

CEQA: How to mend it since you can't end it

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It's no coincidence that California's housing prices began to diverge from the rest of the country in 1970 – the very year that the California Environmental Quality Act (“CEQA”) was enacted.

According to California's nonpartisan Legislative Analyst, “Between 1970 and 1980, California home prices went from 30 percent above U.S. levels to more than 80 percent higher.” By 2015, the average California house cost around 250% of the average U.S. house.

Of course, real estate prices, construction costs, government fees, permitting delays, and zoning restrictions all contribute to California's affordable housing crisis. But CEQA also adds significant costs.

CEQA requires an environmental impact report (an EIR) whenever a government agency proposes to approve a project (including housing projects) that may have a significant effect on the environment. The costs for an EIR can range from \$200,000 to millions of dollars.

And the obligation to assemble such a report causes delay that contributes to higher costs. California's Legislative Analyst estimates that California's ten largest cities averaged 2 ½ years to approve housing projects that required an EIR.

Moreover, after the project is approved, project opponents have used CEQA to further delay and thwart projects through prolonged litigation that challenges purported omissions or inaccuracies in the EIRs' highly technical tomes.

These lawsuits add hundreds of thousands of dollars in attorneys' fees to a project's cost and cause multi-year delays, which, in turn, result in even higher building costs than obtainable when

the project was originally planned. Worse still, financing for a project is generally not available during the CEQA litigation.

Thus, while CEQA's purpose is laudable, it contributes to the high cost of housing developments. And higher construction costs make affordable housing less profitable, which, in turn, makes it less attractive to develop. Significantly, between 2005 and 2014, California built fewer houses per person than New York and Texas.

However, there are some reasonable reforms that could mitigate these costs without undermining CEQA's purpose:

Eliminate the Automatic Right of Appeal for Meritless Cases

Every CEQA suit involves a trial and an equally lengthy appeal.

Substituting the right to appeal with a right to writ review could cut by half the length and cost of CEQA litigation, while reducing the burden on the courts. Under California law, the California courts of appeal can deny review of a meritless writ petition without the extensive briefing and argument involved in an appeal, reducing the appellate stage to a few months.

And to protect a party with a valid appeal, this reform could require the appeals court to grant writ review, allowing for full briefing and oral argument, for any issues in which the complaining party has at least a 50% chance of prevailing.

Prevent Ambushes

Under CEQA, no party may challenge the adequacy of an EIR based on a deficiency unless that particular issue was presented before the governmental agency's final project approval. However, there are ordinarily several opportunities to raise

such claims during the administrative process, including when the first draft of the EIR is circulated for public comment.

Unfortunately, some claimants raise issues late in the process, such as on the final day of the final governmental approval, leaving no time to adequately address the issue without starting part of the process all over.

The Legislature could condition the right to litigate an issue upon its being raised during the EIR's public comment period and could forbid litigation of any issue that could have been raised, but was not raised, in response to an earlier draft of the EIR. This reform would encourage diligence and avoid ambushes.

Make clear that any deficiency must be substantial

EIRs address highly technical measurements of environmental impacts over future decades based on complicated analytic

models. Naturally, oversights and mistakes can occur in documents comprising thousands of pages.

The Legislature should codify a "harmless error" standard that prevents the courts from overturning project approvals where the omitted information would likely not have affected the project's approval and did not significantly affect the general public's ability to evaluate the project's overall impacts.

Conclusion

It is time for the Legislature to take some reasonable steps to reduce the high cost of constructing new housing in California. The fertile field of CEQA offers some low-hanging fruit if the Legislature would only care to pluck it.

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