the kind of housing San Francisco needs to mitigate displacement, provide shelter for its growing population, and arrest unsustainable housing price appreciation. You may learn more about CaRLA at www.carlaef.org.

Sincerely,

Dylan Casey
Executive Director
California Renters Legal Advocacy and Education Fund

December 13, 2021

VIA E-MAIL

President Shamann Walton and Supervisors
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place
City Hall, Room 244
San Francisco, CA 94102

Re: Agenda Item 44
469 Stevenson Street Project (Case No. 2017-014833PRJ)
Proposed California Environmental Quality Act (CEQA) Motion and Findings

Dear President Walton and Supervisors:

Our office represents Yes In My Back Yard (YIMBY) and its project YIMBY Law, California nonprofits dedicated to increasing the accessibility and affordability of housing in California by enforcing state housing laws, and Sonja Trauss in her individual capacity, Executive Director of YIMBY Law. YIMBY, YIMBY Law, and Ms. Trauss strongly support the 469 Stevenson Street Project, Planning Case No. 2017-014833PRJ, which would provide 495 new residential units on a vacant parking lot, with 73 of the units restricted as affordable.

The project sponsor submitted an application for this Project over four years ago, and after numerous delays finally secured an approval for a project that will provide critically needed housing to a City in the midst of a housing crisis. Based on nothing more than vague claims of "inadequate analysis" in the CEQA review of a project that has been under review for four years, the proposed motion and findings effectively denies the Project by overturning the Commission's certification of the Environmental Impact Report (EIR) and putting the Project back to square one. The complete lack of any evidentiary support for the Board's action on the EIR demonstrate that the Board's concern is not with the CEQA document. The Board simply dislikes the Project and is attempting to abuse the CEQA process in order to deny the Project and avoid compliance with state housing laws.

We submit this letter to inform the City that the proposed motion and findings violate CEQA, the Permit Streamlining Act (PSA), the Housing Crisis Act of 2019, and the Housing Accountability Act (HAA). We urge the City to comply with its duties under state law and approve the Project.

1. <u>The City's Action Violates CEQA.</u>

The Planning Commission certified the EIR for the Project on July 29, 2021, finding that the EIR was "adequate, accurate, and objective." Despite these findings, the Board voted to conditionally overturn the Commission's certification on October 26, 2021, subject to written findings in support of the Board's conditional action. The proposed motion and findings do not adequately support overturning the Commission's certification of the EIR and are inconsistent with the requirements of CEQA. The proposed motion and findings confirm that the Board's actions were not supported by substantial evidence and therefore the Commission's certification must be upheld.

The decision to overturn factual determinations that underlie the analysis in an EIR must be supported by substantial evidence. (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516.) CEQA Guidelines section 15384 states that substantial evidence includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts," but does not include "argument, speculation, unsubstantiated opinion or narrative." An EIR is procedurally adequate if the EIR included "sufficient detail" to "enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Id.* at 510, 516.)

The proposed motion and findings are not clear whether the Board is overturning the Commission's certification due to purported procedural deficiencies or factual determinations, stating only an "inadequate analysis" related to historic resources, geotechnical impacts, and unidentified "potential physical impacts" from gentrification. The Initial Study for the Project included a sufficient analysis of all of these issues and determined that potential environmental effects related to these issues would be less than significant. The rationale of the Planning Department's conclusions included sufficient detail for the public to understand and consider these issues, which is all that is procedurally required. Thus in order to overturn the Commission's certification, there must be substantial evidence in support of the Board's actions to overturn the Commission's factual determinations.

With regard to historic resources, the Project is on a vacant parking lot and is not located within a historic district. The Project was reviewed by a Planning Department Historic Preservation Planner, who reviewed all relevant historic information and determined there would

be no material impact to nearby historic resources. The Planning Department identified all nearby historic districts and contributors to those districts, analyzed the potential impacts, and determined based on their expertise that the Project is sufficiently setback from adjacent historic resources so as not to materially impair their character or setting.

The proposed motion and findings state that the Project may have potential impacts to historic resources merely based on statements of opinion from individual Board members that "surrounding taller buildings do impact historic districts." No evidence from historic preservation experts was presented. No facts were provided to identify specific historic resources and character defining features that would be impacted from the Project. The motion and findings confirm that the Board's action is based solely on unsubstantiated opinion that tall buildings are, by their very nature, a significant impact to historic districts. The proposed motion and findings are simply not based in fact or evidence.

With regard to geotechnical impacts, a preliminary geotechnical investigation was completed for the Project by Langan Engineering and Environmental Services, Inc. on August 18, 2017. The investigation determined that, with the implementation of the report's recommendations, the Project will not have an impact on geology and soils, and the Project would be safe from seismic hazards and liquefaction. The Planning Department further found that the Project would be required to comply with the California Building Code, the City's *Interim Guidelines and Procedures for Structural, Geotechnical, and Seismic Hazard Engineering Design Review for New Tall Buildings*; the City's *Guidelines and Procedures for Structural Design Review, Requirements*, and the City's *Guidelines for the Seismic Design of New Tall Buildings using Non-Prescriptive Seismic-Design Procedures*, further ensuring that the Project would not have any adverse impacts to geology and soils. Courts have confirmed that compliance with standard regulations is "a common and reasonable mitigation measure" to ensure potential effects are less than significant. (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 906; *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 933.) It is also important to note that the City routinely relies on the Building Department's future

review of compliance with the building code and seismic guidelines to determine that a project will not have a significant environmental effect.[1]

The motion and findings confirm that the Board's action is based solely on their unsubstantiated opinion that compliance with the California and San Francisco Building Codes in insufficient to reach a conclusion on geological impacts. First, as the Planning Department explained, this conclusion was based on the recommendation and analysis of geotechnical experts, *in addition* to compliance with these requirements. Again, no evidence from geotechnical experts was presented to refute the Planning Department's conclusion. No facts were provided to identify specific impacts that would be caused from the Project. The proposed motion and findings are simply not based on any fact or evidence.

With regard to gentrification impacts, CEQA Guidelines section 15384 states that "evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." First, we not that the potential socio-economic impacts were already analyzed in a report by ALH Economics, which concluded that the project would be a benefit to the community, findings that were confirmed in a peer review by Siefel Consulting. No evidence of potential physical impacts were identified in these experts analysis of the proposed Project.

The proposed motion and findings, on the other hand, are based on Board members unsubstantiated opinions that the Planning Department's approach to analyzing the impacts of gentrification was "fundamentally flawed" and that the EIR lacked analysis of the "foreseeable physical impacts." Again, no evidence from experts was presented to refute the expert reports or the Planning Department's conclusion. The proposed motion and resolution fail to even identify what those supposed physical impacts might be, even if there was evidence to demonstrate the Project would cause gentrification. Once again, there was no evidence from any socio-economic experts and the Board's proposed findings are not based in fact or evidence.

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[1] See, e.g., Planning Department, *Notice of Preparation of an Environmental Impact Report and Public Scoping Meeting 5M Project*, January 20, 2013 at pp. 126-27; Planning Department, *Mitigated Negative Declaration 530 Sansome Street*, July 29, 2021 at pp. 158-160, which we incorporate into our letter and the record by reference.

The proposed motion and findings demonstrate that the Board's action was not based in fact or evidence, and therefore there is no legal basis to overturn the Commission's certification of the EIR for the Project. The Board's vague concerns regarding the adequacy of the EIR, without any supporting evidence, confirms that the Board is not concerned with the EIR – the Board simply dislikes the Project. As the California Department of Housing and Community Development (HCD) noted in its Nov. 22, 2021 letter, the Board's action constitutes an "effective denial" of the Project and is part of a larger trend by the City to ignore its duties under state law to approve housing development projects. The City's actions are an abuse of the CEQA process. The Board should rescind its prior action and uphold the Commission's certification of the EIR and approval of the Project.

2. <u>The City's Action Violates the Permit Streamlining Act.</u>

The PSA sets strict timelines for local agencies to act on proposed development projects, including a requirement for a lead agency to approve or disapprove a project within 120 twenty days from the date of certification of an EIR. (Gov. Code § 65950(a)(2).) The HAA states that a failure to comply with the PSA's time limits constitutes the disapproval of a housing development project. (Gov. Code § 65589.5(h)(5)(B).) CEQA, in turn, requires an EIR to be certified within one year from the date an application is accepted as complete, which may be extended for 90 days by ordinance or resolution if justified by compelling circumstances and if the applicant consents. (Public Resources Code § 21151.5; CEQA Guidelines § 15108.) The duty to certify an EIR within the time limits is a ministerial duty and an agency "has no discretion" to refuse to timely certify an EIR. (*Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215, 222.) Taking the 120-day PSA and 365-day EIR certification timelines together, an agency must act to approve or disapprove a housing development project that requires an EIR within 485 days from the time an application is accepted as complete, which may be extended to 575 days by ordinance or resolution if justified.

An application for the 469 Stevenson Street Project was first submitted 1,487 days ago on November 17, 2017. A revised application for the Project was accepted as complete by the Planning Department 1,292 days ago on May 31, 2018, over two and half times beyond the 485-day statutory limit to take action on the Project. Even if the City had adopted an ordinance to

extend the time to certify an EIR for the Project, which is not the case here, the City would still be 717 days beyond the statutory limit to take action on the Project.

The City had already failed in its duty to timely certify an EIR for the Project when the Commission certified the EIR on July 29, 2021, which was 790 days beyond the time limit to certify the EIR and 670 days beyond the limit to approve the Project. The Board's proposed motion and findings that directs the Planning Department to conduct further environmental review will result in a further failure by the City to comply with CEQA's statutory time limits to certify an EIR and, by extension, will result in a further failure to comply with the PSA's time limits to take action on the Project. The City's failure to comply with these statutory time limits ***also*** constitutes an unlawful disapproval of the Project under the HAA.

3. <u>The City's Action Violates SB 330.</u>

The Housing Crisis Act of 2019, commonly referred to as SB 330, recognizes that permitting delays exacerbates the cost of residential construction and significantly contributes to the housing crisis. (Housing Crisis Act of 2019, Sec. 2(a)(10).) To expedite the approval of housing, SB 330 imposes a strict five-hearing rule for housing projects. (Gov. Code, § 65905.5.) SB 330 defines a "hearing" to include any public hearing, and specifically states that continued hearings "shall count as one of the five hearings." (Gov. Code, § 65905.5(a), (b)(2).). SB 330 requires a local government to approve or disapprove of a housing development application at one of the five hearings. *(Id.)*

The City has already violated the five-hearing rule for the 469 Stevenson Street project. The Planning Commission held the first public hearing on the DEIR for the Project on April 16, 2020. The Commission held the second and third public hearings on the entitlements and the EIR for the Project on June 10, 2021 and June 24, 2021, but continued the item both times without a vote. The Commission conducted a fourth hearing on July 29, 2021, where the Commission voted to approve the Project and certify the EIR. The Board held the fifth hearing, and the final hearing allowed by law, on October 26th, 2021, where the Board reversed the Commission's certification of the EIR without explicitly taking an action to approve or disapprove the Project.

The public hearing currently scheduled for December 7, 2021 to adopt findings to reverse the Commission's certification of the EIR represents the sixth public hearing on the Project, a

clear violation of SB 330's five-hearing rule. The proposed motion appears to put the City on a path toward further violations of the five-hearing rule by directing the Planning Department to undertake further environmental review and requiring additional hearings on the entitlements and EIR for the Project. The Board must revise the proposed motion and findings to explicitly take action to approve or disapprove the Project, as required by law.

SB 330 recognizes that long permitting delays increases construction costs and exacerbates the housing crisis. Unnecessary and costly permitting delays have the same effect as the disapproval of a housing project, which is the reason behind SB 330's five-hearing limit. As HCD noted in its November 22, 2021 letter, the Board's action to overturn the Commission's certification of the EIR "by extension" overturned the approval of this critically needed housing Project, and constitutes an "effective denial" of the Project. We agree. The Board's proposed motion purports to only overturn the EIR certification but is in fact a disapproval of the Project itself.

4. <u>The City's Action Violates the HAA.</u>

The HAA also sets strict timelines for local agencies to determine whether a proposed housing development project is inconsistent, not in compliance, or not in conformity with any applicable plan, program, policy, ordinance, standard, or other requirement. Gov. Code § 65589.5(j)(2)(A)(ii) states that a local agency must provide written documentation identifying and explaining any code noncompliance "[w]ithin 60 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains more than 150 units." Gov't. Code § 65589.5(j)(2)(B) further states that if an agency fails to provide the required written code noncompliance documentation within the specified timeframe, "the housing development project shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision."

Here, the application was deemed complete by the City on May 31, 2018. The Project contains more than 150 units, and thus Gov. Code § 65589.5(j)(2) required the City to provide written documentation identifying and explaining any noncompliance with applicable ordinances, policies, or standards within 60 days (i.e. by July 30, 2018). The City failed to

provide any written noncompliance documentation within that timeframe, and thus as a matter of law, the Project was deemed code-compliant on July 31, 2018. Because the Project has been deemed code-compliant as a matter of law, the City is obligated by Gov. Code § 65589.5(j)(1) to approve the Project at the proposed density unless the City provides substantial evidence to establish that the Project will have a specific, adverse impact upon public health or safety. (*See Cal. Renters Legal Advocacy and Educ. Fund v. City of San Mateo* (Sept. 10, 2021, A159320) __ Cal.App. __.) The City has not identified any specific, adverse impacts to public health and safety that would be caused by the Project, and thus must approve the Project at the density proposed *even if* there was substantial evidence of an environmental effect, which is not the case.

In addition, the HAA makes clear that receipt of a density bonus "shall not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision." (Gov. Code § 65589.5(j)(3).) This is reiterated in Planning Director Bulletin No. 5, which explains that "[a]ny waivers, concessions, or incentives, conferred through the State Density Bonus Law are considered code-complying, and therefore are consistent with the objective standards of the Planning Code." Thus, even though the Project has already been deemed code-compliant, we want to be clear that the density bonus and waivers/concessions have no impact on the Project's code-compliance.[2]

As explained above and as confirmed by HCD, the Board's proposed action on the EIR is an effective disapproval of a code-compliant housing development Project without the required findings. The City has not identified or provided any evidence of specific, adverse impacts to public health and safety that would be caused by the Project, and therefore the proposed motion and findings are violation of the HAA. The Board must act to approve the Project at the proposed density as required by the HAA.

Conclusion

[2] The Density Bonus Law also requires "expeditious processing of a density bonus application" and requires local governments to "Adopt procedures and timelines for processing a density bonus application." (Gov. Code § 65915(a)(3)(A).) Although the City has failed to adopt procedures and timelines for processing density bonus applications, 1,292 days does not constitute the expeditious processing of a density bonus application.

The City's long delays in the permit approval process for the 469 Stevenson Street Project has already violated multiple state laws. The proposed motion and resolution only exacerbate these past violations, and puts the City on the path toward numerous more flagrant violations. We therefore respectfully request that the Board rescind its prior action and uphold the Commission's approval of the Project or we will be forced to take action to enforce state law.

Respectfully Submitted,

ZACKS, FREEDMAN & PATTERSON, PC

Brian O'Neill