Falling Flat

Why the CEQA Affordable Housing Exemptions Have Not Been Effective

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Executive Summary

The California Environmental Quality Act ("CEQA") requires environmental review for new housing developments. However, as California faces an acute shortage of affordable housing, CEQA appears to have become an impediment to the creation of new affordable housing. To combat this problem, the legislature has enacted a statutory exemption from CEQA review for certain kinds of infill and affordable housing developments. At the same time, the State Resources Agency has promulgated a categorical exemption for infill development that benefits urban affordable housing projects. This study sought to determine how effective these exemptions have been by surveying affordable housing developers to determine if they have been able to use the exemptions. The survey also sought to determine how CEQA has affected affordable housing developers in general.

We found that the exemptions are not well utilized, there is widespread unfamiliarity with them and they are too narrow. In addition, developers often avoid the CEQA process by strategically choosing sites that will not trigger full CEQA review or that have already been cleared under CEQA. In addition, developers complain that there is a lack of multifamily zoned land in California.

METHODOLOGY

We surveyed 12 Southern California and 21 Northern California affordable housing developers (out of 81 Southern and 56 Northern California developers contacted originally). These developers had applied for state financial assistance for their projects, either in the form of subsidized bonds or tax credits. They were responsible

for building 67 total housing projects from 2004 and 2005, which are expected to create at least 1534 Southern California housing units and 1347 Northern California units. We also surveyed seven of the 12 planning agencies that reported using the statutory exemption in 2004.

FINDINGS – PLANNING AGENCIES

In contacting the planning agencies who reported using the statutory exemptions, we learned that only 42.8% of the planners who reported using the statutory exemptions actually used them. Most agencies generally confused the statutory exemptions with the broader categorical exemptions and thus misreported their use. Planners did not use the statutory exemptions for the following reasons.

1. LACK OF KNOWLEDGE OF THE EXEMPTIONS

Five of the planning agencies (71.4%) were not familiar with the exemptions.

2. PROJECTS DO NOT QUALIFY FOR THE STATUTORY EXEMPTIONS

Five of the seven planning agencies (71.4%) reported that no projects qualified for the requirements of the statutory exemptions.

3. EXISTENCE OF THE CATEGORICAL EXEMPTIONS

Four of the seven (57.1%) agencies did not need to use the statutory exemption because the categorical exemption already served their needs.

4. CONSISTENCY WITH THE GENERAL PLAN

At least one agency (14.2%) reported that the general plan was not consistent with the development and therefore the agency could not grant the development.

5. RELUCTANCE OF DEVELOPERS TO ASK FOR A CEQA EXEMPTION

At least two agencies of nine surveyed (22.2%) commented that they believe developers are reluctant to ask for the exemption out of fear of neighbor opposition.

6. COUNTIES CANNOT USE THE EXEMPTION IN UNINCORPORATED LAND

All three counties (100%) contacted reported that they were unable to use the exemptions because of the city jurisdiction requirement.

FINDINGS – AFFORDABLE HOUSING DEVELOPERS

1. DEVELOPERS SUBJECT TO CEQA REVIEW

Five Southern California and 14 Northern California projects out of 19 Southern California and 48 Northern California were subject to CEQA review. The rest were able to avoid CEQA review.

Of those 19 subject to CEQA, four projects (5.9% of all projects surveyed and 21% of projects subjected to CEQA review) received Negative Declarations.

12 projects (18% of all projects surveyed and 63.2% of projects subjected to CEQA) received Mitigated Negative Declarations (MNDs).

Two projects (2.9% of all projects surveyed and 10.5% of projects subjected to CEQA) used parcels that had undergone a Full EIR process prior to their purchase.

One project (1.5% of all projects surveyed and 5.3% of projects subjected to CEQA) developer was unable to recall what level of review the project underwent.

Roughly 1634 of the 2881 developments (56.7%) did not receive CEQA exemptions. These developers were unable to avoid CEQA review for the following reasons.

1. THE LOCAL PLANNERS NEVER OFFERED THE EXEMPTIONS

Three of the 17 developers (17.6%) reported that the planners simply never offered the exemptions.

2. THE DEVELOPERS DID NOT KNOW ABOUT THE EXEMPTIONS

Four of 29 developers (13.8%) were not familiar with the exemptions. At least two developers out of 21 total (9.5%) had never heard of CEQA before.

3. THE DEVELOPERS DID NOT THINK THE EXEMPTIONS WERE BENEFICIAL

Three project managers out of 29 (10.3%) reported not believing that the exemptions were worth seeking.

4. THE PROJECT DID NOT QUALIFY FOR EXEMPTIONS

Three project managers of 29 (10.3%) had projects that did not meet the exemptions' specifications.

2. DEVELOPERS NOT SUBJECT TO CEQA REVIEW

48 projects were not subject to CEQA review. They were able to avoid CEQA review for the following reasons.

1. THEY UTILIZED A CEQA EXEMPTION

Four project managers out of 33 (12.1%), who were responsible for five separate projects of the 48 (10.4%), reported using an affordable housing exemption to avoid the CEQA review process. These project mangers could not recall definitively if they used the categorical or statutory exemptions. Overall, roughly 290 of the 2881 affordable housing units covered in this study (10.1%) resulted from the exemption process.

2. TACKING ONTO A CEQA DETERMINATION ALREADY MADE FOR A SPECIFIC PLAN, GENERAL PLAN OR REZONE

Six of the 48 projects (12.5%)cited this strategy as a method of avoiding CEQA review on their projects.

3. REHABILITATING EXISTING BUILDINGS

42 of the 48 projects (87.5%) that avoided the CEQA process employed the strategy of rehabilitating buildings that have already been cleared through the CEQA process for housing.

I. Introduction

The California Environmental Quality Act ("CEQA") has been an important tool for local community groups, environmentalists and environmental justice groups to shape proposed development projects according to their interests. At the same time, California has a severe shortage of affordable housing – a problem that affects the quality of life for millions of residents and damages our economy as the price of housing increases dramatically. CEQA has contributed to this shortage by serving as a stumbling block for affordable housing developers. These affordable housing projects are often unpopular, and many NIMBY (Not In My Backyard) residents use CEQA to halt the process – sometimes long enough to jeopardize the project's financing and therefore torpedo the project altogether.

In this context, the California Legislature, along with the State Resources Agency, has sought to ease the CEQA roadblocks through a number of CEQA exemptions for affordable housing and infill. By increasing the affordable housing stock and locating it as infill within dense urban areas, exemption advocates hope to minimize the impact of new housing on the environment and on the transportation systems on which outlying residents depend, while at the same time providing more housing for low and middle income residents.

This study seeks to examine how effective these affordable housing exemptions have been by determining whether affordable housing developers have been able to use the exemptions. We surveyed 137 affordable housing project managers and developers, as well as key local planning agencies that reported using the statutory exemptions, to find out their experiences with CEQA and with the

exemptions in particular. Ultimately, we found that the exemptions have not been widely used by developers or planning agencies. Both groups remain largely unaware of many of the key exemptions, while developers tend to use creative strategies to avoid having to undergo lengthy CEQA review without using the exemptions. Developers also express doubt that the exemptions will protect them from NIMBY challenges and complain that hostile planning agencies will find ways to avoid granting the exemptions. Finally, many projects do not qualify for the narrowly crafted exemptions.

II. Overview of the CEQA Process

In order to understand the importance of CEQA exemptions, one must first be familiar with the overall structure of CEQA. CEQA, which stands for the California Environmental Quality Act, was enacted in 1970.[1]

By law, CEQA has four main purposes:

1. To inform decision-makers about significant environmental effects.
2. To identify ways environmental damage could be avoided.
3. To prevent avoidable environmental damage.
4. To disclose to the public why a project is approved even if it leads to environmental damage.[2]

According to William Fulton, CEQA is basically meant to ensure that "the environmental consequences of any 'project'—from general plan adoption to permit approval—...are debated by the public and elected officials before a decision is made" by the lead agency on whether to approve the project.[3] The "lead agency" is defined in § 15367 of

[1] Fulton 156.
[2] Fulton 157.
[3] Fulton 157.

the CEQA Guidelines as "the public agency which has the principal responsibility for carrying out or approving a project."[4] For affordable housing developments, the lead agency would typically be the local planning agency of the city where the development is located. If the development is located in an unincorporated area, then the lead agency would typically be the county planning agency. The lead agency accomplishes the goals of CEQA through a three-step process.[5]

The first step of CEQA is the lead agency's determination of whether the action in question is a "project" subject to CEQA.[6] According to CEQA Regulations §§ 15378(a) and (c), a "project" is "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" and "which may be subject to several discretionary approvals by governmental agencies."[7] This blanket definition covers every type of affordable housing development, including both the construction of a new building and the revitalization or rehabilitation of an existing building. Nonetheless, certain projects that would fall under this definition are not subject to CEQA due to the existence of exemptions. If an affordable housing venture is found not to be a "project" subject to CEQA, then the CEQA review process for that venture ends at the first step.

The second step of the CEQA process is the lead agency's determination of "whether the project may have a

[4] http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art20.html
[5] Fulton 162.
[6] Fulton 162.
[7] http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art20.html

significant effect on the environment."[8] Based on the fact that the first step of CEQA requires that the project in question have the potential to directly or indirectly change in the environment, one can logically conclude that any project subject to CEQA's second step "may have an effect on the environment." Therefore, the lead agency's determination for the second step of CEQA hinges on whether that potential effect is "significant." According to Elisa Barbour and Michael Teitz, "The legal standard for determining 'significance' is whether a 'fair argument' can be made that a 'substantial change in physical conditions' will occur."[9] The language in the CEQA Guidelines does list significant effects, but it does not define the terms listed.[10] As a result, CEQA establishes no formal thresholds of significance.[11] As Barbour and Teitz note, "Rather than clarifying substantive environmental standards to be applied in determining specific effects, CEQA's language instead is vague and flexible."[12]

The lead agency's significance determinations are made via an initial study conducted by the lead agency.[13] The initial study usually consists of a checklist with explanations of possible areas of environmental damage.[14]

The initial study can result in a negative declaration, a mitigated negative declaration, or preparation of an environmental impact report. If the initial study reveals that the project will have no significant environmental effects, the lead agency will

[8] http://ceres.ca.gov/topic/env_law/ceqa/guidelines/art1.html
[9] Barbour 4-5.
[10] Fulton 163.
[11] Fulton 163.
[12] Barbour 4.
[13] Fulton 164.
[14] Fulton 164.

issue a "negative declaration."[15] If the lead agency determines that a developer can eliminate all significant environmental effects by changing his project or adopting mitigation measures, the lead agency will issue a "mitigated negative declaration" ("MND"), requiring the project developer to take certain steps to mitigate the environmental effects of the project.[16] An MND is adequate and appropriate if the lead agency has made a good faith effort to determine whether the project would have a significant impact and if evidence supports the lead agency's determination that the mitigated project will have no significant impact on the environment.[17]

A lead agency's issuance of either a negative declaration or an MND ends the CEQA process for that project. On the other hand, if the initial study reveals that the project may have significant environmental effects and a mitigated negative declaration is not issued, then the lead agency will be required to prepare an "environmental impact report" ("EIR").[18]

The preparation of an EIR by the lead agency constitutes the third step of the CEQA process.[19] The project developer, rather than the lead agency, pays the cost of preparing the EIR.[20] According to William Fulton, "The typical EIR costs around $50,000 to $100,000 and takes months to prepare."[21] As a result, "[a] lengthy environmental review can kill a project if a developer does

[15] Fulton 164.
[16] Fulton 164.
[17] Fulton 168.
[18] Fulton 164.
[19] Fulton 166
[20] Fulton 166.
[21] Fulton 166.

not have deep pockets."[22] If the EIR reveals that the project will have significant environmental effects, the lead agency can either: 1) deny the project; 2) approve an environmentally preferable alternative; 3) approve the project on the condition that mitigation measures to reduce the environmental effects are adopted; or 4) approve the project in spite of the environmental effects on the basis of overriding considerations.[23]

CEQA's language gives substantial power to lead agencies. Barbour and Teitz have noted that "CEQA retains substantive flexibility not just in how localities may choose to balance environmental, economic, and social goals, but also in how environmental standards should be applied in any given case."[24] Likewise, Fulton has come to the same conclusion: "

> CEQA does not usurp local authority over land use decisions or establish a state agency to enforce the law. CEQA does not even require local governments to deny all projects that would harm the environment.[25]

Basically, the lead agencies have the power to determine whether a project receives an exemption, a negative declaration, an MND, or an EIR.

When making these determinations, lead agencies may often be influenced by both the litigation threats and local interests. The CEQA process is enforced by private citizens through litigation.[26] Private citizens can bring a lawsuit against a lead agency on the ground that the lead agency has ignored a significant environmental impact for a particular project. The vague CEQA requirements regarding

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[22] Fulton 167.
[23] Fulton 175-176.
[24] Barbout 5.
[25] Fulton 157
[26] Fulton 168.

the definition of a significant environmental impact make lead agencies very vulnerable to this type of litigation. The ambiguity in the law can lead to differences in legal interpretation, opening the way for legal challenge. Private citizens, either out of a concern for the environment or an aversion to new development in their neighborhood, can often convincingly threaten a lead agency with litigation. Even if the litigation is frivolous, it will still cost a city time, resources, and money. Thus, the ever-present litigation threat often pushes cautious lead agencies to err on the side of doing more environmental review than legally necessary during the CEQA process, leading to a project's "paralysis by analysis."[27]

The CEQA review process will often reflect a city's interest. That is, if the city wants a project to go forward, the lead agency will give the project the benefit of the doubt when making "significance" determinations, but if the city is not in favor of a project, the lead agency may be more hesitant to grant either an exemption or a negative declaration. Fulton has stated, "If political forces drive a city or county in a certain direction—whether it's an overall pro-development policy or the approval of a specific project—CEQA is not going to change the direction."[28] Likewise, Barbour and Teitz have written, "CEQA establishes mainly procedural requirements, allowing local governments to retain broad authority and discretion to determine substantive policy goals and objectives."[29]

When local interests are aligned against a certain project, that project's CEQA review will likely be

[27] Fulton 161.
[28] Fulton 179.
[29] Barbour 14.

excessive in light of the actual environmental impact that the project would have. While some may argue that environmental review is never excessive, this extra review comes with a cost in terms of time and money expended. Developers always will bear these costs. When the projects at issue are socially desirable from a statewide perspective, all of Californians will bear this cost.

An affordable housing development will often fit the profile of a project that will face local opposition because it will be perceived to have high service costs (in terms of police and fire calls), high traffic rates, and low property values. As a result, CEQA has the potential to disproportionately impact the amount of affordable housing development in California.

Because many state-level legislators find affordable housing to be socially desirable, they find the costs of excessive CEQA review to be problematic with respect to affordable housing. In response to this problem, the California legislature in the last decade has passed several statutes exempting affordable housing developments from CEQA. These exemptions are just one of the many exemptions to CEQA which affordable housing developers can potentially use to their advantage.

III. CEQA Infill and Affordable Housing Exemptions

Both the California legislature and the Secretary of State Resources Agency have exempted specific types of projects from CEQA review. They generally have three reasons for granting such exemptions. First, some CEQA exemptions exist because if the projects they exempt are desirable from statewide public policy perspective but are undesirable at the local level. In other words, these are

projects that, while desirable to the state in general, are subject to the local NIMBY problem. Other CEQA exemptions exist because they are favored by particularly powerful interest groups, such as the California Building Industry Association. Finally, some exemptions are on the books because the projects in question are unlikely to create environmental damage. Even though the CEQA definition of "project" includes actions that will potentially result in environmental change, not all projects will actually cause environmental damage.

Exemptions can be classified by who creates them. All exemptions are either "statutory" or "categorical." Statutory exemptions are created by the state legislature via the passage of legislation. Examples include demolition permits, adoption of coastal and timberland plans, and some mass transit projects. In 1996, for example, the legislature passed a statutory exemption for all actions taken by transit agencies to reduce spending.[30]

Categorical exemptions are created when the Secretary of the State Resources Agency promulgates them in the Guidelines for Implementation of the California Environmental Quality Act ("the CEQA Guidelines"), which are contained in Chapter 3 of Title 14 of the California Code of Regulations. The Secretary of the State Resources Agency derives his or her power to issue categorical exemptions based on the statutory authority found in CEQA. The CEQA Guidelines are binding on local governments, and courts often give as much weight to the Guidelines as to the CEQA law itself. The Guidelines currently contain 32 categories of exemptions. They include building projects

[30] Fulton 162.

of under 10,000 square feet, projects of three homes or fewer, projects that will result in "minor alterations on the land," and the transfer of land ownership in order to create parks. The complete list of categorical exemptions is located in Article 19 of the CEQA Guidelines.[31]

While many of the statutory and categorical exemptions could be applied to affordable housing developers, several exemptions specifically address the housing issue.

1998 CEQA STATUTORY EXEMPTIONS FOR AFFORDABLE HOUSING

In 1998, the State Legislature enacted an affordable housing exemption in CEQA to expedite housing production. Public Resources Code § 21080.14 contained a 100-unit exemption for affordable housing in urbanized areas, provided the site 1) was smaller than five acres, 2) was not a wildlife habitat, and 3) was assessed for toxic contaminants and other harmful pollutants. Section 21080.10 provided a 45-unit exemption for farmworker housing.[32] As an important feature, localities retained the discretion to deny the exemption based on "unusual circumstances."

1998 CATEGORICAL EXEMPTIONS FOR INFILL

That same year, Governor Pete Wilson's Secretary of the State Resources Agency promulgated a categorical exemption in the CEQA guidelines for infill development.[33] Underscoring the politically sensitive nature of changing

[31] Fulton 163.
[32] http://www.housingadvocates.org/pdf/site/facts/anti%20nimby%20tools.pdf
[33] CEQA Guidelines Section 15332

the CEQA Guidelines, the Secretary made the changes just three months before the Wilson Administration left office.[34]

This new exemption, the Class 32 categorical exemption, addresses infill development projects within cities that 1) are consistent with the general plan and zoning, 2) are located on sites of less than five acres substantially surrounded by urban uses, and 3) have no value as habitat for endangered species. In order to qualify, the project must not result in significant "traffic, noise, air quality or water quality" impacts and must have adequate service from utilities and public services.[35] Like all categorical exemptions, it is "soft" because a locality can avoid using it if it determines that the project will result in significant effects due to unusual circumstances.[36]

In 2000, a number of environmental organizations, including Communities for a Better Environment, filed a lawsuit challenging the validity of the categorical exemption, along with 12 other sections of the CEQA Guidelines. In 2001, the Urban Infill Exemption was upheld in the state Superior Court (Superior Ct. No. 00CS00300), and was again affirmed by the Appellate Court by a unanimous three-judge panel in 2002. The court reasoned that, given the specific limitations contained in the exemption, it was highly improbable that a project qualifying for the exemption could have adverse environmental impacts.[37]

The decision ushered in greater use of the exemptions. Up to that point, the controversy and uncertainty as to the

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[34] Fulton 158.
[35] CEQA Guidelines Section 15332(d)
[36] http://www.mofo.com/news/updates/files/update47.html
[37] Id.

legality had prevented localities from using the categorical and statutory exemptions with confidence.

2002 STATUTORY EXEMPTION FOR AFFORDABLE HOUSING AND INFILL

In 2002, the legislature enacted a new statutory exemption for infill and affordable housing. Palo Alto Democrat Byron Sher, one of the most environmentally-oriented lawmakers of recent times, introduced the bill. Sher was a powerful defender of CEQA, and proposals for large-scale CEQA reform were rare under his leadership. Term limits eventually forced Sher from the legislature in 2004.[38]

Sher's bill, SB 1925, received support from much of the environmental community. The California League of Conservation Voters and the Natural Resources Defense Council co-sponsored it.[39] However, environmental justice advocates, who earlier had challenged the 1998 categorical exemptions, raised concerns that it would leave urban residents who did not possess politically powerful voices out of the process.[40]

The underlying goal of the exemption was to encourage people to live in the city to avoid the negative effects of sprawl, such as more roads, more air pollution, and less open space. However, the bill was extremely narrow in nature. Supporters, such as the Planning and Conservation League, noted that "even though there is a tremendous need for affordable housing in California, especially in urban areas, builders often prefer to build out in the suburbs where land is cheap, and there are fewer constraints."

[38] Fulton 161.
[39] http://www.pcl.org/pcl/pcl_accomp2002.asp
[40] Fulton 162.

Building in the city on small but expensive vacant parcels is "often too time consuming to interest developers."[41] In addition to the environmental justice advocates, opposition came from conservative groups and building associations who wanted much broader CEQA exemptions.[42]

SB 1925 replaced Public Resources Code §§ 21080.7 (exemption for residential infill projects), 21080.10 (exemption for agricultural workers' housing), 21085 (limitation on reducing proposed housing on the basis of CEQA) and 21080.14 (exemption for lower-income residential projects in urban areas) with a new infill exemption that combines the former exemptions in 21159.22-25 and provides additional qualifications for those exemptions in Sections 21159.20 and 21159.21.[43] Importantly, SB 1925 eliminated the discretion of localities to deny the exemption based on "unusual circumstances."[44]

SB 1925 defines an infill site as a site in an urbanized area that was either previously developed for qualified urban uses or that is immediately adjacent to urban uses. The site must not have been developed for urban uses or have parcels created for the past ten years (PRC § 21061.0.5). SB 1925 defines "community-level environmental review" as an EIR certified for a general plan, community plan, specific plan, or housing element, or a subsequent EIR or negative declaration based on such an EIR (PRC § 21159.20). The legislation defines an urbanized area as one that includes a city of at least 100,000 people

[41] http://www.pcl.org/pcl/pcl_accomp2002.asp
[42] Id.
[43] http://www.jonesandstokes.com/resource/oct02.PDF
[44] http://www.housingadvocates.org/pdf/site/facts/anti%20nimby%20tools.pdf

(which may include the populations of not more than 2 contiguous cities). Unincorporated areas may also qualify as urbanized, subject to strict criteria (PRC § 21071). SB 1925 defines "project-specific effect" as all direct and indirect impacts of a project other than cumulative and growth-inducing effects (PRC § 21065.3).[45]

The law also adds Article 6 (beginning with PRC § 21159.20), which creates common standards for exempting qualifying housing projects. Qualifying standards include consistency with an adopted plan, past certification of a community-level environmental review, available utilities and payment of any in-lieu or development fees, absence of wetlands, wildlife habitat value, and harm to special status species, absence of toxic substances on site or successful completion of remediation activities, no significant effect on historical resources, absence of fire and seismic hazards, and absence of "developed open space."[46]

AFFORDABLE HOUSING EXEMPTION (§ 21159.23)

SB 1925 improved the affordable housing exemption for projects with no more than 100 units by replacing the "soft" exemption (which required that the project not have a "significant impact" on the environment) with a "hard" exemption.[47] Residential projects covered under this section can contain retail uses not exceeding 15 percent of the total floor area of the project.[48]

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[45] http://www.jonesandstokes.com/resource/oct02.PDF
[46] Id.
[47] **http://www.omm.com/webdata/content/publications/eb_10_02.pdf**

[48] PRC Section 21159.23(2)(D)

The affordable housing project site must be previously developed for qualified urban uses, contain parcels immediately adjacent to the site that are developed with qualified urban uses, and must not have been developed for urban uses within 10 years prior to the proposed development.[49] In addition, the site cannot be more than five acres and must be located within an urbanized area or within a census-defined place with a population density of at least 5,000 persons per square mile or, if the project consists of 50 or fewer units, within an incorporated city with a population density of at least 2,500 persons per square mile and a total population of at least 25,000 persons.[50]

Projects sites also qualify if they are located within either an incorporated city or a census defined place with a population density of at least 1,000 persons per square mile. However, this portion of the exemption will not apply if there is a "reasonable possibility that the project would have a significant effect on the environment or the residents of the project due to unusual circumstances or due to the related or cumulative impacts of reasonably foreseeable projects in the vicinity of the project."[51] This "soft" requirement therefore applies only to this portion of the exemption and not to the exemption as a whole.

INFILL EXEMPTION (§ 21159.24)

SB 1925 provides a new exemption (§ 21159.24) for infill housing developments that meet certain criteria.

[49] PRC Section 21159.23(2)(B)
[50] PRC Section 21159.23(2)(C)&(D)
[51] PRC Section 21159.23(2)(D)

The Section 21159.24 exemption is a "soft" exemption because planning agencies still have significant discretion to avoid using the exemption. First, the planning agency may determine that a reasonable probability exists that the project will have a project-specific, significant effect on the environment due to unusual circumstances. Second, the planning agency may find that substantial changes or new information with respect to the circumstances under which the project is being developed has occurred since community-level environmental review was certified or adopted.[52]

The infill exemption contains numerous specific requirements. Developments must not be more than 4 acres on an infill site in an urbanized area. They cannot contain more than 100 residential units. As an added detail to promote transit-oriented developments, the projects must be within one-half mile of a major transit stop.

The exemption also contains an affordable housing component. The developer must sell at least ten percent of the housing to families of moderate income. Alternatively, the developer may not rent less than ten percent of the housing to families of low income or not less than five percent of the housing to families of very low income.[53]

The exemption does not cover any single-level building that exceeds 100,000 square feet or that has a density of at least 20 units per acre.[54] The legislation also includes definitions of "infill site" and "urbanized area."[55]

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[52] PRC Section 21159.24(b)
[53] PRC Section 21159.24(a)
[54] PRC Section 21159.24(a)(7)(A)(ii)
[55] PRC Section 21159(d)

IV. General Plans, Specific Plans and Zoning Laws

In addition to the impediments created by the CEQA process, affordable housing developers also must contend with the development restriction created by general plans, specific plans, and zoning laws. Each of California's 478 cities and 58 counties must devise a "general plan," which Govt. Code § 65300 et seq. requires. The General Plan describes the future of the city or county's development in general terms through a series of policy statements in text and map form. The plan itself must conform to CEQA.[56]

California's general plan law requires local governments to include at least seven topic areas in their general plan, including land use, circulation (transportation), housing, open space, conservation, safety, and noise. The state's General Plan Guidelines establish procedures that local governments must follow when analyzing these topic areas, including the expectation that technical analyses will be used to document a community's problems and to justify the policy decisions contained in the general plan. Local governments, however, are generally free to choose their policy direction in devising the general plan.[57]

A general plan is not difficult to change. Amendments to the general plan are usually designed to accommodate a particular development project or alter the plan in some specific way. State law permits amendments four times per year, and any number of individual changes may be grouped into a formal amendment each quarter. As a result, the plan can change at any time as long as a majority of the

[56] Fulton 103.
[57] Fulton 87.

city council or board of supervisors deems the action appropriate.[58]

The state does not enforce its laws regarding general plans and instead leaves enforcement to litigation challenges from local opponents. Lawsuits challenging the general plan usually result from one of four violations: consistency with other planning documents, internal consistency, compliance with state laws governing general plans, and adequacy of the EIR.[59] Any update to the general plan also requires complying with CEQA. This CEQA process is expensive and time-consuming, and most cities and counties report spending one-fifth to one-third of their general plan budgets on an EIR for the plan.[60]

Along with the general plan, the state authorizes localities to draw up "specific plans" to implement the general plan in specific geographical areas.[61] These specific plans must also comply with CEQA.

Each locality's zoning laws must conform to the general plan. When a project would otherwise not conform to the zoning laws, one of the easiest methods of permitting the project is to change the zoning on the parcel of land. City councils and boards of supervisors are often quite willing to change zoning if the project proposed is something they really want built. Zone changes are "legislative" in nature under California law, even if they involve only one parcel of land. This designation means that all zone changes are, essentially, policy statements by the city or county. Therefore, the local legislative body must approve the changes after a public

[58] Fulton 106.
[59] Fulton 121.
[60] Fulton 108.
[61] Fulton 105.

hearing. Zone changes are also subject to initiative and referendum and must comply with the provisions of CEQA.[62]

Given this background, we sought to investigate the experience of planner and affordable housing developers in proceeding through the CEQA process and utilizing its exemptions.

V. Planners' Utilization of CEQA Exemptions

A. METHODOLOGY

We surveyed the planning agencies that reported to the California Office of Planning and Research ("OPR") using the statutory and categorical exemptions in 2005. AB 677, enacted in 2003 and made effective in 2004, requires local agencies to file notice with the OPR every time they determine that an exemption applies to a given task.[63] This information can be found at the California Planners' 2004 and 2005 Book of Lists.

Contacting the planning agencies serves two purposes. First, use of the exemptions, whether categorical or statutory, is initiated by the planning agencies and not the developers. As Richard Lyon of the California Building Industry Association noted, "you can bang your hands on the table all day long and demand an exemption," but it is ultimately up to the planning agencies to grant them.[64] Furthermore, developers are often unwilling to antagonize the planning agencies that they rely on for permits by demanding an exemption. As a result, surveying the planning agencies provides an important perspective on the

[62] Fulton 134.
[63] PRC Section 21152.1(a)
[64] Interview with Richard Lyon, October 19, 2005.

exemption process, because they are ultimately in control of the process.

The second purpose of surveying the agencies that reported using the exemptions is to illustrate how effective the exemptions have been. An effective exemption is one that is utilized by the developers it targets. Therefore, contacting the agencies that claim to have used the exemptions will confirm how widespread the use is and how effective the exemption process has been.

B. FINDINGS

THE GRANTING OF STATUTORY EXEMPTIONS

In 2004, the first year of the reporting requirement, 56 agencies reported using the statutory exemption.[65] As a point of reference, California contains 478 cities and 58 counties with planning agencies, so these 56 agencies represent 10.4% of the 536 city and county agencies.[66] Richard Lyon of the California Building Industry Association (CBIA) contacted 28 of these 56 agencies (50%) and found that planners were confusing the statutory exemptions in SB 1925 with the categorical agencies.[67] As a result, many of these agencies incorrectly reported their using the statutory exemption when they had in fact used the categorical exemption. To underscore Lyon's findings, the following year of 2005 saw the number of agencies reporting using the statutory exemption drop to just 12.[68]

Our initial research supports the CBIA findings. We contacted eight of those twelve agencies and a random two

[65] 2004 Book of Lists, p. 80.
[66] Fulton 103.
[67] Lyon Interview. Lyon contacted 28 jurisdictions, finding only a "small number" used the infill exemption contained in PRC Section 21159.24.
[68] 2005 Book of Lists, p. 79.

of the 2004 agencies that reported using the statutory exemptions.[69] Of the seven of the 12 agencies that responded from the 2005 list, only three (42.8%) confirmed using the statutory exemptions. This response indicates that planners are still confusing the statutory exemptions with the categorical exemptions. Our phone calls with the planners support this finding of confusion, as at least five of the planners (71.4%) contacted were not sure what the statutory exemptions were or what the difference between the statutory and the categorical exemptions were.[70] These five were also unable to definitely recall whether or not they had used the statutory exemptions and needed additional time to do further research to confirm.

In addition, the fact that only three reported using the statutory exemptions reveals that SB 1925 has seen little use. Assuming that an agency who used the statutory exemption would report having done so, only three confirmed agency uses out of California's 478 cities and 58 counties indicates widespread ineffectiveness.

Of the three jurisdictions that reported using the statutory exemptions, roughly eight projects resulted, totaling 155 units. However, one of these three jurisdictions could not definitely confirm that the statutory exemption had been used and roughly estimated the number of times and units created.[71]

As a final point, it is possible that the agencies that reported using the categorical exemptions may have also been confused and meant to report using the statutory exemptions instead. Therefore, the statutory exemptions

[69] The two 2004 agencies were San Luis Obispo and Santa Cruz Counties.
[70] The five include East Palo Alto, Placerville, Santa Clara, Berkeley, and Sacramento County.
[71] Santa Clara County could not definitely answer this question.

may actually have seen more use than would otherwise be indicated. However, one would assume that a planner that used the statutory exemptions, with its detailed and complex requirements, would remember using the statutory exemption. In addition, the categorical exemption has existed longer than the statutory exemption and the planners we contacted were more familiar with the categorical exemptions. These facts indicate that planners were probably not incorrectly reporting using the categorical exemption when they meant to report using the statutory exemption. However, further research is necessary to confirm or deny this possibility by contacting the agencies that reported using the categorical exemptions to determine if any of them meant to report using the statutory exemption.

THE GRANTING OF CATEGORICAL EXEMPTIONS

Although only 42.8% of the planners were actually using the statutory exemption that they reported using, the categorical exemption for infill, which is much broader in applicability, appears to have seen more use. 81 agencies reported using the categorical exemption in the 2005 Book of Lists (15.1% of all city and county agencies).[72]

Although we did not contact those agencies that reported using the categorical exemption, the planners we contacted who had reported using the statutory exemptions reported much greater use of the categorical exemptions than the statutory exemptions. Six of the seven planners (85.7%) confirmed using the categorical exemptions.[73]

[72] 2005 Book of Lists, p. 78.
[73] Only East Palo Alto did not confirm using the categorical exemption, although the agency did use the statutory exemption.

REASONS FOR PLANNERS NOT GRANTING THE STATUTORY EXEMPTIONS:

1. Lack of Knowledge of the Exemptions

As discussed above, five of the planning agencies (71.4%) were not clear what the statutory exemptions were. For example, the Berkeley project tracker computer database contains a checklist box for using the categorical exemption, while no such box exists in their database for using the statutory exemption. Berkeley planners were not immediately clear what the statutory exemption contained. Redding stated, "We have no familiarity with them [the statutory exemptions."

Considering that the twelve agencies that reported using the exemptions most likely represent agencies that are generally favorable toward infill development and affordable housing, they represent the exact type of planning body that should be aware of the statutory exemptions. Yet in our survey, the planners often did not grasp the difference between the statutory and the categorical exemption. In one case, a planner knew only of the 1998 statutory exemption and was unaware that the 1998 exemption had been repealed and replaced by the 2002 exemptions. This planner continued to rely on the repealed exemption.[74]

2. Projects do not Qualify for the Statutory Exemptions

Five of the seven (71.4%) agencies reported not being able to use the exemptions because of the narrowness of the qualifications. Because the infill exemptions have a 100 unit maximum and an urbanized area requirement, some

[74] The planner worked with Sacramento County.

affordable housing projects do not qualify for the exemptions. For example, Redding stated that "the statutory exemptions are very narrow, with no flexibility." Placerville reported that "larger projects didn't qualify, such as a 176 unit apartment that received the tax credit allocation. The larger ones also tend to be on the outskirts of town" and therefore outside of the infill area. Berkeley stated that "the statutory exemptions, due to their very specific nature, do not seem to apply to most of the projects we process."

In other instances, projects did not qualify for the exemptions because agencies determined they would cause negative impacts that required study. For example, at least one agency reported that "one project didn't get the exemption, and they had a mitigated neg dec for noise impacts."

3. Existence of the Categorical Exemptions

Four of the seven (57.1%) planning agencies reported not needing to use the statutory exemptions because the categorical exemption covered their needs. Redding reported that the agency "is more familiar with the categorical exemptions, so it's the first place we look." Berkeley reported heavy reliance on the categorical exemption, and Sacramento County reported using "the categorical exemption all the time." Walnut Creek stated that "the categorical exemption gives a streamlining ability, so we haven't needed to utilize the statutory exemption." Berkeley also felt that the "categorical exemption covers us, even though the statutory exemptions are more bulletproof and might make more sense to use for our more controversial projects."

4. Consistency with the General Plan

At least one agency (14.2%) reported that it was difficult for projects to qualify for the exemptions because the general plan did not allow for affordable housing and infill developments. The exemption requires that a project comply with the general plan, and many affordable housing projects must propose amendments to the general plan in order for their project to comply and qualify for an exemption. East Palo Alto, remarked that "most residential developments come in with GP amendments, so we need to update the General Plan so more [infill and affordable housing] developments can qualify."

5. Reluctance of Developers to Ask for a CEQA Exemption

At least two agencies of the nine that responded (22.2%) mentioned a general reluctance on the part of developers to request exemptions. One agency commented that "applicants are loathe to ask for exemptions because of fears that neighborhood opposition would be even worse" with an exemption. This agency planner felt that "there's enough NIMBYism as it is. Most of them [affordable housing developers] are nonprofits, and neighbors don't like them coming in receiving welfare subsidies to build the housing." Santa Clara also commented that "developers don't go out on a limb with these projects anyway," indicating a desire by developers to avoid antagonizing neighbors or planners with large and potentially controversial projects. Our survey of affordable housing developers also partially reflects this tactic on the part of the developers.

6. Counties Cannot Use the Exemption in Unincorporated Land

California's 58 counties are responsible for planning the unincorporated areas of the county jurisdiction. Because the affordable housing and infill exemptions are tied to urbanized land, and because unincorporated land tends to be rural and non-urban, the three counties (100% of counties) we contacted stated that the exemptions are not significantly useful to them. Sacramento County commented that the "categorical exemption requires that the project 'must be within city limits,' and so no projects fit that description in unincorporated areas. It's a key point that really hinders us and we talk about it all the time." Santa Cruz County reported that "we can't use the statutory exemption because we're not a city, and we're precluded by state law from using it. We need to change the law."

VI. Affordable Housing Developers' Experience with CEQA

A. METHODOLOGY

The purpose of this study is to analyze the effectiveness of the CEQA exemptions for affordable housing developers. The first step in this analysis was to contact developers that are actively involved in affordable housing development in California. One group of developers whom we contacted consisted of developers that had applied to the California Debt Limit Allocation Committee (CDLAC) in 2004 or 2005 for the tax-exempt housing revenue bonds available to "Qualified Residential Rental Projects." According to the CDLAC website,

> These bonds assist developers of multifamily rental housing units to acquire land and construct new units

> or purchase and rehabilitate existing units. The tax-exempt bonds lower the interest rate paid by the developers. The developers in turn produce market rate and affordable rental housing for low and very low-income households by reducing rental rates to these individuals and families.[75]

One important feature of this group, which likely sways our findings, is that they disproportionately represent developers who engage in rehabilitation and acquisition of existing housing sites. In order to qualify for bond financing, a developer cannot be engaged in new construction. However, these bond developers still experienced the CEQA process through neighborhood opposition, processing of general plan amendments, specific plans and rezoning or through other affordable housing projects that did not involve acquisition and rehabilitation work.

Another group of developers whom we contacted were developers who had sought tax credits from the California Tax Credit Allocation Committee (CTCAC). This state tax credit supplements a federal tax credit that "enables developers of affordable rental housing to raise project equity through the 'sale' of tax benefits to investors."[76] Therefore, developers who sought these tax credits, like the developers who sought CDLAC bonds, are actively involved in affordable housing development in California.

The definitions of two important terms in this paper should be clarified. For the purposes of this paper, the term "developer" refers to corporations involved in (1) building new affordable housing or (2) rehabilitating existing structures to either maintain their affordability

[75] http://www.treasurer.ca.gov/cdlac/applications/applications.asp
[76] http://www.treasurer.ca.gov/ctcac/program.pdf

or transfer them from market-rate to affordable housing. In addition, the term "project manager" refers to the developer's employee or consultant who was identified either by the CDLAC website, the CTCAC website, or another employee of the developer as the person who would have the best understanding of how a specific project for which the developers had sought either a CDLAC bond or a CTCAC tax credit dealt with the CEQA review process.

When we contacted these developers, we sought to gain knowledge of their experience with the CEQA process in 2004 and 2005. We would initially focus our inquiry on the specific project for which the developers had sought either a CDLAC bond or a CTCAC tax credit. This quantitative data on these specific projects is listed in the charts in Appendix A of this report. This quantitative data is also listed at the start of each subsection in our findings section below.

In addition to gaining this quantitative data, we also sought to gain a more qualitative data by asking the developers about their general experience with CEQA during 2004 and 2005. The comments from this qualitative part of the study have been included in the findings section under the appropriate subheadings for that topic.

Some of the comments included below about a particular aspect of CEQA came from a project manager who had experienced that aspect of CEQA in other projects besides the project that was being surveyed for the quantitative portion of this study. For example, one of the project managers surveyed avoided CEQA review on the specific project we asked about by tacking onto a previous CEQA review. However, he also had experience with other projects not quantitatively surveyed in which he tried to

use CEQA exemptions but the city planner did not offer them. Therefore, his comments about city planners not being offered CEQA exemptions are listed in the findings below even though the projects to which he refers are not included in the quantitative findings.

This summary of findings is based on 33 responses out of 137 project managers contacted. The 33 responses covers 67 projects from 2004 and 2005 which is expected to create at least 2881 units of newly created or revitalized affordable housing units.

B. FINDINGS

Of the 67 of projects surveyed, 19 (28.4%) were subject to CEQA review. All the other projects (48 total projects or 71.6%) were able to avoid CEQA review.

Projects Subject to CEQA Review (19 Projects; 28.4% of all projects surveyed)

The affordable housing projects that were subjected to CEQA review received a variety of findings from the lead agencies reviewing their project.

Four projects (5.8% of all projects surveyed and 21% of projects subjected to CEQA review) received Negative Declarations, indicating that the projects would not have a significant environmental impact. Of these four NDs, one received the ND indirectly when the developer processed an amendment to the general plan and the amendment underwent CEQA review. Once the amendment received the ND, the development did not have to undergo the CEQA process. Another of the four NDS received the ND for a subdivision development as part of the subdivision review. As the subdivision received the ND, the affordable housing project

within the subdivision did not have to undergo CEQA review separately.

12 projects (18% of all projects surveyed and 63.2% of projects subjected to CEQA) received Mitigated Negative Declarations (MNDs).

Two projects (2.9% of all projects surveyed and 10.5% of projects subjected to CEQA) underwent a Full EIR process, meaning that the lead agency's initial study indicated that the project may have a significant environmental impact. Both of those Full EIRs occurred indirectly because the housing projects accompanied new specific plans. As both specific plans triggered and passed the full EIR stage, the projects associated with the specific plan did not have to undergo another CEQA review.

For one project (1.5% of all projects surveyed and 5.3% of projects subjected to CEQA) developer was unable to recall what level of review the project underwent.

Overall, roughly 1634 of the 2881 or 56.7% of the newly-created affordable housing units covered in this study were created without the assistance of the CEQA exemptions.

Developers in these cases were unable to avoid CEQA review by using exemptions or some other means of avoidance. Four reasons were expressed by developers for why they did not use CEQA exemptions: 1) local planners never offered the developers exemptions; 2) developers did not know about the exemptions; 3) developers did not think the exemptions were beneficial; or 4) the project clearly did not qualify for exemptions

1. The Local Planners Never Offered the Developers Exemptions

Three of the 17 developers (17.6%) who did not use exemptions reported that the planning agency never offered the exemptions to them. Five other project managers surveyed stated that local planners never offered them exemptions, and they did not feel that planners would be offering exemptions anytime soon. One developer commented simply that the "local jurisdiction just informed us they were doing the review; there was no exemption as an option." Although many developers would appreciate having their projects exempt from CEQA, most developers seem resigned to the fact that lobbying for an exemption is fruitless. As a result, developers usually deal with CEQA in other ways.

In some cities, including Los Angeles, developers who feel their project deserves an exemption can try to obtain one "over-the-counter." Over-the-counter exemption forms are the numerous "notice of exemption" forms that the project developer can file with the city. One developer said that while an over-the-counter CEQA exemption is always desirable, most projects need some type of MND associated with them.[77] She found city planners to be "by and large very supportive of affordable housing." She says an MND is not a huge problem for her firm because it is budgeted into the project. Plus, the funding process is a year-long process anyway, so CEQA does not hold them up.

Some planners who have sought exemptions for their projects have received a cold reception from city planners. One project manager who was able to use a CEQA exemption did not believe planners in general would grant exemptions

[77] Ingram Preservation Apartments, scattered throughout Los Angeles- WORKS- Jackie Yount (213-202-3930 x.24)- based on phone conversation on 11/1/05

unless the project in question received local support. She expressed disbelief that the existence of the exemption would provide developers with a guarantee of its use. She commented, "We've only used the CEQA exemption on one project. However, had that project had an opposition from local residents or property owners, I can guarantee you that the City would have found a way to not have allowed us to use the exemption."

Since affordable housing usually faces local opposition, CEQA exemptions are rarely granted by planners. Charles Brumbaugh of the Corporation for Better Housing says that his firm has tried to use exemptions, but the response from planners has been tepid.[78] According to Brumbaugh, "No one seems to want to go down that road."[79] He believes that most local agencies do not like affordable housing because it reduces property taxes while increasing infrastructure costs for a locality, in the form of increased police, fire and 9-1-1 calls.[80] He has worked on projects "from Oakland through Orange." His firm does business in most populated areas of the state, with projects about evenly split between rural and urban areas. In his experience, most agencies will not go out of their way to help affordable housing developers move quickly through CEQA.

Another project manager commented, "[T]he real issue is low income apartments which the neighbors often disdain. CEQA is a convenience that adds legitimacy to the opposition." The developer saw no reason why lead agencies should be able to avoid offering an exemption based on

[78] Brumbaugh
[79] Brumbaugh
[80] Brumbaugh

concerns about significant effects. He argued, "[I]f a project is developed in an area with proper zoning, then I see no additional impact that an apartment or low income subdivision could possibly impose on traffic, sewer, water, and storm drain systems since most of this infrastructure should be developed to meet the zoning capacity of the land." He complained about lead agencies' reluctance to grant exemptions, reporting that the "the key here is to reduce the opportunity of opponents of low income housing to use CEQA challenges when, in fact, all they really want is to get rid of housing for poor families."[81]

Despite these project managers' complaints about lead agency behavior with regard to the exemptions, they often cannot afford to alienate those agencies by complaining to them about their treatment. As Brumbaugh relates, cities have to waive fees and costs for affordable housing developers in most cases, and cities with a redevelopment agency by law will have 20% of their redevelopment agency's budget earmarked by for affordable housing development. In one case, his firm received $8M from a redevelopment disbursal.

2. The Developers Did Not Know About the Exemptions

While part of the problem may be that the local planners made unilateral decisions not to offer the exemptions, the other part of the problem appears to be that developers are unaware that the exemptions exist. Four of 29 (13.8%) reported not knowing that affordable housing exemptions exist for CEQA.

One project manager stated, "I am unaware of CEQA exemptions for affordable housing projects, and they

[81] Paul Ainger, Community Housing Opportunities Corporation.

haven't been mentioned by staff." Another commented, "I was personally not aware the exemptions even existed" and recommended that policy makers make "sure the local jurisdiction knows" they exist.

Just as many of the planners were not clear on the different CEQA exemptions, many of these developers were unaware that the existing exemptions would benefit their housing projects. To underscore this ignorance, at least two developers out of 21 total (9.5%) that responded to the survey had never heard of CEQA before.

3. Developers Did Not Think the Exemptions Were Beneficial

Three project managers out of 29 (10.3%) reported not using the exemptions because they believed that the exemptions would not be beneficial to their project. For example, one project manager commented:

> [A]n exemption wasn't used because the limited nature of the exemptions makes it not worth the difficulty in the real world of getting a project approved outside the normal process. Perhaps we are wrong and are merely ignorant of their potential value, but the perception among my…colleagues is that the exemptions don't really amount to much.

At least one developer of 29 (3.4%) reported not using the exemption out of fear that avoiding CEQA would raise the ire of neighbors who do not want affordable housing in their area. The developer commented that "in some cases with a friendly jurisdiction, we just do the CEQA anyways to provide us with back-up to defend the project against future NIMBY assaults." Echoing this sentiment, another project manager stated, "The main tool the neighbors use to hold you up is traffic congestion, even when you have a legitimate report that claims no mitigation is needed, you

usually end up being forced to do something." These responses indicate that developers fear future lawsuits or neighborhood opposition if they avoid the CEQA process. The uncertainty this fear generates gives developers an incentive to undergo the CEQA process, regardless of the existence of an exemption that would shortcut the process.

Project Manager Brumbaugh finds the present legislation, which gives lead agencies discretion to grant the affordable housing exemption, to be useless. Even if his firm has a valid claim for an exemption, they have no real way of challenging the lead agency. If they were to sue an agency for not being granted an exemption, the project would be delayed even further, and the agency would no longer look upon the developer favorably when disbursing redevelopment funds or reviewing future projects. Therefore, challenging an agency's determination is not a realistic option. The end result for Brumbaugh is that his projects typically face an MND or a limited scope EIR as a result of the CEQA process.

Bill Witte of Related Companies of California seems to take the position that he is comfortable with the cost of MNDs and sees no need to seek exemptions. He says, "We have never used a CEQA affordable housing exemption. Generally speaking, residential projects in general, and smaller, affordable projects in particular, do not require EIRs, so CEQA per se is rarely an issue."[82] The two projects to which he was referring were not small but rather were of comparable size to the other projects that were surveyed. One created 92 low-income units, and the

[82] Fontana Senior Apartments in Fontana and the Jeffrey Lynn Neighborhood Revitalization, Phase 3 in Anaheim- Related Companies of California- Bill Witte (bwitte@Related.com)

other created 85 low-income units.[83] While his projects still face MNDs, he does not find them to be cumbersome in terms of time and cost.

Another Los Angeles, developer, however, is not satisfied with the current situation: "I think the exemptions are a good idea – this is a costly and time consuming process, and providing affordable housing does not come without a cost to developers. Therefore, whatever can be done to expedite these processes is welcome."[84]

In addition, given the planners' discretion, developers never know how much they will face hostility from planners. One developer, Frank Thompson of the Marbill Corporation, says that city planners will sometimes actively try to create a controversy which will trigger greater CEQA review, even when no controversy originally exists.[85] He explained the behavior as follows:

> [C]ities have made determined efforts not to use the CEQA exemptions, on my projects. I have had cities schedule public hearings to then use the 'public controversy' section to require an EIR. This puts up a $400,000 or more barrier, immediately, plus delay of nine to twelve months, to obtain nothing. It is just a slap. In most instances, a mitigated ND or focused study could have done the job. The public controversy section of the law needs to be tightly clarified and objectively quantified if possible, where cities participate in EIR costs if there [are] marginal calls or determinations.[86]

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[83] CTCAC Chart

[84] Wilshire Vermont Station Apartments in Los Angeles- Urban Partners LLC- Justin Chapman (jchapman@urbanpartners.net)

[85] Aurora Village II Apartments in Lancaster (2004)- Marbill Corporation- Frank Thompson (ThompsonHC@aol.com)

[86] Aurora Village II Apartments in Lancaster (2004)- Marbill Corporation- Frank Thompson (ThompsonHC@aol.com)

According to Thompson, such behavior "is really only a problem in about 30% of cities and counties, but it is a big problem where it occurs."[87]

4. The Project Clearly Did Not Qualify for Exemptions

Three project managers of 29 (10.3%) cited the large parcel size and lot size of the project as disqualifying her from using the urban infill exemption. One stated, "We've never gotten a CEQA exemption…our projects are too big." She also opined that "if the definition of 'infill project' could be expanded" to allow "in-fill definitions to apply to county areas and not just within cities," then more of her projects could qualify. Although her project is "located on less than 5 acres, surrounded by fully built out developments," she could not used the exemption because she was on unincorporated county land. The other project, which created 138 low-income senior units, was slightly too large (5.25 acres) to qualify for an infill exemption.[88]

Another development was not qualified for an infill exemption because there were environmental issues concerning wetlands protection, since the new construction was to take place on a flood plain. Although there was concern from the city planner "that anything less than a full EIR would be subject to legal challenge," an MND was ultimately approved in for the project, which generated 170 affordable housing units.[89] In addition, one project manager cited the fact that her "project is located in an historic district" as a reason for not qualifying for the exemption. This project is also "located in what is called

[87] Aurora Village II Apartments in Lancaster (2004)- Marbill Corporation- Frank Thompson (ThompsonHC@aol.com)
[88] Aurora Village II Apartments in Lancaster (2004)- Marbill Corporation- Frank Thompson (ThompsonHC@aol.com)
[89] St. Vincent's Gardens Apartment in Santa Barbara- Mercy Housing- Ben Phillips (BPhillips@mercyhousing.org):

a Maher Ordinance Area" which is an environmental zone "associated with the original SF coastline and landfill/soil issues."[90]

Projects Not Subject to CEQA Review (48 Projects; 71.6% of all projects surveyed)

The affordable housing projects that were able to avoid CEQA review achieved this desirable result in a number of ways. Developers avoided CEQA by: 1) utilizing a CEQA exemption; 2) tacking onto a CEQA determination that had been made for a specific plan, general plan, or rezone; or 3) rehabilitating existing buildings.

1. Utilizing a CEQA Exemption

Four project managers out of 25 (16%), who were responsible for five separate projects of the 48 (10.4%), reported using an affordable housing exemption to avoid the CEQA review process. However, these project mangers were generally unable to recall definitively if they used the categorical or statutory exemptions. Only one developer could state that he had used the statutory exemption for one project. Two more developers essentially guessed that they had used the statutory exemption for affordable housing. At least one developer planned to use an exemption on an upcoming project proposal.[91]

Overall, roughly 290 of the 2881 affordable housing units covered in this study (10.1%) resulted from the exemption process.

2. Tacking Onto a CEQA Determination That Had Been Made for a Specific Plan, General Plan, or Rezone

[90] Chinatown Community, Thai-An Ngo.
[91] Mercy Housing (Stephen Daus)

In order to avoid the time and cost associated with a CEQA review of a project, many developers avoid CEQA review of their project by coming in after a CEQA determination has already been made for their site, either through a rezoning, specific plan or general plan amendment. By selecting these "pre-cleared" sites, the developers remove future doubt about the environmental review process for their project and thus find it easier to secure financing. One developer described this strategy as "piggy-backing" off of a previously completed EIR. His particular project "piggy-backed" onto an EIR that was almost a decade old.[92]

Six of the 48 developers (12.5%) who avoided the CEQA process cited this strategy as a reason why the affordable housing exemptions did not apply to their project. For example, one project manager commented, "staff has used existing neighborhood EIR's done originally for their general and/or specific plan areas when a project is within the desires of the specific plan." Another stated that "we process General Plan Amendments, Rezones, etc. on most projects because we can't afford to purchase multifamily zoned land. So we're basically 'exempt' from using the exemption."

Regarding the financing aspect of the need to have a pre-approved site, a project manager remarked that "it is a timing issue in that that [CEQA] document gets prepared and approved way in advance of the applications for funding." Another project manager stated bluntly, "If you are a developer and buy property that requires a full EIR, then you are a first class fool." These responses indicate that affordable housing developers are using the general plan

[92] Wilshire Vermont Station Apartments in Los Angeles- Urban Partners LLC- Justin Chapman (jchapman@urbanpartners.net)

amendments, specific plans and rezoning process to avoid having to conduct the CEQA reviews for their projects and to ensure that their projects can proceed with as much certainty as possible.

3. Rehabilitating Existing Buildings

Another way to avoid the CEQA process and address the affordable housing situation in California is to rehabilitate existing buildings (to create new affordable housing) and refinance existing affordable housing (to make sure it remains affordable). 42 of the 48 projects (87.5%) that avoided the CEQA process employed this strategy.

This tactic has actually been one of the most common approaches of the housing developers we have contacted, most likely due to our reliance on the list of bond applicants.[93] James Keefe of the BCC Corporation explained why this is a preferable to new construction as a method of generating affordable housing:

> I do not support the concept that newly constructed affordable housing meet lower CEQA requirements because I am concerned that most new affordable housing projects do not make economic sense. The ones that do get built result from receiving far more than their fair share of government money and other social subsidies. Exemption from CEQA is another subsidy. The subsidies are already excessive. The end result is a very high cost per affordable unit created and very few households get served. The focus should be on using scarce government dollars and exemptions from environmental requirements on serving as many people as possible. This can be better done by rent subsidy programs and by creating affordable housing through rehabilitation programs on existing properties. Too much of the subsidy for new construction of affordable units goes to land owners, the development industry

[93] See methodology section for more discussion. It could also reflect the fact that developers are engaging in more rehabilitation work than new affordable housing construction, but this study cannot confirm that finding.

> and to pay excessive (Davis-Bacon) wages and other construction costs. Creating luxury affordable housing for a few lucky households while many go unserved makes no social or economic sense.[94]

One of Keefe's recent project involved acquiring and rehabilitating existing housing. Keefe wrote, "Essentially we converted 170 market-rate units to long-term affordable status without new construction."[95]

Likewise, all of Bentall's projects involve the acquisition and renovation of existing buildings.[96] Hemet and Sterling total of 160 units. In addition, all of the projects of WNC Community Preservation Partners (WNC & Associates are rehab projects with tenants in place. They were all affordable before and after acquisition. The new financing preserved the affordability for at least twenty more years.[97] The Christian Church Homes of Northern California are also involved maintaining the affordability of existing affordable housing.[98] Gary Squier of Squier Properties comments that there is statewide blanket exemption for all existing housing. Unlike Keefe, he would like to these this exemption extended to all affordable housing, whether existing or newly constructed housing.[99]

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[94] Tara Village Apartments in Cypress- BCC Corporation- James Keefe (jkeefe@merccap.com)
[95] Tara Village Apartments in Cypress- BCC Corporation- James Keefe (jkeefe@merccap.com)
[96] Hemet Estates Apartments in Hemet and the Sterling Village Apartments in San Bernadino- Bentall Residential- Ken Reiner (KReiner@Bentall.com)
[97] Garden Valley II Apts. in San Joaquin; the Parlier Plaza Apts. in Parlier; the Whitley Garden I and II Apts. in Corcoran; the MacArthur Apts. in Los Banos; the Casa Maria Apts. in Coachella; and the Coachella II Apts. in Coachella; Rancho Niguel Apartments in Laguna Hills-WNC Community Preservation Partners (WNC & Associates)- Elizabeth Selby (eselby@wncinc.com)
[98] Flower Park Plaza Apartments in Santa Ana- Christian Church Homes of Northern California- Bill Pickel (bpickel@cchnc.org)
[99] Afton Place Apartments in Los Angeles- Squier Properties- Gary Squier (GarySquier@LinkLine.com):

On the other hand, the Ingram Preservation Apartments consisted of moderate rehabilitation of seven existing buildings, and they still faced CEQA review.[100]

VII. Conclusion

The CEQA process is complex and retains many powerful allies with the environmental, environmental justice and homeowner communities. At the same time, California faces a severe housing shortage and is in desperate need of more affordable housing – especially affordable housing located in urbanized areas where residents will not have to rely on the automobile for transportation or open space for new housing areas. The affordable housing exemptions discussed in this study represent the state legislature's attempts to balance these needs.

This study has demonstrated that both the statutory and categorical exemptions have failed to provide affordable housing developers with a strong means of avoiding the CEQA review process and encouraging more production of affordable housing. The statutory exemptions, with its rigid requirements, have seen only minimal use by developers. The broader categorical exemptions have been more utilized, however, and provide a good starting point for further CEQA reform.

Planners who are friendly to infill and affordable housing tend to rely on the Class 32 categorical exemption instead of any statutory exemption. These planners are generally unaware of the existence and details of the statutory exemptions and often find them to be too rigid

[100] Ingram Preservation Apartments, scattered throughout Los Angeles- WORKS- Jackie Yount (213-202-3930 x.24)- based on phone conversation on 11/1/05

and not very useful. County planners complain that county land will not qualify under the exemption despite having high density land. Hostile planners, meanwhile, will not offer exemptions to a project if there is significant local resistance.

Developers, meanwhile, employ the strategy of avoiding CEQA by using sites that have passed the CEQA process (such as through a rezoning, specific plan or general plan). These builders, like many planners, are often unaware of the existence and scope of the exemptions. When they are familiar with the exemptions, they often express disbelief that an exemption will protect them from future neighbor opposition. Sometimes developers are afraid to ask for exemptions from planners because they do not want to antagonize the planners that they rely on for assistance. Finally, many developers' projects do not qualify for the exemption because they are too big or on county or environmentally sensitive land.

The challenge for state policy makers will be to address these stumbling blocks to greater use of the exemptions. While the opposition to affordable housing is often local, the negative effects of a housing shortage are felt by the entire state, from our economy to our quality of life. The state will most likely need to take an active role in resolving this dilemma – far greater than the narrow exemptions that the recent legislation has created.