

CONCURRENCE IN SENATE AMENDMENTS

AB 2501 (Bloom and Low)

As Amended August 19, 2016

Majority vote

ASSEMBLY: 50-11 (May 27, 2016)

SENATE: 34-3

(August 25, 2016)

Original Committee Reference: **H. & C.D.****SUMMARY:** Makes changes to the density bonus law. Specifically, **this bill:**

- 1) Clarifies that when an applicant seeks a density bonus for a housing development within, or for the donation of land for housing within the jurisdiction of a city or county, that local government shall provide the applicant with waiver and reduction of development standards for the production of housing units and child care facilities, in addition to incentives or concessions, as currently provided in density bonus law.
- 2) Prohibits a local government from conditioning the submission, review, or approval of an application for a density bonus on the preparation of an additional report or study that is not otherwise described in density bonus law.
- 3) Allows a local government to require reasonable documentation to establish eligibility for a density bonus, incentives and concessions, waivers of development standards, and parking ratios.
- 4) Requires, in order to provide for the expeditious processing of a density bonus application, the local government to do all of the following:
 - a) Adopt procedures and timelines for processing a density bonus application;
 - b) Provide a list of all documents and information required to be submitted with the density bonus application in order for the density bonus application to be deemed complete, consistent with density bonus law; and,
 - c) Notify the applicant for a density bonus whether the application is complete in a manner that is consistent with the Permit Streamlining Act (Act).
- 5) Modifies the circumstance under which a local government can refuse to grant a concession or incentive to a developer to when a concession or incentive "does not result in identifiable and actual cost reductions" to provide for affordable housing costs or rents for the targeted units rather than when it "is not required in order" to provide for the affordable housing costs.
- 6) Provides that a local government must bear the burden of proof for the denial of a requested concession or incentive.
- 7) Clarifies that "density bonus" means the maximum allowable gross residential density.
- 8) Clarifies that a developer that makes an application for a density bonus may elect to accept no increase in the density of a project.

- 9) Adds "mixed use development" to the definition of "housing development." Mixed use development means developments consisting of residential and nonresidential uses in which the nonresidential uses are less than 50% of the total square footage of the development and are limited to neighborhood commercial use and to the first floor of the buildings that are two or more stories. Neighborhood commercial means small scale-general or specialty stores that furnish goods and services primarily to residents of the neighborhood.
- 10) Provides that the granting of a concession or incentive cannot, in and of itself, require a special study.
- 11) Deletes the requirement that incentives or concessions proposed by a developer or local government result in "identifiable, financially sufficient" and actual cost reductions, and instead, require the "identifiable" and actual cost reductions.
- 12) Clarifies that each component of any density bonus calculation, including base density and bonus density, resulting in fractional units will be separately rounded up to the next whole number. Finds and declares that this provision is declaratory of existing law.
- 13) Provides that the density bonus law shall be interpreted liberally in favor of producing the maximum number of total housing units.
- 14) Provides that a request pursuant to this subdivision shall neither reduce nor increase the number of incentives or concessions to which the applicant is entitled.
- 15) Provides that no reimbursement is necessary because a local agency has the authority to levy service charges, fees, or an assessment sufficient to pay for the program or level of service mandated by this act.

The Senate amendments:

- 1) Allow a local government to require reasonable documentation to establish eligibility for a density bonus, incentives and concessions, waivers of development standards and parking ratios.
- 2) Clarify that a city must grant a developer incentives and concessions as part of a request for a density increase if requested by the developer and if the request is consistent with state law.
- 3) Provide that a request for a parking reduction does not reduce or increase the number of incentives or concessions to which the applicant is entitled.
- 4) Delete the provision that provides that denial of a requested concession or incentive will be deemed to have exhausted the applicant's existing administrative remedies.
- 5) Delete the provision that clarifies that the definition of "density bonus" includes any incentive or concessions, or waiver or reduction of development standard, provided to the applicant for the production of housing units and child care facilities.
- 6) Delete the express prohibition on a developer requesting an increase in density as a concession or incentive.

- 7) Modify the circumstance under which a local government can refuse to grant a concession or incentive to a developer when a concession or incentive "does not result in identifiable and actual cost reductions" to provide for affordable housing costs or rents for the targeted units.
- 8) Make clear that incentives and concessions means regulatory incentives and concessions, reduction in site development standards, zoning, or architectural design standards that result in actual identifiable costs reductions to providing for affordable housing costs or for rents for the targeted affordable units.
- 9) Add conforming changes to avoid chaptering conflicts with AB 2442 (Holden) and AB 2556 (Nazarian), both of the legislative session.

FISCAL EFFECT: According to the Senate Appropriations Committee, pursuant to Senate Rule 28.8, negligible state costs.

COMMENTS: Density bonus law was originally enacted in 1979, but has been changed numerous times since. The Legislature enacted the density bonus law to help address the affordable housing shortage and to encourage development of more low- and moderate income housing units. Nearly 40 years later, the Legislature faces the same challenges. Density bonus is a tool to encourage the production of affordable housing by market rate developers, although it is used by developers building 100% affordable developments as well. In return for inclusion of affordable units in a development, developers are given an increase in density over a city's zoned density and concessions and incentives. The increase in density and concessions and incentives are intended to financially support the inclusion of the affordable units. Because of numerous amendments over the years, State Density Bonus Law is confusing and subject to interpretation by both developers and cities as to its meaning.

All local governments are required to adopt an ordinance that provides concessions and incentives to developers that seek a density bonus on top of the cities zoned density in exchange for including extremely low, very low, low, and moderate income housing. Failure to adopt an ordinance does not relieve a local government from complying with state density bonus law. Local governments must grant a density bonus when an applicant for a housing development of five or more units seeks and agrees to construct a project that will contain at least any one of the following:

- 1) Ten percent of the total units for lower income households;
- 2) Five percent of the total units of a housing for very low income households;
- 3) A senior citizen housing development or mobilehome park; and,
- 4) Ten percent of the units in a common-interest development (CID) for moderate-income households.

A developer can submit a request to a local government as part of their density bonus application for incentives and concessions. Developers can receive the following number of incentives or concessions:

- 1) One incentive or concession for projects that include at least 10% of the total units for lower income households, at least 5% for very low income households, or at least 10% for moderate income households in a common interest development.
- 2) Two incentives or concessions for projects with at least 20% lower income households, at least 10% for very low income households, or at least 20% for moderate income households in common interest developments.
- 3) Three incentives or concessions for projects with at least 30% lower income households, at least 15% for very low income households, or at least 30% for moderate income households in common interest developments.

Timeline for reviewing density bonus application: Existing law does not set a timeline by which a local government must process an application for a density bonus. This bill would require a local government to respond to a density bonus application as required under the Permit Streaming Act. Within 30 days of receiving the application, a local government would be required to notify an applicant in writing if the application is complete. If the determination is not made within 30 days then the density bonus application would be deemed complete.

Electing to accept no density increase: State law allows a developer a percentage increase in density in return for inclusion of a corresponding amount of very- low, low, moderate income units. The maximum amount of density increase a developer can seek is 35%. Existing law allows a developer to choose to accept less of a density increase than he or she is entitled under the statute. The statute does not state explicitly that a developer can seek an amount equal to zero above the zoned density, however some have interpreted the law to allow this. This bill would explicitly state that a developer can elect to accept no increase in density.

Determining the value of concessions and incentives: Developers are allowed to submit a proposal for specific incentives and concession as part of the application for a density bonus. Local governments are required to grant the concessions or incentives a developer requests unless they make written findings based on substantial evidence that the concession or incentive is not required in order to provide the affordable housing, would have specific adverse health and safety impacts, or have an adverse impact on a property registered historic property that cannot be mitigated. When seeking a reduction in a site development standard or modification of zoning requirements or architectural design requirements, or other regulatory incentives and concessions, existing law requires that reduction or modification result in "identifiable, financially sufficient and actual cost reductions." This language was added to the statute by SB 1818 (Hollingsworth), Chapter 928, Statutes of 2004. According to the Assembly Committee analysis of SB 1818, "Current law requires local governments to provide applicants for density bonuses with incentives and concessions in addition to a density bonus, but the law does not quantify the value of the incentives and concessions that must be offered. SB 1818 requires that the incentives and concessions "result in identifiable, financially sufficient and actual cost reductions".

According to supporters of this bill, the intent of this language is to ensure that the concessions and incentives are financially sufficient to reduce the cost of the development to make the affordable housing units financially feasible. Further, according to supporters of this bill, in some cases local governments interpret this language to require developers to submit pro formas showing the amount of profit they will make on a project. The question becomes who determines whether or not a concession or incentives is "financially sufficient" to make the

affordable housing units pencil out. This bill deletes "financially sufficient" as the standard and requires the reduction in site development standards, modification of zoning requirements, or concession or incentive, to result in identifiable and actual cost reductions to provide for affordable housing costs or affordable rents.

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California Environmental Quality Act Lawsuits and California's Housing Crisis

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Summary

The California Environmental Quality Act ("CEQA")¹ continues to play a vital role in assuring that our state and local agencies carefully evaluate, disclose, and avoid or reduce the potentially adverse environmental consequences of their actions. In addition, CEQA ensures that agencies consider and respond to public and agency comments on these environmental issues, and accept the responsibility of disclosing when, even after mitigating adverse impacts, such actions would have significant unavoidable adverse impacts on the environment.

However, in recent years most CEQA lawsuits filed in California seek to block infill housing and transit-oriented land use plans, as well as public service and infrastructure projects in existing California communities. Most of the challenged projects are precisely the types of projects and plans that today's environmental and climate policies seek to promote. The most frequent targets of CEQA lawsuits typically are required to undergo a rigorous environmental analysis and public review process that takes 18 to 36 months or longer. This process involves an Environmental Impact Report and at least three rounds of public notice and comment before being eligible for approval by public votes of elected officials. Projects without the ample economic resources required to pay all costs (including technical and legal experts) are never eligible for an approval, and thus cannot be sued under CEQA. Even the types of infill projects most commonly sued under CEQA that are not ultimately sued must undergo three rounds of costly

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1. Cal. Pub. Res. Code § 21000 (West 2016).

administrative proceedings: (1) local agency staff, (2) appointed planning commissions, and (3) elected city councils or boards of supervisors; planning commission and elected council or board approvals require majority votes from officials who are themselves elected and appointed based on majority votes from elections. CEQA lawsuits may only be filed against the projects that survive this multi-tiered review and approval gauntlet, and are actually approved. There is no data available on the projects that lack the financial resources or the ability to overcome staff or political resistance to complete the entirety of this process, and are thus abandoned or downsized to avoid a CEQA lawsuit, or else, they enter into financial and other settlements to avoid a CEQA lawsuit.

In 2015, I joined with two law firm colleagues and published *In the Name of the Environment*, which was the first comprehensive study of all lawsuits filed statewide under the California Environmental Quality Act.² This study reviewed all lawsuits filed over a three-year study period between 2010 and 2012 (“First Dataset”). Our study recommended a “mend, not end” approach to updating CEQA by modifying CEQA lawsuit rules to assure that enforcement of CEQA is again aimed at protecting the environment and public health. We found that too often enforcement of CEQA is aimed at promoting the economic agendas of competitors and labor union leaders, or the discriminatory “Not In My Backyard” (NIMBY) agendas of those seeking to exclude housing, park, and school projects that would diversify communities by serving members of other races and economic classes. We did not suggest any new CEQA exemptions or otherwise “gutting” CEQA or any other environmental, public health, or climate laws or regulations. We made three specific recommendations for amending CEQA’s litigation rules:

First, anonymous CEQA lawsuits by parties seeking to conceal their identity and their economic interests in the outcome of lawsuits must end. CEQA’s purpose is to protect the environment and human health, not advance economic agendas.

Second, duplicative CEQA lawsuits allowing twenty or more lawsuit challenges for each agency approval for the same project or plan must end. Our communities have and must continue to evolve to meet new environmental, equity, and economic needs without the delays and costs created by serial lawsuits filed over many years (and even multiple decades) that repeatedly attack the same plans and projects.

2. Stephanie M. DeHerrera, David Friedman, Jennifer L. Hernandez, *In the Name of the Environment: Litigation Abuse Under CEQA*, HOLLAND & KNIGHT (August 2015), <https://perma.cc/SV3V-F5L2>. To compile the original report as well as this sequel, we filed a Public Records Act request with the Attorney General’s office, which by statute is required to be served with copies of all CEQA lawsuits filed statewide. See FN 4 in this first report for the lawsuit petition collection methodology.

Finally, we supported expanding “remedy relief” beyond politically favored projects in “transactional” bills that addressed only one or two projects, and instead more broadly limiting the extraordinary judicial remedy of vacating project approvals if a CEQA study is deficient to projects that could actually cause harm to the natural environment or public health. The presumptive remedy for deficient CEQA studies for other projects should be the required correction of CEQA study and imposition of additional feasible mitigation if warranted by the corrected study.

Our study has garnered significant support, and some criticism. No critics found any error in our data. Several commenters asserted that there was not enough CEQA litigation to warrant making any conclusion about the need for modifying CEQA’s litigation rules. Notwithstanding efforts to dismiss the need to update CEQA’s litigation rules, the political reality is that both before and after publication of our study, several “billionaire” projects, such as professional sports arenas and office headquarter complexes, have sought—and many have received—legislative relief from CEQA’s standard litigation framework.

This article presents the next three-year tranche of CEQA lawsuit data (2013-2015) (“Second Dataset”). The pattern of CEQA lawsuits has not changed, although an even higher percentage of CEQA lawsuit challenges were aimed at projects within existing communities. The top lawsuit targets remain infill housing and local land use plans to increase housing densities and promote transit. Given California’s extraordinary housing crisis³ and the shame inherent in having the nation’s highest poverty rate in one of the world’s most successful economies,⁴ the Second Dataset demonstrates even more clearly the need to update CEQA’s litigation rules to bring enforcement of CEQA into alignment with the state’s environmental, equity, and economic priorities.

I. Introduction

The First Dataset, the 2015 study I coauthored, demonstrated that CEQA lawsuits were most often aimed at infill housing (especially multi-family apartments in urbanized areas), that more transit projects were challenged than roadway and highway projects combined, and that the most frequent “industrial” targets challenged were clean energy facilities like solar and wind projects. As we discussed in our first report, these are the

3. LAO *Housing Publications*, LEGISLATIVE ANALYST’S OFFICE, <https://perma.cc/6F87-7NXW>.

4. David Friedman, Jennifer Hernandez, *California’s Social Priorities*, HOLLAND & KNIGHT, Chapman University Press (2015), <https://perma.cc/XKB7-4YK4>.

categories of projects—infill housing, transit, and renewable energy—viewed as environmentally beneficial, and each is a critical element of California’s climate policies.⁵ The First Dataset helped break through political rhetoric about what was—and wasn’t—being targeted by CEQA lawsuits. Most importantly, the data showed that the litigation practice that has evolved since CEQA’s 1970 enactment date was no longer focused on protecting forests and other natural lands, or fighting pollution sources like factories and freeways. Rather, CEQA has evolved into a legal tool most often used against the higher density urban housing, transit, and renewable energy projects, which are all critical components of California’s climate priorities and California’s ongoing efforts to remain a global leader on climate policy.

The First Dataset also demonstrated the widespread abuse of CEQA lawsuits for nonenvironmental purposes. State and regional environmental advocacy groups like the Sierra Club brought only thirteen percent of these lawsuits, while newlyminted, unincorporated groups with environmental-sounding names filed nearly half to the most CEQA lawsuits. Unlike the federal environmental laws that allow for “citizen suit” enforcement like the Clean Water Act, Clean Air Act, and Endangered Species Act, CEQA lawsuits can be filed anonymously. Additionally, lawsuits can be filed by parties attempting to advance an economic rather than environmental agenda, such as business competitors, labor unions, and “bounty hunter” lawyers seeking quick cash settlements, even if they have no real client.

This article compiles and analyzes the next three years of statewide CEQA lawsuits, which extend into California’s post-recession economic recovery period between 2013-2015. We repeated our original study methodology, but also sorted the data into regional subsets to better understand how CEQA lawsuit patterns differ by region. We also mapped CEQA lawsuit challenges in the six-county Los Angeles region, which is the state’s most populous and most CEQA litigious region.

This article also provides more detail on CEQA lawsuits challenging projects to build more housing, given the severity of California’s housing crisis. Nonpartisan agencies⁶ and outside experts⁷ have attributed this crisis to about three decades of severe underproduction of new housing, especially in the coastal employment centers of the Bay Area and Southern California. The housing crisis has produced a cascading sequence of

5. See, e.g., California Air Resource Board Scoping Plans for achieving greenhouse gas reduction targets, available here: AB 32 *Scoping Plan*, CALIFORNIA AIR RESOURCES BOARD (July 14, 2017), <https://perma.cc/B9TH-9R6Y>.

6. LAO, *supra* note 2.

7. Jan Mischke, Shannon Peloquin, Daniel Weisfield, Jonathan Woetzel, *Closing California’s Housing Gap*, MCKINSEY & COMPANY (Oct. 2016), <https://perma.cc/QG7Q-U74E>.

adverse consequences to working Californians. These consequences include the highest poverty rate in the nation when housing costs are taken into account, extreme commutes of more than three hours per day, billions of dollars in lost economic productivity, and adverse personal and public health outcomes including homelessness (more than 40,000 in Los Angeles alone). These extreme commutes, along with a poorly conceived policy to discourage automobile use by intentionally increasing road congestion on highways, has resulted in adverse environmental outcomes. Despite the most stringent clean car and clean fuel mandates in the nation, California's annual air pollution from vehicles actually increased for the first time since such data was collected as drivers face ever longer—in distance and time—commutes.⁸

The key conclusion from this Second Dataset is that CEQA lawsuit abuse is worsening California's housing crisis, increasing air pollution, increasing the global emissions of greenhouse gas that the state has vowed to reduce, and perpetuating and protecting segregation patterns by class and race. Given the social and political values of Sacramento's elected officials, I have concluded that if these CEQA practices were not pursued by powerful Sacramento special interests "in the name of the environment," they would have been roundly condemned - and ended - many years ago.

In short, the need to update CEQA litigation rules and end lawsuit abuse is stronger than ever.

II. CEQA Litigation by the Numbers (2013-2015): After the Great Recession, Even More Lawsuits Target Projects in Existing Communities, Especially Housing.

Our First Dataset⁹ captured the end of the Great Recession, when California's housing market collapsed. During this time, the federal government was issuing substantial grant funding for "shovel ready" public infrastructure (like the California High Speed Rail Project) and green energy upgrades (ranging from LED lighting retrofits for K-12 schools to the construction of large new wind and solar power generation facilities) under the American Recovery and Reinvestment Act of 2009. CEQA lawsuits filed in the First Dataset were about evenly split (49%/51%) between lawsuits targeting public agency projects for which there were no private applicants or "business" sponsor and lawsuits challenging housing or office buildings or other private sector projects sponsored by applicants needing public agency approvals or public funding.

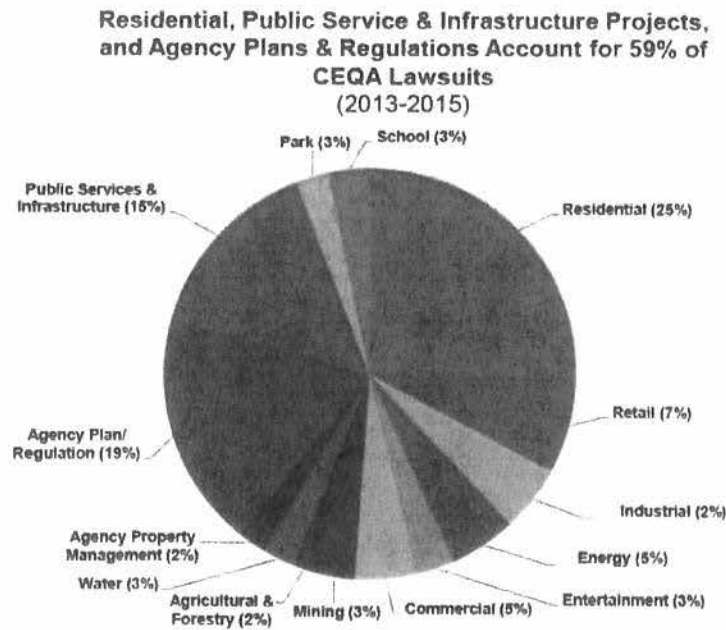
8. Melanie Curry, *Report: CA Emissions Shrinking—Except for Transportation*, STREETS BLOG CAL (Aug. 23, 2017), <https://perma.cc/8434-CUP6>.

9. DeHerrera, Friedman, & Hernandez, *supra* note 4.

A. Fifty-Nine Percent of CEQA Lawsuits Target Housing, Public Service/Infrastructure Projects, and Agency Plans/Regulations.

In the Second Dataset, as shown in Figure 1, the return of private capital to the market after the recession bumped up the number of private applicants seeking government approvals, and the relative share of CEQA lawsuits targeting private sector projects jumped from 51% to 58%. As was true for the First Dataset, the top three categories of lawsuit challenges were housing projects, followed by agency plans and regulations (most of which are local agency plans to increase housing or improve and diversify transportation infrastructure). Rounding off the top three CEQA lawsuit targets were public service and infrastructure construction projects, most of which were located within and served existing communities. In the First Dataset, these three categories of projects comprised 53% of all CEQA lawsuit targets. In the Second Dataset, these project categories accounted for 57% of all CEQA lawsuit targets.

Figure 1: Residential, Public Service & Infrastructure Projects, and Agency Plans and Regulations, Account for 59% of CEQA Lawsuits (2013-2015)



B. Most CEQA Lawsuits Target Projects in Urban Population Centers, Not Rural or Remote Natural Preserve Areas.

Although CEQA lawsuit anecdotes and political rhetoric often focus on protecting natural lands and wilderness areas, in the First Dataset 55% of these lawsuits were filed in the San Francisco and Los Angeles regions, and only 22% of CEQA lawsuits were filed in the combined regions of the Mojave, Sierras, Central Coast, Sacramento, and Northern California (all counties north of San Francisco and Sacramento). In the Second Dataset, the pattern of CEQA lawsuits as a tool used primarily in existing urban population centers increased. The Bay Area and Los Angeles region increased from 55% to 58% of the state's total volumes of CEQA lawsuits. Los Angeles had more than twice as many CEQA lawsuits as the next most litigious region, San Francisco. All 9 regions had some CEQA lawsuits, but the regions with more natural wilderness areas had the fewest CEQA lawsuits: fewer than 10 lawsuits were filed in the Mojave and Sierras, and only 22 CEQA lawsuits were filed in all counties north of Sacramento.

Figure 2: Los Angeles Region Accounts for 38% of CEQA Lawsuits Statewide

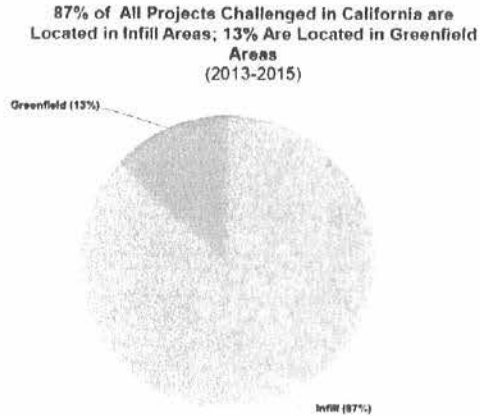


C. The Vast Majority of CEQA Lawsuits Target Infill Projects in Existing Communities, not Greenfield Projects on Undeveloped Lands.

In the First Dataset, about 80% of the CEQA lawsuits challenging projects that involved physical construction were located within the existing development patterns of existing communities, which is a definition of “infill” used by the state agency responsible for CEQA’s statewide regulatory “Guidelines,” the Governor’s Office of Planning & Research.¹⁰ Infill locations either fell within existing city boundaries, or within unincorporated county areas already surrounded by development, such as San Lorenzo in Alameda County and Marina Del Rey in Los Angeles County. Unincorporated county areas at the fringe of existing cities or the edge of unincorporated county communities, even if adjacent to existing development, were tallied as “greenfield” projects, as were projects in agricultural and other undeveloped areas. In the First Dataset, only 20% of CEQA lawsuits filed statewide challenged projects in Greenfields.

In the Second Dataset, the percentage of CEQA lawsuits aimed at infill projects jumped 7%, from 80% to 87% of the CEQA lawsuits challenging construction projects. Projects targeted in Greenfields fell to 12% of CEQA lawsuits filed statewide.

Figure 3: Vast Majority of CEQA Lawsuits Target Projects in Existing Communities



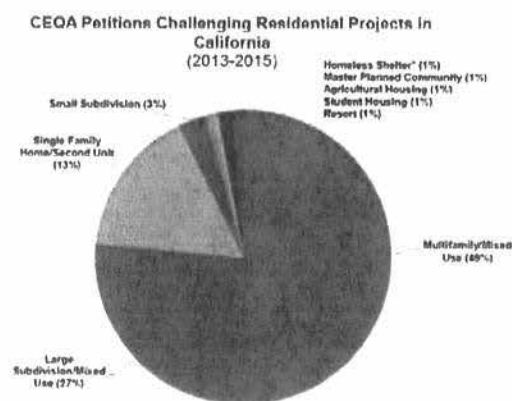
10. Governor’s Office of Planning and Research, *Infill Development*, CA.GOV, <https://perma.cc/3G99-YTGX>.

As part of the regional sorting methodology applied to our Second Dataset, this statewide tally hid more startling statistics: within the 9 counties of the San Francisco Bay Area, for example, 100% of all CEQA lawsuits were filed against projects in infill locations. Even within the Central Valley regions, most often criticized for allowing “sprawl” development, more than 70% of all challenged projects were in infill locations.

D. Infill Housing Remains Top Target of CEQA Lawsuits.

New housing projects were the most frequent target of CEQA lawsuits for which there was a private sector applicant in both the First Dataset and Second Dataset. However, the percentage of CEQA lawsuits against new housing units actually increased—from 21% to 25%—in the Second Dataset, even as California’s housing shortage reached crisis dimensions.¹¹ The percentage of CEQA lawsuits challenging higher density housing projects like apartments and condominiums also increased—from 45% to 49%—while the percentage of CEQA lawsuits challenging single family homes (or second units such as “granny flat” additions to single family homes) dropped from 17% to 13%. In both Datasets, the majority of challenged housing projects statewide were higher density—structures containing multiple housing units like apartments and condominiums—and located in more urbanized areas in regions with higher population densities.

Figure 4: Multi-Family Apartments and Condominium Projects Are Top Target of CEQA Lawsuits Challenging



11. Matt Levin, *California's Housing Crisis – It's Even Worse Than You Think*, MERCURY NEWS (Aug. 28, 2017), <https://perma.cc/K49U-4P4P>.

The regional subset of CEQA lawsuit housing data in the state's two most populous regions, the San Francisco Bay Area and the Los Angeles/Inland Empire/Orange County region, paints a vivid picture of how clearly CEQA housing lawsuits clash with current policies encouraging higher density urban development and increased transit utilization.

Regional Dataset highlights include:

1. One Hundred Percent of Bay Area CEQA Housing Lawsuits and 98% of the Los Angeles Region's CEQA Housing Lawsuits Target Infill Housing in Existing Communities.

Infill housing was far more likely to be targeted by CEQA lawsuits in all coastal regions of the state. One hundred percent of challenged housing projects in the San Francisco region were in infill locations, and 98% of San Diego's challenged housing, 82% of Northern California's challenged housing projects, and 72% of the Central Coast region's challenged housing projects were infill. Even in the rural expanse of Northern California, which runs from the coastline to the Nevada border and includes vast open spaces and low population densities, 82% of challenged housing projects were infill—and in the Sierra Foothills 100% of challenged housing projects were infill. Only in the San Joaquin Valley—which has a booming rate of housing production filled by displaced Bay Area families forced to “drive until they qualify” for affordable rents or home prices, and then endure daily commutes of three hours or longer—were the primary targets of CEQA housing lawsuits in greenfield rather than infill locations. The two regions with the most CEQA lawsuits, Los Angeles and the San Francisco Bay Area, also top state and national charts on high housing prices, high homeless populations, housing supply shortfalls, and unaffordable housing costs that drive poverty.

2. Los Angeles Region Hit with Far More CEQA Housing Lawsuits Than Any Other Region.

In Los Angeles, 33% of CEQA lawsuits target housing projects, far greater than the 24% of CEQA housing lawsuits filed statewide. In the Second Dataset, 13,946 housing units and a 200-bed homeless shelter were targeted by CEQA lawsuits in the Los Angeles region during the three-year study period. In the state's other major population centers, only 25% of CEQA lawsuits challenged housing projects in the San Diego region, 22% in the Bay Area region, and 16% in Sacramento. CEQA lawsuits targeting housing in more rural areas were much less likely, except in the Central Coast counties of Santa Cruz, Monterey, San Louis Obispo, and Santa Barbara where housing challenges comprised 33% of all CEQA lawsuits.

3. Transit-Oriented Urban Housing – Apartments and Condos – Are Top Target of CEQA Housing Lawsuits in LA Region.

Under one of the state's most important climate laws, Senate Bill 375,¹² regional transit agencies are required to identify parts of the region best served by public transit and adopt plans to encourage higher density housing (like multi-story apartment and condominium complexes) to help create riders for transit systems and discourage private automobile use. The least costly—and most common—of these higher density, transit-oriented housing projects are built with wood frames in a mid-rise range of four to six stories. The costliest—and least common—of these projects are high rise towers, required to be constructed from steel and concrete instead of wood frames. Most of these are rental apartments instead of purchased condominiums, and some include some ground floor retail or other nonresidential uses. Just over half (52%) of California's existing housing units are single-family homes, another 9% are attached products like townhomes and duplexes, and 27% of existing housing units are low and mid-rise apartments or condominiums. Only 1% of Californians live in high rise towers, which are by far the most expensive to construct, rent or buy.¹³ Notwithstanding the state's adopted climate and environmental laws and policies to promote higher density transit oriented housing, this form of housing remains the top target of CEQA lawsuits.

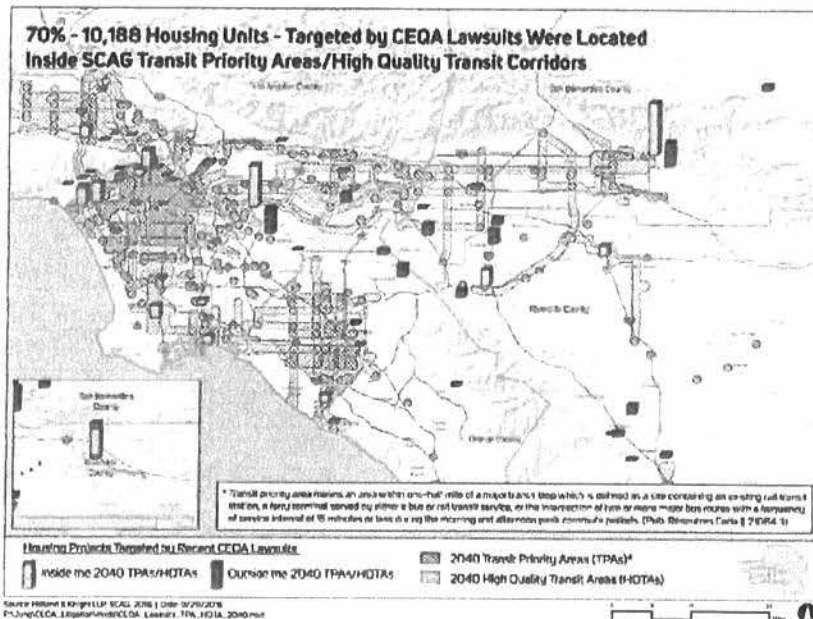
We studied the Los Angeles region—the five counties and 191 cities falling within the jurisdiction of the Southern California Association of Governments (SCAG) regional transit agency—to better understand the use of CEQA against housing projects. With SCAG's assistance, we mapped the location of each challenged housing project, as well as the project's approved number of housing units.

In Figure 5, we first depict this information against the backdrop of the region's best transit locations (around rail stations or in High Quality Transit Corridors (HOTC) with frequent commute hour bus service). 70% of the challenged housing units—10,188 housing units—were located within the transit priority areas and high-quality transit corridors where the state's climate and related environmental policies say we should be building most housing.

12. S.B. 375 of 2007-08, Stats. 2008, ch. 728, at 85.

13. Nathaniel Decker, Carol Galante, Karen Chapple & Amy Martin, *Right Type, Right Place: Assessing the Environmental and Economic Impacts of Infill Residential Development Through 2030*, Mar. 7 2017, <https://perma.cc/96RY-ECW7>.

Figure 5: 70% of LA Region's CEQA Lawsuits Target Transit Oriented Higher Density Housing

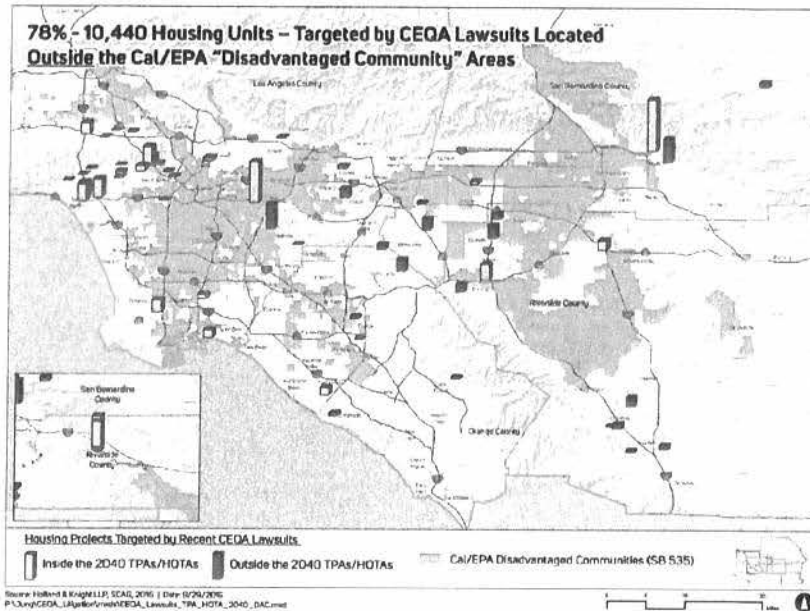


Another inconvenient truth is that LA CEQA housing lawsuits disproportionately target new housing in whiter, wealthier, healthier communities. Some of the political support for protecting the CEQA litigation status quo come from environmental justice advocates who extoll CEQA lawsuits as a tool for protecting poor communities of color that already suffer from disparately high levels of pollution. In response to environmental justice concerns, the Legislature directed California Environmental Protection Agency (Cal EPA) to map environmentally disadvantaged communities.¹⁴ Cal EPA prepared these maps based on metrics that include higher poverty and unemployment rates, lower educational attainment levels, higher populations of non-English speakers, higher rates of asthma and other health conditions associated with pollution, and more nearby sources of pollution such as freeways and contaminated factories.¹⁵ The Second Dataset makes clear that, in fact, CEQA lawsuits are most often filed to challenge projects in whiter, wealthier healthier communities. As shown in Figure 6, 78% of challenged housing units were located outside the boundaries of these mapped disadvantaged communities.

14. Stats. 2012, ch. 830.

15. S.B. 535, *Disadvantaged Communities*, OEHHA, (Apr. 2017), <https://oehha.ca.gov/calenviroscreen/sb535>.

Figure 6: 78% of Challenged Housing Units Located in Whiter, Wealthier, Healthier Areas of LA Region



The disparate use of CEQA lawsuits in whiter, wealthier, healthier communities extends beyond housing to other categories of CEQA lawsuits, such as lawsuits challenging transit improvements, school and park renovations, local land use plans, and upgraded infrastructure. Figure 7 includes the housing project lawsuit targets, and depicts in black dots the location of other types of projects targeted by CEQA lawsuits. Less than 2% of lawsuits were outside the developed “urbanized areas” of the region, and most CEQA lawsuits are filed in West LA and in pockets of wealthier communities elsewhere in the region.

and was nearly twice the take home pay of retail clerks.¹⁷ The best paid of these middle wage job earners, nurses and UPS delivery drivers, needed to spend more than 70% of their take-home pay on their monthly mortgage.¹⁸ The Perata study confirmed that full-time workers at what were once good jobs simply cannot afford housing in many areas of Los Angeles and San Francisco.¹⁹

CEQA is one of the well-recognized culprits in California's housing supply and affordability crisis.²⁰ As UC Berkeley Economics Professor Enrico Moretti, an advocate for increasing density and productivity in urban regions, recently reported in the *New York Times*:

Look at Silicon Valley. It has some of the most productive labor in the nation, and some of the highest-paying jobs, but remarkably low density because of land-use regulations. . . . Building anything taller than three stories, even on empty lots next to a train station, draws protests from homeowners.

And once a project is approved, it faces an endless series of appeals and lawsuits that can add years of delay. Appeals are remarkably easy and affordable to file and can be done anonymously. This basically gives every neighbor a veto over every new project, regardless of how desirable the project might be. It's as if Blackberry had veto power over whether Apple should be allowed to sell a new iPhone.

To make things worse, well-intentioned regulations are often used by neighborhood groups to further delay projects. The California Environmental Quality Act, for example, was written to protect green areas from pollution and degradation . . . Its main effect today is making urban housing more expensive. It has added millions of dollars of extra costs to a sorely needed high-rise on an empty parking lot on Market Street in downtown San Francisco.

The Bay Area's hills, beaches and parks are part of the area's attractions, but there is enough underused land within its urban

17. *Id.*

18. *Id.*

19. *Id.*

20. Chang-Tai Hsieh and Enrico Moretti, *How Local Housing Regulations Smother the U.S. Economy*, N.Y. TIMES (Sept. 6, 2017), <https://perma.cc/W7C6-HKC3>].

core that the number of housing units could be greatly increased without any harm to those natural amenities.²¹

Understanding why CEQA is such a problem weaves together two stories: a short history on how the existing land use patterns were set decades ago, and the strong legal bias against change embedded in CEQA.

A. Much of California's Existing Urban Land Use Patterns, the "Setting" Against Which Environmental Impacts Are Measured and Must Be "Mitigated" Under CEQA, Exist As A Result of Historic Race and Class Segregation.

California communities, like many other communities throughout the country, have a long history of resisting higher density apartments that are affordable to workers earning lower wages—especially workers from minority groups such as African Americans, Latinos, and Asians. Former President Obama cited this history, and particularly the expansive use of land use and zoning laws, in a report confirming that racial and economic class segregation had actually increased rather than decreased in recent years.²²

A recent publication by author Richard Rothstein presents a remarkably thorough history of how zoning and land use laws were designed to promote discrimination against African Americans and other communities of color, recounting disturbing evidence of successful efforts by numerous Bay Area communities to racially segregate.²³ By requiring large lot single family homes, imposing high development fees, and prohibiting or refusing to approve rental apartments or smaller, more affordable homes like duplexes, California communities became segregated by both race and class.²⁴

As dispassionately explained in *Color of Law*, during World War II, factories producing ships and other war material hired women and ethnic minorities to fill out their workforce. In the Richmond shipyards in the Bay Area, the federal government helped support the dramatic growth of new workers near wartime factories by helping finance mortgages for single family homes.²⁵ However, federal policy excluded African American workers

21. Hsieh & Moretti, *supra* note 20.

22. *Housing Development Toolkit*, THE WHITE HOUSE (Sept. 2016), <https://perma.cc/3MAW-A8PN>.

23. RICHARD ROTHSTEIN, *COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

24. *Id.* at 2.

25. *Id.* at 8–9.

from both mortgage assistance and home ownership.²⁶ Instead of accumulating family wealth by making payments on a mortgage, African-American workers paid rent for much smaller rental apartments with far less parkland and other neighborhood amenities. These differential housing programs—single-family home ownership for whites and rental rooming houses for African-Americans—were implemented in compliance with financing and land use agency rules designed to enforce segregation even in California communities that had no prior history of housing segregation.²⁷ After the war, Richmond’s factory workers remained racially integrated with the return of veterans to the workforce, with jobs paying wages that allowed all workers to move up the economic ladder. When Ford Motor Company decided it needed a larger new factory than its wartime Richmond facility, Ford decided to move about forty miles south to Milpitas in Santa Clara County, and the company offered job transfers for its Richmond workers.²⁸ White workers could trade their equity in Richmond homes to buy new homes in Milpitas and nearby Santa Clara county, and did so.

African-American workers, however, were shut out of proximate housing near the new factory by the combination of newly applied discriminatory financing rules, which denied African Americans access to veterans loans and federally insured mortgages, and local “character-of-community” land use zoning laws, which required larger lots and single-family homes (and prohibiting apartments) that were unaffordable to Richmond’s African American community. This was further compounded by a legacy of spending their salaries on rent rather than the wealth accumulation mortgage payments made by their white home owning coworkers.²⁹

Milpitas and Santa Clara county both used discriminatory large lot single family home zoning, as well as high development fees, to price out African-American families near the new Milpitas Ford factory. Over time, Ford’s African-American workforce—now forced to commute more than eighty miles daily—decreased substantially, and was further tainted by reports of unreliability based on commute-related tardiness. Meanwhile, Ford’s white workforce had moved on and up to the next level of home ownership, and any grandchild fortunate enough to have kept that modest three-bedroom ranch home in Milpitas purchased by a white wartime worker scored a financial grand slam given average home values of \$909,900.³⁰

26. *Id.* at 68.

27. *Id.* at 115.

28. *Id.* at 119-121.

29. *Id.* at 174.

30. *Milpitas Home Prices and Values*, ZILLOW, <https://perma.cc/YQY3-ACTQ>.

Workers unable to afford housing due to official government actions that discriminated on the basis of wealth and race never took that first step into middle class stability and wealth accumulation. Every three years, the Federal Reserve evaluates consumer wealth, and every year, the family wealth of homeowners has increased in relation to the family wealth of renters.³¹ The latest complete survey, which includes data from 2010-2013, showed that a homeowners' net worth is 36 times greater than a renters' net worth (\$194,500 v. \$5,400).³² With the latest surge in home prices, the prediction is that the 2014-2016 dataset due to be released later next year will show a wealth differential of 45 times.³³ Homeowners have much more wealth available to deal with college tuition, temporary job loss, illnesses, and other family emergencies. As noted in the *Color of Law*, notwithstanding civil rights reforms in the late 1960s:

Seventy years ago, many working- and lower-middle-class African American families could have afforded suburban single-family homes that cost about \$75,000 (in today's currency) with no down payment. Millions of whites did so. . . . The Fair Housing Act of 1968 prohibited future discrimination, but it was not primarily discrimination (although this still contributed) that kept African Americans out of most white suburbs after the law was passed. It was primarily unaffordability. The right that was unconstitutionally denied to African Americans in the late 1940s cannot be restored by passing a Fair Housing law that tells their descendants they can now buy homes in the suburbs, if only they can afford it. The advantage that FHA and VA loans gave the white lower-middle class in the 1940s and '50s has become permanent.³⁴

Implementation of these civil rights reforms cannot be taken for granted, but require the dogged enforcement advocacy and litigation in each of the successive decades by civil rights advocacy groups such as the Greenlining Institute cofounded by John Gamboa,³⁵ to assure that minority communities get fair access veterans loans, small business loans, insurance

31. Jesse Bricker, et al., *Changes in US Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances*, 100 FED. RES. BULL. 4 (Sept. 2014).

32. *Id.*

33. Lawrence Yun, *How Do Homeowners Accumulate Wealth?*, FORBES (Oct. 14, 2015), <https://perma.cc/BP38-XYM7>.

34. Rothstein, *supra* note 23, at 182–83.

35. THE GREENLINING INSTITUTE, <http://greenlining.org/> (last visited Nov. 8, 2017).

guarantees, and similar middle-class wealth creation programs of the federal and state government. In the forty years since the enactment of the Fair Housing Act, minority home ownership rates and household wealth had substantially improved, and the gap between minority and white families was shrinking.³⁶ That is, until the Great Recession's predatory lending practices, which disproportionately targeted minority communities to take out mortgages that could never be repaid, wiped out decades of progress and plunged a disproportionately high number of minority families into foreclosure and rental housing.³⁷

Our current urban "environment" continues to be dominated by single family homes in neighborhoods consisting of other single-family homes. A recent UC Berkeley study concluded that 62% of California households are single family homes, and another 9% live in town homes or duplexes.³⁸

Changing single family home neighborhoods by adding more residents, more traffic, and more kids using schools and parks challenges decades-old housing patterns. Additionally, bringing people who cannot afford to purchase single family homes in what has become million-dollar neighborhoods due to housing shortage challenges these patterns rooted in race and class discrimination. The core legal structure of CEQA, which measures "environmental" impacts against the existing setting, protects the existing characteristics of those neighborhoods and thus perpetuates land use practices founded in race and class discrimination.

It is noteworthy that CEQA was enacted in 1970, in the midst of the same era of civil rights advocacy and legal reforms. CEQA was also among the first of the modern era of environmental laws, and pre-dated scores of later laws that established mandates for the environmental degradation that dominated headlines in the 1960s and 1970s—mandates requiring clean air and water, public access to the coastline, stewardship of public lands, and the management and cleanup of household and industrial wastes. CEQA's much more generalized framework of disclosing and minimizing "harm" to the environment has never been integrated into the fabric of other environmental laws, and over the years has resulted in what Governor Jerry

36. John Gamboa, *Forward Economic Summit Remarks* (2017), COMMUNITY BUILDERS CALIFORNIA; see also Laura Gambia, *Homeownership and the Wealth Gap*, COMMUNITY BUILDERS CALIFORNIA, (May, 2016); see also Gillian White, *The Recession's Racial Slant*, THE ATLANTIC, (June 24, 2015), <https://perma.cc/DVD4-W6A>; see also Carlos Garriga et al., *The Homeownership Experience of Minorities During the Great Recession*, FEDERAL RESERVE BANK OF ST. LOUIS REVIEW (First Quarter, 2017) at 139–68.

37. Gillian B. White, *The Recession's Racial Slant*, THE ATLANTIC (June 24, 2015) <https://perma.cc/VDY7-MHHB>.

38. Decker, Galante, Chapple & Amy Martin, *supra* note 13.

Brown has called an “amoeba” of law that is constantly expanding and unpredictably evolving—and is now the tool of choice for resisting change that would accommodate more people in existing communities. Meanwhile, CEQA’s status quo defenders focus on the anecdotal use of CEQA against traditional industrial and protecting open space lands, but ignore the far more dominant current uses of CEQA against urban housing projects, and the local infrastructure and service facilities required to serve the people who live in these areas.³⁹ The Second Dataset, with its deeper examination of housing and regions, provides compelling evidence of CEQA litigation abuse to perpetuate racial segregation and economic injustice.

Zoning and other legal obstacles to increasing the supply or cost of homes in existing California communities should be critically scrutinized and updated to address the housing crisis. As demonstrated by the profligate use of CEQA lawsuits against infill housing in existing communities, CEQA has prominent placement on this list of legal culprits.

B. CEQA’s Legal Structure is Biased Against Change, and Thereby Perpetuate Historic Racial and Economic Segregation Patterns.

Racially and economically exclusionary zoning and land use regulatory patterns have created California’s “existing environment” as defined by CEQA. “Impacts” to this existing environment—ranging from temporary construction noise, to changes in private views, to increases in the number of kids playing in a park, going to school or using a library—are all required to be avoided or reduced to a “less than significant level,” to “the extent feasible given the objectives of the project.”⁴⁰ CEQA does not create clear criteria for any of these terms, nor does CEQA define what can be considered an “impact” to the environment. Since CEQA was enacted in 1970, judges have periodically creatively interpreted the law to discover new “environmental impacts,” like changes to private views,⁴¹ or temporary construction noise that complies with construction noise standards required by state and local laws,⁴² which then become mandatory under CEQA even if never expressly enacted by the Legislature. Agency regulators also routinely propose expansions to CEQA to include more “impacts” that

39. See generally CEQA Works, *CEQA Successes*, <http://ceqaworks.org/ceqa-successes> (noting several instances of CEQA successes in protecting the environment and public health).

40. Cal. Pub. Res. Code § 15130(a)(2).

41. *Pocket Protectors v. City of Sacramento*, 124 Cal. App. 4th 903, 904 (2004).

42. *Keep Our Mountains Quiet v. Cty. of Santa Clara*, 236 Cal. App. 4th 714, 716, (2015).

require study and mitigation,⁴³ which in turn lead to greater compliance costs, and more CEQA lawsuits as the precise scope of CEQA's expanded requirements are litigated over the next decade or longer.

As we discussed in our first study, CEQA lawsuits provide a uniquely powerful legal tool to block, delay, or leverage economic and other agendas after a project is approved. CEQA lawsuits can be filed by anyone (anonymously), pursuing any agenda (including perpetuating or expanding racial and economic segregation, gaining an advantage over a business competitor, or leveraging money or other economic concessions such as a labor agreement from a project sponsor), even if the project causes no harm to the environment or public health. The most common remedy in CEQA lawsuits is for a court to vacate—reverse—agency approval of the challenge project pending a redo of the CEQA process. Since CEQA now requires an evaluation of more than 100 topics and sub-topics, appellate courts have found CEQA compliance deficiencies—typically for one part of one study—in nearly half of the CEQA reported appellate court decisions.⁴⁴

The majority of Californians—two-thirds statewide and even 70% in the notoriously NIMBY Bay Area—support building more housing in their communities.⁴⁵ Californians recognize and want to help solve the state's housing crisis, which has adversely affected adults, children, college students, renters, businesses large and small that rely on a stable and diverse workforce, and backbone community contributors like teachers, nurses and firefighters. However, CEQA lawsuits are uniquely anti-Democratic, and uniquely vulnerable to being hijacked for racist and other discriminatory objectives, as well as pursued for economic gains, that would be abhorrent and unlawful if openly acknowledged.

Housing can be built, and it is politically supported by majorities of existing residents, including those who are protective of the character, services, and property values in their community across the country. However, CEQA lawsuits provide California's anti-housing holdouts—the political minority of as few as one anonymous party—with a uniquely effective litigation tool to simply say “no” to change. By filing a CEQA lawsuit alleging that the agency approving the project has made a mistake in analyzing one or more of the nearly 100 impact issues that must be addressed after nearly 50 years of evolving regulatory and judicial

43. Daniel R. Golub & Elizabeth Lake, *New Regulations Could Expand CEQA Review of Impacts to Common Birds*, HOLLAND & KNIGHT (Aug. 24, 2015), <https://perma.cc/A8XV-DNLG>.

44. DeHerrera, Friedman, & Hernandez, *supra* note 2, at 19–22.

45. Katy Murphy, *A Portrait of Housing NIMBY-ism in California*, MERCURY NEWS (Sept. 27, 2017), <https://perma.cc/9XX7-NNXX>.

interpretations of CEQA, this political minority can slow projects or stop them all together.

As noted in our first report, it is also very inexpensive to file a CEQA lawsuit, as courts demand only a few hundred dollars to accept a new lawsuit. The outcome of CEQA lawsuits is extraordinarily unpredictable; a metastudy of many types of lawsuits against agencies shows that agencies win about 80% of such lawsuits, and the chaos that would result from a pattern of agency losses prompted Congress to demand that the Internal Revenue Service track lawsuit outcomes and clarify or amend regulations that resulted in lawsuit losses.⁴⁶ In contrast, several studies of CEQA lawsuit outcomes show a very different pattern. Agencies lose nearly half of CEQA lawsuits, and further, agencies lose even more than half of lawsuits challenging smaller projects for which the agency concluded would cause no "significant" impacts.⁴⁷

When a judge decides that an agency should have conducted its CEQA preapproval review process differently, even if the error is confined to whether the traffic flow at a single intersection was appropriately counted,⁴⁸ the most common CEQA judicial remedy is to "vacate" the project approval until more environmental analyses is completed. This remedy can be applied even to partially constructed or even completed occupied homes. In an infamous example in Los Angeles, for example, a judge vacated the City's approval of a high-rise apartment project that was already occupied, and tenants had to be escorted out. The City's CEQA violation in that case was a court decision that disagreed that the City had appropriately enforced a CEQA mitigation measure requiring the "preservation" of a non-historic building façade as part of the new high rise apartment by allowing the common sense approach of allowing the façade to be temporarily dismantled, and then re-assembled and attached to the new high-rise, which was in fact done.⁴⁹ This incident was described in our first report, and the

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

47. *Id.*

48. David McAfee, *Calif. Appeals Court Affirms SF Win in Waterfront Project Row*, LAW 360 (Aug. 27, 2013), <https://perma.cc/GR7A-KS4E>.

49. Bianca Barragan, *Anti-Density Lawyer May Have Just Forced 40 People Out of Their New Homes in Hollywood's Sunset/Gordon*, CURBED L.A. (Oct. 20, 2014), <https://perma.cc/VAC8-GTKJ>; *see also*, David Zahniser, *Judge's ruling on Sunset/Gordon tower puts tenants in limbo*, L.A. TIMES (Oct. 17, 2014), <https://perma.cc/WVD7-PABA>.

building remains vacant—more than 3 years later—pending the completion of more CEQA review.⁵⁰

Those who successfully sue under CEQA can seek recovery from the public agency or private applicant their attorneys' fees as well as a multiplier, based on the theory that enforcing CEQA confers a benefit on the environment and thus the public.⁵¹ Those filing CEQA lawsuits anonymously, or even for openly extortionate purposes, are protected from becoming the target of CEQA lawsuits by California's anti-SLAPP (strategic lawsuits against public participation) statute, and are entitled to treble damages if improperly targeted by a lawsuit.⁵²

Because of the uncertainty in CEQA's requirements,⁵³ the time (3 to 5 years, with some examples extending to 9 and 10 years) required to complete the trial and appellate court proceedings, and the extreme consequences of an adverse judicial outcome that vacates project approvals, once a CEQA lawsuit is filed it becomes very difficult for a public or private project to access project financing (bank loans or equity investors) or grant funding. To timely complete politically favored projects, the Legislature has passed "buddy bills" granting remedy reform to CEQA lawsuits involving billionaire sports stadiums, corporate headquarters, and the Legislature's own office building.⁵⁴ However, the Building Trades blockade on CEQA reforms that would reduce CEQA's value as a leverage tool to secure Project Labor Agreements has left California's housing crisis at the ongoing mercy of CEQA lawsuits.⁵⁵

The founder of one of the most prolific CEQA plaintiff law firms, Clem Shute, in recently accepting a lifetime achievement award from the environmental section of the California State Bar Association, endorsed the need for CEQA litigation reform:

50. DeHerrera, Friedman, & Hernandez, *supra* note 2, at 65.

51. Arthur F. Coon, *Successful CEQA Petitioners May Recover Attorneys' Fees for Administrative Proceedings and Are Not Disqualified by Nonpecuniary Stake*, MILLER STARR REGALIA (Nov. 7, 2011), <https://perma.cc/YB45-9CG7>.

52. Cal. Code Civ. Proc. § 425.16.

53. The uncertainty of CEQA's requirements was most remarkably noted by the California Supreme Court itself, when it decided a lawsuit involving how CEQA should be applied in the context of greenhouse gas and climate change. The Court identified several "pathways" which "may"—or may not—be acceptable under CEQA, and remanded the issue for further consideration by the lower courts. *Ctr. for Biological Diversity v. Dep't of Fish & Wildlife*, 62 Cal. 4th 204, 195 (2015).

54. Assemb. B. X3 5, (2009), <https://perma.cc/QK3C-GEHM>; S.B. 292, (2011); S.B. 743, (2013); Assemb. B. 1935, (2014).

55. DeHerrera, Friedman, & Hernandez, *supra* note 2.

Moving to the bad and ugly side of CEQA, projects with merit that serve valid public purposes and not be harmful to the environment can be killed just by the passage of the time it takes to litigate a CEQA case.

In the same vein, often just filing a CEQA lawsuit is the equivalent of an injunction because lenders will not provide funding where there is pending litigation. This is fundamentally unfair. There is no need to show a high probability of success to secure an injunction and no application of a bond requirement to offset damage to the developer should he or she prevail.

CEQA has also been misused by people whose move is not environmental protection but using the law as leverage for other purposes. I have seen this happen where a party argues directly to argue lack of CEQA compliance or where a party funds an unrelated group to carry the fight. These, in my opinion, go to the bad or ugly side of CEQA's impact.⁵⁶

In short, the act of filing a lawsuit, with no showing of harm to people or the environment, and no showing of the likelihood of winning on the merits, should not be the equivalent of winning an immediate injunction against a project—a project that has often been shaped by more than two years of community input and approved by elected leaders—with neither a hearing nor a bond.

This economic and legal model of CEQA lawsuits—concealing the identity of those filing and funding CEQA lawsuits, low lawsuit costs, nearly 50% probability of winning, attorneys and bonus awards for successful challengers, and no material financial costs for unsuccessful litigants—has created a robust cottage industry for lawyers and consultants on both sides of CEQA lawsuits. And because CEQA applies only to new projects that require government approval or funding, CEQA's legal structure provides a fearsome shield against change. CEQA lawsuits put a sword in any opponent of change, motivated by any reason, including but by no means limited to protecting housing patterns rooted in race and class discrimination.

IV. CEQA Lawsuits and Traditional Environmental Values: The Ongoing Fight Against Housing by "Slow/No Growth"

56. E. Clement Shute, Jr., *Reprise of Fireside Chat*, *Yosemite Environmental Law Conference*, 25 ENVIRONMENTAL LAW NEWS, 3 (2016).

Environmental Advocates.

Although sometimes derisively referred to as “Not In My Backyard” (NIMBY) advocates, “slow growth” has historically been identified as a pro-environmental agenda and is closely aligned with historic preservation advocates as well as “Save Open Space and Agricultural Resources” (SOAR) land use controls directly enacted by voters in numerous California communities.⁵⁷ Efforts by slow growth communities to shut down housing production and population growth have been largely successful. For example, Marin County, located immediately north of San Francisco, limited population growth to 2% between 2000 and 2010, even though the state as a whole grew by 10% and the counties immediately north of Marin grew at nearly triple the rate of Marin. It is not coincidental that Marin also had the region’s oldest population, earning the top ranking in the number of residents aged 50 or older.⁵⁸ Ventura County, another stronghold of no growth politics, had a healthier growth rate at 9%, but this was dwarfed by the non-coastal Riverside and San Bernadino counties that grew by 42% and 19%, respectively.⁵⁹ It is no coincidence that Marin County has also been targeted for violating federal fair housing laws enacted to combat racial segregation.⁶⁰

Only one Bay Area county accommodated its fair share of population growth: Contra Costa grew by 10.5%.⁶¹ Meanwhile, immediately outside the 9-county Bay Area region, the Central Valley region’s San Joaquin County grew by 22%, while population growth immediately adjacent to the Bay Area region rose to 22%.⁶² Growth rates in more distant reaches of the Bay Area have anti-housing policies so severe that both counties actually lost population in the last census round (2000 to 2010) even though the housing supply crisis in both regions was already acute. Numerous commenters

57. *Growth Results Mixed in November Balloting; Ventura Slow-Growthers Succeed, but Others Fail*, CP&DR (Dec. 1, 1998), <https://perma.cc/8MSN-RL5N>].

58. Association of Bay Area Governments, *A Diverse and Changing Population* (2015), <https://perma.cc/SJ9N-TNMT>.

59. Census Viewer, *Population of Ventura County, California*, <https://perma.cc/JAW6-DCH6>; Joe Matthews, *Growth Limits Have a Downside*, THE SACRAMENTO BEE (Aug. 10, 2016), <https://perma.cc/49PG-DHMF>.

60. Richard Halstead, *Marin Housing Forum Highlights Federal Pressure To Reverse Segregation*, MARIN INDEPENDENT JOURNAL (Apr. 4, 2016), <https://perma.cc/VDK4-L2RL>.

61. Association of Bay Area Governments, *supra* note 58.

62. *Population of San Joaquin County, California: Census 2010 and 2000 Interactive Map, Demographics, Statistics, Graphs, Quick Facts*, CENSUSVIEWER, <https://perma.cc/M7QQ-V8QF>.

have observed that it is not possible to reconcile the climate priority of encouraging infill housing with anti-housing no-growth communities. However, these communities—like Ventura, Marin and San Francisco’s wealthiest old guard anti-housing neighborhoods—also produce stalwart environmental advocates and deep pocket donors for environmental and climate advocacy efforts, and it is at best awkward to challenge the anti-housing sentiments of funders. A new generation of progressive advocates is doing so, including state Senator Scott Weiner and YIMBY (Yes In My Backyard) California co-founders, Sonja Troust and Brian Hanlon.⁶³

Even California’s premier climate champion, former state Senator Fran Pavley, deferred to her NIMBY neighbors in failing to support 2016 legislation to allow “granny flats” to be built in existing single-family homes.⁶⁴ Since many single family homes were built when families were much larger, and homeowners tend to remain in their homes rather than move to smaller homes after their kids leave, these “accessory dwelling units” offer a virtually invisible method for a “win-win” outcome. “Granny flats” create new, lower cost housing—and new income sources for homeowners. Even this most modest of changes to existing neighborhoods has prompted CEQA lawsuits against individual units, and against local zoning regulations that allow such units to be constructed.⁶⁵ *The Color of Law* is a remarkable new history of the abuse of presumptively “color-blind” laws and regulations, such as land use zoning, infrastructure, and workforce labor, and how they were intended to—and in fact did—discriminate against African Americans in California and other states.⁶⁶ Taking a page out of the *Color of Law*, to assure that wealthy enclaves of single family homes remain unblemished by the occasional college student or in-law moving into an existing home with the dignity and privacy afforded by a separate entry door, private bath and galley kitchen, some communities are imposing fees nearing \$100,000 to convert an extra bedroom and bathroom into a studio apartment. Additionally, current building standards can cost another \$100,000 or more in building retrofit, and even small “granny units” of less

63. Loren Kaye, *You Can Have Infill Housing or an Unreformed CEQA, but Not Both*, FOX & HOUND (Apr. 6, 2017), <https://perma.cc/TV5Q-GA34>; Scott Beyer, *California State Senator Scott Wiener: 'San Francisco's Progressives Lost Their Way on Housing'*, FORBES (Jan. 31, 2017), <https://perma.cc/D3YH-ASHW>; Brock Keeling, Alissa Walker, *Can a Grassroots Movement Fix Urban Housing Shortages?*, CURBED (July 20, 2017), <https://perma.cc/AE7Y-A45U>.

64. Mike McPhate, *California Today: A Housing Fix That's Close to Home*, N.Y. TIMES (May 16, 2017), <https://perma.cc/KTD8-UPUP>.

65. Josie Huang, *Court Ruling Forces LA to Cut Back on 'Granny Flat' Permits*, SCPR (Apr. 7, 2016), <https://perma.cc/2777-ABBF>.

66. Rothstein, *supra* note 23.

than 700 square feet can cost \$300,000 or more—assuming no CEQA lawsuit challenges are filed by neighbors.⁶⁷

The fight between traditional environmental advocates (i.e., older homeowners seeking to protect the character of their communities) and newer environmental advocates (i.e., younger workers unable to afford housing and deeply concerned about climate) has played out in two recent fights over the soul, and control, of local Sierra Club chapters. In Seattle, which has produced far more housing than San Francisco despite occupying a smaller region, a group of primarily millennial environmental advocates nominated each other to leadership positions on the local Sierra Club chapter, and then elected themselves as the new generation of Sierra Club leadership.⁶⁸ Overnight, the Sierra Club in Seattle was converted from a preservationist-first, anti-change hammer set to pound any local official tempted to vote for new housing into a pro-housing, pro-transit supporter of evolving mix of higher density urban neighborhoods with multiple ranges of housing prices and lower per capita greenhouse gas emissions. The YIMBYs arrived, and with them, the Sierra Club's endorsement of prolific new housing production in Seattle.

The same tactics failed in two rounds of elections with the fierce old guard leaders of San Francisco's Sierra Club chapter. Although the national headquarters office is located downtown and has long hosted local Sierra Club meetings, the San Francisco chapter has resorted to meeting in the homes of old guard members to try to dissuade YIMBY members from participating in chapter activities, let alone seeking leadership positions. The old guard declined to even allow YIMBY advocates to be included on the ballot for local chapter leadership positions—a decision that was eventually reversed by the national Sierra Club after several rounds of appeals by YIMBY club members. In San Francisco, unlike Seattle, the Sierra Club continues to fight new housing projects—and has never advocated for any new housing project—and woe to the ambitious politician in San Francisco who fails to earn the Sierra Club chapter's endorsement.⁶⁹

For traditional environmentalists committed to preserving the character of their existing community (notwithstanding its probable origin in the race and class based zoning practices of the last century), the awkward truth is that fighting urban density undermines climate leadership. As summarized in a recent Bay Area Sierra Club newsletter article, "How do you convert a NIMBY into a YIMBY?:"

67. Red Oak Realty, *Home Truths: Should You Add an Accessory Dwelling Unit to Your Home?*, BERKELEYSIDE (Feb. 8, 2017), <https://perma.cc/F26Q-82GT>.

68. Interview with Sonja Trauss, California Yes In My Backyard Party Co-Founder (Oct. 2, 2017).

69. *Id.*

Studies have established a clear correlation between urban density and reduced carbon emissions. A 2014 report from the University of California, Berkeley . . . found that families living in denser urban cores had a carbon footprint that was half that of families living in suburbs.

YIMBYs want more than just interconnected [smart growth] neighborhoods – they also want housing to be affordable. Such policies can lead to tension with those residents—often older, whiter, and more affluent—who don't want traffic, congestion, and other effects of urban density, such as shadows from high-rise buildings. The conflicts play out before zoning boards, city councils, and other public bodies where young YIMBYs turn out to support large housing projects. The NIMBYs who oppose them are often progressive, environmentally minded individuals who believe in climate action and recognize that sprawl is unsustainable; they just want to preserve the look and feel of the neighborhoods they call home.⁷⁰

CEQA lawsuits are the perfect tool for the holdout NIMBY. These NIMBYs are like the two individuals who disagreed with the majority vote in multiple Berkeley ballot initiatives to increase density near BART, and decided to file a CEQA lawsuit against a downtown apartment project with the desire to maintain enough room on BART for them to sit instead of stand.⁷¹ CEQA also proved to be the perfect tool for the trio who launched more than twenty lawsuits against the same redevelopment project in Playa Vista over a span of nearly thirty years,⁷² and for the environmentalist lawyer who halted granny units in all of Los Angeles.⁷³ There is irony and tragedy in preserving this fealty to status quo of CEQA lawsuit rules in a state that prides itself on innovation, creativity, and creative (and profitable) disruptive technologies, products and services.

70. Jonathan Hahn, *Pro-Housing Urban Millennials Say "Yes In My Backyard"*, SIERRA (Aug. 23, 2017), <https://perma.cc/KS4R-VE73>.

71. Alexander Barreira, *Residents Sue City Over Environmental Assessment of Harold Way Project*, THE DAILY CALIFORNIAN (Jan. 18, 2016), <https://perma.cc/2MCY-7L8F>.

72. Patrick Range McDonald, *Playa Vista Quicksand*, L.A. WEEKLY (Sept. 19, 2007), <https://perma.cc/4WME-HRWN>.

73. Emily Alpert Reyes, *'Granny Flats' Left in Legal Limbo Amid City Hall Debate*, L.A. TIMES (Aug. 28, 2016), <https://perma.cc/R967-DHB5>.

The fact that NIMBY behavior also effectively discriminates against the minorities barred by law and then practice from many California communities is an uncomfortably racist reality only rarely acknowledged by environmental advocacy groups funded by NIMBYs. As documented in a 2014 University of Michigan study of 191 environmental non-profits, 74 government environmental agencies, and 28 leading environmental grant making foundations, “The State of Diversity in Environmental Organizations,” were funded by environmental group supporters. Despite increasing racial diversity in the United States, the racial composition in environmental organizations and agencies has not broken the 12% to 16% “green ceiling” that has been in place for decades. Confidential interviews with environmental professionals and survey data highlight alienation and “unconscious bias” as factors hampering recruitment and retention of talented people of color. Efforts to attract and retain talented people of color have been lackluster across the environmental movement.⁷⁴

Bias begets blindness: NIMBY use of CEQA lawsuits against multi-family infill housing to protect the “character of their community”—too often used as a code word for excluding “those people”—should have been roundly condemned by environmental advocates who routinely espouse a commitment to equity and environmental justice. Instead, support for anti-housing NIMBY-ism remains firmly rooted in the environmental activist world, prompting Professor Enrico Moretti to resign from his multi-decade membership in the Sierra Club:

Thanks to aggressive lobbying by an odd coalition of Nimby homeowners and progressives – radical county supervisors, tenants’ unions, environmental groups – in places like San Francisco and Oakland, it takes years (and sometimes even decades), harsh political battles and arduous appeals to get a market-rate housing project approved.

Some restrictions make sense: Nobody wants skyscrapers poking up among Victorian houses, and nobody wants to tear down historical buildings. But many others don’t: There are scores of empty parking lots in San Francisco and Oakland that can’t be built on because of political opposition.

Bay Area urban progressives, by fighting new housing in their neighborhoods, cause more sprawl on the rural fringes. I’m a committed environmentalist, and it made me rethink the way I engage with such issues: For example, I was a member of the Sierra Club for more than a decade. But because of all the unwise battles waged by the San

74. Dorceta E. Taylor, *The State of Diversity in Environmental Organizations*, UNIVERSITY OF MICHIGAN, Green 2.0, 1-5, 2 (July 2014).

Francisco chapter against smart housing growth in the city, I quit to support other environmental groups.⁷⁵

V. CEQA Lawsuits and Climate Leadership: Why CEQA Lawsuits and Agency Proposals to Expand CEQA Threaten California's Climate Leadership and Perpetuate Racial and Economic Injustice.

Climate change was not on anyone's radar screen when CEQA was enacted in 1970. Governor Brown and others have described climate change as an "existential" threat to the planet,⁷⁶ which requires immediate and dramatic changes in how we power our homes and factories, how we travel every day, and how our entire economy functions.⁷⁷ The status quo of CEQA's litigation rules directly and indirectly undermines California's climate leadership.

A. Political Resiliency and Climate Change.

Climate change is important to Californians and our elected leaders.⁷⁸ However, the housing crisis, ranging from an explosion in the homeless population, to the unavailability of middle class housing affordable, to teachers and other middle-income workers, now consistently polls much higher than climate change as a priority for Californians—along with other immediate, pragmatic concerns that affect everyone daily, like health care, transportation and schools.⁷⁹

The Governor's climate change regulators have proposed scores of measures to reduce greenhouse gas emissions and help California achieve

75. Enrico Moretti, *Fires Aren't the Only Threat to the California Dream*, N.Y. TIMES (Nov. 3, 2017), <https://www.nytimes.com/2017/11/03/opinion/california-fires-housing.html>.

76. Evan Halper, Melanie Mason, Patrick McGreevy, *Gov. Brown Unveils Plan for Global Climate Summit, Further Undercutting Trump's Agenda*, L.A. TIMES (July 6, 2017), <https://perma.cc/153B-5S7G>.

77. AB 32 *Scoping Plan*, California Air Resources Board (July 14, 2017), <https://perma.cc/B9TH-9R6Y>.

78. David Kordus, *Californians' Views on Climate Change*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (July 2016), <https://perma.cc/9EJB-U7W9>.

79. Mark Baldassare, Dean Bonner, David Kordus, Lunna Lopes, *PPIC Statewide Survey: Californians and Their Government*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (Sept. 2017), <https://perma.cc/NB67-GGZH>.

its climate change objectives. While increased transportation⁸⁰ and energy costs of climate measures has been extensively documented,⁸¹ measures that substantially raise housing costs are less published (e.g., the fact that “net zero” homes cannot meet ten year cost effectiveness criteria required by statute, as recently confirmed by the California Energy Commission Building Standards division).⁸²

Overall, climate regulations already imposed or under consideration for adoption as part of the 2017 “Scoping Plan” to achieve California’s greenhouse gas reduction goals place a disproportionately high burden on those households that have had to move further inland, drive longer distances, live in climates requiring more air conditioning and heating, and rent or purchase housing made more costly by CalGreen’s new climate-based building codes. Even more astonishing, however, are climate agency proposals to actually expand CEQA—increasing both compliance costs and litigation risks—for all new projects, including desperately needed new housing.

Increasing housing costs and expanding CEQA hit hardest at the same California households that have been priced out of urban housing markets. For example, the Office of Planning and Research (OPR) has proposed to expand CEQA to make driving one mile (even in an electric car) a new CEQA impact requiring “feasible” mitigation.⁸³ OPR has also proposed to expand CEQA to make building one mile of new highway capacity (even to relieve congestion, or to build a carpool lane) a new CEQA impact.⁸⁴ Both new impacts are proposed as part of a climate policy initiative of intentionally increasing traffic congestion to induce people to switch from cars to buses (or where available, to rail).⁸⁵ OPR’s proposal to expand CEQA has in turn been endorsed by California’s lead climate agency, the California Air Resources Board (CARB), in its 2017 Scoping Plan proposal.⁸⁶

80. Dale Kasler & Jim Miller, *Will You End up Paying More for Gas Under California’s Cap-and-Trade Extension?*, THE SACRAMENTO BEE (July 18, 2017), <https://perma.cc/L25M-8JWR>.

81. Kate Galbraith, *On Climate, a Rough Road Ahead for California*, CALMATTERS (July 18, 2015), <https://perma.cc/N9RE-KWPU>.

82. California Energy Commission, *Zero Net Energy Strategy Presentation* (8/22/17) (on file with author).

83. Governor’s Office of Planning and Research, *Revised Proposal on Updates to the CEQA Guidelines on Evaluating Transportation Impacts in CEQA* (Jan. 20, 2016), <https://perma.cc/8EWJ-MV3Y>.

84. *Id.*

85. *Id.*

86. Cal. Air Res. Bd., *2017 Climate Change Scoping Plan Update*, at 113 (Jan. 20, 2017), <https://perma.cc/853R-6PJ4>.

Expanding CEQA as a global climate strategy with the intention of forcing families—and disproportionately minority households—that are already priced out of proximate housing, and already burdened by high housing costs and crushing commutes, will earn a future “Color of Law” dishonorable badge of bureaucratic shame when applied to the reality of hard working Californians who are forced to drive ever longer distances, for ever longer periods of time, to get to housing they can afford. In fact, expanding CEQA to intentionally increase traffic congestion disproportionately hits those households without access to adequate housing the hardest: all Californians have to pay new gas taxes for road maintenance, and all have to pay higher gas prices as part of the cap and trade program, but only aspiring families wanting to purchase their first home or rent housing they can afford will bear the cost of an expanded and vague new “vehicle mile travelled” and “traffic inducement” mitigation mandate that applies only to newly approved plans and projects.

CARB’s proposed 2017 Scoping Plan takes an even more expansive approach with CEQA, recommending that “all feasible” mitigation measures reducing greenhouse gas be required for all new projects and plans, with no direction as to how much is enough, or how much more economic burdens should be placed on new greenhouse gas reductions in relation to CEQA’s myriad other impacts and mitigation mandates for new housing,⁸⁷ like school fees, inclusionary housing fees, and other fees that can add more than \$100,000 to the cost of each housing unit (even small rental apartments).⁸⁸ Like the OPR CEQA expansion proposal, the CARB CEQA expansion proposal places a disparate (and case-by-case, lawsuit-by-lawsuit) new greenhouse gas reduction obligation on new housing, above and beyond the many greenhouse gas reduction mandates already imposed on new housing construction by regulations such as California’s extensive “green” building code, and housing-related climate mandates applicable to other sectors such as electricity generation, transportation, and waste management.⁸⁹

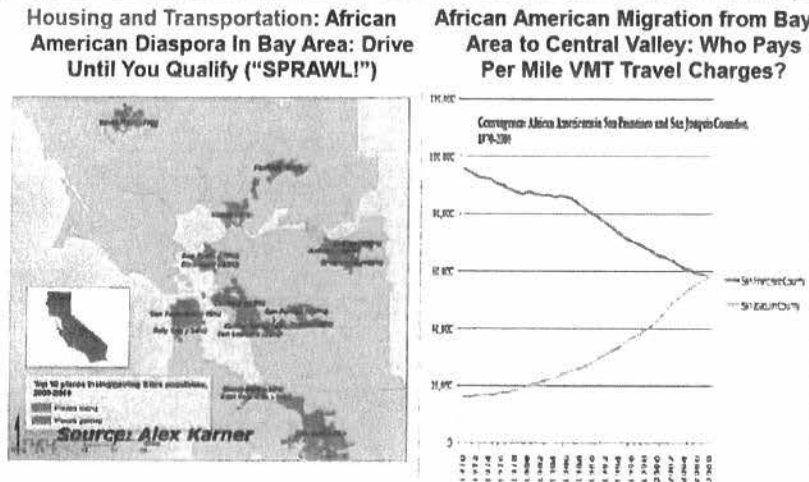
Groups studying the equity impacts of policies to increase urban density have consistently found that those being displaced earn lower incomes than those able to afford the limited numbers of shiny new apartments and condos being built in urban core job centers, and have identified census bureau data supporting their claim. Figure 8 shows the outward migration of African American families from core cities like San Francisco, Oakland, and San Jose to outlying suburbs like Santa Rosa, Fairfield and Antioch—and to even more communities in the San Joaquin Valley.

87. *Id.* at 151–52.

88. *Id.* at 39.

89. Cal. Code Regs. Title 24, Part 11, <https://perma.cc/SV9W-B8ZU>.

Figure 8: African American Family Migration from Urban Core Cities (2000-2010)



The housing crisis has already resulted in severe poverty rates, homelessness, and the diaspora of racial minorities to ever more distant locations. To then use climate policy generally, and CEQA specifically, to charge a fee or otherwise require an unquantifiable level of “mitigation” for every mile travelled for those forced to “drive until they qualify” for housing they can rent or own clearly is precisely the type of disparate impact highlighted in decades of discriminatory government policies in *Color of Law*.

Similarly, to intentionally increase traffic congestion as a climate strategy—which will inevitably result in greater tardiness for those workers forced to live farther away from jobs by the housing crisis—is to replicate the sin of the land use regulators in Milpitas and Santa Clara county faced with the socially unacceptable outcome of accepting a racially integrated change to the character of their community. Whether in the name of climate or community character, minority commuters driving forty miles each way to the Ford factory in Milpitas increased segregation since a reliable and racially diverse workforce simply “can’t be counted on” to get to their jobs promptly. Under this latest version of disparate impact government policies, many more workers (especially those with lower educational attainment levels) are likely to suffer from OPR’s strategy to use CEQA to intentionally increase road congestion, where the solution is less likely to be a whiter, more proximate workforce and more likely to be robotic workforce with fewer overall workers.

While some climate advocates have focused on developing and rapidly deploying clean car technologies, OPR and seven other state agencies have proposed to increase their authority over local land use decisions, and impose urban growth boundaries

(which have been proven to increase housing costs and limit supplies), charge development in urban areas an extra fee to pay for natural land conservation stewardship activities, and prioritize new development on the top target of CEQA lawsuits—high density, transit-oriented housing—at the same time they are expanding CEQA into the uncharted and litigious new territory of vehicle mile travelled and traffic inducement “impacts.”⁹⁰

Meanwhile, notwithstanding billions of dollars in new investments, ridership on public transit has dropped in all California regions,⁹¹ and the nation’s most authoritative transit access study continues to confirm that fewer than 10% of jobs can be accessed even in a 60-minute commute on public transit in any metropolitan region of California.⁹²

In a democracy that depends on majority votes, California’s climate policy must be politically resilient—and it cannot be blind to the race and class of those targeted with higher cost burdens, nor can it be blind to the hardships felt by the 40% of California’s working families living below or near the poverty line.

B. Global Greenhouse Gas Consequences of Housing Crisis Leakage.

California’s climate laws mandate dramatic reductions in greenhouse gas emissions (GHG) generated within the geographic boundaries of California.⁹³ GHG emissions that occur outside California are not counted in California’s GHG emissions inventory, nor are these emissions required to be reduced. These GHG emissions include emissions from manufacturing

90. One of the state’s most prominent experts on traffic studies, Ron Milam of the firm Fehr & Peers, recently reported that there are numerous competing methodologies for attempting to calculate vehicle miles travelled, that VMT growth tracks population and economic activity growth and is not reduced by current transit systems, and emerging transportation technologies like app-based ride services as well as automated vehicles are actually increasing rather than decreasing VMT. See Ronald T. Millam, Fehr & Peers (2017) (on file with author).

91. Laura J. Nelson, L.A. *Bus Ridership Continues to Fall; Officials Now Looking to Overhaul the System*, L.A. TIMES (May 23, 2017), <https://perma.cc/PR4R-G5K8>.

92. Center for Transportation Studies, *Access Across America*, UNIVERSITY OF MINNESOTA (2017), <https://perma.cc/3CT-V9GA>.

93. S.B. 32, 2015–2016 Reg. Sess. (Cal. 2016); Assemb. B. 32, 2005–2006 Reg. Sess. (Cal. 2006).

smart phones, solar panels, computers, and cars bought and used by Californians. Although California has created many “green jobs”—mostly for construction workers installing solar panels—there is also a steady exodus of workers and their families who move to other states. A study by *The Sacramento Bee* of U.S. Census Bureau records found that every year from 2000 to 2015, more people left California than moved in from other states.⁹⁴ The *Bee* estimated that the net outward migration during that period was 800,000 people. In a 2017 poll, half of all respondents reported that they were considering moving out of California because of high housing costs.⁹⁵

The top destinations for these Californians are Texas, Arizona, Nevada, Washington, Oregon, and Colorado. However, every time someone moves from California to any of these other states, global GHG emissions actually increase because per capita GHG emissions are much higher in each of these states, as shown in Figure 10. For example, the per capita GHG emissions in Texas are nearly three times higher than California’s per capita GHG emissions. California has worked very hard to reduce its GHG emissions and already achieved very significant decreases. However, to reduce the next tranche of GHG emissions by the dramatic levels required by law, California’s climate leaders need to decide whether to embrace policies that recognize equity, civil rights, the political need for local resiliency and global effectiveness over time, or are we simply playing a shell game to drive ever more people (and their cars) out of California even if global GHG emissions actually increase?

C. Building Housing Unaffordable to Middle Wage Workers Exacerbates Segregation and Promotes Political Instability, and Threatens California’s Climate Leadership.

The core housing priority informing current climate policies is to build smaller housing units in taller existing multi-family buildings. State climate laws seek to reduce single family home construction. Existing cities and areas long included in plans have also complied with California’s GHG reduction laws. Even ignoring Fannie Mae’s data showing ongoing strong consumer preferences for single family homes, both for empty nest

94. Philip Reese, *California Exports Its Poor to Texas, Other States, While Wealthier People Move In*, THE SACRAMENTO BEE (Mar. 5, 2017), <https://perma.cc/Q6WV-NCGY>.

95. Drew Lynch, *Californians Consider moving to rising housing costs, poll finds*, CAL WATCHDOG (Sept. 21, 2017), <https://perma.cc/5LNT-RQLH>.

households with seniors and for millennials,⁹⁶ the archetypal housing produced favored by climate advocates is simply unaffordable to middle income earners. In a recent report by UC Berkeley's Turner Center for Housing Innovation and UC Berkeley School of Law, the authors assumed that the construction cost per square foot of building a 2,000 square foot single family home was generally equivalent to the cost of building an 800 square foot low-rise apartment (generally six stories or less). Thus, the apartment costs 2.5 times more to build compared to a single family home.⁹⁷ The construction costs for apartments in high rise buildings (steel and concrete structures) is about twice the cost of building mid-rise units.

Middle income families can still afford (barely) to buy a \$400,000 home with three bedrooms, two bathrooms, and a small yard in a distant suburb located north or east of coastal job centers. Middle income families cannot afford, and cannot comfortably fit, in an 800 square foot urban apartment with monthly rents of \$3500 to \$4000.

Consistent with climate policy priorities, the authors of the study recommend dramatically increasing the density of existing communities.⁹⁸ To control costs, the authors recommend cheaper, smaller housing types (duplexes, quadplexes, townhomes, and mid-rise apartments), and development in existing communities for new units.⁹⁹ The authors acknowledge that their preferred "Target Scenario" would "not only entail the new construction of 1.9 million units, but also the demolition and redevelopment of tens and perhaps hundreds of thousands of units."¹⁰⁰ These "demolished units would consist disproportionately of those paying "below the median rents for their neighborhoods."¹⁰¹ The authors then recommend public policy and funding solutions for displaced lower income households.

Displacing hundreds of thousands of existing residents paying "below median" rents falls squarely on the spectrum of other policy proposals by academics and agencies that will disproportionately harm low-income residents, and communities of color. Like the shameful examples described in "The Color of Law," like targeting low income minority communities for large-scale demolition in redevelopment schemes that never seemed to have enough funding to help those it hurt. Another example is promoting

96. Patrick Simmons, *Baby Boomer Downsizing Revisited: Boomers Are Not Leaving Their Single-Family Homes for Apartments I* (2015); Patrick Simmons, *Rent or Own, Young Adults Still Prefer Single-Family Homes I* (2015).

97. Decker, Galante, Chapple & Martin, *supra* note 12, at 31-33.

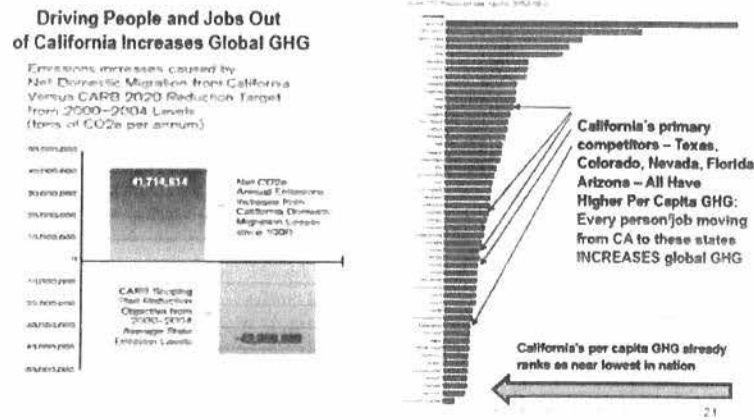
98. *Id.* at (pin cite)

99. *Id.* at 7.

100. *Id.*

101. *Id.* at 25.

community safety by targeting low income communities of color for demolition to make way for interstate highways in cities. The bottom line of this “climate” policy is displacement of those barely hanging on to housing in the midst of an unprecedented housing and poverty crisis in California.



To date, no state agency has acknowledged the global GHG impacts from people moving out of state due to California's housing crisis, or acknowledged that an effective climate policy should keep Californians at home and at work in housing they can afford. Instead, California's CEQA regulators—and a coalition of seven other state agencies—have threatened to intervene in local land use decisions with policies that increase housing costs and target existing urban residents with demolition and displacement. These policies do nothing to increase the housing supply, reduce astronomical housing costs, or overcome the most significant legal barrier to the timely completion of less expensive housing in locally and regionally approved plans that have already been endorsed by state climate regulators as meeting California's climate mandates. Updating CEQA's lawsuit rules as suggested herein would in fact increase the timely production of the types of housing favored by climate policies, and most frequently sued under CEQA. As discussed below, however, these common sense CEQA lawsuit rule reforms run afoul of one of Sacramento's most powerful special interests—the union leaders (and their CEQA law firms) comprising the Building Trades Council.

Functioning infrastructure, quality public services, and more housing all work in tandem along with the land use plans and ordinances that allow for thoughtful integration of these related community needs. When it becomes the norm to have dysfunctional transportation systems and deteriorating parks and libraries, then community resistance to new housing gets even stronger. The environmental and climate policy objectives of encouraging higher density, transit-oriented communities become even less likely to survive the local political approval process. CEQA lawsuits occur

only housing projects that have managed to run this community political gauntlet successfully, and actually get approved. There is no reliable metric for assessing the number of housing projects and housing units that lay on the cutting room floor from projects that never make it to or through the local approval process. Similarly, there is no metric for projects that get substantially downsized as part of the approval process, based on CEQA litigation risks or threats.

VI. Why do CEQA Lawsuit Rules Still Allow Anonymous Lawsuits to be Filed to Advance NonEnvironmental Agendas Against Environmentally Benign or Beneficial Projects Like Housing?

A housing crisis has driven California to have the highest poverty rate of any state in the nation (more than 20%, or nearly 9 million people, according to the US Census)¹⁰² and that leaves 40% of Californians unable to regularly meet basic household expenses (forced to choose between medical care, housing costs, and other routine expenses – and one paycheck or injury/illness away from potential homelessness, according to United Way of California).¹⁰³ Combined with 6 years of data demonstrating that infill housing is the top target of CEQA lawsuits statewide, why has one of the most accomplished politicians of his generation and a “progressive” Democratic party supermajority thrown in the towel on ending CEQA litigation abuse?

Governor Jerry Brown—the same man who was so frustrated by CEQA during his term as Oakland Mayor that he penned an amicus brief to the California Supreme Court which unsuccessfully sought to overturn an appellate court decision that elevated private views from private homes as an “impact” deserving of CEQA protection from the horror of viewing four story town homes¹⁰⁴—promised to reform CEQA, calling it the “Lord’s Work.” By his fourth term, he had given up. In an interview with UCLA’s *Blueprint magazine*, he was blunt in explaining why he couldn’t reform CEQA, stating “the unions won’t let you because they use it as a hammer to get project labor agreements.”¹⁰⁵

102. Dan Walters, *Why does California have the nation’s highest poverty level?*, CALMATTERS (Aug. 13, 2017), <https://perma.cc/GMM9-QWUA>.

103. Betsy Block et al., *Struggling to Get by The Real Cost Measure in California* 2015, UNITED WAYS OF CALIFORNIA 28 (2016).

104. Hon. J. Brown, amicus brief to the California Supreme Court in *Pocket Protectors v. City of Sacramento* (No. C046247) 2005.

105. Jim Newton, *Gov. Jerry Brown: The Long Struggle for the Good Cause*, UCLA BLUEPRINT (2016), <https://perma.cc/QC6D-R6FD>.

Governor's Brown's blunt conclusion that certain construction unions—and not the environmental advocacy groups more frequently associated with environmental laws like CEQA—have blocked CEQA reform was demonstrated in the following two legislative CEQA reform efforts in 2016 and 2017.

A. Protect Anonymity - Oppose Transparency.

To try to advance one of the litigation rule changes that would end CEQA abuse, several experienced CEQA lawyers representing both public agencies and private applicants first requested the California Judicial Council—which establishes court rules such as whether parties filing lawsuits need to disclose their identity—to amend the CEQA court rules that require disclosure at the front end of CEQA lawsuits during filing.¹⁰⁶ The Rules of Court already require this disclosure at the back end.¹⁰⁷ The disclosure is required if the party wins the lawsuit and wants to be paid attorney fees and a bonus from taxpayers, if the lawsuit is against a public agency, and if the lawsuit challenges a permit issued to a private party. The Rules of Court also already require those filing “friend of court” briefs when they are not a party to the lawsuit to disclose their identity and interests.¹⁰⁸ The Judicial Council, most of whom are appointed by the Legislature, balked at our request. The rationale was that requiring disclosure of who sues under CEQA was a policy decision to be made by the Legislature.¹⁰⁹ Working with several senior CEQA lawyers who represent both public agencies and private sector applicants, some members of the legal team who filed the Judicial Council request then drafted legislation that would help end manipulative abuse of overburdened superior judges by requiring those filing CEQA lawsuits to disclose their identity and interest. Judges have been directed by the California Supreme Court to interpret CEQA expansively to protect the environment, but are under no such direction to interpret CEQA expansively to advance the economic interests of anonymous litigants.

One of these bills, Assembly Bill 2026 was then considered in a policy committee hearing in the Legislature. The chief lobbyist for the Building Trades (which primarily represents mechanical trade locals like mechanical, electrical and pipefitters), strongly opposed requiring disclosure in CEQA.

106. See Cal. Code Civ. Proc. § 1021.5

107. *Id.*

108. Cal. R. Ct 8.520 (c).

109. DeHerrera, Friedman, & Hernandez, *supra* note 4, at 78-79.

lawsuits, saying this change would “dismantle” CEQA.¹¹⁰ All major environmental groups that routinely lobby in Sacramento—like the Sierra Club and California League of Conservation Voters—piled on, inexplicably opposing simple disclosure and transparency by those filing CEQA lawsuits. The hearing was particularly ironic in that these identical labor and environmental lobbyists had just urged expanding the transparency requirements of the Coastal Commission—but irony was in short supply in this tense face-off between political integrity and political patronage. Patronage won: while the Democratic chair chided the labor lobbyist by noting that was hard to see why transparency would “dismantle” CEQA, the legislative amendment was defeated in a party line vote.¹¹¹

Others have documented union use of CEQA lawsuits, but such information is hard to come by—and hard to readily verify using online resources—since unions rarely sue in their own name and instead make use of the anonymous CEQA lawsuit abuse route.¹¹²

B. Protect Duplicative Lawsuits: Allow Anyone to Litigate Every Approval, Every Time—Unless Projects Pay Prevailing Wages and Use Apprenticeship Program Workers.

California has an elaborate web of laws aimed at requiring every community to adopt land use plans that balance economic growth, environmental protection, and equity (including affordable housing for low income Californians). None of these plans can be approved without first completing the CEQA process, most often an Environmental Impact Report (EIR). Developing these plans and the EIR generally takes 1-3 years, costs hundreds of thousands and sometimes millions of dollars, involves an extensive community outreach process, and advisory vote by appointed planning commissioners, and a final vote by an elected City Council or Board of Supervisors. These plans identify where future housing and transportation improvements are supposed to be located, as well as parks, employers, schools and other land uses. The plans also identify how much housing should go where, often with a range that allows for future

110. *Assembl. Natural Resources Comm.*: Hearing on A.B. 2002 and A.B. 2026 (Apr. 2016) http://calchannel.granicus.com/MediaPlayer.php?view_id=7&clip_id=3592.

111. *Assembl. Natural Resources Comm.*: Hearing on A.B. 2026 (Apr. 2016).

112. *Documented Building Trades Union Abuse of California Environmental Quality Act (CEQA) 2014-2017*, COALITION FOR FAIR EMPLOYMENT IN CONSTRUCTION (July 27, 2017), <https://perma.cc/3D2F-YTZ6>.

adjustments within the range. These plans can then be targeted by CEQA lawsuits, and invalidated if a judge finds that the EIR was deficient.

Even if the EIR is not flawed, and the plan takes effect without a lawsuit or after a lawsuit, most new housing projects will need to go through the CEQA process all over again, and the project can be sued again, even if it complies with the plan. For big projects that require multiple approvals over time for each phase, more CEQA is generally required for each phase, and projects can be sued again for each phase. For some projects, these duplicative rounds of CEQA lawsuits sometimes span twenty years, and twenty lawsuits, or more.

The 2016-2017 Legislative sessions each took a bank shot approach to ending duplicative lawsuits. Here's the bank shot: CEQA already includes a statutory exemption for projects which an agency is required to approve as long as the project satisfies all approval eligibility requirements. For example, if a homeowner wants to replace windows with energy-efficient double-paned windows, some cities require the homeowner to obtain a "building permit." The city does not have the discretion to deny this type of permit as long as the homeowner meets permit approval criteria (e.g., the window is not too close to the next door neighbor).¹¹³ Local agency approvals for apartments and condominium projects are more complicated, and cities have generally retained the discretion to add conditions of approval or exercise their judgement to downsize or even disapprove a project—and CEQA applies to these "discretionary" permit decisions.

In 2016, when the housing crisis was reaching its first political crescendo in Sacramento and the Governor declared that a state funding solution for housing was infeasible—we could not "spend our way out of the crisis"¹¹⁴—the Governor attempted to squeeze through the eye of a needle a proposal to create a new state law that would assure that apartments and condominium projects received "ministerial" permits as long as the project complied with all local standards, and set aside some units for low income residents.¹¹⁵ The Governor's proposal covered only housing projects sized and located to comply with approved city land use plans, and as noted above, these plans have already gone through the CEQA compliance process.

The Governor's "ByRight" proposed permit process—in which an applicant was entitled as a matter of law to receive a permit for a housing

113. See *Window Permit Checklist*, City of Berkeley Permit Service Center (2010).

114. Liam Dillion, *Governor: We Can't Buy Our Way Out of Affordable Housing Problem*, L.A. TIMES (May 31, 2016), <https://perma.cc/7TT9-FULD>.

115. Liam Dillion, *Why Construction Unions Are Fighting Gov. Jerry Brown's Plan For More Housing*, L.A. TIMES (July 20, 2016), <https://perma.cc/P8EK-WJGT>.

project that met strict environmental criteria—included low-income housing, complied applicable legal standards, and was consistent with the approved local land use plan for which CEQA had already been completed. It would have sped up housing approvals by avoiding a second round of costly and time-consuming CEQA studies, eliminated the potential for a second round lawsuit against a project that complied with a plan, and used an existing CEQA exemption having to legislatively enact a new CEQA exemption or streamlining process. Avoiding statutory amendments to CEQA was a political necessity, since legislators receiving the endorsement and campaign funding contributions from the powerful Building Trades construction union were required to make a litmus test commitment to avoid amending CEQA. (Building Trades Council members use of CEQA lawsuits as leverage for giving their members construction jobs is described further in our first report, and below.)

The Governor's "By Right" proposal in 2016 died without a single Legislator being willing to endorse it—the proposal was never even put in print and introduced as legislation. Opposition by Building Trades to this proposal was vociferous,¹¹⁶ and other unions generally remained silent, even though union members—who typically earn too much money to qualify for "low income" housing and not enough to pay for housing near their jobs, especially in the large job markets in the Bay Area and California—would have been the major beneficiary of speeding up the approval of new housing projects without CEQA lawsuit delays. Construction workers would get work, and the creation of a significant new housing supply in existing communities would have helped California catch up with a deficit of more than one million new housing units.¹¹⁷

The political buzzsaw the Governor ran headlong into was the fact that only CEQA lawsuits against specific projects which are proposed to be built by a specific agency, company or person, create leverage required to avoid or settle a CEQA lawsuit in exchange for entering into a private contract between the project applicant and the union challenger. The form of private contract is a "Project Labor Agreement," and requires the project applicant to use workers from specific union locals for designated types of work (and to make financial contributions to the union's law firm and central leadership to help fund CEQA lawsuits against other projects).¹¹⁸ This use of CEQA lawsuits and lawsuit threats is the "workaround" used to avoid applicable federal and state laws that prohibit public agencies from

116. *Id.*

117. Elijah Chiland, *Here's How Serious California's Housing Shortage Has Gotten*, LA CURBED (Mar. 4, 2016), <http://perma.cc/27FS-HAGG>.

118. Kimberly Johnston-Dodds, *Constructing California: A Review of Project Labor Agreements*, CALIFORNIA RESEARCH BUREAU, CALIFORNIA STATE LIBRARY (Oct. 2001), <https://perma.cc/TK9F-REN4>.

requiring applicants to enter into contracts with private entities like unions as a condition of receiving agency approval. The courts have upheld a narrower set of laws that allow agencies to require union contracts for projects undertaken by the agency itself, and to require “prevailing wages” for projects receiving public funds.

After 2016’s “By Right Fight,” Senator Weiner introduced Senate Bill 35, which was quickly dubbed “By Right Light.” S.B. 35 also required ministerial approvals of housing projects that complied with plans (and thus greatly irritated “local control” advocates such as the representatives from the cities and counties who wanted to retain their authority to approve, downsize, add conditions, or deny such projects).¹¹⁹ However, S.B. 35 had the one magic ingredient missing from the Governor’s 2016 proposal, which was to require housing projects using this “ministerial” approval process to pay “prevailing wages” and benefits to construction workers, and use construction workers enrolled or trained in apprenticeship programs which are generally run by Building Trades for union members.¹²⁰ While the magnitude of cost increase to housing prices caused by paying higher wages and benefits to construction workers are disputed,¹²¹ at the low side estimate prepared by union advocates housing costs increase by 12%,¹²² in a middle range as reported by UC Berkeley’s Program on Housing and Urban Policy concluded that prevailing wages added 9% to 37% to construction,¹²³ and a 48% construction cost increase was reported by Beacon Economics in a 2016 study of a prevailing wage ballot initiative enacted in Los Angeles.¹²⁴ Since California’s average home already costs 2.5 times more than the average home price nationally, and since the US Census has concluded that high housing costs are the reason California has the nation’s highest poverty rate, even a 12% increase in housing costs—with no offsetting cost reductions—

119. See, e.g., League of California Cities opposition to S.B. 35, <https://perma.cc/283C-37SW>.

120. S.B. 35, Ch 366, 2016-2017 Reg. Sess. (Cal. 2017).

121. Liam Dillion, *Here’s how construction worker pay is dominating California’s housing debate*, L.A. TIMES (May 12, 2017), <http://perma.cc/B42R-TTMK>. See also, *Affordable Housing Cost Study*, CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, 47 (Oct. 2014); Newman & Blosser, *Impacts of a Prevailing Wage Requirement for Market Rate Housing in California*, CALIFORNIA HOMEBUILDING FOUNDATION, 16 (Aug. 24, 2017).

122. Interview with Bobby Alvarado, Executive Officer, Northern California Carpenters Union (Sept. 27, 2017).

123. Sarah Dunn, *The Effects of Prevailing Wage Requirements on the Cost of Low Income Housing*, 59 INDUS. & LAB. REL. REV. 141 (2005).

124. Christopher Thornberg et al., *Measure III*, BEACON ECONOMICS, 19 (2016).

makes the housing built under S.B. 35 less affordable to prospective residents. S.B. 35 was signed into law on September 29, 2017.¹²⁵

Use of a putatively color-blind law like CEQA to extract labor agreements continues a regrettable history by some unions to seek economic advantages for their members at the expense of African Americans and other minorities, who along with younger Californians are disparately impacted by California's housing crisis and CEQA's structural bias in favor of the status quo. As well documented in *The Color of Law*:

The construction trades continued to exclude African Americans during the home and highway construction booms of the postwar years, so black workers did not share with whites the substantial income gains that blue collar workers realized in the two big wage growth periods of the mid-twentieth century—war production and subsequent suburbanization. African Americans were neither permitted to live in the new suburbs nor, for the most part, to boost their income by participating in suburban construction . . .

A 1960's executive order covering contractors on federally funded constructed projects prohibited racial discrimination and required affirmative action to recruit African Americans. Yet when a new central post office was authorized for Oakland, California (on land cleared by displacing more than 300 families, mostly African American), not a single black plumber, operating engineering, sheet metal worker, ironworker, electrician or steamfitter was hired for its construction. When the Bay Area Rapid Transit subway system (BART) was built in 1967, not a single African American skilled worker was hired to work on it. The Office of Federal Contract Compliance blamed the unions, all certified by the National Labor Relations Board, for not admitting black members. The BART general manager allow that although BART was "committed to equal opportunity," it was unwilling to insist on nondiscrimination because that might provoke a work stoppage and "[o]ur prime responsibility to the public . . . is to deliver the system . . . as nearly on time as we possibly can." Although federal regulations provided for termination of a contractor for failing to comply with the non-discrimination order, no penalty was ever imposed."¹²⁶

125. S.B. 35, *supra* note 120.

126. Rothstein, *supra* note 23, at 161, 168–69, and 223–36 (regarding discrimination against Latinos, Asians, and other "non-caucasians").

C. Impose Nuclear Option of Reversing Project Approvals For Minor Glitches in Thousands of Pages of Technical Report; Allow only Good Buddies to Fix Studies While Building Projects.

A parade of what our first report calls “Buddy Bills”—limiting CEQA lawsuit judicial remedies and speeding up lawsuit schedules for politically favored professional sports owners and the Legislature itself—were introduced since we completed our first report, and most were approved. For example, the Legislature decided that its own office building should not be affected by the delays and cost overrun risks that occur with CEQA lawsuits, and in an uncodified budget bill gave itself the same remedy reform deal as it gave its favorite hometown basketball team in the Kings Arena Buddy Bill (S.B. 743) introduced and enacted in the last 72 hours of now Mayor (then Senate leader) Darryl Steinberg. The NBA champion Warriors got a deal to expedite the outcome of their CEQA lawsuit, but bills to give the same expedited lawsuit deal to an office tower, LA basketball arena, and corporate headquarters project remain stalled after the first year of this legislative session.

The Legislature’s willingness to shelter itself and favored political cronies from the nuclear option of CEQA’s most common judicial remedy has been forcefully and repeatedly criticized by the editorial boards of California’s major newspapers, which have demanded the same CEQA judicial remedies for the rest of us.¹²⁷ To allow housing projects to be derailed by NIMBY and labor lawsuits, while shielding its own office building and sports venues from CEQA lawsuit delays, shines the brightest of lights on why the much-publicized Legislative “housing package” of 2017 will do little to nothing to get a lot more housing built, and as the Governor noted will actually increase housing costs at a time when housing is already unaffordable to average California households.¹²⁸

127. CEQA *for thee, but not for me*, THE ORANGE COUNTY REGISTER (June 24, 2016), <http://perma.cc/4GCS-UENO>; Liam Dillion, *A key reform of California’s landmark environmental law hasn’t kept its promises*, L.A. TIMES (Jan. 24, 2017), <http://perma.cc/L24V-F5GN>; Scott Peters, *CEQA an obstacle for needed housing in California*, SAN DIEGO UNION TRIBUNE (Mar. 3, 2017), <http://perma.cc/ZP7K-WCUS>; Jim Wunderman, *California can’t reach greenhouse-gas targets without CEQA reform*, S.F. CHRONICLE (July 23, 2015), <http://perma.cc/BQJ8-CJ6L>; *CEQA reform bill falls short*, SF GATE (Aug. 16, 2014), <http://perma.cc/QLL4-MA9G>.

128. Dan Walters, *Walters: Bills would make California housing even more expensive*, THE MERCURY NEWS (Aug. 16, 2017), <http://perma.cc/MQ7O-LBAO>; Liam Dillion, *The housing package passed by California lawmakers is the biggest thing*

VII. Who's Responsible for Perpetuating CEQA Litigation Abuse Against Housing?

Using CEQA lawsuits over and over in the same communities, often for nonenvironmental reasons, remains fiercely defended by an alliance of NIMBY environmental advocates and building trade union leaders—both of which are backbone supporters of the elected legislators in the two-thirds majority Democratic Party in the Assembly and Senate. This coalition has created an iron curtain of opposition to reforming CEQA lawsuit rules to get more housing produced more quickly in locations that have already gone through at least one round of prior CEQA review. Governor Brown, who called CEQA reform “the Lord’s work” when he came into office seven years ago—after directly experiencing CEQA delays and cost overruns in his efforts to bring 10,000 new housing units to downtown Oakland during his two terms as Oakland’s mayor—conceded last year that the politics of CEQA reform were extremely difficult “because labor likes to use CEQA lawsuits to secure P[roject] L[abor] A[greements].”¹²⁹ PLAs are private deals cut between a project sponsor and a particular union local. For projects and in territories where multiple union locals vie for jobs, multiple CEQA lawsuits have been filed against the same project. By threatening or filing and then settling a CEQA lawsuit, union locals gain leverage to demand PLAs that require that its members get a negotiated set of project jobs. Even projects that are required by law, or agree to pay, the “prevailing wages” established by a state agency (which are typically just under three times higher than local wages for comparable work), find themselves targeted with CEQA lawsuits and lawsuit threats by union locals that demand that jobs go to their members – payment of prevailing wages alone is not sufficient.¹³⁰

It is no coincidence that the campaign watchdog organization Maplight has discovered that construction unions are also the largest single donor to Sacramento legislators with campaign contributions in excess of \$4 million for the most recent years data is available, with the next five highest interest groups, including state and local government employees and police and fire fighters unions, each falling below \$3 million.¹³¹

they've done in years. But it won't lower your rent. L.A. TIMES (Sept. 15, 2017), <http://perma.cc/Q694-BL8T>.

129. Jim Newton, *supra* note 105.

130. See Liam Dillion, *Here's how construction worker pay is dominating California's housing debate.* L.A. TIMES (May 12, 2017), <http://perma.cc/B42R-TTMK>.

131. See *Interest Groups*, MAPLIGHT, <http://perma.cc/9JMC-7C98>.

Data showing that the vast majority of California's union workers, who make too much money to qualify for subsidized "low income" affordable housing, but not enough to rent (let alone buy) a home near where they work, suffer most acutely from the housing crisis combination of an acute housing supply shortage, extremely high housing costs, and daily commutes that for many workers (including construction workers) now extend to three hours or more each day (and cause some workers to sleep in pickup trucks near job sites away from their families for much of the week).

Nevertheless, although more than 130 housing bills were introduced to address the housing crisis in 2017, as the *Los Angeles Times* editorial board critically noted:

[L]egislators and Brown are still avoiding some of the most controversial, and possibly, effective reforms. What about changes to the California Environmental Quality Act, which is too often used to block or shrink infill, transit-adjacent housing developments that are exactly the kind of environmentally-friendly projects the state needs?¹³²

Such entreaties, and the housing needs of its members, have not moved building trade leadership to reconsider its "transactional" use of CEQA lawsuit threats to force PLAs. Not since the prison guards union was the most powerful union in Sacramento—powerful enough to secure CEQA exemptions for prisons which then incarcerated generations of young people—has a trade union so completely controlled the "environmental" priorities that CEQA once protected.

Conclusion: Prayer for Relief

In August of 2016, I joined more than 100 fellow Democrats on the lawn of former State Treasurer Phil Angelides in Sacramento in a fundraiser for Hillary Clinton. Former President Bill Clinton spoke at the event, and graciously praised California for its innovation economy, its environmental leadership, and its generous funding of Democratic party candidates. He then gave us all a jolt when, with a sharp eye and serious tone, he explained that when he was growing up in Arkansas, "everyone knew that if you worked hard and played by the rules, you'd do better than your parents. That wasn't true if you were black, and we needed to work on that. But it was true for the rest of us."

Having secured our attention, he went on to explain that for too many Americans—including people living not too far away from where we were

132. See Times Editorial Board, *To End the Housing Crisis, California Leaders Can't Be Afraid to Put All Options on the Table*, L.A. TIMES (May 27, 2017), <http://perma.cc/BU7S-2783>.

standing in the Central Valley—that promise that you’d do better than your parents if you worked hard and played by the rules hadn’t been true for far too long, in some areas, for generations. He said what we have now in America just wasn’t ok, and we needed to all acknowledge—both parties—that we’d made some mistakes. “None of us knew,” he said, “what globalization was going to mean for American workers, for manufacturers.” And now that we do know, “we have to acknowledge the pain, we have to work on restoring upward mobility and the American dream, to the huge numbers of people in vast areas in the country that are suffering.”

President Clinton spoke to my heart with that speech, and he spoke to my own background as a child of Pittsburg, California, where struggling families are still suffering from the shutdown of so many California factories in the 1980s and 1990s. And in that crowd of Hilary supporters, I saw the silos, the walls we have created between the haves and have-nots, where many in the crowd—including the top ranking environmental regulators in the Brown administration—stiffened with resistance to the notion that they bore any responsibility for creating or solving the suffering of so many. Instead, I saw in the crowd a shudder of rejection—“those people” and “those jobs” are at odds with our politically correct policy priorities, which are best addressed at tony conferences among the well-dressed and well-educated where “those people” are tucked away discretely behind kitchen doors and valet stations.

I saw that rejection in CEQA lawsuits across the state that oppose housing for “those people,” like the lawyer challenging a Habitat for Humanity affordable housing project in downtown Redwood City¹³³ that will block part of the view from the single family home he converted to an office more than twenty years ago.

I saw it in the vitriol of opponents of a Planned Parenthood clinic relocating to an existing office building, in a CEQA lawsuit¹³⁴ spanning more than three years, based on the city’s failure to evaluate the environmental consequences to noise and public safety that the litigants have themselves promised to cause if the clinic is allowed to open. I see it in the three other

133. *Friends of Cordilleras Creek v. City of Redwood City*, No. CIV517288, 2013 Cal. Super. LEXIS 11599, at 1, 2 (Nov. 15, 2013).

134. *Respect Life South S.F. v. City of South S.F.*, No. 524437 (Cal. Super. Ct. Filed July 2, 2014); *Respect Life South S.F. v. City of South S.F.*, 15 Cal. App. 5th 449 (2017).

CEQA lawsuits targeting health care facilities in Kern County,¹³⁵ San Leandro,¹³⁶ and Willits.¹³⁷

I saw the kids that will attend school in trailers, and never experience the school improvements built and funded, but stalled by CEQA lawsuits in El Cerrito,¹³⁸ Mill Valley,¹³⁹ San Mateo,¹⁴⁰ Mendocino, Los Angeles,¹⁴¹ and Imperial County.

I saw the kids and grownups sidelined by CEQA lawsuits against parks in Salinas,¹⁴² San Rafael,¹⁴³ San Francisco,¹⁴⁴ Newport Beach,¹⁴⁵ Albany¹⁴⁶ and Marina Del Rey.¹⁴⁷

I saw patrons of San Francisco's library,¹⁴⁸ the Gene Autrey Museum,¹⁴⁹ and the San Martin Mosque as these projects spend their limited funds on

135. Tehachapi Area Critical Land Use Issues Group, (Cal. Super. Ct. Cnty. of Kern. Filed Oct. 19, 2011).

136. *Preserve San Leandro Mobility v. City of San Leandro*, 2010. Cal. Super. Ct. Cnty. of Alameda. (Filed May 28, 2010).

137. *Keep the Code v. City of Willits*, (Cal. Super. Ct. Cnty. of Mendocino. Filed May 4, 2015).

138. CEQA Working Group, *CEQA Misuse Case Study: Portola Middle School, El Cerrito*, (Oct. 6, 2017), <https://perma.cc/8D3G-W3M9>.

139. *Citizens for Educated Government v. Mill Valley School District*, (Cal. Super. Ct. Marin Cnty. Filed July 18, 2011).

140. *Alliance for Responsible Neighborhood Planning et al. v. Burlingame School District*, No. CIV 519075 (Cal. Super. Ct. Cnty. of San Mateo. Filed May 15, 2014).

141. *Eastwest Studios v. City of L.A.*, (Cal. Super. Ct. Cnty. of L.A. Filed Sept. 17, 2017).

142. *Higashi Farms, Inc. v. City of Salinas*, (Cal. Super. Ct. Cnty. of Monterey. Filed Dec. 18, 2014).

143. *Gallinas Creek Defense Council v. City of San Rafael*, (Cal. Super. Ct. Cnty. of Marin. Filed Jan. 17, 2013).

144. *Sierra Club v. City of S.F.*, Now. CPR-12-512566, 2014 Cal. Super. LEXIS 2773 (Cal. Super. Ct. Cnty. of S.F. Filed Feb. 5, 2013).

145. *Banning Ranch Conservancy v. City of Newport Beach*, (Cal. Super. Ct. Cnty. Orange. Filed Aug. 24, 2012).

146. *Sierra Club v. East Bay Regional Pwarks District*, (Cal. Super. Ct. Cnty. of Alameda. Filed July 29, 2015).

147. *Ballona Wetlands Land Trust v. California Coastal Commission*, (Cal. Super. Ct. Cnty. of Los Angeles. Filed Feb. 11, 2013).

148. *Friends of Appleton-Wolfard Libraries v. City of S.F.*, No. CPF-11-511469, 2012 Cal. Super. LEXIS 4130 (Cal. Super. Ct. Cnty. of S.F. Filed July 26, 2012).

lawyers fussing about the details of traffic studies drag on for years after everyone thought their project was “approved.”

I saw the emergency communication services of Los Angeles, Google’s internet fiber project, metro projects, bicycle plans, shuttle bus services,¹⁵⁰ tree removals in Beverly Hills¹⁵¹ and tree plantings in Santa Monica,¹⁵² and sediment removal in a water reservoir, all arrayed in front of a harried superior court judge asking—reasonably—what is the environmental problem that brings you to my court, and then diving into thousands of pages of detailed study for that “gotcha” moment when the judge says, “let’s vacate this whole approval and just go back to fix this one thing.”

And I saw thousands of stalled affordable housing units projects¹⁵³ scrambling for funding given the demise of California’s redevelopment tax increment laws, apartments next door to new transit stations that cost California’s trusting taxpayers billions of dollars to construct, and apartments in neighborhoods in virtually every California community with struggling strip malls and cleaned up industrial lands, perfectly situated for residential use.

These projects—all included in the stacks of more than 1,000 CEQA lawsuits in our offices—don’t get any more “environmental” or “equitable” with time. The housing crisis has gotten worse, the migration of Californians to lower cost states with higher per capita GHG has made global climate change worse, and the burden of these misbegotten government policies once again falls disproportionately harder on people of color struggling for a fair shake, not a hand shake and environmental platitudes. The status quo created by CEQA’s litigation rules is morally and environmentally unconscionable. Modest reforms, not “buddy bills” or sweeping exemptions, will restore CEQA to its important role in protecting the environment and public health. The housing crisis, and the suffering of

149. *Highland Park Heritage v. City of Los Angeles*, (Cal. Super. Ct. Cnty. of L.A. Filed July 26, 2011).

150. *Coalition for Fair, Legal and Environmental Transit v. City of S.F.*, (Cal. Super. Ct. Cnty. of S.F. Filed May 9, 2014).

151. *Homeowners of Angelo Drive to Save the Great Ficus Trees v. S.C.*, No. S202955, (Cal. Super. Ct. Cnty. of L.A. Filed June 1, 2012).

152. *Charmont Partners v. City of Santa Monica*, (Dist. Ct. Cnty. of L.A. Filed Jan. 26, 2012).

153. *Bowman, v. City of Berkeley*, 122 Cal. App. 4th 572 (2004); *Brief for Appellant, Ad-Hoc Committee v. County of Placer*, Cal. App. 3 Dist. (2013) WL 2112039; *Dessins v. City of Sacramento*, (Cal. Super. Ct. Cnty of Sacramento. Filed, Feb. 6, 2014); *Stephen Wollmer v. City of Berkeley*, (Cal. Super. Ct. Cnty. of Alameda. Filed Apr 1, 2010); *Save Tara v. City of West Hollywood*, No. BS090402, (Cal. Super. Ct. Cnty. of L.A. Filed July, 2004).

too many Californians, are more important than the special interest campaign contributor defenders of the status quo.