QUICKER, EASIER, CHEAPER?

THE EFFICACY OF CEQA STREAMLINING FOR INFILL DEVELOPMENT

A Thesis

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in

Urban Land Development

by

Lisa Loann Reynolds

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Department of Public Policy and Administration

Abstract

of

QUICKER, EASIER, CHEAPER?

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by

Lisa Loann Reynolds

Although a recent survey of cities and counties ranks the California Environmental Quality Act (CEQA) environmental review process well below other barriers to implementing infill projects, many developers still feel CEQA is vexatious, creating uncertainty that hinders investment and drives up costs, especially when hampered by frivolous lawsuits. Developers believe CEQA adds time, cost, and uncertainty to infill and mixed-use development projects. This perception may deter needed development and inhibit the building industry's shift to more infill development projects. While infill development will not satisfy all market demands, infill helps California meet the AB 32's requirement to cut greenhouse gas emissions. Further, infill development creates a more sustainable development, a healthier environment, and a more vibrant quality of life. To boost infill development, the California Legislature adopted several CEQA reforms to streamline --or in some cases exempt -- certain infill projects.

No mechanism comprehensively tracks the use of specific infill streamlining provisions. Further, there is almost no empirical research that analyzes these streamlining provisions for either their effectiveness or promoting infill development. I conducted nine interviews to find out more about the CEQA reforms in SB 375 and SB 226, plus the exemption for residential infill development in SB 1925. I wanted to solicit information about individual experiences and

perceptions within the real estate development industry. I also wanted to know about the challenges of using those CEQA streamlining provisions and exemptions. Most importantly, I wanted to know if the recent CEQA streamlining legislation supports infill development by making the environmental review process for these projects quicker, easier, and cheaper.

My research revealed multiple barriers to infill development, but interview respondents agreed that infill development is harder than greenfield development. I also discovered several projects that used (or are using) recent CEQA reforms to streamline the environment review process. I believe that the recent streamlining provisions can reduce time and costs. While streamlining provisions help infill development, the process could be still faster, easier, and less expensive. I conclude that challenges still remain before CEQA streamlining reforms can really work.

_____________________________, Committee Chair
Robert W. Wassmer, Ph.D.

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Date

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Chapter 1

INTRODUCTION

This thesis seeks to understand the effectiveness of recent California Environmental Quality Act (CEQA) streamlining legislation in encouraging urban infill development by making the environmental review process for these projects quicker, easier, and cheaper, as well as reducing the potential for needless litigation. Although a recent survey of cities and counties ranks the CEQA environmental review process well below other barriers to implementing infill projects (Governor's Office of Planning and Research, 2012, p. 24), many developers still feel CEQA is vexatious, creating uncertainty that hinders investment and drives up costs, especially when hampered by frivolous lawsuits.[1]

According to John D. Landis, former Chair of the Department of City and Regional Planning at the University of California Berkeley, "developers view CEQA as a barrier that adds time, cost and uncertainty to infill and mixed-use development projects" (as cited in The California Performance Review, 2007, p. 948). This perception may be due to developers focusing solely on their individual projects, and the issues, problems, and frustrations that delay or even threaten their success, while cities and counties have a much broader, multi-project point of view. Regardless, it is this perception that may continue to deter needed development and inhibit a shift to the amount of infill projects necessary to not only help California meet its greenhouse gas (GHG) reduction requirements, as mandated by Assembly Bill 32 (AB 32), but create more sustainable development, a healthier environment, and a more vibrant quality of life.

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[1] After finishing this thesis and receiving my faculty advisors' approval, I learned that the "Overture" infill development project in Berkeley did not use the SB 226 streamlining provision after all. Instead, as the project proponent explained, the City of Berkeley used the Class 32 categorical exemption. Because the proponent contacted me after I completed this thesis, I could not include that information in my text. However, readers should know that the "Overture" project did not use SB 226, but instead relied on a Class 32 exemption. I regret any confusion. Nevertheless, my basic analysis and main conclusions have not changed. Challenges still remain before CEQA streamlining reforms can really work. My thesis examines this problem and explains why.

Purpose for Study

The purpose of this thesis is to ascertain if recent reform legislation to streamline the environmental review process --or in some cases exempt --for infill development projects has been effective in promoting more compact, transit-oriented, mixed-use urban development. Currently, there is no mechanism in place that tracks statewide use of both CEQA streamlining provisions and exemptions for infill to quantify their use. Therefore, through discussions with real estate developers, planners, and lawyers, this thesis will add knowledge about the use of recent streamlining provisions and exemptions. Second, through a series of interviews with real estate developers, planners, and lawyers, I will ascertain this group's perspective on streamlining provision and exemption ease of use and efficiency. Last, by engendering discussion with the interview participants on proposed recommendations to further improve CEQA streamlining and exemptions to encourage use and infill development, this thesis will offer ideas and recommendations to improve the environmental review process that better supports more compact, mixed-use, infill development projects.

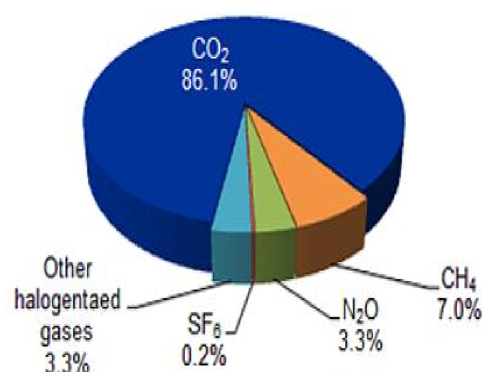
The remainder of this introductory chapter includes a brief summary of the concerns and laws that led up to recent CEQA reform efforts including climate change and AB 32, the Global Warming Solutions Act and impetus of Senate Bill 375 (SB 375), the Sustainable Communities and Climate Protection Act. The chapter also summarizes specific issues that support the need for more compact infill development including greenhouse gas emissions from transportation, past land use development patterns and vehicle miles traveled, and demographic trends. The final section gives a brief description of CEQA as it relates to these matters and lays out the remaining chapters of this thesis.

Background

Climate Change

As seen in Figure 1-1, the largest contributor to GHG emissions is carbon dioxide (CO_2), which the California Air Resources Board (CARB) says accounted for approximately 86 percent of emissions in California in 2009 (CARB, 2011, p. 11). Over the past century, human activities have released large amounts of CO_2 and other GHGs into the atmosphere. The constant exchange of CO_2, both being produced and absorbed by plants, animals, and microorganisms by this natural process, tends to stay balanced.

Figure 1-1 **Percent Contribution to 2009 Gross GHG Emissions**



Source: CARB (2011)

However, the addition of CO_2 from human activity has overwhelmed our carbon sinks that in both land (e.g., forests, soil) and oceans, absorb carbon. Released into the atmosphere, GHGs blanket the Earth, causing temperatures to rise and resulting in climate change. Consensus is building about long-term global warming impacts such as increased intensity of hurricanes, droughts, higher frequency of wildfires, extreme rainstorms, sea level rise, and loss of animal and plant species.

Although California is the second largest emitter of CO_2 emissions in the United States, it is one of the lowest emitters on a per capita basis. However on a global scale, California ranks as the 14th largest CO_2 emitter with the 19th largest per capita emissions (CARB, 2011, p. 3). National policy (the United States is the second largest emitter of CO_2) to address global warming is lagging behind. Therefore, acting as a “laboratory of democracy,” often taking the lead on issues and inspiring other states and the nation to create change, California is implementing a very ambitious initiative, AB 32, to do its part in slowing down the impacts of climate change.

Global Warming Solutions Act

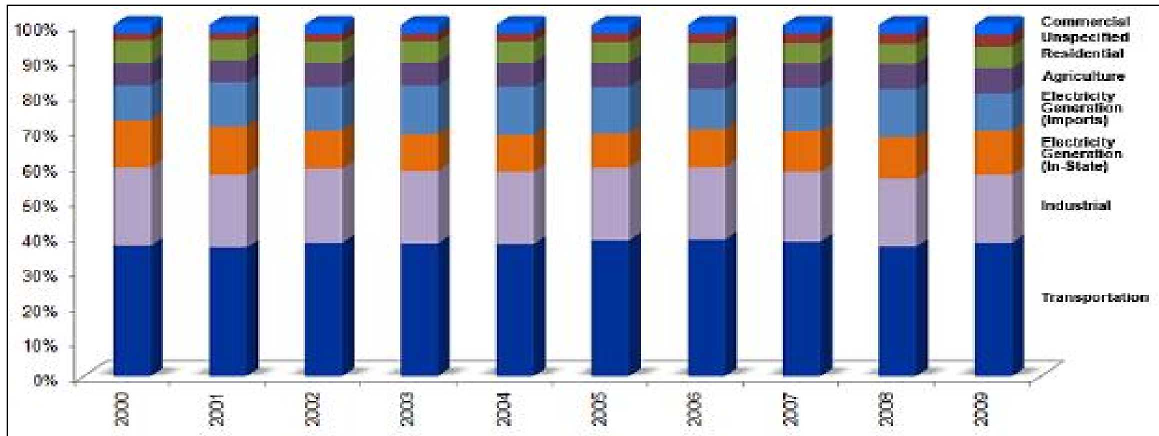
Responding to a muddle of deficient state and local laws dealing with environmental issues, the federal government enacted several laws, most notably the Clean Air Act of 1970 and Clean Water Act of 1972 (federal laws trumping state laws to provide regulatory clarity in addressing problems of national magnitude). However, since then the federal government has been slow to initiate broad policy to address not only the national but international issue of climate change. This languid response has prompted some states to take independent action. In 2006, then Governor Arnold Schwarzenegger made a valiant move, signing into law California's AB 32 (Nunez & Pavley, 2006), the Global Warming Solutions Act, calling for reducing California's GHG emissions to 1990 levels by 2020. A landmark piece of legislation, AB 32 requires CARB to quantify GHG emissions, identify the statewide level of GHG emissions in 1990 to serve as the emissions limit goal for 2020, and develop a plan to reduce emissions from all sources. Executive Order (S-3-05) calls for a deeper reduction by 2050, to 80 percent below 1990 levels.

Transportation

A key area of focus will need to be in transportation. As seen in Figure 1-2, producing 38 percent of total gross emissions, the transportation sector is the largest emitter of GHGs in California (CARB, 2011, p. 16). The transportation sector includes emissions from aviation (excluding military activities), on-road vehicles, rail and water-borne vessels, and other unspecified sources. Figure 1-3 shows that in 2009, of the on-road vehicles, which accounts for 92.6 percent of emissions from the transportation sector and 35 percent of all statewide GHG emissions, light duty passenger vehicles (cars and light duty trucks) accounts for approximately

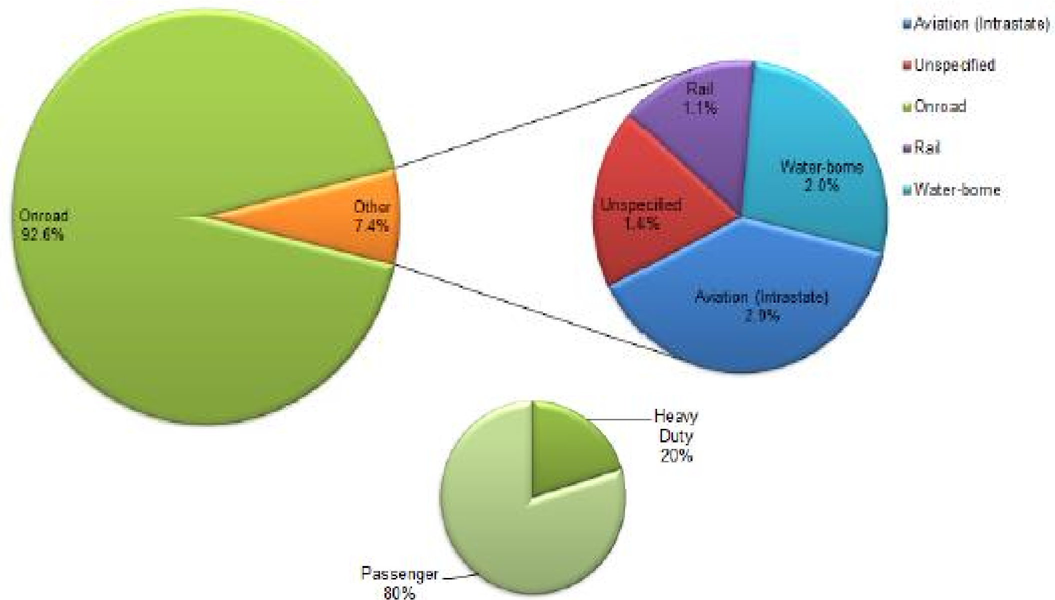
80 percent of on-road emissions, or 74 percent of all transportation sector emissions (CARB, 2011, p. 25).

Figure 1-2 **Contribution of Economic Sectors to GHG Emissions**



Source: CARB (2011)

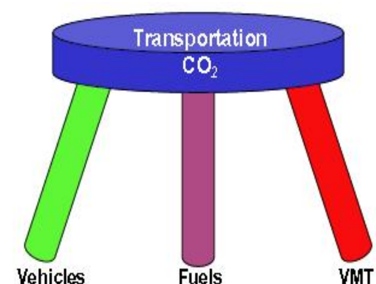
Figure 1-3 **2009 GHG Emissions from (On-road) Transportation**



Source: CARB (2011)

Although it acknowledged that technological advances such as cleaner fuels and more fuel-efficient vehicles would achieve significant emission reductions in the transportation sector, CARB concluded that these changes would not be enough to meet AB 32's goals. The CARB decided to add a third strategy needed to both maintain these achievements and further cut emissions. The goal of this third strategy is to reduce vehicle miles travelled (VMT). Illustrated by the Center for Clean Air Policy's (CCAP) well-known "three-legged stool" (Figure 1-4), transportation GHG emissions are a result of three factors. These factors are vehicle fuel efficiency, the lifecycle GHG emissions of fuels (all emissions associated with the production, transportation and consumption of fuel), and how much and how far people drive, as measured in VMT.

Figure 1-4 **Transportation GHGs "Three-Legged Stool"**



Source: CCAP

Because of concerns over U.S. energy dependency, as well as environmental pollutants, Congress passed the Energy Independence and Security Act of 2007, which includes provisions to increase vehicle fuel-efficiency requirements and fuel carbon intensity reductions. While energy and environmental policy initiatives at both the federal and state level, including higher Corporate Average Fuel Economy (CAFE) standards and the development of lower carbon fuels, also work toward reducing GHG emissions, gains achieved from these technological advances will likely be offset by continued growth in VMT. According to data from the Federal Highway Administration (FHWA) and the U.S. Department of Transportation (DOT), between 1980 and 2005, VMT grew three times faster than the population. This growth rate was also twice as fast as vehicle registrations during the same time period (Ewing, Bartholomew, Winkelman, Walters, & Chen, 2008, p. 21). While population growth has been responsible for one-quarter of the increase in VMT, a larger share comes from the effects of the built environment. More

specifically, when homes and jobs are constructed increasingly further apart, and other destinations such as shopping are isolated from both work and home, a much larger share is attributed to more frequent and longer trips, as well as driving alone.

Land Use

Since the end of World War II, a convergence of federal policy and programs and concerns over increasing congestion and crime in the central cities propelled Americans to build homes away from workplaces and to isolate other destinations based on the assumption that people will use cars. The federal polices include the Federal Housing Act of 1954, which assisted local governments with planning single-family detached homes, and the Federal Highway Act of 1956, which created the interstate highway systems. Because a larger share of American communities now depends on automobiles, car trips and distances have increased. According to Ewing et al. (2008), as with driving, development is also consuming land "at a rate almost three times faster than population growth" (p. 3).

To reduce the need to drive while conserving open space and prime agricultural land, and reducing GHG emissions, better community planning and more compact development near transit and amenities can allow people to live within walking or bicycling distance to nearby destinations. Improving access promotes fewer vehicle trips and lowers emissions. Mounting evidence shows that with greater compact development, people drive 20 to 40 percent less while obtaining other fiscal and health benefits (Ewing et al., 2008, p. 4). However, environmental impacts, climate change, and public health are not the only reasons for promoting more compact urban infill development. Changing demographics and preferences, including an aging population and a renewed desire for lively, cohesive neighborhoods, are increasing consumer demand for a diverse housing mix, within compact, walkable neighborhoods, near public transit

and amenities, and within more urban settings. According to Doherty and Leinberger (2010), the Great Recession of 2008 "highlighted a fundamental change in what consumers *do* want: homes in central cities and closer-in suburbs where one can walk to stores and mass transit" (para. 7).

Demographic Trends

Along with population growth, the demographic characteristics of the population are changing. In 1960, about half of all households had children. In 2000, the fraction was down to about one-third with a forecast of only about 28 percent of households with children by year 2025 (Nelson & Malizia, 2006, p. 395). Forecasted demographic changes also includes growth in married couples without children, one-person households, and baby boomers who will become empty nesters and retirees, who are exhibiting preference for compact walkable neighborhoods. According to the U.S. Census Bureau's population projections (2012), the population aged 65 years and older will more than double between 2012 and 2060 and will account for just over one in five residents at 21.9 percent of the population.

In the National Survey on Communities, when given the choice between a community with large lot, single-family homes, no public transportation or sidewalks, work commutes of 45 minutes or longer, along with shopping and schools located miles away and a more compact community with a mix of housing types, less than a 45 minute commute to work, with shopping, schools, and transportation nearby, 55 percent of Americans expressed a preference for the compact community (as cited in Ewing et al., 2008, p. 23). However, it is not just a matter of preference but also a matter of need that is increasing demand for compact, mixed-use development. One in five people over the age of 65 years are no longer driving and many more only drive occasionally (the rate of vehicle fatalities also increases after age 65). Compact development near transit and amenities is necessary to allow seniors to remain active within their

communities, and maintain their independence and ability to access essential services (Bailey, 2004, pp. 2-3).

Sustainable Communities and Climate Protection Act

Reducing VMT to help lower GHG emissions requires changing driving behavior by getting people to drive less. This recognition led to the passage of California SB 375 (Steinberg, 2008), the Sustainable Communities and Climate Protection Act, which linked transportation to land use planning, housing, and employment to encourage regional planning efforts that integrate these sectors into a more cohesive growth plan that focuses on compact, transit-oriented, and mixed-use development. To implement its goals, AB 32 further directs CARB to set regional GHG emission reduction targets from passenger vehicle use. In 2010, CARB established these targets for both 2020 and 2035 for each of the State's 18 regional Metropolitan Planning Organizations (MPOs).

MPOs receive federal funds for transportation planning and programming within urban areas with a population in excess of 50,000. Under the Act, each MPO must prepare a Sustainable Communities Strategy (SCS) as a part of its Regional Transportation Plan (RTP). The SCS is a set of regional strategies that combines land use, housing, and transportation planning to allow the region to meet its GHG emission reduction target by reshaping the built environment to increase connectivity, and building more compactly with greater access to alternative transportation and amenities. Greater access to these conveniences reduces the frequency and length of vehicle trips. CARB must review the adopted SCS and concur with the MPO's determination that if implemented, the SCS would assist in meeting the regional GHG targets. If the combination of measures in the SCS would not meet the regional targets, the MPO must prepare an Alternative Planning Strategy (APS) to meet the targets. The APS is separate

from the RTP. Transportation projects that are consistent with an SCS have priority for federal funding.

SB 375 also provides an incentive to encourage both local governments and developers to implement the SCS (or APS). As discussed in Chapter 2, developers of residential mixed-use and Transportation Priority Projects (TPPs) can get some relief from environmental review requirements under CEQA if their projects are consistent with a region's SCS (or APS) and meet other outlined requirements. Relief from CEQA can vary from removing the requirement of addressing growth-inducing impacts, and impacts or alternatives dealing with the effects of cars and light duty trucks, to full CEQA exemption.

CEQA

CEQA requires public officials to review the environmental impacts of new development projects. Projects are those activities, either public or private, which have the potential for resulting in direct physical change or a reasonably foreseeable indirect physical change in the environment. Projects can include activities that have no direct effect on the environment, but that will open the way for indirect effects. For example, the adoption or amendment of a local general plan or zoning ordinance is a project under CEQA, as is a city annexation that would promote future development.

Since its adoption in 1970, CEQA has attracted controversy. For years, the most common complaints about CEQA were about its negative economic impacts. One such negative impact is the cost to developers of legal conflict and delay caused by uncertain and inconsistent requirements. Much of the uncertainty stems from the law itself, which includes language that allows flexibility, but which is also vague. This flexibility and vagueness makes for differences in requirements not only from one jurisdiction to another, but from one project to another in the

same jurisdiction. These ambiguities can drive up costs for developers and exacerbate fears of litigation. While the actual number of lawsuits is relatively low, the threat of litigation exerts a strong influence on CEQA implementation. This is particularly true for urban infill development. In a study by Hernandez and Golub (2012), when analyzing 95 published opinions from 1997 to 2012, in which plaintiffs litigated the validity of an EIR to the California Court of Appeal or Supreme Court, out of 59 cases categorized as either greenfield or infill, 35 (59 percent) were infill projects (p. 5).

Remainder of Thesis

The reminder of the thesis is comprised of six chapters. Chapter 2 gives context to the thesis question, elaborating on the historical background, purpose, and objectives of CEQA. It also provides an outline the environmental review process, requirements, and necessary documentation. It discusses criticisms about CEQA, past reforms, and recent reform provisions intended to streamline --or in some cases exempt --infill development. Chapter 3 is the Literature Review, which discusses prior research around the use and effectiveness of CEQA streamlining provisions and exemptions.

I present my methodology in Chapter 4, describing the process that I used to interview developers, planners, and lawyers as a means of data collection, including what the interviews will address. As mentioned earlier, there is no mechanism in place that comprehensively tracks use of both streamlining provisions and exemptions for infill. Rather, researchers use surveys and interviews to analyze frequency of use and effectiveness. The chapter also summarizes responses to questions about infill barriers and CEQA streamlining provision and exemption use. Chapter 5 presents projects that have used provisions under SB 1925, SB 375, or SB 226, to streamline or exempt the project from the CEQA environmental review process and provides feedback about

the use of these provisions. Chapter 6 describes recommendations for future CEQA reform and makes suggestions on how to improve streamlining and exemption use. Lastly, Chapter 7 summarizes my findings about the use of recent CEQA reforms, challenges, and ideas for future change.

Chapter 2

CEQA AND CEQA REFORM

This chapter gives context for my thesis question by providing a brief history of CEQA, its purpose and objectives, outlining the environmental review process, and describing the requirements including necessary analysis and documentation about potential environmental impacts from development. To understand how CEQA reforms can streamline the environmental review process, it is first necessary to understand activities subject to CEQA, what the process entails, its real and perceived benefits and hindrances, and its influence on planning and development. The first section of this chapter explains the history of CEQA. The second section describes early reforms that attempt to streamline the process. The last section addresses more recent concerns and efforts to ease the environmental review process specifically for infill development.

What is CEQA?

The California Public Resources Code (PRC), beginning at Section 21000 (§21000) contains the statutory provisions of CEQA. The Guidelines for Implementation of the California Environmental Quality Act ("Guidelines") are the official administrative interpretation of CEQA. While the Governor's Office of Planning and Research (OPR) is responsible for preparing and updating the Guidelines, the Secretary of California's Natural Resources Agency (CNRA) is responsible for adopting the Guidelines, which implement the directives of the Act. The Guidelines, contained in Division 6, Chapter 3 of Title 14 of the California Code of Regulations (CCR) beginning at Section 15000 (§15000), explain and interpret the law for the public agencies required to administer CEQA and for the public generally. The Guidelines provide objectives, criteria, and procedures for the evaluation of projects and the preparation of their related

environmental documents. The statutory provisions of CEQA and the CEQA Guidelines are binding on all California public agencies.

CEQA incorporates scientific information and public input into the approval of development projects. As Guideline §15002 explains, the four basic purposes of CEQA are to:

- Inform governmental decision makers and the public about the potential for significant environmental effects of proposed activities;
- Identify ways to avoid these environmental effects or significantly reduce them;
- Prevent significant and avoidable environmental damage by requiring changes to projects through the use of alternatives or mitigation measures, when feasible; and,
- Disclose to the public the reasons why a project involving significant environmental damage was approved in the manner the agency chose.

Two other accepted objectives are to foster interagency coordination in the review of projects and enhance public and other state and local agency participation in the planning process (Bass, Bogdan, & Rivasplata, 2012, p. 3). Unlike ministerial activities, which only require a decision by applying predetermined criteria with little or no personal judgment as to the wisdom or manner of carrying out the project (e.g., issuing a fishing license or registering an automobile), if a project requires any discretionary judgment which involves deliberation when approving a project, it is subject to CEQA.

Although seemingly complicated, CEQA walks public officials through a series of sequential decisions that determines a project's required level of environmental review. The lead agency, most often a city or county because they process most regulatory permits, is responsible for conducting the environmental review and has final approval of the project. The lead agency first determines if the project is exempt from CEQA pursuant to either a statutory or a categorical exemption. If the project is exempt, the lead agency does not need to conduct an environmental review. If the lead agency determines the project is not exempt and subject to CEQA, it conducts an initial study. An initial study preliminarily assesses project impacts. Examples of possible

impacts include effects to biological, mineral, agriculture and forestry, and cultural resources; geology and soils; utilities and systems; and, public services including impacts on schools, parks, and police and fire protection services. The preparation of the initial study involves consultation with other agencies, called responsible agencies, which have their own discretionary approval powers over the proposed project. These agencies are typically agencies charged with regulating specific environmental resources. Based on the results of its analysis, the lead agency has three options:

- If there are no significant adverse environmental impacts, the lead agency prepares a **negative declaration**.
- If actions, such as modifying project design or incorporating public agency suggested measures can mitigate any significant adverse effects to less than significant, the lead agency can prepare a **mitigated** **negative declaration**.
- If the lead agency determines that feasible mitigation measures will not reduce all significant effects to less than significant, it is required to prepare an **environmental impact report.**

A negative declaration is a document that includes a description of the project, the initial study, and a formal finding stating the project will not have significant adverse effects. A mitigated negative declaration also includes the mitigation measures incorporated into the project.

The environmental impact report (EIR) is the focal point of CEQA. EIRs inform decision makers and the public about a project's significant environmental impacts, and identify mitigation measures and reasonable alternatives to avoid or reduce those effects, if feasible. The document also shows the public how government officials attempt to protect the environment and better ensures political accountability. While the document does not need to be technically perfect, it must be satisfactory, complete, and a good faith effort to fully disclose a project's potential significant environmental impacts.

While there are many types of EIRs, the two most common are the program EIR and the project EIR. A lead agency prepares a program EIR, referred to as a "first-tier" document, for an

agency program or series of related actions that agencies characterize as one large project such as agency plans, policies, and regulatory programs. A general plan serves as a land development plan, including community goals, policies, and implementation measures for cities and counties. A specific plan, a more detailed plan for a smaller portion of the community, complements and is required to be consistent with a community's overall general plan. These plans are examples of an activity that, if found to have the potential to cause significant environmental impacts, requires a program- or "plan-level" EIR.

A project EIR analyzes the impacts of an individual activity or specific project such as a housing development. Referred to as "tiering," these "second-tier" documents, as well as negative declarations, can use analysis already conducted in a prior "first-tier" EIR, which eases the demand, time and cost of environmental review for the subsequent project. A lead agency can also prepare a Master EIR (MEIR), which is similar to program EIR, for a general or specific plan. As described later in this chapter, MEIRs can increase the use of negative declarations and "focused" EIRs for subsequent individual project proposals within the planning area, because much of the required environmental analysis is completed in this first-tier document.

While CEQA does not dictate a standard EIR format, it does require specific content including direct and indirect impact assessment, as well as cumulative effects and project alternatives. Direct impacts are project effects that happen at the same time and in the same place as the project activity. Indirect impacts are also project effects, but occur at some distance from the site or in the future, that are reasonably foreseeable, such as air quality issues, traffic congestion, or increased growth. CEQA also requires analysis of cumulative effects, which are the incremental effects of the project that when combined with other past, concurrent or anticipated projects may cause or compound any significant environmental effects. Additionally, EIRs must describe and comparatively evaluate a range of project alternatives or alternative

locations that could feasibly achieve most of the basic project objectives, and avoid or lessen any significant environmental impacts.

The environmental review process can take anywhere from six months to over a year, depending on the complexity of the project and the type of documentation required. For a private (versus public) project, CEQA provides 180 days for a lead agency to adopt a negative declaration and one year from its acceptance of a complete project application for a certified EIR In practice, and especially when dealing with larger and more complex projects, lead agencies may not complete an EIR within the time limit. Another potential cause for delay comes from the threat of litigation. CEQA is a self-enforcing statute meaning that enforcement is left to citizen court challenge. Although Landis, Pendall, Olshansky, and Huang (1995) states litigation is rare, with approximately one lawsuit for every 354 project reviews (p. 90), "studies indicate the threat of litigation does exert a strong influence on CEQA implementation" (Barbour & Teitz, 2005, p. iii). Between additional holding costs, which developers pay to keep the right to develop a property, and possible litigation, delays cost developers far more than the cost for preparing the EIRs. These costs and the hint of fervent opposition, especially for more controversial projects with strong "not in my backyard" (NIMBY) resident coalitions, can deter needed development.

As noted earlier, some projects are exempt from CEQA because the Legislature gave them statutory exemptions or the CEQA Guidelines provided categorical exemptions. Projects are often exempt because they generally do not result in significant environmental impacts or based on policy judgment, outweigh other considerations. However, unlike most statutory exemptions, which provide absolute relief from CEQA review, a project that is categorically exempt is still subject to CEQA if it meets any one of the following conditions outlined in Guideline §15300.2. These conditions include a project that:

- is located on a toxic site listed by the California Environmental Protection Agency ("Cortese List");

- harms the significance of a historical resource;
- damages scenic resources within officially designated state scenic highways;
- occurs in specified sensitive environments (e.g., wetlands);
- has a significant cumulative impact; or,
- has any "unusual circumstances."

Unusual circumstances differ from the general circumstances of the project covered by the exemption. If the unusual circumstances create a potential risk to the environment, the lead agency cannot invoke the exemption.

An example of a categorical exemption is a Class 3 exemption (Guidelines §15303) for small structures (e.g., up to six multi-family dwelling units or up to four commercial buildings, each not exceeding 2,500 square feet in floor area, in urbanized areas). Another example more specific to infill development is a Class 32 exemption (Guidelines §15332) for projects that are (a) consistent with the applicable jurisdiction's general plan and zoning; (b) on a site within city limits and no larger than five acres substantially surrounded by urban uses; (c) adequately served by all required utilities and public services; and (e) where there is no value as habitat for endangered, rare, or threatened species. The lead agency must also determine that the project would not result in any significant traffic, noise, air quality, or water quality impacts. Thus, in addition to meeting these criteria, infill projects must still conduct some level of environmental analysis. If any one of the above listed conditions exist, the lead agency cannot invoke the exemption.

For those infill developments that are not categorically exempt from CEQA, the California Legislature has made several attempts to streamline the environmental review process, or exempt certain projects, but only a few have succeeded. Even the successful provisions are narrow in terms of their project applicability, making them limited vehicles for encouraging

needed development. Therefore, planners and developers may use these provisions infrequently, if at all.

Past CEQA Reforms

Since its adoption, CEQA has been controversial. For example, during recessions builders blame CEQA for slowing down economic recovery. During these downturns, business leaders and developers call for regulatory relief. Responding to these criticisms in the early 1980s, then Governor George Deukmejian appointed a task force to recommend ways to reduce CEQA's regulatory burdens. The Legislature only implemented a few modest reforms, a short-lived priority in light of improving economic conditions. However, the Legislature did add a streamlining provision for residential projects consistent with the policies, goals, and requirements of a city or county's general plan, community plan, or zoning with a corresponding certified plan-level EIR (PRC §21083.3, Guidelines §15183).

Similar to tiering, PRC §21083.3 (Guidelines §15183) allows the environmental review for development activities within the same jurisdiction to use environmental analysis conducted for the certified general plan, community plan, or established zoning policies. Using this process reduces redundancy and cost. The project EIR needs to address only those significant impacts peculiar to the project or parcel, or those impacts that the earlier EIR did not cover or with new information are now more significant than described. Additionally, effects are not considered peculiar to a project or parcel if a lead agency can apply uniformly applicable development polices or standards adopted by the agency that were determined to substantially mitigate the significant environmental effect, unless substantial new information shows the policies and standards will not substantially mitigate the environmental effect. A well-prepared plan-level EIR, as well as uniformly applicable development policies or standards, also increases the

possibility that a lead agency can issue a negative declaration, decreasing costs even further. By the time the Legislature enacted it, Government Code §65457 already allowed residential projects to avoid all CEQA document requirements if the project conformed to an adopted specific plan with an adequate EIR. In 1992, the Legislature amended the CEQA streamlining provision, extending it to other land uses.

California saw tremendous growth during the 1980s that, by the early 1990s, set off public backlash to the increasing problems associated with growth. At the same time, developers were frustrated with long project review periods, calling for further streamlining measures while planners wanted to merge the CEQA environmental review process with more comprehensive planning efforts. Environmentalists who previously remained steady in their conviction that CEQA not be "watered-down," its strength already compromised early on when the law changed, no longer requiring projects to select the *best* project alternative (the one expected to have the least environmental impact), were also recognizing the need for change. As long as proper findings were made, these environmentalists were recognizing the need for improved integration as well as streamlining, particularly to promote better, more environmentally-friendly, urban development.

These concerns, along with another economic recession, spurred renewed interest in CEQA reform. As a result, in 1993, AB 1888 (Sher, 1993) passed (PRC §21157), essentially replacing previous versions of EIR tiering with the MEIR process. This new section allowed public officials to evaluate the cumulative, growth-inducing, and irreversible environmental effects for subsequent projects to the greatest extent feasible. The intent of the section was to substantially reduce the amount of review for subsequent projects. Although implementing several changes to CEQA, MEIR tiering was the only significant streamlining provision to result from that round of CEQA reform debate.

Recent CEQA Reforms

More recent CEQA reforms arose from concerns over a housing shortage and the need to expedite housing production, specifically affordable housing. According to Demographia International Housing Affordability Survey (2006), in 2005, five out of the 10 least affordable major housing markets internationally were in California (p. 1). This issue and increasing concerns over the impacts of climate change have been responsible for more recent reform efforts, particularly changes to help encourage compact infill development. CEQA Guidelines §15191(e) defines an infill site as a site (a) previously developed for qualified urban uses; (b) where all immediately adjacent parcels are developed with existing qualified urban uses; or, (c) without any parcels created within the past 10 years, with at least 75 percent of adjacent parcels developed with existing qualified urban uses and 25 percent previously developed for qualified uses. Guidelines §15191(k) defines a "qualified urban use" as any residential, commercial, public institutional, transit or transportation passenger facility, or retail use, or any combination of those uses.

SB 1925 (Sher, 2002)

One such reform was the adoption of a statutory exemption though SB 1925. Although the exemption applies to agricultural employee housing, affordable housing, and residential infill (each with their own project requirements), I will only discuss its use for residential infill projects. As seen in Table 2-1, a residential infill project must not only meet all the threshold criteria for the exemption, but also all the listed residential infill project requirements.

Table 2-1 **SB 1925 (Sher, 2002): Residential Infill Exemption Criteria**
Threshold Criteria for Exemptions (PRC §21159.21, Guidelines §15192): • Project is consistent with an adopted general or specific plan; • An adopted or certified community-level environmental review which covers the project site; • Project is adequately served by existing utilities, and applicant paid all in-lieu or development fees; • Absence of wetlands, wildlife habitat value, and harm to protected species; • Site is not on the "Cortese List" of contaminated sites; • Absence of toxic substances on site or successful completion of remediation activities; • Project has no significant effect on historical resources; • Absence of fire, seismic, landslide, flood or public health hazard risk; • Project is not located on developed open space (e.g., public park) as defined by Guideline §15191(d); • Project is not located within the boundaries of a state conservancy.
Project Criteria (PRC §21159.24, Guidelines §15195): • Satisfies the criteria of PRC §21159.21 (above) and the community-level environmental review was adopted or certified within the last five years; • A residential project on an infill site of no more than four acres; • Does not contain any single-level building that exceeds 100,000 square feet; • Within one-half mile for a major transit stop; • Promotes higher density infill housing (at least 20 units per acre) ; • 100 or fewer units, including a minimum number of affordable units (or payment of in-lieu fees).

Although a statutory exemption, this residential infill exemption does not absolutely exempt a project from CEQA review. If there is a reasonable possibility that the project will have a project-specific, significant effect on the environment because of unusual circumstances, or there are substantial changes in circumstances or new information becomes available after certification and adoption of the community-level environmental review, the lead agency cannot invoke this exemption. However, the lead agency can use this exemption to streamline the environmental review process by limiting analysis to only those project-specific effects, circumstances, and new information, which made the exemption inapplicable.

SB 375 (Steinberg, 2008)

In 2008 came the passage of SB 375. As a follow-up to AB 32, SB 375, the Sustainable Communities and Climate Protection Act, further directs CARB to set regional targets for GHG emission reductions from passenger vehicle use. Additionally, each of California's MPOs must

prepare a SCS as an integral part of its regional transportation plan (RTP), or an APS. If implemented, the SCS would assist in meeting the regional GHG targets through more compact development. In addition to these mandates, SB 375 also includes provisions designed to streamline CEQA review for infill projects. The provisions apply to qualifying residential or mixed-use developments, and transit priority projects (TPPs). Table 2-2 outlines the requirements for streamlining under SB 375.

Table 2-2 **SB 375 (Steinberg, 2008): Mixed-Use, Residential, and TPP Streamlining Criteria**
Project Criteria for Mixed Use & Residential (PRC §21159.28): • At least 75% of total building square footage is for residential use; • Consistent with the use designation, density, building, intensity, and applicable policies for the project area in either an approved SCS or APS accepted by CARB or is a Transit Priority Project as defined below.
Project Criteria for Transit Priority Project (PRC §21155 et seq.): • Consistent with the use designation, density, building, intensity, and applicable policies for the project area in either an approved SCS or APS; • At least 50% of total building square footage is for residential use and, if contains 26% - 50% of nonresidential use, a minimum floor area ratio of .75; • Minimum net density of 20 dwelling units per acre; • Within one-half mile of major transit stop or high-quality transit corridor included in the RTP (with no more than 25% of all parcels, and 10% or 100 units, whichever is less, no further than one-half mile from the transit stop or corridor).
Project Criteria for Sustainable Communities Project (PRC §21155.1): • Satisfies the criteria for a Transit Priority Project (above); • Project is adequately served by existing utilities, and applicant pays all in-lieu or development fees; • Absence of wetlands or riparian areas, no significant value as wildlife habitat, and does not harm any protected species; • Site is not on the "Cortese List" of contaminated sites; • Absence of toxic substances on site or successful completion of remediation activities; • Project has no significant effect on historical resources; • Absence of fire, seismic, landslide, flood or public health hazard risk; • Project is not located on developed open space (e.g., public park) as defined by Guideline §15191(d); • Site is no more than eight acres and project has no more than 200 residential units; • Project has no single-level building greater than 75,000 square feet; • Is 15% more energy-efficient than California requirements and landscaping is 25% more water-efficient than the average household use in the region; • Does not result in any net loss of affordable housing within the project area; • Compatible with nearby operating industrial uses; • Within one-half mile of rail station or ferry terminal included in the RTP, or within one-quarter mile of a high quality transit corridor; • Meets minimum affordable housing requirements, pays in-lieu fees, or project provides a minimum of five acres of open space per 1,000 residents of the project.

If a project is a mixed-use or residential development with at least 75 percent of building square footage for residential use, and is consistent with the SCS or APS, any required environmental documents need not reference, describe, or discuss growth inducing impacts, or impacts from car and light-duty truck trips on global warming and the regional transportation network. Additionally, the environmental document does not need to provide a reduced residential density alternative to the project to reduce these impacts. If the project qualifies as a TPP, it gets the same relief and the lead agency has the option to prepare a Sustainable Communities Environmental Assessment (SCEA) instead of a negative declaration, or a limited environmental review instead of a full EIR. Although similar to a negative declaration, the substantial evidence standard of review applies to the use of a SCEA. The substantial evidence standard provides a higher bar to challenge than the fair argument standard of review. As discussed in Chapter 3, this makes the decision and agency more impervious to subsequent litigation. If the TPP qualifies as a "sustainable communities project," it is exempt from further CEQA review.

SB 226 (Simitian, 2011)

In 2011, the passage of SB 226 created an alternative streamlining method specifically for infill for any one or more uses including (a) residential; (b) retail and commercial where no more than half the site is used for parking; (c) a transit station; (d) a school; or, (e) a public office building (PRC §21094.5, Guidelines §15183.3). Table 2-3 lists the conditions necessary to use this method.

Table 2-3 **SB 226 (Simitian, 2011): Infill Project Streamlining Criteria**
PROJECT CRITERIA (PRC §21094.5, Guidelines §15183.3): • Consistent with the use designation, density, building, intensity, and applicable policies for the project area in either an approved SCS or APS; *OR,* • If outside the boundaries of an MPO, a small walkable community project located in an area designated by a city for that purpose; *OR,* • Is located within an MPO that has not yet adopted a SCS or APS, and has a minimum residential density of 20 units per acre or a minimum floor area ratio of 0.75; • Is in an urban area and on a site previously developed, or where at least 75 percent of adjacent parcels are developed with existing qualified urban uses. • The project must also satisfy the performance standards now contained in the new Appendix M to the CEQA Guidelines. These performance standards include: • On-site renewable power generation (e.g., solar photovoltaic) for non-residential projects • If applicable, site remediation • For residential units within 500 feet or an appropriate local agency determined distance from a significant source of pollution, compliance with an adopted community-plan or zoning code risk reduction plan OR if none adopted, enhanced project air filtration. • Additional Appendix M standards based on project type (e.g., residential, commercial)

Under PRC §21094.5(Guidelines §15183.3), a small walkable community project means a project that is in an incorporated city that is not within the boundary of an MPO and (a) has a project area of one-quarter mile radius of contiguous land completely within the existing city boundaries; (b) includes a residential area adjacent to a downtown retail area; and, (c) has a minimum density of eight residential units per acre or a minimum floor area ratio of 0.5 for retail or commercial use. An urban area under this section means either an incorporated city, or an unincorporated area completely surrounded by one or more incorporated cities that together, have a minimum population of 100,000, and where the population density of the unincorporated area is at least equal to the population of the surrounding cities. This law is founded on the streamlining provision pursuant to PRC §21083.3 (Guidelines §15183). If a project qualifies for streamlining under this provision, the lead agency is not required to address a project impact analyzed in a prior program- or plan-level EIR, or when a uniformly applicable development policy or standard substantially mitigates the effect. Depending on the effects addressed in the prior EIR and the availability of uniformly applicable development policies or standards that apply to the eligible

infill project, streamlining under this section will range from a complete exemption from further CEQA review, to an obligation to prepare a narrowed, project-specific environmental document. Additionally, for a TPP, the lead agency can elect to prepare a SCEA, which has the higher substantial evidence standard of review. Again, this makes the decision and agency more impervious to subsequent litigation.

As described in this chapter, the CEQA review process requires analysis of all potentially significant environmental impacts for a project. Although virtuous in its purpose to protect the environment, CEQA has also been a center of debate. With multiple stakeholders involved, each with their own interests and concerns, it has been difficult to make needed reforms that adequately address both unintended problems and new priorities. This challenge has resulted in streamlining provisions and exemptions with numerous conditions. With so many requirements, reforms meant to incentivize compact infill development that helps reduce GHG emissions and create more sustainable development may only apply to very few projects. Thus, planners and developers may find them ineffective. The next chapter is the Literature Review, which discusses prior research on the use of CEQA streamlining provisions and exemptions.

Chapter 3

LITERATURE REVIEW

Introduction

Since its adoption in 1970, CEQA has addressed potential environmental effects caused by growth and development. CEQA provides information to decision makers and the public, and requires inclusion of measures and the consideration of project alternatives to mitigate negative impacts. However, unintentional and unforeseen consequences have also resulted. These consequences, as well as changes in priorities, continue to require CEQA reform. Fears over CEQA affecting economic recovery, adequate housing, and infill development continue to prompt reform to streamline environmental review or exempt certain projects from CEQA. However, there is little recent research examining the use of these provisions, let alone their effectiveness in making the environmental review process easier, faster, or cheaper, or in changing development patterns that support larger initiatives including, GHG emission reduction goals.

According to Barbour and Teitz (2005), the “empirical research conducted during the window of CEQA reform debate in the 1990s remains the most recent extensive available in accessing CEQA implementation practices” and that “beyond the work of Landis et al. (1995) and Olshansky (1996 a and b), it is difficult to identity extensive, rigorous empirical analysis on CEQA practice and implementation, let alone its broader effects on either the environment or on urban development” (pp. 1 & 8). If California is going to meet its greenhouse gas emission reduction goals partly through reducing vehicle miles traveled, it is important to ascertain if recent legislative actions to reduce the burden of CEQA on infill development is actually working and if not, potential changes to improve their effectiveness. Earlier research on the use of tiering or “front-loading” environmental review to streamline the process for subsequent projects,

particularly the use of a Master EIR (MEIR), and CEQA exemptions for urban infill gives some idea about the use of more recent streamlining provisions.

This chapter begins with research conducted on the use of tiering to streamline environmental review. It also describes potential obstacles to using this process including outdated general plans and related fiscal constraints. Lastly, this chapter summarizes research conducted on the use of exemptions under SB 1925. While not the same as CEQA streamlining provisions for infill development, it does offer some insight into other potential challenges in the use of more recent CEQA reform to streamline infill projects.

Tiering

Although initially limited, provisions promoting the use of tiering from program- or plan-level EIRs go as far back as 1979. This process reduces environmental review redundancy, often lowering cost and speeding up the approval process for subsequent projects. The apex of these provisions, and as part of the CEQA Reform Act of 1993, was the codification and use of MEIRs. The main purpose of the MEIR was to strengthen tiering by allowing the MEIR to analyze both potential program- or plan-level environmental impacts, as well as subsequent project impacts to the furthest extent feasible, in an effort to reduce duplicative analysis. This analysis includes evaluation of cumulative, growth-inducing, and irreversible significant environmental effects of subsequent projects. However, according to Barbour and Teitz (2005), the process of tiering appears to be "easier in theory than in practice" (p. 21).

In 1991, researchers conducted an extensive CEQA implementation practices survey, with 322 cities and 40 counties (70.6 percent of all cities and counties) responding equally well, 70.8 percent and 69 percent, respectively. According to Olshansky (1996a), 47 percent of all survey respondents indicated they used program EIRs, 29.7 percent a Master Environmental

Assessment (a precursor to MEIRs), and 42.5 percent an EIR in conjunction with a specific plan within the last five years (pp. 8-9). Detailing the same survey data, Landis et al. (1995) stated that less than a third of California cities and 40 percent of counties reported preparing a Master Environmental Assessment for the purposes of tiering. Additionally, only about 20 percent of cities and counties avoided an EIR by tiering off a specific plan EIR. Only 3.3 percent of these cities and 7.5 percent of these counties used the option more than five times (p. 91). As noted earlier, a residential project can avoid all CEQA document requirements, if it conforms to an adopted specific plan with an adequate EIR pursuant to Government Code §65457.

The intent of the MEIR streaming provision was to specifically address complaints about the need to evaluate more regional environmental impacts at the plan level and to set forth mitigation measures to limit the review process for subsequent projects. According to Barbour and Teitz (2005), in an annual survey of cities and counties conducted by OPR in 2002, with 250 cities and 34 counties responding, 44 percent of jurisdictions used program EIRs, 23 percent MEIRs, and 43 percent specific plan EIRs. There is relatively little change in the more than ten years between this survey and the one conducted in 1991 with the exception of MEIRs, which declined 7 percent. In 1991, the results were 47 percent, 29.7 percent and 42.5 percent, respectively. Counties used program EIRs and specific plan EIRs for tiering significantly more than cities. With less than one-quarter of cities and counties taking advantage of the MEIR option, at nearly equal use by both, the MEIR provision is used less frequently than other provisions to streamline environmental review. However, when considering the use of any tiering option, 65 percent of cities and 85 percent of counties used at least one (Barbour & Teitz, 2005, p. 22).

AB 2922 (Laird, 2004), added the ability for agencies to adopt a mitigated negative declaration that tiers off a MEIR. While this allowance broadens use of MEIRs and appears to be

an incentive that would increase MEIR use, some CEQA practitioners still express legal exposure concerns about using MEIRs. According to Collin, similar to tiering negative declarations from program EIRs, "MEIR requirements apply the fair argument standard for review of subsequent projects, and some observers argue that this reduces any real streamlining benefit at the back-end" (as cited in Barbour & Teitz, 2005, p. 22). The fair argument standard sets a low threshold, meaning that if a project opponent can fairly argue that a project may cause a significant environmental impact, a lead agency must prepare an EIR. In a 1990 survey of San Francisco Bay Area practitioners (attorneys, planning directors, and private planning practitioners), 54 percent of respondents indicated legal defensibility as the driver to preparing an EIR, most of the time or fairly often. Almost half of the respondents believed CEQA gives too much power to NIMBY and other project opponents (Barbour & Teitz, 2005, p. 11). Thus, rather than for the purpose of disclosing potential environmental impacts, the thrust behind preparing a comprehensive EIR instead of using an applicable streamlining option is often for the purpose of legal defensibility.

Obstacles to Streamlining

Outdated Plans

Another reason for the lack of tiering provision use is because of outdated general plans and their associated EIRs. General plans ideally set a framework for the CEQA review process. When acting as CEQA lead agencies, cities and counties follow the CEQA Guidelines. The Guidelines provide that a lead agency conducting environmental review of a project consider whether the project would conflict with an applicable land use plan, policy, or regulation, adopted for the purpose of avoiding or mitigating an environmental effect. According to Olshansky (2006a), a majority of the 1991 survey respondents (60.6 percent) agreed that general plans help

guide decision-making, but a large portion of respondents also reported their general plans were out of date (p. 12). To use the MEIR streamlining provision, the MEIR cannot be more than five years old upon the filing of the subsequent project.

According to Landis et al. (1995), using the 1991 survey data, 35.6 percent of jurisdictions (36.6 percent of cities and 22.5 percent of counties) reported their current general plan was no more than five years old and 33.8 percent (34.6 of cities and 22.5 percent of counties) stated their current general plan was between six and 10 years old. Almost one-third (30.6 percent) of the respondents (28.8 percent of cities and 40 percent of counties) said their current general plan was more than 10 years old (p.91). On average, general plans were more than 12 years old (Barbour & Teitz, 2005, p. 23). A majority of 1991 survey respondents working in a jurisdiction with a general plan more than ten years old reported their plans were ineffective as a tool to help guide their decision-making (Olshansky, 2006a, p. 13). As stated by Binger and McBride, "without a plan to guide CEQA review, it is more likely to be ad hoc and redundant across projects" (as cited in Barbour & Teitz, 2005, p. 19).

Based on data from OPR (2004), on average, land use and circulation elements within the general plan were eleven years old. Housing elements averaged eight years old. Forty-six percent of land use elements, 45 percent of circulation elements, and 34 percent of housing elements were more than ten years old (Barbour & Teitz, 2005, p. 19). At that time, state law required the updating of housing elements every five years. According to OPR's annual survey conducted in 2011, 46.9 percent of land use elements and 46.7 percent of circulation elements were more than ten years old. Half of four other required elements (conservation, open space, noise, and safety) were also more than ten years old. However, only 7.7 percent of the last required element, housing, were over ten years old and 76.6 percent were less than six years old (Governor's Office of Planning and Research, 2012, pp. 349-363). An explanation for why

jurisdictions are not comprehensively updating their general plans, and associated EIRs, more frequently is cost. Unlike project EIRs, general plan EIRs are mostly not reimbursable by developers, although developers may later rely on these documents to help streamline their project's environmental review.

Fiscal Constraints

Cost is another reason why local officials do not use tiering. Based on the 1991 survey, the average cost of a general plan was $208,000, with a median cost of $120,000. A locality's (city or county) general fund pays for most of these costs. In comparison, the average EIR cost was $38,124 with most (86.7 percent) of these costs funded by development applicants (Olshansky, 1996a, p. 9). For smaller or cash-strapped jurisdictions, the cost can deter them from completing more frequent comprehensive updates. In 1990, jurisdictions spent about 10 times more on EIRs than on general plans (Olshansky, 1996a, p. 14). Again, unlike an EIR for a general plan, developers pay almost all of the cost for project-level EIRs. For this reason, instead of conducting more comprehensive general plan updates, some jurisdictions are opting to amend or update only those elements within the general plan that must be regularly revised (i.e., housing element) or merely amend it. Cities and counties can amend their general plan mandatory elements only four times a year (Government Code §65358 [b]). According to Olshansky (1996a), in 1989 and 1990, approximately 30 percent of jurisdictions approved four amendments, the maximum allowed. Most (84.7 percent) of these amendments were revisions to the land-use map and 36.6 percent of those were a land-use designation change for just one parcel (p. 8).

Based on responses to OPR's 2002 survey of cities and counties, the cost for updating general plans increased from 1991 to 2002. According to Barbour and Teitz (2005), the average cost as of that year for a general plan update was about $380,000. Thirty percent of the total cost

of a general plan update was for CEQA review and 11 percent was associated with the cost for public participation (pp. 23-24). For comparison, when adjusting for inflation, the average cost in 1991was $275,000 (2002 dollars). In 2007, the League of California Cities reported that a General Plan update can “range from $500,000 in smaller communities to as much as $5 million in larger ones” (as cited in Altmaier et al., 2009, p. 50). Most of the 1991 survey respondents with a general plan dated before 1987 said that it was difficult to get City Council Members to agree to fund the updating of the general plan (Olshansky, 1996a, p. 9).

Use of CEQA Exemptions

There is little empirical analysis on CEQA practice and implementation, let alone its broader effects on urban development. There is even less research that provides both comprehensive and detailed CEQA streamlining provision and exemption use data, including qualitative information that explains why planners and developers choose or choose not to advocate for the use of one of these reliefs. More importantly, if they did use a CEQA streamlining provision or exemption enacted by the legislature for infill, was it effective in making the environmental review process easier, and in reducing time and cost. In researching academic studies on this specific question, I could only locate one comprehensive study that attempted to identify specific exemptions used and if none were used, the reasons why, with both planner and developer feedback.

In 2003, the California Legislature passed a bill requiring planners to report their use of CEQA exemptions. AB 677 (Firebaugh, 2003) requires local agencies to file a notice with OPR when they determine that an exemption applies to a project. This record keeping requirement, however, applies only to statutory exemptions for development created by SB 1925 (PRC §§21559.22 - 21559.24). SB 1925 provides CEQA statutory exemptions for certain agricultural

employee housing, affordable housing, and residential infill projects. While streamlining provisions are not the same as exemptions which can relieve projects from CEQA, exemptions often have similar requirements, such as consistency with plan-level documents such as general, specific, and community plans. The survey results and feedback received sheds light on potential challenges facing recently enacted infill streamlining provisions, as well as exemptions.

In 2004, the first reporting year, 56 agencies representing approximately 10 percent of the State's local planning agencies (cities and counties) reported using the statutory exemption (PRC §21559.24) for residential infill development (Elkind & Stone, 2006, p. 16). However, after further inquiry by Richard Lyon of the California Building Industry Association (CBIA) with 28 (50 percent) of these agencies, the majority of them acknowledged confusing the new statutory exemption with the Class 32 categorical exemption for infill, which has broader applicability. In 2005, the number of planning agencies reporting use of the new statutory exemption dropped from 56 agencies down to 12, representing just three percent of all local planning agencies. Interviews conducted with 10 of these 12 agencies revealed that at least three (and no more than five) actually used the statutory exemption for residential infill (Elkind & Stone, 2006, p. 16).

The discrepancy parallels the finding that half of the ten planners contacted (five agencies), were unsure of what the statutory exemptions were or how they differed. One planner stated that he relied on an exemption enacted in 1998, though SB 1925 repealed it in 2002 (Elkind & Stone, 2006, pp. 19-20). The interviews also revealed four other reasons why planners did not grant exemptions for urban infill including:

- projects inconsistent with the general plan;
- developers reluctant to ask for CEQA exemptions out of fear of amplifying any neighborhood opposition and increasing the chance of litigation;
- counties ineligible for statutory or categorical exemptions in unincorporated land; and,
- exemptions are too narrow in scope.

Consistent with the prior discussion about outdated general plans, “one agency reported that the project did not comply with a general plan because the plan had not been updated or amended to allow for affordable housing and infill development” (Elkind & Stone, 2006, p. 17). The interviews also revealed that the majority of planners were more comfortable using exemptions that were already familiar to them.

Elkind and Stone (2006) also surveyed developers who are involved in developing affordable housing. Although 69 out of 134 individuals responded (51.5 percent), they report responses from the 50 individuals involved specifically in new construction (versus rehabilitation) of affordable housing projects. Out of 89 recent affordable housing projects discussed, 20 projects (22.5 percent) used a CEQA exemption of some kind. Only one project definitely used the new statutory exemption for affordable housing (PRC §21159.23), three other projects guessed they used it, and many developers had difficulty remembering which exemption they used (Elkind & Stone, 2006, pp. 23-24). The majority (76.8 percent) of projects received either a negative or mitigated negative declaration. The remaining projects used other processes to comply with CEQA. Approximately 7.3 percent of these projects went through a full EIR as part of a larger plan’s environmental review and only one project (1.5 percent) went through a full EIR by itself.

In response to a question about why they did not use an exemption on any project (not just the 89 mentioned above), respondents expressed reasons including local planners hesitant to grant exemptions (14 percent) and projects too large to qualify (26 percent). Seven respondents (14 percent) stated that exemptions were not beneficial to developers and five developers (10 percent) were unaware of the CEQA exemptions (Elkind & Stone, p. 48).

Summary and Application to Research

Currently, there is no mechanism that comprehensively tracks the use of specific infill streamlining provisions and exemptions, and little empirical research analyzing their effectiveness in general, let alone for promoting infill development. As seen in this Literature Review, increasing the use of CEQA streamlining provisions and exemptions to reduce duplicative analysis and make the environmental review process for developers easier, faster, and cheaper faces many challenges. Many of these will likely continue to challenge more recently enacted CEQA reforms. Barbour and Teitz (2005), Olshansky (2006a), and Landis et al (1995), describe the legal concerns, outdated general plans and EIRs, which are often used for tiering, and the financial disincentives for updating them. They also show that rather than increasing in use, use of program plans, MEIRs, and specific plans for tiering have either remained stable or have declined. Elkind and Stone (2006) provide even further detail when reporting on the use of specific urban infill and affordable housing exemptions. In particular, those exemptions provided under SB 1925. In their research, it is not only a matter of outdated planning documents, fiscal constraints, and legal concerns, but many planners and developers are either unaware of new exemptions, are more comfortable with exemptions they are already familiar with, or believe that these new exemptions are of no benefit to developers.

Because there is very little information on the effectiveness of streamlining provisions and exemptions for infill, it is difficult to gage their actual impact on increasing infill development. In light of the goals set out in AB 32, as well as other infill development hurdles, it is important to not only ascertain their effectiveness in obtaining this outcome, but also determine if the environmental review process is easier, faster and cheaper for these types of developments. Using the prior research discussed in this chapter as the beginnings of a foundation of knowledge, I will add additional information applicable to future development and refinement of CEQA

reform. The following chapter discusses the methodology used in this study, as well as the findings about infill barriers and general use of CEQA streamlining provisions and exemptions.

Chapter 4

RESEARCH METHODOLOGY AND FINDINGS

Research Methodology

Interviews

To gather information about the efficacy of recent CEQA reform legislation that provides environmental review streamlining or in some cases exemption for infill development projects, I conducted nine interviews. I interviewed people from three groups: (1) real estate developers, (2) planners, and (3) lawyers. My questionnaire included a follow-up question suggested in the report, *CEQA Reform: Issues and Options*, by Barbour and Teitz (2005). I based the other questions on legislation that allows CEQA streamlining and exemptions for certain infill projects. I wanted to solicit information about individual experience and perceptions within the development industry about the barriers to infill. I also wanted to know about general CEQA streamlining provision and exemption use, and the challenges to using them. Most importantly, I wanted to know about the use and effectiveness of recent CEQA reforms intended to support infill development. The interview questionnaire included both closed- and open-ended questions to elicit specific feedback about barriers to infill and the use of CEQA streamlining provisions and exemptions.

The interview questionnaire began with a question about the barriers to infill development, and the role that CEQA plays, as well as a general question about the use of CEQA streamlining provisions and exemptions. The questionnaire also asked questions about three recently enacted laws that provide CEQA streamlining or exemption specifically to support infill projects. The three laws are SB 375 (PRC §21159.28 for mixed-use and residential projects, and PRC §21155 et seq. for Transit Priority Projects (TPPs) and Sustainable Communities Projects), SB 226 for infill projects (PRC §21094.5, Guidelines §15183.3), and SB 1925, specifically the

exemption for residential infill development (PRC §21159.24, Guidelines §15195). I wanted to know if they were effective in making the CEQA environmental review process quicker, easier, and cheaper for more compact and transit-oriented infill development. A final question requested recommendations for future CEQA reform or other suggestions to encourage use of CEQA exemptions and streamlining provisions. Appendix A is a copy of the interview questionnaire. The following describes the process that I used to select interview participants and the method that I used to collect and analyze the data.

Selecting Participants, and Data Collection and Analysis Method

I identified interview participants though discussions with colleagues in the urban and environmental planning field, and my professional acquaintances involved in real estate development and environmental law. Criteria for inclusion in the study consisted of planners, real estate developers who work primarily on infill development projects, or lawyers whose practices include land use, specifically urban redevelopment, and environmental and CEQA matters. Out of this group, I focused on those individuals who worked on at least one project that used a CEQA streamlining or exemption provision for an infill project. I was especially interested in the reactions from those with experience in using a streamlining provision or exemption provided under SB 226, SB 375, or SB 1925. There was no incentive for participation in the study.

I invited potential interviewees to participate in the study by email; if interested, we scheduled an interview time. I emailed a consent to participate in research form (Appendix B) and received a signed copy back from each participant before the interview. I also sent the interview questionnaire in advance to allow participants to prepare for the interview. I conducted the interviews either in-person or over the phone. During the interviews, I took detailed notes,

asking for clarity when needed. When the interview ended, I thanked the interviewee for his or her time. If needed, I made a follow-up call or sent an email to the interviewee to get further clarification. I also asked participants to contact me if any concerns or questions arose after the interview. The average interview lasted an hour. Although I used a uniform questionnaire to more easily organize and compare the responses, the interviewees could provide additional comments outside the scope of the questions.

After finishing the interviews, I compiled the results into a single document, broken out by question which allowed me to easily see how the answers to the questions were similar, and which were different. Then I highlighted any additional comments received outside of a response to a specific question. This system allowed me to organize responses, identify themes, and easily draw general conclusions. This method also allowed me to keep the majority of the interview results anonymous.

The developers I spoke with have years of experience. Their project portfolios consist mostly, if not entirely, of both large and small infill projects. One of the developers that I interviewed also works on large master planned communities, which offered some comparative insight. Because developers spend most of their time acquiring land, planning projects, and building structures, many rely on planners and lawyers to give them guidance and advice regarding CEQA legislation and compliance. For this reason, I also interviewed planners and lawyers, as well as developers. This thesis collectively presents the questions and responses I received during the interviews.

My questions fit into four categories: (1) barriers to infill development, (2) CEQA streamlining provision and exemption use and challenges, (3) use and effectiveness of streamlining provisions and exemptions under SB 1925, SB 375, or SB 226, and (4) recommendations for change and suggestions to encourage the use of the recent CEQA reforms.

The following sections summarize the interview responses to infill barriers and general use of streamlining provisions and exemptions, and provide quotes from some interviewees that support the general conclusion or theme. Chapter 5 presents projects that have used provisions under SB 1925, SB 375, or SB 226, to streamline or exempt the project from the CEQA environmental review process and provides feedback about the use of these provisions. Chapter 6 describes recommendations for future CEQA reform and makes suggestions on how to improve streamlining and exemption use.

Barriers to Infill Development

What are the barriers to infill development? What role does CEQA play?

I started my interviews with this question because I wanted to know what the interviewees perceived as the top barriers to infill development, and how the CEQA environmental review process ranked among these barriers. While the answers varied, many barriers center on the same theme, that urban infill development compared to suburban development (a.k.a. greenfield development or sprawl) is more difficult. The top barriers include infrastructure and other infill related costs, the competition with sprawl, environmental significance thresholds, and CEQA abuse.

Infrastructure

According to two developers, including one whose projects consist of both infill projects and master planned communities, infrastructure is one of the most expensive and often hidden costs, and the biggest barrier to infill development.

> *"Infrastructure can be a jurisdiction's biggest hidden cost because it's not uncommon to run into unforeseen problems underground."*

Upgrading inadequate or antiquated infrastructure (e.g., water lines) in older urban neighborhoods

is one of the biggest challenges to developing an infill project. Infill development is at a disadvantage compared to greenfield development because infill developers often contend with 50- to 100-year old infrastructure that requires complete replacement. As one developer said when referring to deferred maintenance on infrastructure, "you are paying for past sins." The other developer said while existing buildings and structures are observable and a developer can test the soil, it is not unusual to run into unseen and undocumented underground infrastructure. These types of discoveries do not happen in greenfield development, but for the infill developer they often result in unexpected costs and delays.

While installing new infrastructure for suburban developments is costly, rehabilitating older infrastructure is more expensive because replacing aging public works in established neighborhoods can go beyond the actual development site (e.g., water and sewer lines). Although these off-site improvements also benefit other businesses and residents, the infill builder bears the exclusive burden. As one developer commented, in greenfield development, where everything is more "neat and tidy" because the required infrastructure is all new, the infrastructure is at least partially paid for by the jurisdiction. In some communities, local officials require the initial developer to install all of the new infrastructure for a greenfield development and then require subsequent builders to pay their proportional shares into a fund that then reimburses the first developer.

Competition with Sprawl

Another developer responded that the top barrier to infill is the competition with sprawl. He said that it comes down primarily to two things: economic fundamentals and political culture. It is more expensive to build infill than greenfield projects. Land in the urban core is generally more

> *"In our world, the biggest barrier to infill development is the competition with sprawl."*

expensive compared to land on the urban periphery or in more rural areas. One of the lawyers also said that it is the layering of fees that is the biggest barrier to infill. Developers must pay more for land and frequently pay more in fees (e.g., entitlements, permitting fees) for an infill project relative to a greenfield project, in addition to having the infrastructure challenges. Also, there is the potential added expense for soil remediation. Unlike undeveloped areas, many underutilized, abandoned, or vacant urban sites were once industrial or commercial projects and are frequently contaminated. Contaminated sites (a.k.a. brownfields) require costly remediation.

One developer commented that barriers are interrelated. It is difficult to make infill development economically viable. There is a much higher level of uncertainty and financial risk compared to most greenfield development projects. In most instances there is also a much smaller projected return on investment, especially in a depressed economic market. This high level of risk also makes it harder to secure funding for projects in neighborhoods that need the most reinvestment and economic stimulus. Overall, the financial risk is the biggest risk for infill developers.

"It all comes down to money and elected officials and when someone comes along and wants sustainability, it just isn't sexy."

In addition to a fundamental economic imbalance, there is also the matter of a community's "political culture." One developer said that local government has a "prerogative toward sprawl." There are "incentives for sprawl and the subsidizing of sprawl, you have distortions in the marketplace and a lack of government fair play, and the upside of land speculation is huge!" In his mind, there are essentially two cultures. He said first, there are those, such as planners and architects, who are hopeful and believe the future is going to be better. He stated that city and county planning staff "get it," they know that infill is the right model. The second culture consists of the elected officials. As he stated, "it all comes down to money and elected officials and when someone comes along and wants sustainability, it just isn't

sexy." However, another developer commented that he believes that city leadership and staff do focus on creating a better urban core. He said that bigger cities tend to understand the importance of the urban core.

Environmental Thresholds

From a planner's perspective, a barrier to infill development is the application of local environmental thresholds. Planners determine whether a project may have a significant effect on the environment using pre-determined environmental thresholds of significance. These thresholds are measures of environmental change that are either quantitative, or as specific as possible for topics that are difficult to quantify such as aesthetics. As discussed in Chapter 2, potential project-related effects above a threshold of significance require an EIR if the effects cannot be mitigated to a less-than-significant level.

> *"Local jurisdiction regulations or mandatory provisions set out in a city or county's general plan set environmental thresholds that are too low, or thresholds that are not found under CEQA; crazy thresholds that are not applicable to previously developed areas."*

Locally determined thresholds supplement provisions in the Guidelines for determination of significant environmental effects. These thresholds need to maintain a standard which will afford the fullest possible protection of the environment, within the reasonable scope of CEQA, by imposing a low threshold requirement for the preparation of an EIR. However, sometimes these thresholds are too low or applied too conservatively. Requiring thresholds that cities apply jurisdiction-wide, for both the urban and suburban or more rural areas, for impacts such as traffic flow and noise, limits the ability to build infill development in California cities. As one lawyer commented, "how do you account for building in an already built environment?"

Infill development typically takes place in areas with a lot of noise; if it happens to be a residential project, noise standards are tough to meet. Similarly, traffic levels of service (LOS)

standards are also difficult to meet, especially in urban areas that are already over the thresholds, requiring the need for environmental reviews that are costly, cause delays, and impede project implementation. Additionally, these significant impacts need mitigation which, as in the case of LOS, requires costly measures such as widening streets at the expense of pedestrian improvements (e.g., wider sidewalks, curb bulb-outs). These types of measures contradict the purpose of infill development in discouraging the use of automobiles. Additional infrastructure improvements adds expensive and can make the project infeasible. In addition, infill projects' significant impacts, particularly those related to noise and traffic, can trigger neighbors' protests.

CEQA Abuse

In addition to being more challenging in terms of cost and economic feasibility, the local political culture, and "one-size-fits-all" environmental significance thresholds, interviewees also cited neighborhood resistance or CEQA abuses as a barrier to getting needed urban infill development built. The "not in my backyard" ("NIMBY") syndrome is familiar. Organized community resistance can be formidable, especially in heavily populated areas and economically well-off neighborhoods. When an infill project stirs up controversy, vocal neighbors can be a political problem. Vigorous opposition can delay infill development projects for years. Persistent opposition, even to well-designed projects, can kill projects. This resistance comes from the fear that property values will decline and less affluent neighbors will live nearby, and that noise, traffic and strain to existing public facilities and services such as schools will increase. Concerns over these types of issues are extremely rare in greenfield development because there are no neighbors. One of the tools used by project opponents to delay or even stop infill development is CEQA.

> *"CEQA isn't the problem, the problem is the people who abuse it."*

Opponents to development projects have found that they can use CEQA as a tool to delay or stop projects. While citizen groups and environmental organizations have used CEQA for years to address legitimate environmental concerns, NIMBYs, labor unions, and business competitors have also used CEQA to push their own goals. For example, unions file CEQA challenges to coerce project sponsors into providing work for their members. One developer said that although he personally does not see unions come out much to hold up a project, private project developers must carefully analyze this potential cost which he estimated to add approximately 10 percent to the total project cost. Additionally, a lawyer mentioned that unions also can and have killed CEQA reform efforts.

Another lawyer said infill projects can attract opposition from all sides. Although a project is the type of development an environmental activist wants (i.e., building on existing urban sites instead of greenfield), if it is "happening in his own backyard, he has a strong inclination to protect what he has." As one planner commented, this impulse is a natural and understandable reaction, especially from a person who has a heavily mortgaged home and that fears the new project will erode property values. Another planner could not recall ever seeing a lawsuit, or the threat to use CEQA to delay a project, that had something to do with "the spirit" of CEQA in protecting the environment. The essence of the lawsuits were not for the purposes that people claimed, but instead the things they were truly concerned about such as noise or traffic, or to leverage some type of payoff.

Infill developers face the challenge of working with people or groups that oppose the project, but opponents' concerns often have nothing to do with the environment. While infill development in the abstract sounds good, many people do not want high density near their homes. The potential for CEQA litigation and abuse causes trepidation in infill developers, planners, and lawyers about

"The low threshold for a lawsuit is still a big concern."

using CEQA streamlining provisions or exemptions that are more unfamiliar. Beyond the CEQA environmental review process itself, the financial risk compounded by the perceived risk of a lawsuit can kill a needed infill project.

One planner said that the “low threshold for a lawsuit is still a big concern.” This fear is not only about the costs associated with litigation, but also about “home rule.” Jurisdictions do not want their decisions overturned. The planner further commented that it is cheap to file a lawsuit, and when it happens it “adds about 1.5 years to the project; if the plaintiff loses, he has the option to appeal which buys him about another year.” In the planner’s mind, beyond the streamlining provisions, legislation that addresses this issue is the next “frontier” for CEQA reform. As one developer said, CEQA itself is not really a big problem. The problem is the people who abuse the CEQA process. People with money will fight if they really do not want a project and will use CEQA as a tool to stop it. That said, while neighborhood controversy can be formidable it is rare. As one developer stated, the lack of controversy is especially true in Central Valley jurisdictions where they are struggling to attract any kind of development.

CEQA

The CEQA environmental review process itself was at the bottom of the list of barriers to infill development. According to one developer, CEQA is “a pain in the ass, often just doing studies to do studies, and it can become very expensive.” That said, CEQA is not a huge barrier to infill development. The developer went on to say that many jurisdictions will confer with project applicants and allow them to influence the type of environmental documents they will use, or request exemptions. However, if the lead agency does not agree with the applicant’s assessment, the developer “just does what he needs to do,” to

> *“CEQA is a pain in the ass, just doing studies to do studies, and it can become very expensive. However, unless there is a controversy, it's really not that big of a problem.”*

comply and get the project approved, and "it's not that big of a deal." According to the developer, sometimes the jurisdiction has "already set the table" in terms of the level of environmental review or document it will use. That said, the need to prepare a full EIR is rare. According to Landis et al. (1995), in a 1990 survey, responding cities averaged 19 negative declarations for each new EIR. For responding counties, the average was 26.9 negative declarations for each new EIR.

Two developers said that most of their projects can get though the CEQA process using a negative declaration or mitigated negative declaration. According to one developer, there is a level of comfort with preparing negative declarations, especially on projects in the Central Valley area where he does not perceive much controversy over infill. While CEQA streamlining provisions and exemptions for infill may be helpful, the CEQA environmental review process itself, is "not really that big of a problem." As one planner stated, "CEQA doesn't drive the project, it's just a disclosure document."

CEQA Streamlining Provision and Exemption Use

How often do you use CEQA streamlining provisions or exemptions for a project? What specific exemptions or streamlining provisions do you use most often and why? Have you used exemptions or streamlining provisions specifically enacted by the legislature?

When I asked developers if they have used a CEQA exemption or streamlining provision for an infill development project, two developers stated "yes." One developer commented that his projects qualified for exemptions some of the time, but most of the time they get through the environmental review process with a negative or mitigated negative declaration. The other developer believed that her firm has used CEQA exemptions in the past; however, she did not know or could not recall which ones or how often. Another developer stated that none of his

projects used a CEQA exemption, but that an upcoming project, a 60- to 80-unit development, appears to have all the attributes to invoke an exemption.

The three planners whom I interviewed said that they have used CEQA exemptions. One planner stated that he has used the streamlining provision under SB 226 to exempt a project from further environmental review. Although he has used other exemptions, it was difficult for him to recall specifically which ones other than stating those under CEQA Guidelines §15300 (referring to all classes of categorical exemptions provided in the Guidelines). Another planner recalled that in her jurisdiction, they frequently used Class 32 exemptions for infill development projects, as well as the statutory exemption under Government Code §65457 for residential projects or zone changes. As mentioned in Chapter 2, this law allows a residential project to avoid all CEQA document requirements (i.e., exempt) if the project conforms to an adopted specific plan with an adequate EIR. The last planner said her jurisdiction used the streamlining provision under SB 375 for mixed-use and residential projects. In her jurisdiction, planners have also used Class 3 exemptions for small structures, as well as Class 32 exemptions. However, use of the Class 32 exemptions is now rare as the jurisdiction's general plan is out of date. One of the criterions for a Class 32 exemption is consistency with the jurisdiction's general plan. Similarly, because their specific plans are also outdated, they are unable to use Government Code §65457 to exempt subsequent residential projects.

When referring to small and less complex development projects, a lawyer said that while "niche or in-line projects may be able to use streamlining provisions or exemptions, the CEQA reforms intended to make infill easier are less likely to be helpful for the bigger projects that anchor neighborhoods." He said there "isn't a policy with the appetite" to accommodate the more significant projects and that recent reforms are just "nibbling around." He went on to say that the "good projects are using the same processes and the little ones are just exempt." All three

lawyers whom I interviewed said they believe that the Legislature's CEQA reform efforts for infill could be useful and that every little bit helps. However, only one said that the reform efforts were not trivial. He further stated the benefit is worth what the Legislature is doing because it is at least doing something versus nothing by trying to make more broad-based rewards for infill. One lawyer felt that the Legislature expends an inordinate amount of resources for very little return; in his words, "we are missing the ball."

One lawyer pointed specifically to the Class 32 exemption in the Guidelines, for infill development. This categorical exemption is similar to the statutory exemption for residential infill under SB 1925 in terms of a long list of criteria and being subject to certain exceptions. He commented that the criteria still require a number of studies (e.g., traffic analysis) to demonstrate that the project is exempt. Because the developer is already paying for these types of studies, that are completed out of fear of lack of knowledge, the developer will likely want a negative declaration.

Although infill projects have greater potential to be exempt, developers are hesitant to use them or conduct a lesser amount of environmental review that may jeopardize the project by making the environmental review document or exemption less defensible. As discussed in Chapter 3, Elkind and Stone (2006) found the one of the reasons why planners did not grant exemptions for urban infill was that developers are reluctant to ask for exemptions out of fear of amplifying any neighborhood oppositions and increasing the chance of litigation. According to the lawyer, if a developer is going to spend the money on the studies that support the decision to exempt the project, he wants a document that is more defensible. Additionally, "while a developer waits to see if his project qualifies for the exemption, the time spent waiting could have been spent preparing a negative declaration, so it may have been time wasted." This statement was similar to a comment received from a developer who said that "all things being equal, you go

slightly more expensive and time-consuming to bullet proof it from others." That said, two planners whom I interviewed commented that when their jurisdictions tell developers that their projects qualify for exemptions, most developers elect to take the exemption.

One lawyer was instrumental in getting a more recent piece of CEQA reform legislation, SB 743 (Steinberg, 2013), adopted. However, getting the bill passed came with a very high price tag: a costly community workforce and training agreement which contains a no-strike provision and would make sure unions get most of the construction jobs. The lawyer commented that if it had not been for this agreement, the bill likely would not have passed. While these types of agreements are controversial, the law itself exempts infill projects that are a residential, employment center, or mixed-use project; located in a Transit Priority Area (TPA); consistent with a specific plan for which there is a certified EIR; and, consistent with an adopted SCS or APS. According to OPR's website, OPR has identified over 100 specific plans that might enable use of this exemption. Because the reform is new, evaluating whether or not projects have used this exemption is outside the scope of this thesis and therefore, unknown at this time.

Three interviewees (two planners and one lawyer) stated that they have projects where they used, or are in the process of using, a streamlining provision enacted by the Legislature. The lawyer discussed use of PRC §21083.3 (Guidelines §15183) to streamline projects. As Chapter 2 explained, the environmental review for development activities within the same jurisdiction can use the environmental analysis conducted for a general plan, community plan, or zoning. Unless an impact is peculiar to the parcel or project, then the particular issues addressed in prior documents are statutorily exempt. Additionally, under PRC §21083.3 (Guidelines §15183) effects are not peculiar to the project or parcel if a jurisdiction's previously adopted uniformly applicable development policies or standards will substantially mitigate that effect, unless substantial new information shows the policies and standards will not substantially mitigate the

environmental effect. Although not specific to infill projects, the lawyer stated that he is surprised that few people are aware of this streamlining provision, which he often proposes to clients. Two planners to whom I spoke have used, or are in the process of using, a recently adopted CEQA streamlining provision, one under SB 375, the other under SB 226.

The responses to the question about barriers to infill resulted in a variety of responses. However, the responses demonstrate that from the viewpoint of developers, planners, and lawyers, urban infill is more challenging to build than greenfield development. The higher cost for land, infrastructure, and related development fees including potential site remediation, combined with neighborhood controversy and a political culture tilted toward sprawl, can delay or kill a well-designed infill project. While going through the CEQA environmental review process can be daunting, the process is not a significant barrier to infill development. As one planner commented, streamlining provisions and exemptions are not so much a benefit for developers as it is for cities and counties by assisting them in getting infill projects more easily and expeditiously through the environmental review process. The question is whether these benefits ultimately translate to savings in time and cost for infill developers. The next chapter discusses use of CEQA streamlining and exemption provisions specifically under SB 1925, SB 375, or SB 226.

Chapter 5

CEQA REFORMS FOR INFILL DEVELOPMENT

This chapter summarizes responses to interview questions about the use of recent CEQA streamlining provisions or exemptions under SB 375 (PRC §21159.28 for mixed-use and residential projects, and PRC §21155 et seq. for TPPs and Sustainable Communities Projects), SB 226 for infill projects (PRC §21094.5, Guidelines §15183.3), and SB 1925, specifically the exemption for residential infill development (PRC §21159.24, Guidelines §15195). This chapter also presents projects that have used one of these provisions or exemptions. Additionally, this chapter provides interviewee feedback or lessons learned when using these environmental review processes.

Streamlining Provisions and Exemptions under SB 1925, SB 375, and SB 226

How would you describe the general awareness of recent CEQA reforms to streamline or exempt infill projects, specifically those under SB 1925, SB 375, and SB 226? Have you used any of these exemptions or streamlining provisions? If yes, what was your experience?

I asked the developers if there was an awareness about recent CEQA streamlining provisions and exemptions for infill, in particular those under SB 375 (PRC §21159.28 for mixed-use and residential projects, and PRC §21155 et seq. for Transit Priority Projects and Sustainable Communities Projects), SB 226 for infill projects (PRC § 21094.5, Guidelines §15183.3), and SB 1925, specifically the exemption for residential infill development (PRC §21159.24, Guidelines §15195). One of the developers said it depends, and it was difficult for her to answer either way. She went on to say that in conversations with colleagues, she perceived a general awareness about legislation related to their business. However, she stated that developers are either too busy to be involved with CEQA reform efforts or do not feel it is worth their time to pursue use of these streamlining provisions or exemptions for their own projects.

Because developers, infill or otherwise, have many other worries, they rely on development industry organizations to be involved in legislative policy. She said that when questioning fellow infill developers about their use of recent CEQA streamlining provisions or exemptions, they tend to laugh and respond that their projects could not benefit from them. Another developer said that he read about the new laws, but could not specifically reference them. A third developer who said he is "heavily involved in advocating for all things sustainable," including CEQA reform legislation to both promote infill and discourage sprawl, does not believe the recent reforms are of any significant benefit.

As expected, lawyers are aware of the recent CEQA reforms to streamline or exempt infill projects. However, they are extremely wary of them and lean toward using familiar CEQA environmental review processes. One lawyer said that like other attorneys, he has a good idea of what is defensible. When considering the option to use a particular environmental document or exemption, the choice is all about the potential risk. For this lawyer, the recent streamlining and exemption provisions impart greater questions and concerns, and little comfort. A developer commented that there are too many uncertainties, such as getting all of the necessary entitlements and financing support for projects, as well as infrastructure challenges. She further stated that although a lead agency may determine that a project requires an EIR, the process, timing, and associated costs are clear.

When asking developers if they have used an exemption under SB 1925, or a streamlining provision under SB 375 or SB 226, only one said he used an exemption under SB 1925. However, the exemption was for an affordable housing project (PRC §21159.23), not specifically for an infill project (PRC §21159.24). Affordable housing projects are between 30 and 40 percent of his business. One of the criteria to invoke PRC §21159.24 is project consistency with the applicable general or specific plan and the associated EIR. The jurisdiction

must have adopted or certified the EIR within the last five years. This requirement automatically eliminated one and potentially two agencies based on the planners I spoke with whom stated that most if not all of their plans were outdated. As described in Chapter 3, OPR's 2011 annual survey revealed many required general plan elements are outdated. According to the survey, 46.9 percent of land use elements and 46.7 percent of circulation elements were more than ten years old. Half of four other required elements (conservation, open space, noise, and safety) were also more than ten years old. None of the planners or lawyers I interviewed recalled using PRC §21159.24 to exempt a project from CEQA.

None of the developers either used or was aware of other developers who have used a streamlining provision under either SB 375 or SB 226. The lawyers were equally unaware. Moreover, one of the lawyers said that while some regions are actively implementing SB 375 and promoting its CEQA streamlining provisions, in other regions there is more lackluster implementation of the law and subsequently a lack of interest in using the streamlining provisions. One of the lawyers commented that SB 375 incentives to promote infill development, including the streamlining provisions and exemptions, are not strong. A developer commented that the law, which proponents heralded as the instrument to change existing suburban development patterns toward more compact, transit-orient development, essentially "has no teeth." Cities and counties still have ultimate authority over land use within their boundaries and are not required to have general plans consistent with the SCS or APS. Another lawyer commented that while it may have some effect, it is not difficult to approve projects because regional SCS land use map boundaries include land speculation. As discussed in Chapter 2, use of streamlining provisions under SB 375 and SB 226 requires consistency with the regional planning agency's SCS, or an APS accepted by CARB. The lawyer further commented that the

streamlining and exemption benefits are merely "carrots" meant to encourage, but are actually too limiting for the majority of infill projects.

One lawyer commented that while OPR has exerted a tremendous amount of effort to make the SB 226 streamlining updates to the Guidelines workable, and has heavily promoted the Guidelines ease of use, it appears that OPR may have persuaded only a handful of infill developers to take advantage of the CEQA streamlining benefit. Another lawyer was more complementary of SB 226, stating that it has a "much improved approach." However, it is likely too soon to determine if it is helpful in encouraging infill development because development in general has been slow. He went on to say that the streamlining provision is likely another carrot. Although tooted to provide streamlining to a wider range of infill projects, he said the actual intent is more likely to limit the scope of project types to those the State wants.

When searching for projects that have used the recent CEQA streamlining provisions or exemptions, I located one project that used the residential infill exemption under SB 1925. Approved in late 2014, the project is located at 1112-1122 Pico Boulevard in Santa Monica. The project is a four-story residential building with 32 rental units. None of my interviewees were involved in this Santa Monica project. Again, the people I interviewed could not recall using an exemption under SB 1925; however, two used a streamlining provision, one under SB 375 (PRC §21159.28) and the other under SB 226 (PRC §21094.24, Guidelines §15183.3). The following section describes the projects and provides feedback about the provisions' ease of use, savings, and recommendations for future utilization.

Using CEQA Streamlining for Infill Development Projects

I identified several projects that used a recent streamlining provision. I had the opportunity to interview individuals involved in two of these projects, one who used PRC

§21159.28 for mixed-use and residential projects and the other PRC §21094.5 (Guidelines §15183.3) for infill projects. Each project discussion includes the project location, description, and background information to provide context for the responses received during the interviews. I follow this information with a description of the environmental review process, and how each project met the streamlining criteria. The discussion then provides feedback from the interviewees who were directly involved with the project.

The Cannery Project, Davis, California

Project Location

The Cannery project is located in the City of Davis on a generally slanted rectangle site with the northern and eastern boundaries of the site coterminous with the City boundary (Figure 5-1). Along the west boundary is the Union Pacific Railroad (UPRR) and the F Street open drainage channel, and along the south runs East Covell Boulevard that provides the access points into the project. Residential neighborhoods are located west of the UPPR line and F Street channel. Multi-family residential and office uses are across East Covell Boulevard to the south of the project site. Adjacent lands to the north and east are currently zoned Limited Industrial (M-L) under the jurisdiction of Yolo County, and are seasonally farmed with rotating annual crops.

Figure 5-1 **The Cannery Project Site**

Source: Google Earth

The Hunt-Wesson tomato cannery formerly occupied the project site. Hunt-Wesson, Inc. constructed the cannery in 1961, which operated for 38 years before closing in 1999. In 2000, Davis City Council rezoned the project site from Industrial to PD-1-00 (Planned Development-

Industrial) to allow for the possible development of a business park. The obsolete canning facilities were subsequently demolished and a few building foundations remained in the southern portion of the site. The northern portion of the site, once intended for plant expansion, remained undeveloped. The property is entirely within the City boundary and designated in the City's general plan for urban use; therefore, the project was not subject to local Measure J/R, which gives voters the right to have final approval over any newly proposed urban or residential developments on agricultural land or open-space. Re-purposing approximately 100 acres of land, The Cannery project incorporates a mix of land uses, including low, medium, and high density residential units; a recreational clubhouse; a mixed-use business park consisting of the Commerce District and Town Center with commercial retail, office, mixed-use lofts, stacked flats, and plazas; open spaces including greenbelts, agricultural buffers, park, and amphitheater; and an urban farm (Figure 5-2).

***Figure 5-2* The Cannery Project**

Source: City of Davis

Project Description

The project will include over 500 residential dwelling units (ranging from permanently affordable apartments to single-family detached) for-sale and for-rent, plus accessory dwelling units. The project also has a 15-acre mixed-use area (approximately 6 acres west side and 9 acres east side) that could accommodate approximately 170,000 square feet of use (e.g., retail, office, upper story residential) and employment opportunities for approximately 600 to 850 jobs. The project has open space uses including open space along the west edge, an agricultural buffer and urban farm on the east edge, and greenbelts. The project also includes approximately six net acres of parks on two park sites. The project proposes an off-site bicycle and pedestrian path connection to existing bicycle facilities south of the project site. The project also proposes approximately 10 miles of on-site bicycle and pedestrian improvements.

In 2004, Lewis Planned Communities acquired the project site from Hunt-Wesson's parent company ConAgra Foods, Inc., and proceeded with the pursuit of residential mixed-use development of the project site. However, on March 16, 2009, just before embarking on the EIR preparation process for The Cannery project application, Lewis withdrew its application. On September 7, 2010, ConAgra Foods regained title to the property and reinitiated planning efforts by submitting a pre-application for development of The Cannery project. On October 26, 2010, the Davis City Council authorized a pre-application process for the project site. On September 23, 2011, ConAgra Foods submitted a formal application for The Cannery. The applicant submitted a project description and site plan to the City on February 1, 2012. Project approval required a variety of entitlements from the City of Davis, including general plan amendments, rezoning, and certification of an EIR.

Environmental Analysis

As the lead agency under CEQA, the City contracted with DeNovo Planning Group in conjunction with Fehr & Peers, to prepare a project-level environmental assessment in accordance with the requirements of CEQA, the Guidelines, the City's procedures for the implementation of CEQA, and other applicable laws. At the consultants' suggestion, the City agreed to preparation of an EIR using the streamlining provision under SB 375 for mixed-use and residential projects (PRC §21159.28). The project was eligible for the streamlining provision because it:

- had at least 75 percent of total building square footage for residential use; and,
- was consistent with the use designation, density, building intensity, and applicable policies for the project area in either an approved SCS or APS accepted by CARB.

The project did not qualify as a TPP because it did not meet the minimum net density of 20 dwelling units per acre criterion. Meeting this requirement, and located within one-half mile of a major transit stop or high-quality transit corridor, would have provided the City the additional benefit of preparing a Sustainable Communities Environmental Assessment (SCEA), or a more limited environmental review. As demonstrated in Section 3.7 of The Cannery project's EIR ("Greenhouse Gases and Climate Change"), the City found the proposed project consistent with Sacramento Area Council of Governments' (SACOG) SCS, and incorporated applicable mitigation measures contained within the SCS EIR. Pursuant to the streamlining provision, the project's EIR did not have to reference, describe, or discuss:

- growth inducing impacts;
- a reduced residential density alternative to address the effects of car and light-duty truck trips generated by the project; and,
- project specific or cumulative impacts from cars and light-duty truck trips on global climate change or the regional transportation network if the project incorporates the mitigation measures required by an applicable prior environmental document.

Regarding the impact to GHGs and global climate change, the EIR only had to addresses impacts related to GHG emissions from residential and non-residential buildings (e.g., emissions generated from the production of electricity for building operations).

In a CEQA workshop hosted by SACOG in December 2013, Katherine Hess, Community Development Administrator at the City of Davis, spoke specifically about using the streamlining provision for The Cannery project. In her presentation, she talked about how the project met the provision's eligibility requirements. Although the City's planning team (City planning staff and consultants) could easily calculate the non-residential square footage portion of the project, it had to make some assumptions about the residential square footage. Making assumptions about the size of different dwelling types, the team used the number and types of dwelling units to show that the project had at least 75 percent of total building square footage for residential use. Because projects often go through several reviews, revisions, and assumption changes, she wondered what would happen if a project later "fell short" of a requirement. Although this problem did not happen with The Cannery project, she suggested that lead agencies either mitigate or have a contingency plan as part of a project's condition of approval, especially on projects that barely meet an objective requirement threshold. The mitigation or contingency plan would help a lead agency stay consistent with the CEQA process.

After establishing that the project met the residential requirement, the City had to show that the project was consistent with the SCS. According to Kirk Trost, Chief Operating Officer and General Counsel for SACOG who also spoke at the workshop, a project only needs to be consistent with the SCS land use map. He said that if a project is consistent with the SCS land use map, then SACOG expects the project to be consistent with all the SCS policies. Katherine said that although the SCS appendix specifically identified the site as anticipated for more intensive urban development, the City took a conservative approach by reviewing all SCS

policies and showed the relationship of the project to the SCS. The City documented consistency with a mixed-use development, including a range of housing types and emphasis on transit and bike connectivity, and at times quoted the SCS directly. The City also worked closely with SACOG during this review process. As required, the City reviewed all SCS mitigation measures and incorporated those applicable to the project in the EIR, though most did not apply. The Greenhouse Gases and Climate Change section of the project EIR includes a matrix of SCS EIR mitigation measures and if applicable, where the City incorporated the mitigation measure into the project EIR. According to Katherine, the public did not question the process used to demonstrate project consistency with the SCS during the Draft EIR's public review period.

Interview

In addition to hearing Katherine's presentation about her experience using PRC §21159.28, I interviewed her to get additional feedback about using the streamlining provision. She told me that the provision "worked generally quite well." The City did not analyze the potential environmental effects of GHG emissions from passenger vehicles and light-duty trucks resulting from project implementation because it could rely on the GHG mobile emissions analysis and mitigation measures in the SCS EIR. To determine the significance of potential impacts related to GHG emissions from residential and commercial buildings, the City used pre-determined thresholds. However, the City made assumptions about emissions from mixed-use developments, as the City does not have standards for this type of development. The City found that the potential impacts related to GHG emissions from buildings because of project implementation were less than significant.

Growth inducing impacts were not a major concern because the project is sufficiently self-contained; thus, the potential impacts were likely less than significant. However, the City

received comments from the California Department of Transportation (Caltrans) about regional transportation issues, specifically traffic congestion on the I-80 freeway. Caltrans understood that the City did not need to analyze the impacts pursuant to CEQA and did not question the adequacy of the EIR, but that did not mean the existing regional transportation issues went away. The City also received similar comments from the community stating the need to look at the project's impact on the regional transportation network. Pursuant to the streamlining provision, the City did not need to analyze impacts to the regional transportation system from passenger vehicles and light-duty trucks. Additionally, the project was more than one mile from the I-80 freeway, and the City did not expect many on and off freeway trips. The City responded to these comments by tying them back to the traffic analysis in the SCS EIR and working through these concerns with Caltrans and the public. Both Kirk during the SACOG workshop and Katherine suggested that lead agencies engage Caltrans early when using the new CEQA provisions to "get in front of their concerns."

Overall, using the streamlining provision saved the City a little bit on time and cost of analysis of mobile GHG emissions and traffic effects because the City did not have to conduct monitoring and trip counts, and perform the subsequent calculations. However, Katherine could not estimate the amount of money or time saved. Because the City was anticipating fewer than five percent of trips going in any direction, it probably would not have been significant. She said that for projects with more potential for significant impacts, especially smaller projects that cannot easily absorb the cost for the GHG and traffic analysis, the savings could be significant.

When reflecting back on the experience, Katherine said that the interesting question with streamlining is that "some people still wanted to know the results of the analysis that we did not do." Although SACOG recently conducted the regional traffic and GHG analysis for the SCS EIR, there was not a project specific analysis. She said that many environmentally active

community members wanted to know the GHG impacts from the vehicles, which Katherine felt was not an unreasonable request. She said that although the public understood the law, they did not like it. She went on to say that if it had "been a project that required voter approval, we would have had to figure out what is it that voters need to know to cast an informed vote." Katherine said that the City could have clarified that SACOG covered the traffic and GHG analysis and mitigated for it in the SCS EIR, and that the City was implementing those decisions that SACOG cleared through CEQA. Nomenclature is important. Rather than saying that the lead agency is taking advantage of a CEQA streamlining provision that says it does not have to look at certain impacts, it can say it or another lead agency analyzed and addressed the impacts in a prior environmental document. The difference in nomenclature can make the streamlining benefit look a lot different to members of the community.

There were "still questions about disclosure and remembering that CEQA is a disclosure document." Katherine believed that some community members felt that it was not completely fair that the City did not have to do a piece of the environmental analysis that they might have liked to see in order to evaluate the whole project. She also stated that because the City did not have the numbers from analyzing locally the impacts related to mobile GHG emissions, what would have been a technical exercise (e.g., calculating mobile GHG emissions and mitigating for impacts) became a general policy discussion about GHGs and sustainability. Public comments included the need for more sustainability from the project, such as zero net energy for the homes and better bicycle connectivity. Because the City did not have the numbers, it switched to a policy discussion and the policies came to "they may meet our standards, that's still not good enough, we need more sustainability from the project." She said that although a policy discussion is where the topic of GHGs and sustainability probably belongs in terms of developing city goals and development standards, it made it a little less precise as they went through the project review

process. Because the "City didn't have an answer as to how much sustainability is enough and the right efforts for GHGs, what it came down to was a policy decision."

Overture Project, Berkeley, California

Project Location

The Overture project is located in the City of Berkeley on a generally square site consisting of two merged parcels (Figure 5-3).[2] The project is located on the south side of University Avenue near Grant Street, fronting University Avenue to the north. Adjoining land uses include a restaurant to the west and a motel to the east. The site backs up to multi-family residential homes that front Addison Street to the south. The site is zoned C-1 (General Commercial) and is within the University Avenue Strategic Plan Area (Strategic Plan) Mixed-Use Overlay Zone.

Figure 5-3 **Overture Project Site**

Source: Google Earth

University Avenue is a heavily traversed road and has a mix of commercial uses, including offices, food services, lodging, and retail establishments, as well as residential mixed-use buildings. The Overture project involved the demolition of two, two-story buildings. One building, constructed in 1982, contained a retail furniture business and a yoga studio. Built in 1921, the second building contained a quick-service coffee shop and a retail establishment. The project site is less than one-half mile from the Downtown Berkeley Bay Area Rapid Transit

[2] After I finished this thesis, I learned that the "Overture" project did not use the SB 226 streamlining provision, but instead relied on the Class 32 categorical exemption. For more details, see Chapter 1, page 1, footnote 1.

(BART) station, adjacent to a number of frequently running bus lines, and located one-half block from the Downtown Node. The Strategic Plan established "nodes" along University Avenue and San Pablo Avenue that are within walking distance of nearby residential areas, and provide neighborhood-serving goods and services. The Berkeley City Council approved the Overture project in 2014 and it is currently under construction.

Project Description

The project is a four-story mixed-use residential building with 44 dwelling units (studios, and one- and two-bedroom units), including four below-market units, and three commercial retail/food service spaces (over 4,500 square feet) facing University Avenue (Figure 5-4). A below-grade parking garage will include 19 vehicle parking spaces (16 residential), 63 secured bike parking spaces, and a bike repair station. The development also includes residential amenity spaces, including a lobby, gym, kitchen, laundry area, and over 6,000 square feet of exterior open space (courtyard, roof deck, patios/balconies). The total gross floor area is approximately 34,000 square feet. The net housing unit density is 147 units per acre (44 units on 0.3 acres). The project will also offer residents either two free carshare memberships or two subsidized transit vouchers equivalent to the value of the carshare memberships, for each residential unit for 40 years.

Figure 5-4 **Overture Project**

Source: City of Berkeley

Environmental Review Process

The project developer applicant retained consultant Mark Rhoades of Rhoades Planning Group to represent him during the project review and approval process. In consultation with the owner, Mark requested that the City of Berkeley exempt the project from further CEQA review pursuant to the streamlining provision under SB 226 (PRC §21094.5, Guidelines §15183.3). The project was eligible for streamlining because it met the following criteria:

- located in an incorporated city or unincorporated area completely surrounded by incorporated cities;
- consistent with an approved SCS or APS; or, if outside the boundaries of an MPO, a small walkable community project located in an area designated by a city for that purpose; or, if the project is located within an MPO that has yet to adopt an SCS or APS, has a residential density of 20 units per acre and minimum FAR of 0.75;
- located on a previously developed site or a site where at least 75 percent of adjacent parcels are developed with existing qualified urban uses; and,
- satisfies the performance standards contained in Appendix M to the CEQA guidelines:
    - either located at a distance of 500 feet, or a local agency determined distance, from a significant source of pollution (e.g., high-volume roadway); or, compliant with an adopted community-plan or zoning code risk reduction plan; or, includes enhanced project air filtration; and,
    - if on a formerly contaminated site, has documentation of completed remediation or implementation of the recommendations provided in a preliminary endangerment assessment or comparable document that identifies remediation appropriate for the site.

Because the Overture project is predominantly residential, it qualified as a residential project; therefore, the project also had to meet one of the following Appendix M performance requirements:

- located within one-half mile of an existing major transit stop or an existing stop along a high quality transit corridor; or ,
- located in a low vehicle travel area within the region, where the per capita vehicle miles traveled (VMT) is below the average regional per capita VMT; or,

- consists of 100 or fewer units, all of which are affordable to low income households, where the developer of the project commits to ensuring the continued availability and use of the housing units for low income households, for a period of at least 30 years.

As the lead agency under CEQA, the City determined that the project was eligible for streamlining because it met the criteria, including being located within one-half mile to an existing major transit stop (BART). Pursuant to PRC §21094.5 (Guidelines §15183.3), the City did not need to apply CEQA to a project effect if a lead agency addressed it as a significant effect in a prior plan-level EIR, even if all feasible mitigation measures did not reduce the effect to less than significant. The City could also make a finding that uniformly applicable development policies or standards would substantially mitigate the effect. The City determined that the project was consistent with the general use designation, density, building intensity, streetscape, and applicable policies specified for the project area in the City's Zoning Ordinance, specifically with the C-1 zone's University Avenue Mixed-Use Overlay (adopted in 2004).

Because the CEQA requirement to analyze potential impacts related to GHG emissions resulting from project implementation was new, in addition to the general plan EIR the City referenced the GHG analysis conducted for the City of Berkeley's Climate Action Plan (adopted in 2009). The environmental analysis did not indicate any measures beyond the City's generally applicable standards. The City determined that the project was exempt from further CEQA review because a combination of plan-level analysis and City policies or standards addressed all potential environmental effects.

Interview

I interviewed Mark Rhoades who founded the Rhoades Planning Group in 2012. Mark has 22 years of experience as a land use planner and developer consultant in both the public and private sectors. Between 1998 and 2007, Mark served as the Planning Manager for the City of

Berkeley. Mark has been involved in CEQA reform efforts at both the state and local level for 20 years. He was also involved with OPR's recent efforts to improve the CEQA streamlining review process, particularly implementation of SB 226 for infill development. He said that much of the recent legislation reflects these efforts.

When I asked Mark if he knew how the City determined that the Overture project was consistent with the regional planning agency, Association of Bay Area Government (ABAG) and Metropolitan Transportation Commission's (MTC) SCS, he said no, but mentioned that all of his projects are within a Priority Development Area (PDA). PDAs are locally identified areas within existing communities approved by local cities and counties for future growth. PDAs are an integral part of the regional Plan Bay Area, which is the region's SCS. PDAs are typically accessible to transit, jobs, shopping, and other services. Jurisdictions propose that PDAs will absorb 80 percent of new housing and over 60 percent of new jobs on less than five percent of the San Francisco Bay Area's land.

Mark has used a variety of CEQA streamlining provisions and exemptions over the course of his planning career. As a developer consultant, he now mostly uses PRC §21094.5 (Guidelines §15183.3) for his eligible infill projects. In addition to the Overture project, he is using the provision to streamline an EIR for Berkeley's first downtown high-rise under the new Berkeley Downtown Area Plan. He expects to streamline or exempt several other new projects that he is working on using this provision. Mark commented that as a former city planner and now developer consultant, his prospective about using recent streamlining provisions is likely "more balanced." He said that most developers do not have the same broad experience with the environmental review process.

Based on his knowledge and experience with the streamlining provision, the provision is "less of a boon for developers than it is for cities should they choose to use it appropriately." He

said “for cities that are trying to get traction on development in their cores, in particular, it’s a fantastic tool, but the burden on the cities is to have plan documents with robust enough EIRs or a climate action plan to ride coat-tails on.” However, he did not believe that many cities have put the resources into their plans and thus, are not well prepared to take advantage of CEQA streamlining provisions or exemptions. He said what CEQA has moved into now is a “refocus of our resources and our efforts on our urban cores, but not everyone has drank that Kool-Aid” and “plenty of cities are still going to do some greenfield stuff and do CEQA the way we know how, the good old-fashioned way, and whatever it takes it takes.” He further stated that those jurisdictions which are more “savvy,” some in the San Francisco Bay Area, and the Los Angeles and San Diego areas, is where the State will see use of this provision; primarily, because “they have the resources to put the studies in place.” He said these cities are more serious about urban infill and the transit connection in their cores.

Developers go where the property values are high and according to Mark “are going to do whatever the city tells them to do.” He further stated that developers “don’t want to mess in their garden, so if a city says we are not going to use that, very few developers have the chutzpah to say oh yes we are, and here’s why, we’ve already laid it out.” Mark said that is what he does and a developer who either has the right consultant or understands this well enough will try to “put all those pieces together” to see if the project is eligible for the streamlining. He further stated that if he gets resistance from the City, he is willing to say “alright CEQA says right here it shall be determined to be exempt, not maybe if you think so on a good day.” He said “that’s the part about messing in the garden and not many developers want to go have that arm wrestle with people who are going to be reviewing their project.” He felt many developers might tell a jurisdiction that their project qualifies for CEQA streamlining or is exempt, but when they get pushback, they back down.

In conjunction with developers' reluctance to challenge a lead agency's decision, is a jurisdiction's lack of political will. He said that city staff has to answer to politicians. If city staff are not educating the politicians, or if politicians are not going to their regional planning agency meetings, they are just doing business as usual. The "business as usual just sputters along." Mark reiterated that PRC §21094.5 (Guidelines §15183.3) does not say "if you want to, it says if you are, you are" exempt and that is an important point. CEQA "isn't giving you a choice," if a project qualifies to be exempt from CEQA, the local agency must determine the project exempt. He said that this requirement is something that he has tried to tell developers and jurisdictions for years. He said there is also a lack of political will among local elected officials to use new streamlining provisions because many agencies are still afraid of the courts being differential and "not having their back." However, he felt that if a local agency can put together a rational conclusion for using the streamlining provision, the "court is going to take that."

Mark also felt that cities do not have the "political will to stand up to the opposition which is frustrating for developers." For this reason, he never recommends preparing a negative declaration that has a higher risk of challenge by project opponents because of the fair argument standard. Instead, he tries to get a project exempted from further CEQA review which is easier now because PRC §21094.5 (Guidelines §15183.3) allows jurisdictions to also rely on broadly applicable development policies or standards. The City does not need to analyze an environmental effect resulting from a project if a policy or standard substantially mitigates the effect. Depending on the effects addressed in a prior EIR and the availability of uniformly applicable development policies or standards that apply to the eligible infill project, streamlining under this provision will range from a complete exemption to an obligation to prepare a narrowed, project-specific environmental document. If he cannot get a project exempted, he will

request a streamlined EIR and try to get down to just a couple of issues that need to be analyzed instead of a full EIR.

I asked Mark if the streamlining provision saved on time or cost, he said, “I don’t know if it saves a lot of money because you’re doing the studies anyways” to support the exemption. He said “we still need to make the case as to why a project fits this exemption, but the protection is significant and worth it.” While not applicable to the Overture project, he said the big savings for most infill projects is on the toxics issues as infill projects are frequently on Cortese-listed sites. A project proposed on a Cortese-listed site would have prevented the use of earlier exemptions. The ability to refer to city policy or standard related to site remediation has filled this gap. He said the broadly applicable standards, that as Berkeley’s Planning Manager he developed in conjunction with Berkeley’s Toxics Management Division, on how to handle brownfield sites can “save at least several months” that the lead agency would otherwise need for preparation of a mitigated negative declaration. A mitigated negative declaration is also “much easier to challenge” than an exemption under PRC §21094.5 (Guidelines §15183.3) because of the higher “substantial evidence” standard of review threshold. As long as a lead agency makes its determination on a rational decision-making basis, and “no one can poke holes into that that leads to a different conclusion, then you’re in good shape.” Mark said that it saves time in that way. Overall, he estimated an exemption could shave three to four months off the environmental review process, and the EIR streamlining possibly six months.

In addition to the Overture project, Mark proposes use of PRC §21094.5 (Guidelines §15183.3) on other projects to either narrow the scope of the EIR or exempt the project from further CEQA review. These projects include:

- The Roost @ Blake at 2029-2035 Blake Street, Berkeley: a proposed five-story mixed-use building with both residential, office and commercial uses. (exemption)

- Bancroft Apartments at 2124 Bancroft Way, Berkeley: a proposed six-story, 50-unit, residential development. (exemption)
- Berkeley Plaza at 2211 Harold Way, Berkeley: a proposed mixed-use building with 355 residential apartments and 10,455 square feet of commercial space. (streamlined EIR)

The City of Berkeley was the first jurisdiction to use the streamlining provision. Mark said that because the City first used the streamlining provision to exempt the 1935 Addison Street project, it is now more comfortable using the provision on other projects.

Neither the Davis nor the Berkeley project resulted in a substantial amount of time or cost saved by using either PRC §21159.28 or PRC §21094.5 (Guidelines §15183.3) to streamline the environmental review process. However, both interviewees stated that the amount of time or cost saved depends on the project's characteristics. Using PRC §21159.28 for eligible projects that have more significant impacts to mobile GHG emissions and global climate change, the regional transportation network, or the potential for significant growth inducing effects can result in a "significant" cost savings. Projects eligible for streamlining under PRC §21094.5 (Guidelines §15183.3) are potentially exempt from further CEQA review if a combination of prior analysis, and city policies or standards, fully address all potential impacts pursuant to CEQA. An exemption can save an estimated three to four months of time and up to six months for a streamlined EIR.

In addition to the two projects presented in this chapter, I located a project that is using PRC §21094.5 (Guidelines §15183.3) to streamline an EIR. It is the 1300 El Camino Real Greenheart project in Menlo Park. The lead agency also determined that the project was eligible for the provision under SB 743 that exempts the City from addressing both aesthetic and parking impacts resulting from project implementation. Although it was difficult to locate projects that have used the residential infill exemption under SB 1925, PRC §21159.24 (Guidelines §15195), or a streamlining provision under SB 375, I located several projects that have either used or are

expecting to use provisions under SB 226. The next chapter presents recommendations for future CEQA reform and suggestions to promote the use of CEQA streamlining provisions and exemptions for infill.

Chapter 6

CHALLENGES, OPPORTUNITIES, AND FUTURE CEQA REFORM

This chapter describes responses to questions about both actual and perceived challenges to using CEQA streamlining provisions and exemptions, ideas to encourage use, and recommendations for future CEQA reform. The first section describes challenges or concerns in using CEQA streamlining provisions and exemptions, including multiple and restrictive requirements, and legal defensibility. I follow this discussion with suggestions from interviewees and literature about ways to encourage use of streamlining provisions and exemptions, as well as recommendations for future CEQA reform to better support infill development. These suggestions include broader exemptions with objective criteria, expanded streamlining provisions with regulatory and judicial guidance, strengthened plan-level review and funding mechanisms, education, and reduction of costly delays.

Challenges to Using CEQA Streamlining Provisions and Exemptions

What are the challenges to using CEQA streamlining provisions or exemptions for infill?

Multiple and Restrictive Requirements

Several developers, lawyers, and a planner said that recent CEQA reforms to streamline or exempt infill projects from further environmental review have too many requirements that narrow the scope of eligible projects. This narrowing causes an exclusionary effect that limits the number of infill projects that can benefit from the reforms; thus, only a very small subset of projects qualifies. A lawyer also expressed concern about the copious conditions creating a "net" that can increase the risk of a lawsuit. A long list of conditions, especially conditions that are subjective, increases the number of potential arguments that a project opponent can use to dispute a lead agency's decision to use a streamlining provision or invoke an exemption.

To use the exemption under SB 1925, in particular PRC §21159.24 (Guidelines §15195), a lead agency needs to find that an infill project meets over 20 conditions. The exemption is only applicable to residential urban infill projects on a site no larger than four acres, and located within one-half mile of a major transit stop. Other project limitations include a maximum of 100 dwelling units and a minimum density of 20 dwelling units per acre. Other criteria include a project that does not have a significant effect on historical resources, is adequately served by existing utilities, is not on a Cortese-listed site, and on a site with an absence of wetland or wildlife habitat value. Deficiency in any one of the multiple conditions results in the lead agency's inability to invoke the exemption. One planner stressed that "many infill sites are on the Cortese List for various reasons" and a developer mentioned his projects range from 14 to 400 residential unit developments. As described in Chapter 3, a study revealed that reasons for planning agencies not granting exemptions for urban infill included exemptions that are too narrow in scope, and twenty-six percent of developer respondents expressed reasons including projects too large to qualify.

Included on the list of multiple conditions is the requirement that the lead agency demonstrate project consistency with a general or specific plan, and a community-level EIR certified or adopted within the last five years. As described in previous chapters, many jurisdictions do not put resources into updating their plans and associated EIRs. One planner said that in addition to having outdated plans, her jurisdiction chose not prepare an EIR for its climate action plan (CAP). CEQA did not require lead agencies to analyze GHG impacts from project implementation until March, 2010. Preparation of a CAP EIR gives a lead agency the opportunity to apply the EIR's GHG analysis to future projects, potentially filling a gap that could render the project exempt from further environmental review. Thus, the jurisdiction is not prepared to receive the full streamlining and exemption benefits from the recent CEQA reforms.

When referring to PRC §21159.24 (Guidelines §15195), lawyer Jennifer Hernandez (2012) stated "to date there have been no confirmed instances of the use of the statutory exemption" (SB 1925 [Sher, 2002] bullet point). As a lawyer interviewee commented, the intent of the State is to limit the scope of project types the State wants. However, in this instance the State was likely too restrictive. In my research, I identified only one project that used the exemption. Because of the multiple and restrictive requirements, including a recently certified or adopted community-level EIR, most projects are ineligible for the exemption.

Six years after adopting SB 1925, the California Legislature passed SB 375. While there are few requirements to streamline infill projects under PRC §21159.28 (at least 75 percent of building square footage is residential and the project is consistent with the SCS or APS), it is limited to residential and mixed-use projects. The streamlining benefit only applies to potential impacts from cars and light-duty truck trips on global climate change and the regional transportation network. While the number of requirements pursuant to PRC §21159.28 are few, PRC §21155 et seq. for TPPs, specifically Sustainable Communities Projects, requires a project meet over 20 conditions to exempt it from further CEQA review. However, CEQA streamlining and exemption provisions have progressed.

The streamlining provision under SB 226 (PRC §21094.5), adopted by the California Legislature in 2011, applies to a wider range of infill project types and transit-oriented areas, has fewer restrictive conditions than earlier streamlining and exemption provisions, applies to all environmental impacts pursuant to CEQA, and does not require a recently adopted or certified community-level plan EIR. Depending on the effects addressed in the prior EIR and the availability of uniformly applicable development policies or standards that apply to the eligible infill project, streamlining under this section ranges from a complete exemption from further CEQA review, to an obligation to prepare a narrowed, project-specific environmental document.

However, while the Legislature loosened some of the restrictive conditions, use of the provision is limited mostly to cities. In developing streamlining provision criteria that directs development that supports State goals, further efforts by the State should include fewer restrictive conditions while still encouraging infill development.

Legal Defensibility

Another impediment to using recent CEQA streamlining provisions or exemptions is the perceived risk of litigation. Unlike other statutory exemptions that apply regardless of the project impacts, PRC §21159.24 has an Achilles heel. As described in Chapter 2, acting like a categorical exemption a project is not eligible if it meets any of the conditions outlined in Guideline §15300.2. One of these requirements includes the subjective condition that projects not have any "unusual circumstances." Unusual circumstances differ from the general circumstances of the project covered by the exemption. If the unusual circumstance creates a potential risk to the environment, the lead agency cannot invoke the exemption. Therefore, the exemption can be lost if there is a reasonable possibility of a project-specific effect on the environment due to unusual circumstances. Additionally, if there are substantial changes in circumstances or new information becomes available after certification and adoption of the community-level EIR, the lead agency cannot invoke this exemption. These exceptions along with the list of restrictive conditions add uncertainty for infill developers.

As described in Chapter 4, many developers are more comfortable with using a negative declaration than an exemption. Developers hesitate to use exemptions or conduct a lesser amount of environmental review that may jeopardize the project by making the environmental review document or exemption less defensible. According to a lawyer, if a developer is going to spend the money on the studies that support the decision to exempt the project, he wants a document

that is more defensible. As described in Chapter 3, a study revealed that reasons for planning agencies not granting exemptions for urban infill include developers reluctant to ask for CEQA exemptions out of fear of amplifying any neighborhood opposition and increasing the chance of litigation. However, while a negative declaration is subject to the fair argument standard of review, if a lead agency determines that a project is exempt, the court is likely to uphold the lead agency's determination if it is supported by substantial evidence (e.g., impact studies). According to lawyers Shimko and Francois (2011), "in applying the substantial evidence standard of review, the court looks to see if there is substantial evidence in the record that supports the agency's decision" (p. 43). With a negative declaration, the court instead looks to see if there is substantial evidence in the record that supports a fair argument that the project may result in significant environmental effects (Shimko & Francois, 2011, p. 43).

Courts have also construed the PRC §21083.3 (Guidelines §15183) streamlining provision, described in Chapters 2 and 4, as an exemption. According to Shimko and Francois (2011), "as an exemption, reliance on this streamlining provision should also be subject to the more deferential standard of review" (p. 44). If "a project is consistent with the development density established in a general plan or zoning ordinance that was subject to an EIR, and there are no impacts that are peculiar to the project or parcel or new potentially significant cumulative impacts, an agency does not need to prepare a new environmental document" (Shimko & Francois, 2011, p. 44). Nevertheless, categorical exemptions, as well as the statutory exemptions under SB 1925, are still subject to exceptions. Shimko and Francois (2011) suggested that to encourage use of PRC §21159.24 (Guidelines §15195), the Legislature should amend it so that at a minimum, it is "treated as an absolute statutory exemption rather than being viewed as akin to a categorical (or qualified) exemption from CEQA" (p. 47).

The substantial evidence standard of review provides a higher threshold than the fair argument standard when project opponents use CEQA to challenge a lead agency's decision to approve a project. Streamlining provisions under SB 375 and SB 226 provide the substantial evidence standard. Under SB 375, when a lead agency elects to prepare a SCEA, instead of a negative declaration, for a TPP, the court will apply the higher substantial evidence standard of review if opponents' challenge the project using CEQA. The substantial evidence standard makes the decision to invoke the streamlining provision and agency more impervious to litigation.

This is similar to the streamlining provision under SB 226 (PRC §21094.5). However, this provision provides CEQA streamlining for a wider range of project types (e.g., residential and commercial developments, transit stations, schools, public buildings) in more locations (e.g., near transit stops, in low vehicle miles traveled [VMT] areas). Pursuant to SB 226, lead agencies can use the CEQA Infill Checklist (Guidelines "Appendix N") to document the substantial evidence of no significant impacts absent from the community-plan(s) EIRs, and impacts considered and mitigated for in a prior plan-level EIR or local development policies or standards. A lead agency can also use Appendix N to narrow down the scope of the environmental review for projects that require an EIR. Increased legislative and judicial guidance that the substantial evidence standard of review applies to an agency's determination that a project qualifies for an exemption or streamlining process could greatly enhance reliance by developers, agencies and CEQA practitioners on these types of provisions.

Increasing Use of CEQA Streamlining Provisions and Exemptions

What would help increase use of the streamlining provisions and exemptions for infill development? What changes would make the provisions and exemptions more effective?

Broader Exemptions with Objective Criteria

One lawyer commented that exemptions need to be “more black and white.” CEQA exemptions need to target a broader range of project types and have clearer, objective requirements such as building or site limits, minimum density, and absence of wetlands. Objective, instead of subjective, criteria would increase the use of exemptions by reducing the risk for alternative interpretation and conclusion about a project’s potential environmental impacts. He said that objective criteria would protect a lead agency that is “going out on a limb” to invoke an exemption. Shimko and Francois (2011) supported this observation when they wrote that an “exemption would be far more useful if it were more ministerial in nature and structured in a checklist format with objective standards” (p. 43). However, Shimko and Francois suggested that exemptions include only the requirement that urban uses surround a project, instead of including restrictive conditions such as building size limits. Shimko and Francois (2011) said if a site is “substantially surrounded by urban uses, there is no need for a size limitation or restriction to projects only within incorporated areas” (p. 43). They further stated, “if the Legislature is serious about promoting infill, the restrictions on project size and density should be eliminated” (p. 47). The Natural Resources Agency should also consider less restrictive categorical infill exemptions.

Shimko and Francois also suggested that project consistency with the general plan or zoning ordinance remain a criterion for invoking an exemption. However, a planner commented that a lead agency may find it easier to use an exemption or streamlining provision if it only had to show project consistency with the use designation, density, building, intensity, and applicable policies of the community-plan. The requirement to show consistency with a plan overall is difficult if the plan is outdated. She said this requirement is why it is now rare for her jurisdiction to use the Class 32 categorical exemption.

Jurisdictions can also streamline the approval process by allowing more types of projects with ministerial permits, including site plan review. In a hearing report from the California Senate Local Government Committee (2004), Tom Steinbach, then Executive Director of the Greenbelt Alliance, explained that a big step to promote infill development includes "as-of-right approval for certain infill projects" (p. 4). He explained that first a community has to designate where growth will occur and adopt a specific plan for those areas with full CEQA review. If a lead agency finds that an infill project is "consistent with these plans, then it should be ministerial" (p. 5). The Greenbelt Alliance is a San Francisco Bay Area environmental group that supports infill projects to protect the ridges and hills. The group endorses worthy infill projects as part of its "Greenbelt Alliance Endorsement Program."

In 2003, the California Legislature passed AB 1866 (Wright, 2002) to increase affordable housing. This law requires local governments to ministerially approve applications for second units in zones that permit single-family dwellings, by local ordinance. A local ordinance can include criteria such as design standards (e.g., identical paint hue as the primary dwelling), but the criteria must allow approval of a second unit application without the exercise of discretion. Because project review is ministerial, the project is not subject to CEQA. A lawyer whom I interviewed commented that he understands that jurisdictions do not like to give up discretionary approval because "in a lot of cities people want to touch the important projects by having input on the design"; however, unlike CEQA "that does not cost the developer money."

Expanded Streamlining and Regulatory Guidance

In addition to having exemptions with objective and less restrictive criteria, and ordinances that require ministerial approval, CEQA streamlining provisions for infill projects that are ineligible for a complete exemption can further support compact, transit-oriented

development. Use of the streamlining review process by lead agencies can increase development momentum by reducing the time and cost of environmental review. When referring to streamlining, a developer said he is "supportive of things that make it easier for infill," but stressed that lead agencies still need to be "looking at the things they need to." He said that although he believed the environmental review process should be as "expeditious as possible, especially if impacts have already been analyzed," and that he is "all for expanding" streamlining, it should not be done "irresponsibly." Another developer commented that "we tend to over analyze so it needs to be more practical."

According to Altmaier et al. (2009), the State could expand streamlining by amending CEQA to allow plans and associated EIRs for "priority development areas" identified in the SCS or APS (p. 48). Priority areas are areas designated in urban regions for transit expansion and transit-oriented development. CEQA could stipulate that if an adequate plan-level review is conducted for a priority development area and a specific plan for development is prepared within one of these areas, a lead agency can determine future projects conforming to these plans exempt from further CEQA review (Altmaier et al., 2009, p. 48). However, State law requires that specific plans be consistent with general plans. This requirement means that "tiering a plan for a priority area from an SCS or APS might not work if the planned development is not consistent with the relevant local government general plan" (Altmaier et al., 2009, p. 53). SB 375 does not require that local plans be consistent with the SCS or APS. Therefore, the State would need to resolve this issue.

Because the State mandates that lead agencies rely on CEQA streamlining for qualifying projects, jurisdictions need to make land use decisions using this process. However, lead agencies need more regulatory guidance on the documentation needed to support their decisions to streamline or invoke an exemption. For example, when streamlining the environmental review

process using PRC §21083.3(Guidelines §15183), the lead agency's record needs to demonstrate that the agency relied on analysis in a previous EIR or a local development policy or standard. However, it is unclear as to what type of document the lead agency should use to demonstrate the supporting evidence. It is also unclear as to what type of document a lead agency needs to use to study the impacts that the agency deemed peculiar to the project or parcel. The lack of clarity on the appropriate documentation is another reason why planners do not use this streamlining provision. However, for TPPs, SB 375 does direct lead agencies to prepare an initial study similar to that for a negative declaration when using a SCEA (§21152.2). Pursuant to SB 226, lead agencies can also use Appendix N as a template to document the substantial evidence of no significant impacts absent from the community-plan(s) EIRs, and impacts considered and mitigated for in a prior plan-level EIR or local development policies or standards. Legislative and judicial guidance that the substantial evidence standard of review applies to an agency's determination under PRC §21083.3 (Guidelines §15183), as well as on proper documentation when using this or other similar streamlining provisions could encourage local official and CEQA practitioners to use them often.

Strengthened Plan-Level Review and Funding Mechanisms

CEQA reforms have successively addressed concerns about using streamlining provisions and exemptions. These concerns include numerous and restrictive conditions, potential litigation, and guidance on documentation requirements. However, these reforms have not addressed one of the most substantial obstacles, the financial constraint to plan-level review. As discussed in Chapter 3, the average cost for a project-EIR is substantially lower than the cost for a general plan. A locality's (city or county) general fund pays for most (86.7 percent) of these costs, while development applicants fund project-EIRs. For smaller or cash-strapped

jurisdictions, the cost can deter them from completing more frequent comprehensive general plan updates. These provisions do not address this funding imbalance, nor do they "enhance mitigation options for localities that accept projects (such as infill) that produce regional benefits but local costs" (Altmaier et al., 2009, p. 50). At a local level, it is tough to find both time and money to strengthen plan-level documents and produce more robust and defensible EIRs.

According to Altmaier et al. (2009), the State could take several actions to help local and regional agencies, such as technical assistance and a permanent source of funds for regional and local planning under SB 375. Funding could include a revolving loan fund available to these agencies for developing plans (e.g., general plan, SCS) and preparing the associated EIR. The lead agency can pass the cost onto developers whose projects the lead agency determines are consistent with the Plan (p. 51).

Education and Sticks

A planner said that one opportunity to encourage more use of CEQA streamlining provisions and exemptions is through education. She said that planners certified by the American Planning Association (APA) through its American Institute of Certified Planners (AICP) must take continuing education courses (32 units/hours per two-year reporting period). Although some courses are required (e.g., ethics, planning law), other course topics are elective. She commented that various organizations offer workshops on CEQA topics, such as case law updates and trends, but that it is "unfortunate that they really don't tell you how it applies to what you do." She felt that more people would go to courses about CEQA streamlining provisions and exemptions if the courses offered "more practical experience using these new pieces of legislation." She mentioned that she would have attended classes about preparing a Master Plan EIR if an organization had offered them. She said the City of Sacramento prepared a Master Plan EIR, but she was "not sure

if everyone knew what it was." Now when the City tries to tier subsequent projects, "additional reporting requirements for projects that could have been exempt now goes under conditional notices." She further stated "in order to get staff to use new streamlining provisions and exemptions, they need training. Otherwise, how do we understand these new pieces of legislation?"

Another planner said that there needs to be education though organizations such as the League of California Cities to help "the top decision makers, city managers and the council people, understand the protections that are embedded" in the new streamlining provisions. The decision makers "need to understand the process a little bit better and what the intent of it is." He said there are several CEQA processes. First, there is a process for greenfield development, one for exurban or more rural areas, and another process for the suburbs. Then, "there is a CEQA process that is specific to urban infill in places that are tied to the SCS that are within the priority development areas where you don't even contemplate an EIR or negative declaration." This later process is "what the State is trying to do, this is where the State has decided it is trying to do it, and you cities this is how you have to think about it." He said it is not necessary to address approximately one-third of CEQA impacts in an initial study for projects in the urban context because of prior state or federal actions (e.g., provision of statewide soils maps).

He further stated that there should be "sticks not carrots" for jurisdictions "that are not doing it," when referring to consequences for those jurisdictions not using the CEQA exemptions and streamlining provisions when applicable. He said that the density bonus law (Government Code §§65915, 65915.5) is a stick because it requires jurisdictions to grant a project a density bonus, as well as other incentives, when a developer includes a certain percentage of affordable housing units in a project. If a jurisdiction does not grant the density bonus, it will result in the

jurisdiction paying the developer applicant attorneys' fees and giving him the building permits. He further stated that "cities don't do carrots" and "CEQA doesn't have sticks in it."

Reduction of Costly Delays

Reluctance to using a CEQA streamlining provision or exemption includes the perceived threat of a lawsuit. As described in Chapter 2, although rare, the threat of litigation exerts a strong influence on CEQA implementation. The potential for litigation is particularly true for urban infill development. In a 2012 study by Hernandez and Golub (2012), when analyzing 95 published opinions from 1997 to 2012, in which plaintiffs litigated the validity of an EIR to the California Court of Appeal or Supreme Court, out of 59 cases categorized as either greenfield or infill, 35 (59 percent) were infill projects (p. 5). Between suspension of project approval and additional holding costs, delays cost developers far more than preparing an EIR. These costs and the hint of fervent opposition, especially for more controversial projects with strong "not in my backyard" ("NIMBY") resident coalitions, can deter needed development.

One planner said that the "low threshold for a lawsuit is still a big concern." This fear is not only about the costs associated with litigation, but also about "home rule." Jurisdictions "have a high level of interest in making sure their decisions are not overturned." Therefore, although all discretionary projects have indemnification clauses in the conditions of approval, lead agencies often jump in and co-defend. Thus, lead agencies and developers often split the cost. According to a planner, the city sometimes pays more than the developer to defend its decision because it wants its decision to stand. Jurisdictions worry that their decisions "aren't overturned by the angry mob every time they turned around," so they are motivated to participate in the lawsuit. Unless a jurisdiction does not have the resources, it is going to participate.

One planner stated when referring to CEQA reforms for infill, "we've done a good job with the first half of it, but the court half of it needs to change." The planner referenced a case where a city determined that a project was exempt under a Class 3 and Class 32 exemption. Project opponents challenged and three years later, the Supreme Court upheld the City's original decision to exempt the project under the categorical exemptions. The project took a year and a half because it was so controversial to approve, but three years later the lead agency was still in court; meanwhile, "we are just sitting around waiting for the court to act." He further stated that although "the density bonus process, Permit Streamlining Act, and CEQA reforms are all the tools that we have to guide this process, it still takes too long."

Senate Bill 122, introduced by Senators Jackson, Hill, and Roth on January 15, 2015, attempts to reform CEQA to address time-consuming and costly delays without undermining the environmental review process. As introduced, the bill would improve the process in three ways:

- **Create an Internet Clearinghouse for CEQA Documents -** The bill would require that OPR expand its current document repository to include all documents required to be prepared under CEQA, making them easily accessible to the public.
- **Concurrent Preparation for Anticipated Court Challenges -** One of the necessary elements for litigation to move forward is the compilation of the "record of proceedings," which is a written record of all the materials supporting the lead agency's decision. This process can take months to complete. This bill would allow a lead agency to prepare the record concurrently during the CEQA process.
- **Address "Document Dumping"-** The late submission of documents and information into CEQA proceedings has been a problem. This bill would establish new procedures that would preserve the public's ability to participate while better incorporating late information into the decision-making process. This new procedure would improve predictability and efficiency of the process.

The applicant triggers the concurrent record preparation by submitting a written request and consent to the same by the lead agency. While the Legislature has yet to flesh-out the language, the bill may provide an opportunity to expedite the CEQA and project approval process that would benefit all types of projects, including infill. These new procedures could improve

predictability and efficiency in the CEQA review process that could save time and resources, and reduce costs. However, SB 122 also has an expressed intent to provide another public review period for the Final EIR. This provision of a second review period would go in the opposite direction of CEQA reform. If drafted appropriately, the proposed statue has the potential to effect significant litigation reform.

This chapter described responses to questions about both actual and perceived challenges to using CEQA streamlining provisions and exemptions, ideas to encourage use, and recommendations for future CEQA reform. Some of the challenges included multiple and restrictive requirements and lack of legal defensibility. Suggestions to improve use of CEQA streamlining provisions and exemptions include broader applicability, and less restrictive and subjective criteria. Lead agencies also want better assurance through legislative and judicial guidance. This guidance includes applicability of the higher substantial evidence standard of review to their decisions and better guidance on documentation requirements to support these decisions. While streamlining provisions have progressively improved, there are still opportunities to make the process easier to use. Additional suggestions included education and stronger incentives for lead agencies to use the provisions to expedite infill development, strengthening plan-level review, as well as reducing project approval delays. As one planner stated, the process of getting needed infill development is still too slow. The following chapter summarizes my findings about the use of recent CEQA reforms, challenges, and ideas for future change.

Chapter 7

CONCLUSION

This thesis set out to understand the effectiveness of CEQA streamlining legislation in encouraging urban infill development by making the environmental review process for these projects quicker, easier, and cheaper, as well as reducing the potential for needless litigation. Specifically, I wanted to assess the effectiveness of the streamlining provisions under SB 375 (PRC §21159.28 for mixed-use and residential projects, and PRC §21155 et seq. for Transit Priority Projects (TPPs) and Sustainable Communities Projects) and SB 226 for infill projects (PRC §21094.5, Guidelines §15183.3), as well as the exemption under SB 1925, specifically PRC §21159.24 (Guidelines §15195) for residential infill development. While this inquiry did not result in a definitive answer, I believe that the more recent streamlining provisions, particularly SB 226, are gaining traction and have potential to reduce time and costs. However, there are still challenges to overcome to make these laws more effective.

My respondents varied on the question of barriers to infill development. However, they generally agreed that infill development is harder than greenfield development. The higher costs for land, infrastructure, and other development related fees, as well as the potential cost for site remediation, combined with neighborhood controversy and a political culture slanted toward sprawl can delay or thwart needed infill development. Local jurisdictions can also have jurisdiction-wide environmental impact significance thresholds that are set too low or applied too conservatively, limiting the ability to build infill development. The higher level of uncertainty and financial risk also makes it harder to secure funding for projects in neighborhoods that need the most reinvestment and economic stimulus. Overall, the financial risk is the biggest risk for infill developers.

My respondents told me that they had trouble using CEQA streamlining provisions and exemptions because of multiple and restrictive conditions, and legal threats. As one lawyer stated, copious conditions creates a "net" that can increase the risk for a lawsuit. A long list of conditions, especially subjective conditions, increases the number of potential arguments that a project's opponents can raise to dispute a lead agency's decision. I discovered that the statutory exemption pursuant to PRC §21159.24 (Guidelines §15195) is only applicable to residential infill development, and has a long list of other restrictive conditions. This list of criteria also includes consistency with an adopted general or specific plan and a community-level EIR adopted or certified within the last five years. However, many jurisdictions have outdated plans and associated EIRs. Additionally, the statutory exemption is similar to a categorical exemption and therefore, unlike other statutory exemptions, is subject to exceptions. Accordingly, few developers or local agencies use this exemption. Although I located a project that used the exemption, none of my interviewees recalled using it on their projects.

The substantial evidence standard of review has a higher bar to challenge than the fair argument standard when a project opponent challenges a lead agency's project approval, using CEQA. Streamlining provisions under SB 375 and SB 226 provide the substantial evidence standard. The higher threshold applies when a lead agency prepares a SCEA, instead of a negative declaration, for a TPP. However, the streamlining provision under SB 226 applies to a wider range of project types (e.g., residential and commercial developments, transit stations, schools, public buildings) in more locations (e.g., near transit stops, in low vehicle miles traveled [VMT] areas). Additionally, the lead agency is not required to address a project impact analyzed in a prior program- or plan-level EIR, or when a uniformly applicable development policy or standard substantially mitigates the effect. Depending on the effects addressed in the prior EIR and the availability of uniformly applicable development policies or standards that apply to the

eligible infill project, streamlining under this section will range from a complete exemption from further CEQA review, to an obligation to prepare a narrowed, project-specific environmental document.

The Cannery project was the first project within the Sacramento region to use one of these streamlining provisions, specifically PRC §21159.28 pursuant to SB 375. I interviewed Katherine Hess, Community Development Administrator for the City of Davis, who was involved with The Cannery project. She said the streamlining provision "worked generally quite well." While using the streamlining process saved a little bit of time and money, she could not estimate the amount of money or time saved. However, the impacts from cars and light-duty trucks on GHGs and the regional transportation network would not have been significant as the planning team did not expect many on and off freeway trips, and anticipated fewer than five percent of trips in any direction. However, the savings could be significant for projects that have a greater potential for impacts, especially smaller projects that cannot easily absorb the cost for the GHG and traffic analysis.

In addition to providing feedback in terms of how the new process worked for The Cannery project and an impression of the amount of time and money saved, Katherine Hess, as well as Kirk Trost during the SACOG CEQA workshop, offered tips and lessons learned when applying the new process. First,

- For jurisdictions that have regional traffic congestion problems, lead agencies should engage Caltrans early when using the new CEQA streamlining provisions to "get in front of their concerns."

Although Caltrans understood that the City did not need to analyze the impacts to the regional transportation network from passenger vehicle and light-duty trucks, it did not mean that the existing traffic congestion issues went away. Partnering with Caltrans early in the process can address concerns prior to release of the draft EIR for public review. Second,

- Nomenclature is import and can make a difference in how the streamlining benefit looks to members of the community.

Rather than saying that the lead agency is taking advantage of a CEQA streamlining provision that says it does not have to look at certain impacts, it can say it or another lead agency analyzed and addressed the impacts in a prior environmental document. Last,

- For eligible projects that barely meet an objective requirement (e.g., residential square footage) for invoking a streamlining provision, a lead agency should have a plan in case the project later falls short of the requirement.

This preparedness could be in the form of mitigation or a contingency plan as part of a project's conditional approval. This mitigation or contingency plan would help a lead agency stay consistent with the CEQA process.

I also interviewed Mark Rhoades of the Rhoades Planning Group about his experience using the streamlining provision under SB 226 (PRC §21094.5, Guidelines §15183.3). Mark uses this provision almost exclusively for his eligible infill projects. He recently used the provision for the Overture project in Berkeley to exempt it from further CEQA review. [3] He said that he did not know if using the exemption saved a lot of money. However, he said that the ability to use the City's standards for toxics issues and remediation of Cortese-listed sites could save at least several months that a lead agency would otherwise need to prepare a mitigated negative declaration. He also said that it saves time if a jurisdiction makes a determination to use the provision on a rational decision-making bases, so "no one can poke holes" in it. He said that the exemption "put more in the basket of exemptions that did not used to be available, so long as a city has taken a little bit of time and done its homework." Overall, he estimated that using the

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[3] After I finished this thesis, I learned that the "Overture" project did not use the SB 226 streamlining provision, but instead relied on the Class 32 categorical exemption. For more details, see Chapter 1, page 1, footnote 1.

provision to exempt a project could shave three to four months off the environmental review process, and the EIR streamlining possibly six months. Based on his knowledge and experience with the streamlining provision, the provision is "less of a boon for developers than it is for cities should they choose to use it appropriately."

In order to obtain the benefits of the new streamlining provisions, cities and counties need to be prepared. As Mark stated, PRC §21094.5 (Guidelines §15183.3) is a fantastic tool, but cities need to have a plan document with a robust enough EIR to "ride coat-tails on," and put together broadly applicable development policies or standards for everything else. In addition to the toxics issues, impacts on historic resources are another environmental issue that jurisdictions need to address with uniformly applicable development policies or standards. According to Mark, both Cortese-listed sites and historical resources are what have "typically thrown projects into a mitigated negative declaration or an EIR." Environmental impacts related to toxics issues in particular were easy to challenge because the complexity makes it easy to show a different conclusion. However, not many jurisdictions have "put the resources in those baskets."

General plans ideally set a framework for the CEQA review process. Many streamlining provisions or exemptions that lead agencies can use for infill development specifically require consistency with a general or specific plan, and zoning. The exemptions include categorical exemption Guidelines §15332 (Class 32) and statutory exemption PRC §21159.24 (Guidelines §15195). Streamlining provisions include PRC §21083.3 (Guidelines §15183) and Government Code §65457. Additionally, plans need robust EIRs from which subsequent projects can tier. According to OPR's annual survey (2012), 46.9 percent of general plan land use elements and 46.7 percent of circulation elements were more than 10 years old. Half of four other required elements (conservation, open space, noise, and safety) were also more than ten years old. As two planners stated, most if not all of their jurisdictions' plans were outdated. Thus, many

jurisdictions are not prepared to take full advantage of CEQA streamlining provisions and exemptions.

While the CEQA process can be frustrating and costly, it is more certain among the many uncertainties that besiege infill development. Because of the number of uncertainties, many developers gravitate to the familiar and dependable CEQA processes; thus, most developers are not well-versed in the more recent CEQA streamlining provisions and exemptions. A developer who said that he is "heavily involved in advocating for all things sustainable" commented that he did not believe the recent reforms are of any significant benefit. On the other hand, land use and environmental lawyers are aware of the recent reforms, but remain cautious about their effectiveness and ability to withstand project opposition. Although they perceive the reforms as still restricted to a small subset of projects, they do feel they may be useful. Planners have used various exemptions and streamlining provisions. However, outside of the conventional statutory and categorical exemptions, and tiering, it is difficult for them to recall which ones. As discussed in Chapter 3, Elkind & Stone (2006) found that out of ten planners interviewed, the majority of them were more comfortable with using exemptions that were already familiar to them (p. 17). While the responses may indicate that the majority of developers, planners, and lawyers habitually employ more established practices or that there is a need for more education about the differences and application of more recent CEQA exemptions and streamlining processes, I believe that it also signifies an overarching lack of political will.

In addition to recommending fewer restrictive and subjective criteria, as well as providing a higher substantial evidence standard of review to increase the use of CEQA streamlining provisions and exemptions, I also recommend more education. Increasing education for planning staff requires amplifying CEQA courses to include more practical application of CEQA streamlining provisions and exemptions. Planning organizations and programs such as the

APA's AICP Certification Maintenance Program can help. City staff also needs to educate appointed planning commissions and elected officials about CEQA reforms. Additionally, regional agencies, associations, and other planning organizations can be instrumental in encouraging use of the streamlining provisions and exemptions by educating the top local decision-makers (e.g., city managers, council members) on the new processes, their intent, and their embedded protections.

Elkind and Stone (2006) found that few jurisdictions took advantage of the PRC §21159.24 exemption for residential infill, with only 12 agencies (representing three percent) of all California agencies (cities and counties) indicating they used the exemption in 2005 (p. 16). Further inquiry with ten of the 12 agencies resulted in at least three (and no more than five) actually using the exemption. The interviews also revealed why planners did not grant exemptions for infill including, projects inconsistent with the general plan, developers reluctant to ask for CEQA exemptions out of fear over neighborhood opposition and risk of litigation, counties ineligible for an exemption, and exemptions to narrow in scope. Similarly, when surveying affordable housing developers, only one out of 89 projects confirmed using the similar exemption under SB 1925 for affordable housing, PRC §21159.23 (Elkind & Stone, 2006, pp. 23-24). In response to a question about why the developers did not use an exemption on a project (not just for the 89 projects mentioned above), reasons included local planners hesitant to grant exemptions (14 percent) and projects too large to qualify (26 percent). Seven respondents (14 percent) stated that exemptions were not beneficial to developers and five developers (10 percent) were unaware of the CEQA exemptions.

When referring to the new CEQA reforms, a planner said what "you're hearing from some developers is that there isn't the political will at the local agency level to spring these parts of CEQA, especially when the courts are going to be very deferential." Jurisdictions "have a high

level of interest in making sure their decisions are not overturned." There is also a lack of political will among local elected officials to use new exemptions or streamlining provisions because many agencies are still afraid of the courts "not having their back." For jurisdictions, it is about "home rule," and they want to make sure their decisions "aren't overturned by the angry mob every time they turned around."

As one developer commented, the political culture is "slanted" toward sprawl. Some leaders oppose infill because they believe residents prefer suburban development and lifestyle while others may prefer to let developers dictate the planning process through ad hoc proposals. Local officials may want to maximize revenue from sales tax which results from commercial retail such as "big-box" stores, instead of residential and mixed-use developments, or as one developer stated, "when someone comes along and wants sustainability, it just isn't sexy." Additionally, if residents, planners, and elected officials lack a clear vision of what a sustainable community looks like, local opposition expressed as concerns about increased traffic and noise can paralyze a jurisdiction. Community opposition can result in the lack of political support at the local level. As one planner stated,

> Infill is also harder because you have neighbors. Our communities are people and people are not good with change, and when change is proposed along the lines of an infill development project neighbors don't like it and neighbors go to public meetings, and they tell city council people that they vote, and the politicians get scared, and they start to back off. So the fact that we have so much housing and infill housing that is subject to the whim of the politicians, we will never be able to build enough housing in the infill setting to start to scratch the surface of demand.

It is critical for state and regional agencies to provide incentivizes to local jurisdictions that involve citizens in the community visioning and development plan process. Engaging citizens

early and often is an opportunity to both educate and provide opportunities for citizen participation. Citizens actively engaged in the shaping of their community better ensures support and less resistance to change.

In addition to increasing education, the Legislature could amend CEQA to allow plans and associated EIRs for "priority development areas" identified in the SCS or APS. CEQA could declare that if an adequate plan-level review is conducted for a priority development area and a specific plan for development is prepared within one of these areas, a lead agency can determine future projects conforming to these plans exempt from further CEQA review (Altmaier et al., 2009, p. 48). Additionally, the State could provide technical assistance to both MPOs and local agencies to develop legally defensible plans under CEQA from which lead agencies can tier subsequent projects. More importantly, the State could provide permanent financial support to these agencies for these efforts. Funding could include a revolving loan fund available to these agencies for developing plans and preparing the associated EIR. The lead agency can pass the cost onto developers whose projects the lead agency determines are consistent with the plan. In addition to broadening streamlining options and strengthening plan-level review, legislative and judicial clarity on the appropriate documentation to record evidence that supports a lead agency's decision to invoke a streamlining provision will further encourage use of these provisions.

Less restrictive and more objective criteria, the higher substantial evidence standard of review, education, broader streamlining, strengthened plan-level review, as well as more legislative and judicial guidance will help promote use of CEQA streamlining provisions and exemptions. However, these efforts to encourage may not be enough to promote use of the provisions and infill development. It is one thing for a statute to allow a practice, but another thing entirely for a city or county to have the political courage to use it. While density bonus laws, the Permit Streamlining Act, and CEQA reforms are all tools to help guide the process, it

still takes too long. As one planner commented, “the issue is not the issue, it is the political process that is the issue” and “statewide legislation may need to chip away at the level of discretion that local agencies are allowed to exercise” in order to get the needed infill development built.

When referring to recent CEQA reforms for infill, one planner commented “we’ve done a good job with the first half of it, the court half of it needs to change.” Senate Bill 122, introduced by Senators Jackson, Hill, and Roth on January 15, 2015, is an attempt to reform CEQA to address time-consuming and costly delays without undermining the environmental review process. The bill may provide an opportunity to expedite the CEQA and project approval process that would benefit all types of projects, including infill. These new procedures could improve predictability and efficiency in the CEQA review process that could save time and resources, and reduce costs. However, SB 122 also has an expressed intent to provide another public review period for the Final EIR. This provision of a second review period would go in the opposite direction of CEQA reform. If drafted appropriately, the proposed statue has the potential to effect significant litigation reform. This is the next frontier for CEQA.

Appendix A

INTERVIEW QUESTIONNAIRE

1. What are the barriers to infill development? What role does CEQA play?

2. Have you used a CEQA streamlining provision or exemption? If yes, please describe the project(s) and the provision or exemption used. Have you used exemptions or streamlining provisions specifically enacted by the legislature?

3. How often (frequently, sometimes, rarely, never) do you use CEQA streamlining provisions or exemptions for a project? What specific exemptions or streamlining provisions do you use most often and why?

4. How would you describe the general awareness, use, and opinions about recent CEQA streamlining provisions and exemptions, especially SB 1925, SB 375 and SB 226?

5. Have you used an exemption under SB 1925 for residential infill, or a streamlining provision under SB 375 for mixed-use and residential infill or a transit priority project, or SB 226 for infill development? If yes, what was your experience? For each project, describe how the provision or exemption was effective (please provide detailed feedback such as amount of time saved and percentage of savings)?

6. What are the challenges to using CEQA streamlining provisions or exemptions for infill?

7. What would help increase use of the streamlining provisions and exemptions for infill development? What changes would make the provisions and exemptions more effective?

Appendix B

CONSENT TO PARTICIPATE IN RESEARCH

You are being asked to participate in research which will be conducted by Lisa Reynolds, a student in Urban Land Development (Department of Public Policy and Administration) at California State University, Sacramento.

The purpose of the study is to acquire knowledge on the use and effectiveness of recent CEQA legislation. Through a questionnaire and follow-up phone interview, or an in-person interview, you will answer questions about your understanding, experience, and opinion about recently enacted CEQA streamlining provisions and exemptions, specifically SB 1925 for residential infill, SB 375 for mixed-use/residential and transit priority projects, and SB 226 for infill projects, as well as suggestions for future reform. The questionnaire and follow-up phone interview, or in-person interview, may require up to an hour of your time. If items in the questionnaire or interview seem personal, you don't have to answer the question.

You may gain additional insight into recent CEQA streamlining and exemption legislation or you may not personally benefit from participating in the research. It is hoped that the results of the study will be beneficial for future CEQA reform to encourage increased infill development.

You will have the option to keep your responses to any of the questions, or any additional comments, confidential. Please note that due to the small number of participants, a knowledgeable reader may still be able to ascertain your identity. You will be asked if you are agreeable to using your name, title and organization name. If you would prefer, we can discuss other options (e.g. pseudonym) that will still convey the necessary information that fulfills the goal of this research.

Questionnaires and notes from interviews will be reviewed, transcribed, and maintained only by the researcher, and will be stored in a secure location. The completed questionnaires and notes will be destroyed within two years from the date the information was received. You will not receive any compensation for participating in the study.

If you have any questions about this research, you may contact Robert Wassmer at (916) 278-6304 by e-mail at rwassme@csus.edu.

Your participation in this research is entirely voluntary. Your signature below indicates that you have read this page and agree to participate in the research.

_______________________________________ ____________________

Signature of Participant Date

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