

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

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This Article explores the slow-motion collision between two statutes at the center of California’s housing crisis: the California Environmental Quality Act and the state’s Housing Accountability Act. Each statute has a bonafide claim to being a “super-statute”—one that exerts a broad effect on the law. Yet the two statutes came of age in different eras—the California Environmental Quality Act in the 1970s and the Housing Accountability Act in the 2010s—and have fundamentally different institutional and normative premises. After tracing the evolution of the statutes, we explore two problems at their intersection: (1) cities’ use of endless environmental review to launder the denial of housing projects that the Housing Accountability Act means to protect; and (2) analytical confusion about the proper scope of environmental review for projects protected by the Housing Accountability Act. We propose solutions that harmonize the two laws, remaining faithful to the text and purpose of the California Environmental Quality Act while fulfilling the Housing Accountability Act’s instruction that it be interpreted “to afford the fullest possible weight to the interest of . . . housing.” Our solutions are not inevitable. In another possible future, the California Environmental Quality Act runs roughshod over the Housing Accountability Act, crippling California’s efforts to provide more housing and, ironically, to respond to the threat of climate change. We hope this Article’s intervention makes that future a bit less likely.

DOI: <https://doi.org/10.15779/Z387H1DN66>

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** Associate, Covington & Burling LLP. The authors write in their personal capacity and do not represent any position of the University of California or Covington & Burling LLP. We thank Paul Campos, Meryl Chertoff, Sheila Foster, Dan Golub, Rick Frank, Sarah Jones, Moira O’Neill, David Schleicher, and Bryan Wenter for helpful feedback. Portions of this Article were previously published in blog format at the State and Local Government Law Blog. One of the authors (Elmendorf) has provided pro-bono advice to a state legislator (Assemblymember Phil Ting) and a think tank (SPUR) working to codify some of the solutions proposed in this Article.

Introduction	656
I. How CEQA and the HAA Became “Super”	662
A. The California Environmental Quality Act	663
B. The Housing Accountability Act	669
C. A Note on the HAA’s CEQA Savings Clause	674
II. Does the HAA (or Anything Else) Provide a Remedy for CEQA- Laundered Project Denials?	677
A. Capitalizing on Administrative Law’s Achilles Heel	679
1. Delay	679
2. Bad Faith	681
B. But the HAA Is a Game Changer, Right?	684
C. Solutions	685
1. Bad-Faith Delay Through CEQA Reversal as HAA “Disapproval”	685
2. Enforcing CEQA Timelines in Light of the HAA	692
3. Levering “Pretext” for Judicial Review of CEQA- Clearance Denials	694
D. Coda	697
III. Calibrating Environmental Review to the Scope of Municipal Discretion Under the HAA	698
A. “Effect” Relative to What? Defining a Reference Alternative for CEQA Review of HAA-Protected Projects	700
B. Does CEQA Allow It?	703
C. The Governor’s Role	709
Conclusion	712

INTRODUCTION

In October of 2021, San Francisco’s Board of Supervisors voted down a proposal to build nearly 500 new homes—many affordable—on an empty downtown parking lot at 469 Stevenson Street.¹ A politically influential activist

1. Annie Gaus, *Supervisors Under Fire Vote Against Proposed SOMA Apartment Building Sparks Furor, May Violate State Law*, S.F. STANDARD (Oct. 28, 2021, 4:59 PM), <https://sfstandard.com/housing-development/supervisors-under-fire-vote-against-proposed-soma-apartment-building-sparks-furor-may-violate-state-law/>; Chronicle Editorial Board, *Editorial S.F. Supervisors Have Lost Their Minds on Housing. Here’s What Mayor Breed Can Do About It*, S.F. CHRON. (Oct. 29, 2021, 9:09 PM), <https://www.sfchronicle.com/opinion/editorials/article/Editorial-S-F-supervisors-have-lost-their-minds-16575969.php>; Gil Durand, *Absurdity’ San Francisco Leaders Stall SOMA Housing Project to Preserve Parking Lot*, S.F. EXAM’R (Oct. 29, 2021), https://www.sfexaminer.com/archives/absurdity-san-francisco-leaders-stall-soma-housing-project-to-preserve-parking-lot/article_404ef58e-f31d-5961-815c-585645fc30ad.html; Heather K. Knight, *S.F.’s Real Housing Crisis Supervisors Who Took a Wrecking Ball to Plans for 800 Units*, S.F. CHRON. (Oct. 30, 2021), <https://www.sfchronicle.com/sf/bayarea/heatherknight/article/S-F-supervisors-complain-about-our-housing-16576412.php>; Alexis Kosoff, *Why State Lawmakers Are Fired Up over a Derailed S.F. Housing Project*, S.F. CHRON. (Nov. 2, 2021, 1:08 PM),

had been lobbying the developer to “donate” a portion of the site to the city, which the city could then bank for future development as a smaller, 100 percent affordable project.² The developer demurred. After much hue and cry about speculative gentrification impacts, the supervisors put the kibosh on the project, notwithstanding the planning commission’s determination that the project complied with all applicable requirements.³

Afterward, one supervisor said he would “feel very good about this vote” if the site “become[s] a 100% affordable project,” but that if “15 years from now it’s still a parking lot, then I will not feel good.”⁴

This might seem like ordinary urban land-use politics. In California, however, much of what used to pass as ordinary land-use politics is now against the law. The supervisors’ vote came right on the heels of a major Court of Appeal decision upholding California’s Housing Accountability Act (HAA), which the legislature has greatly strengthened in recent years.⁵ The HAA now requires cities to approve housing projects that a reasonable person *could* deem compliant with applicable standards, even if other reasonable people disagree.⁶ It upends the world of discretionary development permitting that took hold in the 1970s, when local governments in high-demand housing markets converted land-use regulation into a medium for wheeling and dealing over the terms on which any proposed project could proceed.⁷

The twist in the Stevenson Street case is that, technically, the supervisors did not actually vote to deny the project. They voted instead to require further study of putative project impacts under the California Environmental Quality Act (CEQA) while making clear that they aimed to kill it.⁸ Other cities have used similar maneuvers, albeit with much less fanfare.⁹ This presages the legal clash that we explore in this paper.

<https://www.sfchronicle.com/sf/bayarea/heatherknight/article/S-F-supervisors-complain-about-our-housing-16576412.php>; Diana Ionescu, *San Francisco Supes Reject Proposal To Turn Parking Lot Into Housing*, PLANETIZEN (Nov. 23, 2021, 12:00 PM), <https://www.planetizen.com/news/2021/11/115376-san-francisco-supes-reject-proposal-turn-parking-lot-housing>.

2. The activist, John Elberling, memorialized his demands in a blog post published shortly after the supervisors’ vote. See John Elberling, *The Facts Behind the Developer Propaganda on Soma Housing Project*, 48HILLS (Dec. 6, 2021), <https://48hills.org/2021/12/the-facts-behind-the-developer-propaganda-on-soma-housing-project/>. On Elberling’s influence, see J.K. Dineen, *You Don’t Mess with Him’ How an S.F. Housing Advocate Wields Power by Funding Ballot Measures*, S.F. CHRON. (Nov. 18, 2021, 3:59 PM), <https://www.sfchronicle.com/sf/article/He-s-been-blamed-for-killing-housing-but-16630332.php>.

3. See sources cited in note 1, *supra*.

4. Knight, *supra* note 1.

5. See generally Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo, 283 Cal. Rptr. 3d 877 (Ct. App. 2021).

6. CAL. GOV’T CODE §§ 65589.5(f)(4), (j). Subdivision (j) does provide an exception for projects that would violate an objective health or safety standard.

7. On that transformation, see generally Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591 (2010).

8. See *infra* text accompanying notes 164–180.

9. See Letter from Daniel R. Golub on behalf of the Housing Action Coalition to the Hon. Barbara J. Parker, Oakland City Attorney, re: 1396 Fifth Street (Oct. 21, 2021) (on file with authors) (challenging

The HAA and CEQA have fair claims to being what professors Bill Eskridge and John Ferejohn call “super-statutes.”¹⁰ As Eskridge and Ferejohn define it, a super-statute is a law that

(1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.¹¹

As we explain in Part I, CEQA became super in the 1970s, thanks to a run of California Supreme Court decisions that construed it broadly to give, as the court saw it, “the fullest possible protection to the environment.”¹² The HAA began earning its stripes much more recently. The turning point came in 2017, when the legislature dramatically strengthened the law and codified that it “be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.”¹³

The ostensible “super-ness” of the two statutes creates a predicament for courts and other actors because CEQA and the HAA could not be more different in their basic institutional and normative principles. Consider three points of contrast. First, CEQA’s working premise is that “new construction” is bad for the environment.¹⁴ “Current environmental conditions” in the vicinity of a

city council’s decision to sustain an appeal of the planning commission’s unanimous determination that the housing project was exempt from CEQA); *Sonoma - 149 Fourth St.*, CARLA BLOG, <https://carlaef.org/legal-case/149-fourth-st-sonoma/> (last visited Oct. 21, 2022) (stating that housing organization had settled their HAA claim after “[r]unning] into an unfriendly judge who decided that nothing could overrule a city’s CEQA decision”). Oakland ultimately voted to issue the CEQA exemption and approve the 1396 Fifth Street project, ten months after the city council hearing at which the appeal was first heard. A warning letter from the state housing agency and the threats of HAA litigation from the project sponsor and YIMBY groups may have spurred the city to approve it. TRD Staff, *Oakland Finally Approves Housing Development, But Delay Could Kill It*, THE REAL DEAL (Jul. 25, 2022, 8:30 AM), <https://therealdeal.com/sanfrancisco/2022/07/25/oakland-finally-approves-housing-development-but-delay-could-kill-it/>; Sarah Klearman, *The State Began Investigating S.F., Oakland Housing Six Months Ago. What Happened?*, S.F. BUS. TIMES (Jul. 13, 2022, 10:38 AM), <https://www.bizjournals.com/sanfrancisco/news/2022/06/13/hcd-san-francisco-investigations-rhna.html>. Cf. Ayla Burnett & Samantha Norris, *Major West Oakland Housing Development Remains in Limbo*, THE OAKLANDSIDE (Dec. 13, 2021), <https://oaklandside.org/2021/12/13/golden-west-oakland-housing-development/> (detailing history of conflict over the project).

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

11. *Id.* at 1216.

12. *Friends of Mammoth v. Bd. of Supervisors*, 104 Cal. Rptr. 761, 768 (1972); *No Oil, Inc. v. City of Los Angeles*, 118 Cal. Rptr. 34, 38 (1974); *Wildlife Alive v. Chickering*, 132 Cal. Rptr. 377, 381 (1976).

13. S.B. 167, 2017 Leg., Reg. Sess. (Cal. 2017).

14. See, e.g., *Friends of Westwood, Inc. v. City of Los Angeles*, 235 Cal. Rptr. 788, 793 (Ct. App. 1987) (“the purpose of CEQA is to minimize the adverse effects of new construction on the environment”). This premise is laid bare by the fact that CEQA requires no analysis before a government agency denies a project, see CAL. PUB. RES. CODE § 21080(b)(5) (exempting “[p]rojects which a public agency rejects or disapproves”), whereas a full EIR is required if there is a “fair argument” that the approval of a project “may” have a significant environmental effect on any aspect of the physical environment, no matter how large the project’s countervailing environmental benefits. See *No Oil, Inc.*, 118 Cal. Rptr. at 45. Although CEQA codifies a legislative intent that agencies in regulating private activities give “major consideration . . . to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian,” CAL. PUB. RES. CODE § 21000(g), the proviso about “a decent

proposed project should be preserved if possible.¹⁵ By contrast, the HAA regards housing construction in urbanized areas as presumptively good for the environment. It opens with a legislative finding that local barriers to housing development cause “urban sprawl, excessive commuting, and air quality deterioration,” “undermining the state’s environmental and climate objectives.”¹⁶

Second, CEQA privileges slow, careful, deliberative evaluation of every possible environmental impact. If there is a fair argument that a project “may” have any significant local environmental impact, CEQA compels the preparation of an exhaustive environmental impact report (EIR).¹⁷ Litigation over the sufficiency of a CEQA clearance usually blocks construction while the case crawls along.¹⁸ The HAA, on the other hand, calls for speed. It requires cities to notify developers of any general plan or zoning standards a project violates within thirty to sixty days after receiving the complete project application,¹⁹ and it stipulates that violations of the state’s Permit Streamlining Act (PSA) shall be deemed violations of the HAA.²⁰

Third, courts in CEQA cases presume that cities act in good faith unless the city shortcuts environmental review.²¹ When pertinent facts and empirical

home . . . for every Californian” has to date had no apparent effect on the courts’ CEQA jurisprudence. We searched Westlaw for opinions citing this proviso. As of this writing, there are sixteen in total, not one of which invokes the proviso to put a limiting gloss on CEQA.

15. See CAL. PUB. RES. CODE § 21002 (declaring “the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects”); CAL. CODE REGS. tit. 14, § 15125 (stating that an EIR shall describe existing environmental conditions in the vicinity of the project, and that this description of existing conditions shall normally serve as the baseline for evaluating potential environmental effects of the project).

16. CAL. GOV’T CODE § 65589.5(a). See also *id.* § 65589.5(b) (“It is the policy of the state that a local government not reject or make infeasible housing development projects . . . without a thorough analysis of the economic, social, and environmental effects of the action”).

17. *No Oil, Inc.*, 118 Cal. Rptr. at 38.

18. STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT § 23.92 (CEB 2021) (“PRACTICE TIP: Injunctions are often not necessary to prevent work on the project from proceeding. Although the project applicant may start construction while litigation is pending, the applicant proceeds at its own risk. Because an adverse ruling on the merits by the trial court may result in an order enjoining construction, the project applicant may not be willing to start construction before the trial court decides the case.” (citations omitted).)

19. CAL. GOV’T CODE § 65589.5(j)(2).

20. *Id.* § 65589.5(h)(6)(B) (defining “disapproval” for purposes of the HAA to include failure to approve or deny a project within the time periods set by the Permit Streamlining Act).

21. This presumption manifests doctrinally as a distinction between *de novo* or “independent judgment” and deferential “substantial evidence” review. On questions where cities are considered trustworthy, the courts review the city’s decision deferentially (“substantial evidence”); on questions where cities’ competence or good faith is doubted, courts review the city’s decision *de novo*. The principal CEQA issues that get *de novo* / independent judgment review are about shortcutting of environmental review, specifically (1) determinations that a project does not require an EIR because there’s no “fair argument” that the project may have a significant environmental effect, see KOSTKA & ZISCHKE *supra* note 18, § 6.76 (citing and discussing cases); (2) whether an EIR sufficiently discussed a potential environmental impact, see *Sierra Club v. Cnty. Of Fresno*, 241 Cal. Rptr. 3d 508, 516–20 (2018); and (3) whether the agency complied with the procedural requirements of CEQA, *id.*

inferences are disputed, courts defer to the city's judgment.²² Not so under the HAA, which eliminates the traditional deference courts gave to cities regarding a housing project's compliance with local standards.²³ The HAA also prevents cities from using discretionary standards to deny or reduce the density of a project;²⁴ disables cities from applying most standards that post-date the developer's filing of a preliminary project application;²⁵ and authorizes courts to order the approval of projects that were denied in bad faith.²⁶

So how will the HAA and CEQA fit together? On one view, CEQA must reign supreme because a longstanding provision of the HAA states, "Nothing in this section shall be construed to relieve the local agency from complying with . . . the California Environmental Quality Act."²⁷ California courts have sometimes (less than carefully) concluded that such a clause entirely subordinates one statute to another.²⁸

But, as noted, the California legislature more recently proclaimed that the HAA "shall be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."²⁹ To achieve its stated purpose—to "meaningfully and effectively curb[] the capability of local governments to deny, reduce the density for, or render

at 512. Conversely, cities' factual determinations and empirical inferences are reviewed deferentially. *Id.* at 511–16.

22. *Sierra Club*, 241 Cal. Rptr. at 516–20.

23. CAL. GOV'T CODE § 65589.5(f)(4); *Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo*, 283 Cal. Rptr. 3d 877, 892–95 (2021) (rejecting city's argument for deference on meaning of its design guidelines. And applying HAA's "reasonable person" standard to determine project's compliance).

24. CAL. GOV'T CODE §§ 65589.5(h)(8), (j); *Cal. Renters Legal Advoc. & Educ. Fund*, 283 Cal. Rptr. 3d at 890–94 (reversing city's denial of project because city relied on design guidelines that were not objective).

25. CAL. GOV'T CODE § 65589.5(o).

26. *Id.* § 65589.5(k)(1)(A)(ii).

27. *Id.* § 65589.5.

28. For an illustration of how "reigning supreme" works in practice, consider the Court of Appeal's treatment of the relationship between a different environmental statute (the Coastal Act) and a different housing statute (the Density Bonus Law) in *Kalnel Gardens, LLC v. City of Los Angeles*, 208 Cal. Rptr. 3d 114, 122 (Ct. App. 2016). Like the HAA, the Density Bonus Law states that it shall not be construed in derogation of the Coastal Act. Compare CAL. GOV'T CODE 65589.5(e), with CAL. GOV'T CODE § 65915(m). However, the Coastal Act provides that the agency in charge of coastal development permits "may not require measures that reduce residential densities below the density sought by the applicant if the density sought is within the permitted density [under local zoning plus state density bonus law], unless the issuing agency . . . makes a finding, based on substantial evidence in the record, that the density sought by the applicant cannot feasibly be accommodated on the site in a manner that is in conformity with [the Coastal Act]." CAL. PUB. RES. CODE § 30604(f). In *Kalnel Gardens*, the agency denied the housing project on aesthetic grounds without making this infeasibility finding. The court excused the agency from the finding requirement on the theory that an outright denial of a housing project is not a "density reduction." 3 Cal. App. 5th at 947. This wordplay move was textually unnecessary (surely reducing density to zero can be described as a "reduction in density") and had the effect of categorically elevating the Coastal Act over the Density Bonus Law, notwithstanding pretty clear textual indications that the legislature wanted the two laws to be integrated with one another. See CAL. PUB. RES. CODE § 30604(f); CAL. GOV'T CODE §§ 65915(f)(5), (j).

29. S.B. 167, 2017 Leg., Reg. Sess. (Cal. 2017); CAL. GOV'T CODE § 65589.5(a)(2)(L).

infeasible housing development projects”³⁰—the HAA must exert a gravitational pull on CEQA. The alternative is a world in which cities would have virtually unfettered discretion to use CEQA to delay projects indefinitely, to force project proponents to pay for round after round of expensive environmental studies,³¹ and to encumber projects with costly mitigation requirements even if the project would be a big environmental win.³²

California’s housing and climate goals hang in the balance. Because CEQA focuses government decision makers on environmental impacts in the vicinity of a project, and because CEQA does not apply when cities say “no” to housing, CEQA gives asymmetric leverage to neighborhood opponents of the infill development that California needs to deal with climate change.³³ These projects are an environmental win: building dense housing in urban areas dramatically reduces vehicle emissions, as the HAA recognizes,³⁴ and alleviates pressure to build in the state’s wildfire-prone “wildland-urban interface.”³⁵ Harmonizing CEQA and the HAA is no mere academic exercise.

This Article runs as follows: Part I recounts the evolution of CEQA and the HAA, illustrating their respective claims to super-statute status. We will see that CEQA’s “super-ness” was revealed in part by its crushing a pro-development precursor to the HAA, the Permit Streamlining Act.³⁶ We will also explore the history of the HAA’s CEQA savings clause.

30. CAL. GOV’T CODE § 65589.5(a)(2)(K).

31. *Appellate Court Addresses Consultants’ Liability re Failure to Timely Prepare an EIR under CEQA*, GORDON & REES (Jan. 2010), <https://www.grsm.com/publications/2010/appellate-court-addresses-consultants-liability-re-failure-to-timely-prepare-an-eir-under-ceqa> (“Although CEQA places responsibility on the “lead agency” to prepare the EIR, in most circumstances the agency requires the project proponent to pay for the cost of the EIR”).

32. *See infra* Parts 0–0.

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

34. *See* Christopher M. Jones et al., *Carbon Footprint Planning Quantifying Local and State Mitigation Opportunities for 700 California Cities*, 3 Urb. Plan. 35, 44 (2018); Nathaniel Decker et al., *Right Type, Right Place Assessing the Environmental and Economic Impacts of Infill Residential Development Through 2030*, CTR. FOR L., ENERGY, & AND THE ENV’T, Mar. 2017, at 27–29.

35. By 2050, at the current rate of growth and under current growth patterns, an additional 645,000 housing units will be developed in very high fire-hazard severity zones. Karen Chapple et al., *Rebuilding for a Resilient Recovery Planning in California’s Wildland Urban Interface*, NEXT 10 & UC BERKELEY CTR. FOR COMM. INNOVATION, June 2021, at 7; *see* Greg Rosalsky, *How A Blistering Housing Market Could Be Making Wildfires Even More Dangerous*, NPR (Sept. 14, 2021), <https://www.npr.org/sections/money/2021/09/14/1036085807/how-a-blistering-housing-market-could-be-making-wildfires-even-more-dangerous>.

36. CAL. GOV’T CODE §§ 65920–65923.8.

Part II delves into the problem one of us has dubbed “CEQA-laundered denial[s],” now exemplified by the Stevenson Street project in San Francisco.³⁷ The municipal strategy of using CEQA to evade the HAA exploits soft spots in CEQA and background principles of administrative law. But we shall argue that an HAA construed as “super” can provide a remedy nonetheless, either directly or through its gravitational pull on CEQA and administrative law.

Part III contends that the HAA ought to shape environmental impact analysis itself. Because CEQA only applies to discretionary governmental acts,³⁸ environmental review for HAA-protected housing projects should consider only impacts caused by discretionary conditions that cities impose, not all the impacts that result from adding new dwelling units to the site. This only makes sense: the state legislature has prescribed that a certain number of units may be built on the site, and CEQA does not apply to state legislation.³⁹ Our HAA-informed gloss on the scope of CEQA review would eliminate substantial environmental reviews for the mine run of zoning-compliant housing projects.⁴⁰

But this is only one possible future. In another, CEQA swallows the HAA, worsening California’s affordability crisis, increasing greenhouse gas emissions, and exacerbating socioeconomic and racial inequality.⁴¹ This would only create more fodder for those who argue that California is symbolically liberal but operationally conservative.⁴² Stay tuned.

I. HOW CEQA AND THE HAA BECAME “SUPER”

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

37. Christopher Elmendorf (@CSElmdorf), TWITTER (Oct. 30, 2021), <https://twitter.com/CSElmdorf/status/1454460433671229443>.

38. CAL. PUB. RES. CODE § 21080.

39. *See id.* § 15378(b) (“Project [for CEQA purposes] does not include . . . [p]roposals for legislation to be enacted by the State Legislature”).

40. It’s important to recognize that CEQA does not itself confer discretion on municipal decision makers. *See id.* § 21004 (“In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division”).

41. *Cf.* ISSI ROMEM & ELIZABETH KNEEBONE, DISPARITY IN DEPARTURE: WHO LEAVES THE BAY AREA AND WHERE DO THEY GO? 8 (2018); Justin Ray, *Renting Is a Struggle for Black and Latinx Californians*, *Report Finds*, L.A. TIMES (Oct. 28, 2021), <https://www.latimes.com/california/newsletter/2021-10-28/black-california-renting-essential-california>; Marisol Cuellar Mejia et al., *California’s Housing Divide*, PUB. POL’Y INST. OF CAL. (May 13, 2022), <https://www.ppic.org/blog/californias-housing-divide/>; Peter Hepburn et al., *Racial and Gender Disparities Among Evicted Americans*, 7 SOCIO. SCI. 649, 649 (2020). Note that California has codified a requirement that local governments “affirmatively further fair housing”—which means, among other things, providing opportunities to develop affordable housing in high-opportunity neighborhoods—even as laws like CEQA arm local opponents of neighborhood change. *See* <https://www.hcd.ca.gov/affirmatively-furthering-fair-housing> (last visited July 10, 2022) (providing resources on history and implementation of the “affirmatively further fair housing” requirement).

42. Ezra Klein, *California Is Making Liberals Squirm*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/opinion/california-san-francisco-schools.html>.

(1) seeks to establish a new normative or institutional framework for state policy and (2) over time does “stick” in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.⁴³

In Part I.A, we explain how CEQA became a super-statute in the 1970s and then muscled a precursor of the HAA out of the way. Part I.B takes up the HAA and shows how it is becoming super today. Finally, in Part I.C, we explore the legislative history and current import of the provision stating that the HAA does not “relieve” a city from CEQA.⁴⁴

A. *The California Environmental Quality Act*

Enacted in 1970, CEQA heralded a transition from Governor Pat Brown’s California—a land of burgeoning suburbs and massive water and highway construction projects—to the slow-growth California that his son, Jerry, would preside over.⁴⁵ CEQA requires state and local agencies to study, disclose, and mitigate the environmental effects of discretionary agency actions that may significantly affect the environment.⁴⁶ Whether the legislature intended CEQA to be a “super-statute” is open to debate, but, looking back, it is clear that CEQA did “establish[] a new normative [and] institutional framework for state policy” and that the framework “stuck in the public culture” and had “a broad effect on the law.”⁴⁷

Two early judicial decisions launched CEQA on its path to “super-ness.” In *Friends of Mammoth v. Board of Supervisors*, the California Supreme Court gave a “broad interpretation to the act’s operative language” and extended CEQA to cover private activities such as homebuilding that require public permits.⁴⁸ Next came *No Oil, Inc. v. City of Los Angeles*, which held that CEQA requires preparation of a full EIR “whenever it *can be fairly argued* . . . that the project *may have a significant environmental impact*,” not just where the project is likely to have “important” or “momentous” impacts.⁴⁹

Beyond their immediate holdings, *Friends of Mammoth* and *No Oil* stood for a larger principle: that CEQA should be construed broadly and purposefully to give “the fullest possible protection” to the environment.⁵⁰ Although the

43. Eskridge & Ferejohn, *supra* note 10, at 1216.

44. CAL. GOV’T CODE § 65589.5(e).

45. For an in-depth look at how this transition played out in the California Supreme Court, see Joseph F. DiMento et al., *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist-Erratic Eras*, 27 UCLA L. REV. 859, 862–63 (1980).

46. See generally KOSTKA & ZISCHKE, *supra* note 18.

47. Eskridge & Ferejohn, *supra* note 10, at 1216.

48. 104 Cal. Rptr. 761, 769–770 (1972).

49. 118 Cal. Rptr. 34, 38 (1974).

50. See, e.g., *Wildlife Alive v. Chickering*, 132 Cal. Rptr. 377, 381 (1976) (relying on *Friends of Mammoth* and *No Oil* for the proposition, “[W]e have recognized the necessity of interpreting CEQA

legislature has repeatedly tinkered with CEQA,⁵¹ it has not challenged this foundational maxim, which courts continue to invoke to this day.⁵²

CEQA has also had “an effect beyond the four corners of the statute.”⁵³ The best example is court reliance on CEQA to disembowel the Permit Streamlining Act (PSA),⁵⁴ which was something of a precursor to the HAA.

The PSA originally required cities to approve or deny applications for a “development project” within one year of receiving a complete application, on pain of the project being “deemed approved” as a matter of law.⁵⁵ The Act did not expressly state that an agency’s failure to complete environmental review within the one-year period would result in the project’s constructive approval, but everything about the statute suggests that this was the legislature’s intent.

Consider, first, that the same bill that established the one-year PSA deadline also established deadlines for completing and certifying a CEQA review, the longest of which is also one year.⁵⁶ The bill as enacted also stated that the PSA’s one-year limit for project approval may be waived if the lead agency prepares an environmental impact statement under the National Environmental Policy Act (NEPA), the federal analogue to CEQA.⁵⁷ This implies that if a project *only* requires review under CEQA, it is subject to the PSA’s usual one-year limit and constructive approval penalty. Finally, the opening article of the PSA declared, “To the extent that the provisions of this chapter conflict with *any other provision of law*, the provisions of this chapter shall prevail.”⁵⁸ No carveout for CEQA was provided.

Yet, when courts confronted the question of whether a development project could be deemed approved under the PSA, notwithstanding the agency’s failure to complete and certify an EIR, they answered with a perfunctory “no.”⁵⁹ In two paragraphs of cursory analysis, the Court of Appeal concluded that automatic approval under the PSA would be unthinkably “drastic,” apparently because the legislature did not specifically “mention EIR certification in the [PSA’s]

broadly so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language”) (internal quotations omitted).

51. KOSTKA & ZISCHKE, *supra* note 18, §§ 1.24–1.26.

52. *See, e.g.,* Sierra Club v. Cnty. Of Fresno, 241 Cal. Rptr. 3d 508, 516 (2018) (“The foremost principle under CEQA is that the Legislature intended the act to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”) (citations and quotations omitted); Mountain Lion Found. v. Fish & Game Comm’n, 65 Cal. 4th 105 (1997) (holding that CEQA exemptions are to be construed narrowly).

53. Eskridge & Ferejohn, *supra* note 10, at 1216.

54. 1977 Cal. Stat. 3993.

55. *Id.* at 3995–96.

56. *Id.* at 4001.

57. In this circumstance, the PSA’s time limit for project approval is sixty days following certification of a “combined environmental impact report [CEQA]-environmental impact statement [NEPA].” *Id.* at 3996.

58. *Id.* at 3993 (emphasis added).

59. Land Waste Mgmt. v. Contra Costa Cnty. Bd. of Supervisors, 271 Cal. Rptr. 909, 915–16 (Ct. App. 1990).

automatic approval provisions.”⁶⁰ The gravitational pull of CEQA overwhelmed what should have been a fairly easy inference from the text and structure of the PSA, rendering the PSA’s one-year clock largely nugatory. (The court’s decision delayed the clock’s starting time from the developer’s filing of a complete project application, to the local agency’s completion of CEQA review.)

In theory, the Court of Appeal’s decision left open the possibility of enforcing CEQA’s time limits through mandamus, rather than automatic approval, but later decisions undermined this remedy too. Although a panel of the Court of Appeal held that mandamus is available if a city sits on a completed EIR without taking action to certify or disapprove it,⁶¹ a subsequent Court of Appeal decision, *Schellinger Brothers v. City of Sebastopol*,⁶² held that courts may not order a city to certify an EIR (as opposed to ordering the city to make up its mind about whether to certify it).⁶³ Even more damningly, *Schellinger* held that the project applicant had, by cooperating with the city well past the one-year deadline, forfeited its right to enforce CEQA’s deadlines.⁶⁴

Nowhere did *Schellinger* acknowledge that developers have an obvious economic incentive to cooperate with cities that exercise discretionary authority over their projects. That the court’s decision had the practical effect of nullifying the PSA for any project that requires an EIR also went unmentioned. The legislature probably intended that the CEQA and PSA deadlines run concurrently, but courts decided that they run back-to-back and that the first one (CEQA) is essentially unenforceable. The pull of the super-statute had enervated the PSA.

One measure of a statute’s super-ness is what a society will sacrifice to give it effect. If courts or other actors trim the statute where it butts up against other values and goals, the statute isn’t very super. But if other actors continue to give it the fullest possible construction even at the expense of other goals, the statute is super indeed. On this metric, CEQA looks super. Although it is notoriously difficult to estimate CEQA’s costs,⁶⁵ the courts, the executive branch, and the legislature have elaborated CEQA in ways that evince a willingness to incur substantial costs. The gutting of the PSA is just one example.

For another, consider that CEQA as construed by the courts and the Office of Planning and Research requires “substantial” mitigation of every identified impact unless “economic, social, or other conditions make it infeasible . . .”⁶⁶

60. *Id.*

61. *Sunset Drive Corp. v. City of Redlands*, 86 Cal. Rptr. 2d 209, 216–17 (Ct. App. 1999).

62. 102 Cal. Rptr. 3d 394, 409 (Ct. App. 2009).

63. *Id.*

64. *Id.* at 410–412.

65. Many of the costs come in the form of projects that were never proposed on account of CEQA requirements, but there is no credible way of estimating the universe of forgone projects without quasi-random variation in which sites are subject to CEQA (which does not exist).

66. CAL. PUB. RES. CODE §§ 21002, 21002.1; KOSTKA & ZISCHKE, *supra* note 18, § 17.13.

By contrast, CEQA's federal analogue, NEPA, requires only discussion of potential mitigation measures, not adoption of them.⁶⁷

Further, CEQA permits only narrow exemptions. The legislature has authorized the Office of Planning and Research and the Natural Resources Agency to create exemptions through the CEQA Guidelines, but it has not told them to weigh the costs of environmental review when deciding what to exempt. Rather, it instructed them to exempt "classes of projects that have been determined *not to have a significant effect* on the environment."⁶⁸ The Guidelines provide that an exemption may not be issued to an otherwise-qualified project if there is a "reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."⁶⁹ And the courts construe CEQA exemptions narrowly.⁷⁰

Prevailing notions about what counts as an environmental impact have also become more expansive over time. The Office of Planning and Research publishes an environmental checklist form to help lead agencies decide whether a project requires an EIR.⁷¹ The current form has ninety checkboxes for types of "potentially significant" impacts;⁷² a generation ago, it had about one-third fewer.⁷³

CEQA's gradual sprawl to encompass more varieties of impact owes something to the California Supreme Court's early pronouncement that CEQA should be construed broadly and to the Court's rejection of the notion that CEQA covers only "important" or "momentous" impacts.⁷⁴ But rules about CEQA litigation and remedies probably deserve some of the credit (or blame) too. Courtroom doors swing open for any opponent of a project who wants to challenge an agency's allegedly unlawful short-cutting of environmental review, such as granting an exemption or approving a negative declaration for a project

67. See *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("[NEPA's] mandate to the agencies is essentially procedural"); *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980) ("once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken") (internal citations and punctuation omitted); 40 C.F.R. § 1502.16(a)(9) (requiring discussion, though not adoption, of "[m]eans to mitigate adverse environmental impacts of" the project); 40 C.F.R. § 1502.14(e) (counseling that range of project alternatives included in environmental impact statement should include "appropriate mitigation measures").

68. CAL. PUB. RES. CODE § 21084(a) (emphasis added).

69. CAL. CODE REGS. tit. 14, § 15300.2(c).

70. See KOSTKA & ZISCHKE, *supra* note 18, § 5.126 (citing cases about judicial construction of the categorical, i.e., guidelines-based, exceptions).

71. See KOSTKA & ZISCHKE, *supra* note 18, § 17.3; ASS'N OF ENV'T PROS., 2022 CEQA STATUTE & GUIDELINES 335–49.

72. ASS'N OF ENV'T PROS., *supra* note 71, at 335–49.

73. OFF. OF PLAN. & RSCH., CEQA: THE CALIFORNIA ENVIRONMENTAL QUALITY ACT, LAW AND GUIDELINES 309–15 (1984).

74. See *supra* text accompanying notes 48–52.

that should have been processed with an EIR;⁷⁵ certifying an EIR that should have addressed certain potential impacts in more detail;⁷⁶ or approving a project with conditions that fail to mitigate identified environmental impacts to the maximum feasible extent.⁷⁷ So long as the plaintiff's objection was raised in the administrative process, it can be litigated in court,⁷⁸ and the party behind the lawsuit does not even have to reveal their identity.⁷⁹ The simple act of filing a CEQA claim is usually enough to put a project on ice, at least for a while, since lenders generally won't finance a project until any legal claims against it have been resolved.⁸⁰ And if the plaintiff prevails, they can often recover attorneys' fees from the defendant.⁸¹ These mutually reinforcing factors encourage speculative legal attacks on the environmental review of controversial projects.⁸²

By contrast, if a permitting agency "long-cuts" environmental review by, for example, requiring an EIR for a project that could have been processed with an exemption or refusing to certify an EIR unless further studies are conducted on non-issues, then the project proponent has no practical remedy. We explain why this is so in Part II.A, *infra*. But for now, the important point is what follows from the asymmetry. The asymmetry encourages agencies to err on the side of CEQA excess, particularly for controversial projects with well-funded opponents. When courts encounter CEQA, it is almost always in the context of

75. KOSTKA & ZISCHKE, *supra* note 18, § 6.76 (reviewing cases about the "fair argument" standard, which renders the question of whether a project requires an EIR rather than negative declaration a question of law).

76. *Sierra Club v. Cnty. of Fresno*, 241 Cal. Rptr. 3d 508, 519–520 (2018) (holding that whether an EIR "reasonably sets forth sufficient information to foster informed public participation and to enable the decision-makers to consider the environmental factors necessary to make a reasoned decision" is a question of law subject to *de novo* judicial review), citing *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm'rs.*, 111 Cal. Rptr. 2d 598, 606 (Ct. App. 2001).

77. See KOSTKA & ZISCHKE, *supra* note 18, §§ 14.8–14.20 (discussing cases on legal adequacy of mitigation measures).

78. See *id.* § 23.97 (discussing exhaustion of administrative remedies); *id.* §§ 23.3–23.14 (discussing liberal standing rules).

79. Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENV'T L.J. 21, 59–60 (2018) (discussing failed effort to get Judicial Council or Legislature to require disclosure of the identity of party who filed CEQA lawsuit).

80. See *Getting in Its Own Way Behind California's CEQA Curtain*, HOLLAND & KNIGHT, <https://www.hklaw.com/en/case-studies/getting-in-its-own-way-behind-californias-ceqa-curtain> (last visited Oct. 23, 2022) (quoting leading CEQA practitioner Jennifer Hernandez, "the act of merely filing a lawsuit is enough to halt construction loans for the 95 percent of housing not subsidized by taxpayers, as well as halt grants for government-subsidized affordable housing").

81. KOSTKA & ZISCHKE, *supra* note 18, §§ 23.126–23.137.

82. The actual share of proposed housing projects that undergo CEQA litigation is probably quite small. A recent study of all approved (not proposed) projects in twenty jurisdictions found that only about 2.8 percent were the subject of litigation. MOIRA O'NEILL ET AL., EXAMINING ENTITLEMENT IN CALIFORNIA TO INFORM POLICY AND PROCESS: ADVANCING SOCIAL EQUITY IN HOUSING DEVELOPMENT PATTERNS 80 (2022). While most of the cases featured CEQA claims, other claims were brought as well. *Id.* at 82. However, the small share of approved projects that face CEQA litigation is only the tip of an iceberg: it doesn't tell us anything about payoffs that were made to avoid litigation, or expenses that were incurred to bulletproof environmental review documents, or projects that faced litigation and were withdrawn because of it, or projects that were never proposed in the first place because developers judged the CEQA compliance costs and litigation risks to be too high.

an allegation that the agency did too little review, not too much. And every so often a panel of the Court of Appeal will hold that the agency should have studied a new kind of putative environmental effect, which then becomes part of the CEQA canon.⁸³

Writing about the seemingly unrelated field of patent law, Jonathan Masur has argued that such asymmetries tend to ratchet the law in the direction favored by the parties with the opportunity and incentive to sue.⁸⁴ Denials, but not grants, of patents by the Patent and Trademark Office are appealable to the Federal Circuit.⁸⁵ As a result, the appellant in a case before the Federal Circuit is almost always arguing that the Office afforded too little protection to an alleged invention, not too much. Although most such claims fail, the occasional wins tend to expand what is patentable.⁸⁶ The Patent and Trademark Office then becomes even more liberal in granting patents, and future cases about patent denials arise from facts that could move the law toward an even more pro-patent position.⁸⁷

So too with CEQA. Asymmetric litigation pressure encourages fulsome environmental review, rather than the kind of thin review that might generate precedents limiting CEQA's reach. In a world where agencies err on the side of too much environmental review, not too little, it is hard for courts to make new law limiting CEQA's reach without speaking in dicta. Speaking in dicta is, of course, disfavored.⁸⁸

This is not to say that courts never have opportunities to chip away at CEQA.⁸⁹ Still, the opportunities are rarer than they would be if agencies also faced claims from plaintiffs arguing that an environmental review exceeded what CEQA requires. In sum, CEQA's "super-ness" today is the joint product of early,

83. See, e.g., *Make UC a Good Neighbor v. Regents of Univ. of Cal.*, 304 Cal. Rptr. 3d 834 (Ct. App. 2023) (holding that CEQA requires analysis of "social noise" impacts of a student dorm). Although the California Supreme Court just granted a petition to review this case, see *Make UC a Good Neighbor v. Regents of the Univ. of Cal.*, No. S279242, 2023 WL 3514237 (Cal. May 17, 2023), the Court rarely corrects Court of Appeal decisions concerning CEQA, as it grants only about 3 percent of petitions for review in civil appeals. See 2019 COURT STATISTICS REPORT, STATEWIDE CASELOAD TRENDS 2008-09 THROUGH 2017-18, CAL. JUD. COUNCIL 30 (2019).

84. Jonathan Masur, *Patent Inflation*, 121 YALE L.J. 470, 531–32 (2011).

85. *Id.* at 475.

86. *Id.* at 491–92.

87. *Id.* at 492.

88. *Cf. id.* at 493–94, 494 n.101 (making similar point about patent law).

89. *Cf. Berkeley Hillside Pres. v. City of Berkeley*, 184 Cal. Rptr. 3d 643, 650–661 (2015) (holding that the "unusual circumstances" exception to the CEQA exemptions is not satisfied by a mere "reasonable possibility" that an activity will have a significant effect on the environment, and disapproving *Communities for a Better Environment v. California Resources Agency*, 126 Cal. Rptr. 2d 441, 464 (Ct. App. 2002)); *Porterville Citizens for Responsible Hillside Dev. v. City of Porterville*, 69 Cal. Rptr. 3d 105, 121 (Ct. App. 2007) ("Unsubstantiated fears about potential economic effects resulting from a proposed project are not environmental impacts that may be considered under CEQA."). See also *infra* notes 201–210 and accompanying text (discussing the dearth of case law on whether a city ordered too much CEQA review).

expansive decisions of the California Supreme Court, fifty years of asymmetric litigation pressure, and legislative and executive-branch acquiescence.

B. *The Housing Accountability Act*

In its current form, the HAA prevents cities from denying or reducing the density of housing projects that comply with applicable, objective planning and zoning criteria unless the city shows that the project would violate a health or safety standard.⁹⁰ The statute establishes rules of construction,⁹¹ procedure,⁹² evidence,⁹³ and remedies⁹⁴ that are very favorable to housing.

But the HAA was far from “super” as enacted in 1982, though even then it had become clear that cities were putting the brakes on housing production.⁹⁵ The law originally consisted of just two short paragraphs telling local governments to approve zoning-compliant housing projects unless the project would injure public health or safety.⁹⁶ A 1990 amendment added additional protections for affordable projects.⁹⁷ Today, a qualifying affordable project must be at least 20 percent low-income or 100 percent moderate income.⁹⁸

Subsequent updates to the HAA (1) barred local governments from denying zoning-compliant projects except on the basis of written health or safety standards;⁹⁹ (2) defined projects as zoning-compliant if they satisfy the objective standards found in the city’s zoning code and general plan as of the date of the

90. CAL. GOV’T CODE § 65589.5(j)(1)(A).

91. *Id.* § 65589.5(a)(2)(L) (“It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.”).

92. *Id.* § 65589.5(j)(2) (stating that project shall be deemed to comply with any standard of which the local government fails to give prompt written notice of noncompliance).

93. *Id.* § 65589.5(f)(4) (“a housing development project or emergency shelter shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity”).

94. *Id.* § 65589.5(k) (authorizing courts to order projects approved, fine cities, and award attorneys’ fees to prevailing plaintiffs).

95. CAL. LEGIS. ANALYST’S OFF., CALIFORNIA’S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 7 (2015) (noting that California home prices were 80 percent higher than the national average by 1980, compared to just 30 percent higher than the national average in 1970). Since then, there has been extensive literature exploring the political economy and public choice explanations for why so few American cities are pro-development. *See, e.g.*, WILLIAM A. FISCHER, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 1 (2001) (describing the organizing power of local incumbent homeowners); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1676–78 (2013) (emphasizing the power individual local legislators have over their districts in the absence of differentiated party competition); Roderick M. Hills, Jr. & David Schleicher, *Balancing the “Zoning Budget,”* 63 CASE WEST. L. REV. 81, 81 (2011) (emphasizing the difficulty of mobilization by developers against seriatim downzonings).

96. 1982 Cal. Stat. 5484.

97. 1990 Cal. Stat. 6553 (S.B. 2011). These protections are described in Part I.0, *infra*.

98. CAL. GOV’T CODE § 65589.5(h)(3).

99. S.B. 1711, 1991 Leg., Reg. Sess. (Cal. 1992) (codified at CAL. GOV’T CODE §§ 65589.5(d)(2), (j)(1)).

developer's project application;¹⁰⁰ (3) cracked down on certain obvious ruses, such as cities declaring any zoning-code violation to be a health-and-safety violation;¹⁰¹ (4) required cities that wrongfully deny an affordable project to pay the prevailing party's legal fees;¹⁰² (5) authorized courts to compel cities to take action on a wrongfully denied project within sixty days;¹⁰³ and (6) authorized courts to fine cities that deny projects in bad faith and then miss the short, 60-day deadline for complying with a court's remedial order.¹⁰⁴

All of this sounds pretty super, but if the test for a super-statute is that it "sticks" in "the public culture" and "has a broad effect on the law,"¹⁰⁵ then the HAA did not become a serious candidate until 2016–2017. There were few HAA cases before then, most likely because developers who suffer a wrongful project denial are rarely willing sue a city with which they hope to do business again in the future. In 2015, however, a ragtag bunch of self-described "YIMBYs" (Yes in My Back Yard advocates for housing) coalesced in San Francisco, discovered the HAA, and started suing suburbs for denying needed housing.¹⁰⁶ It was not entirely clear whether they even had standing to do so, but the legislature answered their call and authorized HAA enforcement by "housing organizations."¹⁰⁷

A year later, in 2017, the legislature enacted a trio of bills that dramatically strengthened the HAA and declared it super.¹⁰⁸ Assembly Bill 1515 took up the question of what it means for a housing project to comply with general plan, zoning, and design standards.¹⁰⁹ The courts had long deferred to cities on such matters, refusing to set aside municipal determinations that a project was noncompliant if any reasonable person could agree with the city's conclusion.¹¹⁰ A.B. 1515 turned that doctrine on its head, defining projects as compliant as a

100. S.B. 748, 1999 Leg., Reg. Sess. (Cal. 1999) (codified at CAL. GOV'T CODE § 65589.5(j)(1)).

101. S.B. 575, 2005 Leg., Reg. Sess. (Cal. 2005) (codified at CAL. GOV'T CODE § 65589.5(d)(2)(A)) (declaring that an affordable housing project's inconsistency with the city's general plan or zoning ordinance is not, per se, a "specific adverse impact" on health or safety violation of a written health or safety standard). See also Christopher Elmendorf (@CSElmendorf), TWITTER (Dec. 23, 2021), <https://twitter.com/CSElmendorf/status/1474286668936998914> (providing an example from 1991 of city end-running the HAA by declaring requirement of two off-street parking spaces per residential unit to be necessary for public health and safety).

102. A.B. 369, 2001 Leg., Reg. Sess. (Cal. 2001) (codified at CAL. GOV'T CODE § 65589.5(k)(1)(A)(ii)).

103. S.B. 748.

104. S.B. 575.

105. Eskridge & Ferejohn, *supra* note 10, at 1216.

106. CONNOR DOUGHERTY, GOLDEN GATES: THE HOUSING CRISIS AND A RECKONING FOR THE AMERICAN DREAM 93–116 (2020).

107. A.B. 2584, 2015 Leg., Reg. Sess. (Cal. 2016) (codified at CAL. GOV'T CODE 65589.5 § (k)(1)(A)(i)).

108. A.B. 678, 2017 Leg., Reg. Sess. (Cal. 2017); A.B. 1515, 2017 Leg., Reg. Sess. (Cal. 2017); S.B. 167, 2017 Leg., Reg. Sess. (Cal. 2017).

109. A.B. 1515.

110. *See No Oil, Inc. v. City of Los Angeles*, 242 Cal. Rptr. 37, 47–48 (1987); CECILY TALBERT BARCLAY & MATTHEW S. GRAY, CALIFORNIA LAND USE & PLANNING LAW 538–40 (36th ed. 2018).

matter of law if any reasonable person could deem the project to comply on the record before the city, even if another reasonable person might agree with the city's conclusion that a project is noncompliant.¹¹¹

A companion bill, Senate Bill 167, required cities to give developers prompt written notice of any zoning, general plan, or design standard that their proposed project violates, on pain of the project being deemed to comply as a matter of law.¹¹² S.B. 167 also narrowed the HAA's carveout for health and safety standards by requiring cities to show by a preponderance of the evidence that the project would violate a specific health or safety standard.¹¹³ (The previous evidentiary standard gave cities more slack.¹¹⁴) Finally, S.B. 167 codified numerous legislative findings, including:

The Legislature's intent in enacting [the HAA] in 1982 and in expanding its provisions since then was to significantly increase the approval and construction of new housing . . . by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects That intent has not been fulfilled.¹¹⁵

And:

It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.¹¹⁶

A year later, the legislature added:

It is the intent of the Legislature that the conditions that would have a specific, adverse impact upon the public health and safety [within the meaning of the HAA] arise infrequently.¹¹⁷

In 2019, the legislature codified a preliminary application process, allowing developers to quickly establish a vesting date after which the city may not use newly adopted standards to deny or downsize the project.¹¹⁸ The legislature also spelled out what it means for a zoning standard to qualify as objective;¹¹⁹ only

111. The new standard is codified at CAL. GOV'T CODE § 65589.5(f)(4).

112. S.B. 167, 2017 Leg., Reg. Sess. (Cal. 2017) (codified at CAL. GOV'T CODE § 65589.5(j)(2)).

113. CAL. GOV'T CODE § 65589.5(j)(1) (2021).

114. The former standard, "substantial evidence," was very deferential. See Bill Analysis of S.B. 167, Sen. Floor (May 23, 2017), at p. 5, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB167 ("This bill increases the burden on local jurisdictions from 'substantial evidence' to 'a preponderance of the evidence' when making findings as to the disapproval of a housing development project. According to the author, state courts are too deferential to local jurisdictions and accept 'any justification' for failing to meet state housing goals.")

115. *Id.* § 65589.5(a)(2)(K).

116. *Id.* § 65589.5(a)(2)(L).

117. A.B. 3194, 2017 Leg., Reg. Sess. (Cal. 2018) (codified at CAL. GOV'T CODE § 65589.5(a)(3)).

118. S.B. 330, 2019 Leg., Reg. Sess. (Cal. 2019); CAL. GOV'T CODE §§ 65943, 65589.5(h)(5). Originally slated to expire after five years, S.B. 330 was extended for another half decade by S.B. 8, 2021 Leg., Reg. Sess. (Cal. 2021).

119. CAL. GOV'T CODE § 65589.5(h)(8) (2021) ("'[O]bjective' means involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and

such objective standards may be used to deny or reduce the density of a project.¹²⁰

All this evinces a legislative intent to forge a super-statute, but whether the HAA “‘stick[s]’ in the public culture such that . . . its institutional or normative principles have a broad effect on the law”¹²¹ ultimately depends on how judicial and executive-branch actors respond to it.

In *California Renters Legal Advocacy and Education Fund v. City of San Mateo* (*California Renters*), the pumped-up HAA passed its first judicial test with flying colors.¹²² The city of San Mateo had rejected a small condo project based on the city’s Multi-Family Design Guidelines, which prescribe “a transition or step in height” between new multifamily buildings and adjoining single-family homes.¹²³ When a nonprofit housing organization challenged the project denial in court, San Mateo argued that the HAA violated its right to “home rule” under California’s constitution and the prohibition against delegation of municipal authority.¹²⁴ In the alternative, the city asserted that the HAA’s definition of project compliance left intact the tradition of judicial deference to cities on questions about the meaning of local ordinances and that the city, in denying the project, had effectively interpreted its design guidelines to require setbacks that the project lacked.¹²⁵ A trial court accepted the city’s constitutional and statutory arguments,¹²⁶ but the Court of Appeal would have none of it.¹²⁷

Before the appellate court, San Mateo and local government *amici* mustered new constitutional attacks on the HAA—not just home rule and private delegation, but due process too.¹²⁸ The Court of Appeal could have dodged the new issues, but instead it decided all of the constitutional questions—against the city—thereby securing the HAA’s footing going forward.¹²⁹ The appellate court also carefully traced the evolution of the HAA, juxtaposing it against the seeming intractability of California’s housing shortage. It concluded, “[t]he HAA is today

uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official.”).

120. CAL. GOV’T CODE § 65589.5(j)(1).

121. Eskridge & Ferejohn, *supra* note 10, at 1216.

122. 283 Cal. Rptr. 3d 877, 900 (Ct. App. 2021).

123. *Id.* at 883–85.

124. Order Denying Petition for Writ of Administrative Mandate at 4–6, *Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo*, 283 Cal. Rptr. 3d 877 (Ct. App. 2021) (No. 18-CIV-02105).

125. *Id.* at 3–4.

126. *Id.* at 3–6.

127. *Cal. Renters Legal Advoc. & Educ. Fund*, 283 Cal. Rptr. 3d at 895–902.

128. Respondents’ Brief in Opposition to Petitioners’ Opening Brief, *Cal. Renters Legal Advoc. & Educ. Fund*, 283 Cal. Rptr. 3d 877 (No. 18-CIV-02105); Brief for Cal. State Ass’n of Cnty. as Amici Curiae Supporting Respondents, *Cal. Renters Legal Advoc. & Educ. Fund*, 283 Cal. Rptr. 3d 877 (No. 18-CIV-02105).

129. *Cal. Renters Legal Advoc. & Educ. Fund*, 283 Cal. Rptr. 3d at 895–902.

strong medicine precisely because the Legislature has diagnosed a sick patient.”¹³⁰

The legislature’s instruction that the HAA “be interpreted and implemented in a manner to afford the fullest possible weight to . . . housing” was reiterated three times in the court’s opinion.¹³¹

As for San Mateo’s design guidelines, the Court of Appeal held that they were not objective and, in the alternative, that a reasonable person could deem the project at issue to comply with them.¹³² Hard-eyed independent judicial review, not deference, was the order of the day. Deferring to the city’s interpretation of the guidelines would be “inappropriate,” the court explained, lest the City “circumvent[] what was intended to be a strict limitation on its authority.”¹³³

California Renters is only one case,¹³⁴ but other courts have already taken note.¹³⁵ What’s more, other actors in California’s legal-political establishment are also embracing the HAA and signaling that they want it to have “a broad effect on the law.”¹³⁶ After the trial court in *California Renters* struck down the HAA, Attorney General Becerra announced that his office would intervene on appeal.¹³⁷ When the Court of Appeal’s decision came down, new Attorney General Bonta put out a press release trumpeting the win.¹³⁸

While *California Renters* was pending, the Governor requested, and the legislature authorized, funding for a new Housing Accountability Unit within the Department of Housing and Community Development (HCD).¹³⁹ Fully staffed,

130. *Id.* at 902.

131. *Id.* at 887, 894, 902.

132. *Id.* at 889–95.

133. *Id.* at 893–94 (citing *Ruegg & Ellsworth v. City of Berkeley*, 277 Cal. Rptr. 3d 649, 664 (Ct. App. 2021)). *Ruegg* is an important case that takes a similar no-deference stance in the context of SB 35, a recently enacted bill that requires cities that are not making adequate progress toward their share of the regional housing target to permit certain projects ministerially. *See* S.B. 35, 2017 Leg., Reg. Sess. (Cal. 2017); CAL. GOV’T CODE § 65913.4.

134. Though *Ruegg & Ellsworth* is similar in spirit. *See Ruegg & Ellsworth*, 277 Cal. Rptr. 3d at 649.

135. *See Bankers Hill 150 v. City of San Diego*, 289 Cal. Rptr. 3d 268, 283–84 (Ct. App. 2022), review denied (May 11, 2022) (extensively quoting *California Renters* for its analysis of the standard of review under the HAA).

136. Eskridge & Ferejohn, *supra* note 10, at 1216.

137. Emily Durey, *State Intervenes in San Mateo Housing Case that Could Have Major Implications*, MERCURY NEWS (Jan. 15, 2020), [mercurynews.com/2020/01/14/state-intervenes-in-san-mateo-housing-case-that-could-have-major-implications/](https://www.mercurynews.com/2020/01/14/state-intervenes-in-san-mateo-housing-case-that-could-have-major-implications/).

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

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

the Housing Accountability Unit will be a twenty-five-person team that investigates alleged violations of state housing law, sends warning letters to cities, and makes referrals to the Attorney General's new "housing strike force."¹⁴⁰ The HAA is not the only housing law the Housing Accountability Unit and the strike force will enforce, but it is the capstone.¹⁴¹ The fact that these new enforcement capacities came together in the shadow of *California Renters* suggests that the HAA is in fact bringing about "a new normative [and] institutional framework for state policy" which will "stick[] in the public culture" and have "a broad effect on the law."¹⁴²

The acid test is now at hand. Two days after San Francisco's Board of Supervisors stalled the Stevenson Street project—voting to require further environmental study while treating the vote as a project denial¹⁴³—the director of the state housing department announced that its Housing Accountability Unit would investigate the apparent denial.¹⁴⁴ We'll soon learn whether the HAA is super enough to stand up to CEQA, or whether it will tumble like its precursor, the PSA.

C. *A Note on the HAA's CEQA Savings Clause*

The invitation for San Francisco's maneuver in the Stevenson Street case was a proviso in the HAA that states, "Nothing in this [statute] shall be construed to relieve [a city] from complying with . . . the California Environmental Quality Act."¹⁴⁵ This clause originated as a perfunctory addition to a 1990 measure, Senate Bill 2011 (SB 2011), which sought to augment the HAA with a powerful "builder's remedy" that would exempt affordable housing projects from local regulations.¹⁴⁶

The sponsors of SB 2011 argued that cities without a compliant "housing element"—a state-approved plan to accommodate the city's share of regionally needed housing—should not be allowed to deny affordable housing projects

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

141. For a summary of the laws the HAU may enforce, see *Accountability and Enforcement*, CAL. DEP'T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/planning-and-community-development/accountability-and-enforcement> (last visited Nov. 15, 2022) (select "Enforcement Authority" tab).

142. Eskridge & Ferejohn, *supra* note 10, at 1216.

143. See *infra* notes 164–179 and accompanying text.

144. J.K. Dineen, *State Investigating S.F.'s Decision to Reject Turning Parking Lot into 500 Housing Units*, S.F. CHRON. (Oct. 28, 2021), <https://www.sfchronicle.com/sf/article/State-investigating-S-F-s-decision-to-reject-16573167.php>.

145. CAL. GOV'T CODE § 65589.5(e).

146. S.B. 2011, 1982 Cal. Stats. 5484.

except on narrow, enumerated grounds.¹⁴⁷ As introduced, the bill would have barred noncompliant cities from applying their zoning code, general plan, or development standards to an affordable project.¹⁴⁸

Early in the legislative process, some advocates expressed concern that SB 2011 might exempt affordable housing from CEQA and other environmental laws.¹⁴⁹ The savings clause was added in response, to ensure that the HAA does not “relieve” a city from complying with CEQA.¹⁵⁰ However, in reading the entire bill file, we found no memo, letter, bill summary, newspaper clipping, or anything else explaining *how* anyone thought CEQA would or should apply to this new class of zoning-exempt projects. Nor did anyone address CEQA’s application to the traditional class of HAA-protected projects in cities with compliant housing elements, i.e., projects that comply with the city’s objective general plan and zoning standards.

Most of the debate over SB 2011 centered on arguments that the bill would let developers run roughshod over local planning. Eventually, the legislature made some softening amendments,¹⁵¹ but, backed by a coalition of business groups and affordable housing advocates,¹⁵² the bill passed both houses of the legislature in a form that was expected to be transformative.¹⁵³ Governor George Deukmejian’s Office of Local Government Affairs urged a veto, contending that the enrolled bill would “prohibit a city . . . from denying a high density apartment project . . . [in] a low density single-family residence area.”¹⁵⁴ But his HCD

147. See Memorandum from Dave Kilby, Cal. Chamber of Com., to Sen. Comm. on Hous. & Urban Affs. (Apr. 5, 1990) (on file with authors); Letter from Bay Area Council to Sen. Comm. on Hous. & Urban Affs. (Apr. 6, 1990) (on file with authors).

148. Bill Analysis of S.B. 2011, Sen. Comm. on Hous. & Urban Affs. (Apr. 5, 1990) (on file with authors).

149. See Fax Transmittal to Paula Carrell from John [last name not legible] (Mar. 28, 1990) (providing draft of amendments) (on file with authors).

150. See *id.*; S.B. 2011, 1989 Leg., Reg. Sess. (Cal. 1990) (as amended in the Senate on Apr. 5, 1990) (on file with authors).

151. The most important of these allows local governments to apply “development standards” that are consistent with meeting their housing targets. See CAL. GOV’T CODE 65589.5(f)(1); ASSEMB. LOC. GOV’T COMM., QUESTION & ANSWER PAPER: S.B. 2011 3–4 (1990) (stating that the development standards exception “appears to supersede” the bill’s core requirement that cities not impose conditions that render the project infeasible, so long as the development standards are consistent with “objectives stated in the housing element”).

152. Vlae Kershner, *Bill to Force Cities to Build Low-Income Housing Gets Ok*, S.F. CHRON., Aug. 22, 1990 (describing SB 2011 as “one of the biggest legislative surprises of the current session” and “supported by an odd coalition of liberal housing advocates and conservative business groups”).

153. See *infra* notes 154–155 and accompanying text (describing bill’s characterization by state agencies); Kershner, *supra* note 152 (calling S.B. 2011 “a powerful bill designed to bludgeon exclusive suburban communities into accepting low-income housing”). In folder ten of the bill file, there is a newspaper clipping of unmarked origin that quotes Burlingame city council candidate Dorothy Cusick as saying, “Unless we get the housing element of our general plan updated, there’s not much the City Council can do to prevent a developer from building multiple dwelling units without regard to zoning, lot setbacks and densities if 20% of the units are designated low cost.”

154. OFF. OF LOC. GOV’T AFFS., ENROLLED BILL REPORT, S.B. 2011 5 (Sept. 6, 1990) (on file with authors).

recommended approval, quoting advocates who called it the most important housing bill in a decade.¹⁵⁵

Governor Deukmejian followed HCD's advice and signed the bill into law.¹⁵⁶ Yet the new builder's remedy, so feared and vaunted, never amounted to much. We canvassed developers, housing advocates, and HCD staffers for examples of its use and found just one attempt—which failed.¹⁵⁷ But the CEQA savings clause that was added as an uncontroversial check on the builder's remedy lives on, constraining not only the imagined zoning-noncompliant project in a city without a compliant housing element, but also potentially every plain vanilla, fully plan- and zoning-compliant project anywhere in the state. How seriously it constrains these ordinary projects will depend on how the arguments of Parts II and III of this paper are received.

Needless to say, it would be odd to read a minor addition to a pro-housing bill as inadvertently gutting the very statutory scheme it meant to strengthen. The Office of Local Government Affairs and others vociferously opposed SB 2011 because they believed it would prevent cities from denying high-density affordable apartment projects in low-density neighborhoods.¹⁵⁸ Presumably, they would not have fought the bill if they had thought its CEQA proviso allowed cities to put HAA-protected projects on ice. It also bears emphasis that the CEQA savings clause predates the Court of Appeal decisions that read CEQA in a manner that gutted the PSA and rendered the CEQA timelines essentially unenforceable.¹⁵⁹ Circa 1990, it was reasonable to believe that the risk of CEQA abuse was minimal because prolonged CEQA delays were illegal.

So, the CEQA savings clause should not be read to swallow the HAA. But neither should it be read out of the statute. The legislature confirmed as much in 2019 when it added a new requirement and a correlative CEQA carveout to the HAA.¹⁶⁰ The new provision bars cities from applying almost any development standard or fee to a project if the measure was adopted after the developer's filing of a preliminary project application—except that the city may apply the measure if “necessary to avoid or substantially lessen an impact of the project under the California Environmental Quality Act.”¹⁶¹

155. DEP'T OF HOUS. AND CMTY. DEV., ENROLLED BILL REPORT, S.B. 2011 3 (Sept. 15, 1990) (on file with authors).

156. 1990 Cal. Legis. Serv. 1439 (West) (stating that bill was approved by the Governor on Sept. 28, 1990).

157. This attempt is memorialized in the S.B. 2011 bill file. A homeowner in Albany tried to legalize an existing second unit and was told to provide two off-street parking spaces. The homeowner tried to use S.B. 2011 to get around the parking requirement, and the city said no, arguing that the parking minimum was a “health and safety standard” and therefore a permissible ground for denial under the HAA. The homeowner opted not to sue. *See* Bay Area Council, *Albany Steamrolls Region's First SB2011 Challenge*, HOUSING & DEVELOPMENT REPORT 2 (May 1991) (on file with authors).

158. *See supra* note 154.

159. *Land Waste Mgmt. v. Contra Costa Cnty. Bd. of Supervisors*, 271 Cal. Rptr. 909, 915–16 (Ct. App. 1990); *Schellinger Bros. v. City of Sebastopol*, 102 Cal. Rptr. 3d 394, 405–06 (Ct. App. 2009).

160. CAL. GOV'T CODE § 65589.5(o).

161. *Id.* § 65589.5(o)(2).

The difficult task of courts and administrators today is to harmonize the two “super-statutes”: to ensure that cities complete appropriate environmental reviews without using CEQA to slip the HAA’s grip. We explore how to do so in the next Parts.

II. DOES THE HAA (OR ANYTHING ELSE) PROVIDE A REMEDY FOR CEQA-LAUNDERED PROJECT DENIALS?

The HAA prevents cities from denying or reducing the density of housing projects, but, as noted, it does not exempt projects from environmental review.¹⁶² And although CEQA spells out time limits for the completion of environmental review, those limits have proven illusory in court.¹⁶³ So if a city wants to deny a project that the HAA protects, what is to keep the city from laundering the denial, as it were, through CEQA? May the city keep demanding additional environmental studies until, after squandering years and fortunes, the developer cries uncle and walks away?

These are the questions raised by our running example, the San Francisco Board of Supervisors’ vote sustaining a local gadfly’s appeal of the Stevenson Street project. Rather than deny the project outright or reduce its density—likely HAA violations—the Board reversed the planning commission’s certification of the project’s EIR and directed the clerk to prepare findings that it was inadequate.¹⁶⁴

Yet, given what the appellant wanted and what supervisors said at the hearing and afterward, it is clear that the Board’s real objective was not to surface and mitigate potential environmental impacts, but to defeat the project. The appellant, a local political power broker,¹⁶⁵ made no bones about his goal. In an op-ed and blog post, he demanded that the project sponsor donate at least a third of the site to the city and proceed with a smaller project.¹⁶⁶

Most of the supervisors who voted “No” argued that the project was not affordable enough and would cause gentrification¹⁶⁷—which is not an

162. *Id* § 65589.5(e).

163. *See supra* notes 53–64 and accompanying text.

164. *See* Meeting Minutes, SAN FRANCISCO BD. OF SUPERVISORS (Oct. 26, 2021), https://sfbos.org/sites/default/files/bag102621_minutes.pdf.

165. *See* Dineen, *supra* note 2 (profiling the appellant, John Elberling, and quoting a developer as saying “I realized pretty quickly if I wanted to build in SoMa I was going to have to go through John”).

166. *See* Elberling, *supra* note 2; Angelica Cabande et al., *The Solution to SF’s Affordable Housing Crisis Is Simple — Build Affordable Housing*, S.F. EXAM’R (Nov. 29, 2021), <https://www.sfexaminer.com/opinion/the-solution-to-sfs-affordable-housing-crisis-is-simple-build-affordable-housing/>.

167. Supervisor Walton argued that the new housing would “have a very significant displacement and social economic impact on the Sixth Street corridor.” Joe Kukura, *Supes Shoot Down 27-Story SoMa Residential Tower Over Seismic, Displacement Concerns*, SFIST (Oct. 27, 2021), <https://sfist.com/2021/10/27/supes-shoot-down-27-story-soma-residential-tower-over-earthquake-displacement-concerns/>. Supervisor Preston stated he was “baffled” that the city did not get independent guidance in analyzing impacts of gentrification and displacement. Tim Redmond, *In Dramatic Move, Supes Block Huge Luxury Housing Project in Soma*, 48HILLS (Oct. 27, 2021),

environmental impact¹⁶⁸ and is exceedingly unlikely to be caused by the project in any event.¹⁶⁹ Supervisor Mandelman told a reporter that he would “feel very good about this vote” if the site “become[s] a 100% affordable project,” but that if “15 years from now it’s still a parking lot, then I will not feel good.”¹⁷⁰ That is an explanation for a vote to deny, not a vote for further environmental study. Supervisor Melgar said the problem was that the developer hadn’t “negotiated a deal” with TODCO, the politically powerful nonprofit that led the charge against the project.¹⁷¹ That, of course, has no bearing on the adequacy of the EIR.

The supervisors who voted “No” also knotted themselves up with self-contradictory objections. For example, Ronen and Mandelman stressed that the developer did not have financing and that the project probably was not economically viable, with the implication being: “Don’t blame us for blocking housing.”¹⁷² Yet, they also demanded that the developer reserve more units for low-income households,¹⁷³ making the project even more difficult to finance.

The representative who came closest to voicing an environmental objection was Supervisor Ronen, who expressed concern that the project’s foundation might be inadequate.¹⁷⁴ She pointed out that another downtown project, the Millennium Tower, had required an expensive retrofit, and she argued that the EIR for Stevenson Street should have fleshed out the seismic issues in detail.¹⁷⁵

<https://48hills.org/2021/10/in-dramatic-move-supes-block-huge-luxury-housing-project-in-soma/>.

Supervisor Chan commented that it was “interesting” that the Planning Commission did not “broaden its analysis” to include gentrification impacts. *Id.*

168. See *Porterville Citizens for Responsible Hillside Dev. v. City of Porterville*, 157 Cal. App. 4th 885, 905–06 (Ct. App. 2007) (“Unsubstantiated fears about potential economic effects resulting from a proposed project are not environmental impacts that may be considered under CEQA.”). CEQA focuses on impacts on the “physical environment,” see CAL. PUB. RES. CODE § 21065; CAL. CODE REGS. tit. 14, §§ 15060(c)(2), 15060(c)(3), 15378(a), not on social impacts. See also *Make UC A Good Neighbor v. Regents of the Univ. of Cal.*, No. A165451, 2023 WL 2205638, at *18-20 (Cal. Ct. App. Feb. 24, 2023) (holding that plaintiffs alleging indirect physical impact from possible displacement possibly caused by a project that increases demand for housing must clear a high evidentiary hurdle in order to trigger CEQA review). CEQA focuses on impacts on the “physical environment,” see CAL. PUB. RES. CODE § 21065; CAL. CODE REGS. tit. 14, §§ 15060(c)(2), 15060(c)(3), 15378(a), not on social impacts.

169. The vast majority of studies with a plausible strategy for identifying the causal effect of new housing development on nearby rents have found that the effect is negative. For a review, see Shane Phillips et al., *Research Roundup The Effect of Market-Rate Development on Neighborhood Rents*, UCLA LEWIS CTR. (Feb. 17, 2021), <https://www.lewis.ucla.edu/research/market-rate-development-impacts/>. Adverse gentrification effects near the Stevenson Street project are particularly unlikely because the low-income residents nearby live in protected single-room occupancy hotels, subsidized housing projects, and rent-controlled apartments. See Randy Shaw, *What Drives SF’s Gentrification? It’s Not What Many Think*, BEYONDCHRON (Nov. 2, 2021), <https://beyondchron.org/what-drives-gentrification-its-not-what-many-think/>.

170. Knight, *supra* note 1.

171. *Id.*

172. See Hillary Ronen (@HillaryRonen), TWITTER (Nov. 1, 2021, 9:47 AM), <https://twitter.com/HillaryRonen/status/1455214820454637570>; Rafael Mandelman (@RafaelMandelman), TWITTER (Nov. 1, 2021, 2:27 PM), <https://twitter.com/RafaelMandelman/status/1455285482468691968>.

173. See Twitter threads *supra* note 172.

174. Dineen, *supra* note 144.

175. *Id.*

The Initial Study treated these issues as “less than significant” because they were addressed by the building code and an engineering peer review required of all large buildings.¹⁷⁶ Accordingly, the EIR did not further address them.¹⁷⁷ However, no one put any evidence in the record suggesting that a code-compliant, peer-reviewed project on the site would be an earthquake hazard to people or buildings nearby. Nor, as best we can tell, had Ronen or any other supervisor objected to previous EIRs that treated seismic impacts as adequately addressed through the building code and engineering peer review. Contrary to Ronen’s claims to the press, the impact of an earthquake on a proposed building is not an “environmental impact” under CEQA.¹⁷⁸

All of this suggests that the seismic safety issue—the only plausibly legitimate justification for the Board’s decision to reverse the CEQA certification¹⁷⁹—was pretextual. It was a fig leaf to cover up what the Board intended but was not allowed by law to do: to disapprove the project because it is too big, or not affordable enough, or because the project sponsor did not accede to the appellant’s land-donation demand.

A. *Capitalizing on Administrative Law’s Achilles Heel*

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

1. *Delay*

The Board of Supervisors’ vote to reverse certification of the Stevenson Street EIR was tantamount to saying, “We haven’t made up our mind about this project, and we need more information before we can make up our mind.” When agencies say they need more time to gather information, courts normally let them have it. If an antsy plaintiff sues, the court will say that the suit is premature

176. NOTICE OF PREPARATION OF ENVIRONMENTAL IMPACT REPORT, S.F. PLANNING DEP’T. 185–89 (2019), https://sfplanning.org/environmental-review-documents?field_environmental_review_catag_target_id=212&page=2&order=title&sort=asc.

177. See S.F. PLAN. DEP’T, DRAFT ENVIRONMENTAL IMPACT REPORT (2020), https://sfplanning.org/environmental-review-documents?field_environmental_review_catag_target_id=212&page=2&order=title&sort=asc.

178. See Dineen, *supra* note 144 (quoting Supervisor Ronen). CEQA requires analysis of the impact of the building on the environment, not the environment on the building. See *Cal. Bldg. Indus. Ass’n v. Bay Area Air Quality Mgmt. Dist.*, 196 Cal. Rptr. 3d 94, 107 (2015) (holding that CEQA Guideline which provided that “an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision,” was “clearly erroneous and unauthorized under CEQA”).

179. To be clear, this justification would be legitimate only if there were a “fair argument” that the building itself may cause significant damage to the physical environment in the vicinity of the site, in the event of an earthquake. *Cf. id.* at 107 (holding that CEQA analysis should consider “exacerbating effect” of new construction on existing environmental hazards, but not the effect of the hazard on the new construction or its occupants).

because there is not yet a “final” agency decision, or the plaintiff has not “exhausted her administrative remedies,” or because the case is not yet “ripe.”¹⁸⁰ After all, it would be a waste of judicial resources and a big practical problem for governance if anyone waiting in line for an agency decision could ask a judge to let her jump the queue.¹⁸¹

The legal doctrines that prevent plaintiffs from attacking agency delay have exceptions, but the exceptions are very narrow. For example, California courts excuse plaintiffs from exhaustion when further agency proceedings would be “futile,” but only if the plaintiff can “positively state” what the agency has decided, thus rendering further proceedings pointless.¹⁸² The courts have also waived exhaustion when the agency has no legal authority to conduct the proceeding at issue¹⁸³ and when pursuing further proceedings would result in “irreparable harm.”¹⁸⁴ None of these exceptions fits the Stevenson Street scenario. The Board of Supervisors carefully avoided “positively stating” its decision; there is no question that the Board is authorized by law to be the city’s ultimate CEQA decider; and the irreparable-harm exception is “applied rarely and only in the clearest of cases.”¹⁸⁵

It is also true that if the legislature prescribes clear-cut timelines for an agency decision, a plaintiff can, in theory, use traditional mandamus to get a court order requiring the agency to act.¹⁸⁶ But as we illustrated in Part I’s

180. *See, e.g.*, *AIDS Healthcare Found. v. State Dep’t of Health Care Servs.*, 194 Cal. Rptr. 3d 425, 441–43 (2015) (holding that decision of administrative agency reversing order of the administrative law judge and remanding for additional proceedings before the administrative law judge is unreviewable).

181. The exhaustion doctrine is “principally grounded on concerns favoring administrative autonomy (i.e., courts should not interfere with an agency determination until the agency has reached a final decision) and judicial efficiency (i.e., overworked courts should decline to intervene in an administrative dispute unless absolutely necessary).” *Farmers Ins. Exch. v. Superior Ct.*, 6 Cal. Rptr. 2d 487, 496 (1992). California courts often treat these three doctrines—exhaustion, finality, and ripeness—as more or less interchangeable. *See, e.g.*, *California Water Impact Network v. Newhall Cnty. Water Dist.*, 75 Cal. Rptr. 3d 393, 411 (2008) (describing exhaustion as “closely related” to finality); *O.W.L. Found. v. City of Rohnert Park*, 85 Cal. Rptr. 3d 1, 12 (2008) (stating that finality is an “outgrowth” of ripeness); *see also Tigor Title Ins. Co. v. F.T.C.*, 814 F.2d 731, 732 (D.C. Cir. 1987), in which the three judges each issued their own opinion explaining why the case was untimely, relying on the same facts and normative considerations but using different doctrinal labels: exhaustion per Judge Edwards, finality per Judge Williams, and ripeness per Judge Green.

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

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

184. *Kaiser Found. Hosps. v. Superior Ct.*, 128 Cal. App. 4th 85, 105 (2005).

185. *City & Cnty. of San Francisco v. Int’l Union of Operating Eng’rs, Loc. 39*, 151 Cal. App. 4th 938, 948 (2007).

186. CAL. CIV. PROC. CODE § 1085(a) (authorizing a writ of mandate “to compel the performance of an act which the law specially enjoins”); *e.g.*, *Sunset Drive Corp. v. City of Redlands*, 86 Cal. Rptr. 2d 209, 214 (1999) (holding that, under section 1085, a court may compel a city to make its decision in the time period required under CEQA); *see also Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004)

discussion of *Schellinger* and the CEQA timelines, these cases make courts uncomfortable.¹⁸⁷ At most, a court will order the agency to make a decision, but not tell the agency what to decide.¹⁸⁸ Moreover, if the developer cooperates with the city past the deadline, the doctrine of laches may bar their claim altogether.¹⁸⁹

2. *Bad Faith*

The other formidable barrier to a judicial fix for CEQA-launched project denials is the principle that courts should review agency decisions solely on the basis of the reasons stated by the agency at the time of the decision, rather than figuring out the agency's real reason and setting the decision aside if that reason was unlawful.

To the extent that the Board's decision to require further CEQA study of the Stevenson Street project is reviewable at all, a court would normally uphold the decision so long as the findings prepared by the clerk include some legitimate reason for additional CEQA study.¹⁹⁰ The stated rationale must also draw some support from the record of materials before the Board, but the evidentiary demand is lax.¹⁹¹ If a reasonable person could agree with the Board's decision in light of the evidence in the record, courts generally will accept it.¹⁹²

Federal administrative law has a narrow exception to these general precepts. Upon a "strong showing of bad faith," a court may peer behind the agency's public rationale and the record of contemporaneous materials the agency assembled to justify it.¹⁹³ If the court concludes from this investigation that the

(explaining that, under the federal APA, "when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be").

187. See *supra* text accompanying notes 63–64.

188. *Schellinger Bros. v. City of Sebastopol*, 102 Cal. Rptr. 3d 394, 408 (Ct. App. 2009) (noting that a section 1085 (traditional mandamus) remedy "issues to compel the performance of a ministerial duty, and even then it will not compel the exercise of such a duty in a particular fashion").

189. *Id.* at 410–12.

190. Judicial review in CEQA cases is usually limited to the record of the agency proceeding. See KOSTKA & ZISCHKE, *supra* note 18, §§ 23.48–23.56; cf. MITCHELL E. ABBOTT ET AL., CALIFORNIA ADMINISTRATIVE MANDAMUS § 6.119 (CEB 2021) ("Whether the scope of review is the substantial evidence test or the independent judgment test, the trial court cannot substitute its own findings to cure the agency's inadequate findings as an alternative to remanding the case to the agency False") (citations omitted). The deferential "substantial evidence" standard governs judicial review of "the agency's conclusions, findings and determinations, the scope of the EIR's analysis, the amount or type of information contained in the EIR, the methodology used to assess impacts, and the reliability or accuracy of the data supporting the EIR's conclusions." KOSTKA & ZISCHKE, *supra* note 21, § 23.34.

191. Nominally, the city's decision must be supported by "substantial evidence" in the record, but this standard is not demanding. It requires only "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." CAL. CODE REGS. tit. 14, § 15384(a). See also *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 47 Cal. 3d 376, 393 (1988); KOSTKA & ZISCHKE, *supra* note 18, § 23.34.

192. See *id.*

193. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (noting that "inquiry into the mental processes of administrative decisionmakers is usually to be avoided," but it may be

agency's stated reasons were pretextual, the court may set aside the agency's decision, even if the stated reasons, if real, would have sufficed to justify it. This obscure doctrine enjoyed a moment of renaissance when Chief Justice Roberts invoked it to invalidate the addition of a citizenship question to the U.S. Census during the presidency of immigration-restrictionist Donald Trump. But even as the Chief Justice insisted that courts "are 'not required to exhibit a naivete from which ordinary citizens are free,'"¹⁹⁴ he was at pains to limit the bad-faith exception. The Census dispute was not "a typical case in which an agency may have both stated and unstated reasons for a decision," but rather the "rare" one in which the agency's "sole stated reason" "seems to have been contrived."¹⁹⁵

It is for very good reasons that the bad-faith exception is narrow. Much like aggressive judicial review of agency delay, courtroom trials focused on the real reasons for agency action would gum up the work of government.¹⁹⁶ Discovery requests and depositions would divert public officials from their charge.¹⁹⁷ Courts would struggle to disentangle the mix of political and policy-minded considerations that shape agency decision making—especially when the leaders of the agency in question (e.g., a city council) are elected officials who inevitably pay attention to politics even when acting in a quasi-judicial capacity (e.g., hearing a CEQA appeal).

Finally, it is black-letter law that when an agency makes a reversible error, the judicial remedy is to vacate the agency's decision and remand for a do-over.¹⁹⁸ Even in the Census case, the Court did not strike the citizenship question from the Census: it just told the Commerce Department to try again.¹⁹⁹ But what does this achieve if the agency is acting in bad faith? A court order telling San

permitted upon "a strong showing of bad faith or improper behavior"); *see also* SEC v. Chenery Corp., 318 U.S. 80, 94–95 (1943) (stating the general rule that agency action may only be upheld on the contemporaneous record).

194. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)).

195. *Id.*

196. *See* Aram A. Gavoor & Steven Platt, *Administrative Records After* Department of Commerce v. New York, 72 ADMIN. L. REV. 87, 98 (2020) (predicting that extra-record review in the federal context will "divert resources from agencies' core missions, compulsorily draw the attention of officers of the United States who should otherwise be engaging in the executive function of running the government, and cause long delays with more bet-the-agency litigation"); *see also* Jennifer Nou, *Census Symposium A Place for Pretext in Administrative Law?*, SCOTUSBLOG, (June 28, 2019, 12:54 pm), <https://www.scotusblog.com/2019/06/census-symposium-a-place-for-pretext-in-administrative-law/> (voicing similar concerns).

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

198. CEQA codifies this principle. CAL. PUB. RES. CODE § 21168.9(c) ("Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way."). *See also* KOSTKA & ZISCHKE, *supra* note 18, § 23.125 ("The requirement in Pub Res C § 21168.9(b) that a peremptory writ of mandate specify what action by the agency is necessary to comply with CEQA is limited by the provision in § 21168.9(c) that the statute does not authorize a court 'to direct any public agency to exercise its discretion in any particular way.'").

199. *See Dep't of Com.*, 139 S. Ct. at 2576.

Francisco's Board of Supervisors to rehear the Stevenson Street CEQA appeal would be an invitation to re-laundry the denial, minus the revealing tweets. The pointlessness of the remedy strongly reinforces the argument for not engaging the pretext question in the first place.²⁰⁰

Given the formidable barriers to challenging agency inaction, the courts' reluctance to address agency motives, and the lack of any remedy under CEQA if a city demands more environmental review than the statute requires, it should come as no surprise that the caselaw about CEQA abuse is scant. Looking for cases where someone argued that an agency broke the law by doing "too much" CEQA review is like trying to find the proverbial needle in a haystack of cases about whether an agency did too little.

We did, eventually, find two cases.²⁰¹ In one, the trial court held that courts lack "the authority to review the appropriateness of" a city's decision to require additional environmental study following the circulation of a draft EIR.²⁰² The Court of Appeal sustained the trial court's decision on the separate grounds of laches without settling the question of reviewability.²⁰³ In the other, a county board of supervisors rejected the planning staff's recommendation of a mitigated negative declaration for a mining company's exploration permit and voted to require an EIR.²⁰⁴ The court sustained the county's decision without addressing finality or exhaustion.²⁰⁵

The bottom line is that fifty years into the life of CEQA, there is not a single published opinion deciding whether a local agency's demand for additional, unwarranted environmental review is subject to judicial review or, if reviewable, whether there is a remedy beyond remanding to the agency for reconsideration.²⁰⁶ The lack of case law no doubt reflects the remote odds that such a claim would result in a meaningful win.

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

201. In addition to the cases discussed in this paragraph, there is also a pending case in which plaintiffs are trying to use a federal statute, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 et seq., to curtail sham CEQA litigation by competitors of a project. See Arthur F. Coon, *CEQA Meets RICO Round Two*, MILLER STAR REGALIA (July 31, 2020), <https://www.ceqadevelopments.com/2020/07/31/ceqa-meets-rico-round-two/> (discussing *Relevant Group, LLC v. Nourmand*, No. 2:19-cv-05019 (C.D. Cal. 2022)).

202. *Schellinger Bros. v. City of Sebastopol*, 102 Cal. Rptr. 3d 394, 400–01 (Ct. App. 2009).

203. *Id.* at 410–413.

204. See *Oro Fino Gold Mining Corp. v. Cnty. of El Dorado*, 274 Cal. Rptr. 720, 722–23 (Ct. App. 1990).

205. See *id.* at 724–28.

206. Cf. *Schellinger Bros.*, 102 Cal. Rptr. 3d at 405–09 (holding that courts may order a local agency to make up its mind about whether to certify an environmental document after the review is complete, but may not decide the merits of the environmental review until the city acts in the first place).

B. But the HAA Is a Game Changer, Right?

The foregoing ought to douse any hope one might have about using CEQA or background principles of administrative law to curtail CEQA-laundered project denials. But when the project getting laundered is a housing project, a court must consider the HAA as well. And the HAA shakes up the background principles of administrative law, reworking some and tossing others in the garbage.²⁰⁷

- The HAA expressly authorizes judicial inquiry into bad faith.²⁰⁸ “Bad faith” as defined by the Act “includes . . . an action that is frivolous or otherwise entirely without merit.”²⁰⁹ This means that a court can find bad faith without subpoenas, depositions, or other searching inquiry into the mental processes of city council members. Objective frivolousness is enough.
- In cases where a court finds bad faith, the HAA supplants the traditional do-over remedy. It authorizes courts to order the project approved and to retain jurisdiction to ensure that this order is carried out.²¹⁰ Even if the court does not find bad faith, the HAA requires it to issue an order compelling compliance within sixty days and to fine cities that miss the deadline.²¹¹
- The HAA provides at least a partial remedy for delay, as it defines “[d]isapprove the housing development project” to include “[f]ail[ing] to comply with the time periods [for project review] specified in [the PSA].”²¹²
- The HAA eliminates judicial deference to local governments on all questions about whether a housing development project complies with applicable standards.²¹³

207. *Cf.* SEN. COMM. ON TRANSP. AND HOUS., HOUSING ACCOUNTABILITY ACT: PROJECT APPROVAL, ANALYSIS OF AB 3194 4 (amended June 20, 2018) (describing the HAA’s standard for determining whether a project is consistent with local land-use rules as a “game changer”); Nestor M. Davidson, *Localist Administrative Law*, 126 *Yale L.J.* 564, 614 (2017) (arguing that “courts should resist false parallels to higher levels of government, where structural realities may be very different”).

208. CAL. GOV’T CODE § 65589.5(l).

209. *Id.* § 65589.5(l).

210. *Id.* § 65589.5(k)(1)(A)(ii).

211. *Id.* §§ 65589.5(k)(1)(A)(ii), (k)(1)(B).

212. *Id.* § 65589.5(h)(6).

213. *Id.* § 65589.5(f)(4) (“[A] housing development project or emergency shelter shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity.”); *id.* § 65589.5(j)(1) (requiring local government that would disapprove or reduce density of a project that is consistent within meaning of (f)(4) to make “written findings supported by a preponderance of the evidence on the record” that the project “would have a . . . significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete” and that “[t]here

The HAA's stance is one of extreme distrust toward local governments. When the legislature amended the HAA in 1990, it added a finding that "the excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing."²¹⁴ But as the legislature noted in 2017, when it strengthened various HAA provisions, "[t]he Legislature's intent in enacting this section. . . has not been fulfilled."²¹⁵ Hence the new policy going forward: "that [the HAA] be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."²¹⁶

But there is a catch. While the HAA provides a powerful remedy for bad-faith project denials, its only explicit remedy for delay is tied to the PSA. Yet as noted in Part I, the PSA clock doesn't start to run until CEQA review has been completed,²¹⁷ and the HAA does not "relieve [a city] from . . . complying with" CEQA.²¹⁸

How can a court make sense of these conflicting directives? In the rest of this Part, we sketch three possible solutions.²¹⁹

C. Solutions

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

Our first solution is for courts to hold that a city's delaying of a project in bad faith amounts to "disapproval" under the HAA, at least if the delay occurs through a negative vote on a formal approval the developer needs. Importantly, if courts conclude that a bad-faith denial of a CEQA clearance²²⁰ is a

is no feasible method to satisfactorily mitigate or avoid the adverse impact . . . other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density").

214. Senate Bill 2011, Cal. Stats. 1990, Ch. 1439, sec. 1 (adding findings to the HAA).

215. S.B. 167, 2017 Leg., Reg. Sess. (Cal. 2017); CAL. GOV'T CODE § 65589.5(a)(2)(K). For an argument that increased interregional competition in contemporary America further justifies state-level legislative efforts to promote regionalism in land use, see Nestor M. Davidson & Sheila R. Foster, *The Mobility Case for Regionalism*, 47 U.C. Davis L. Rev. 63, 69 (2013).

216. CAL. GOV'T CODE § 65589.5(a)(2)(L).

217. See *supra* text accompanying notes 59–60.

218. CAL. GOV'T CODE § 65589.5(e).

219. Shortly after the authors posted their first draft of this Article, one of the authors was approached by a group that hoped to codify the proposed solutions. What resulted was Assembly Bill 2656, which integrated aspects of the first and second solutions proposed in this section into a new statutory scheme. Despite fierce opposition from some unions and environmental groups, AB 2656 made it through the Assembly and all substantive committees in the Senate before the chair of the appropriations committee killed it by exercising his discretion not to bring it up for a vote. See A.B. 2656, 2021 Leg., Reg. Sess. (Cal. 2022) (unenacted). Elmendorf, who advised on the bill throughout the legislative session, summarized his reflections in a Twitter thread. See Chris Elmendorf @CSElmendorf, TWITTER (Aug. 12, 2022, 6:16 PM), <https://twitter.com/CSElmendorf/status/1558261164378767362>.

220. By "denial of a CEQA clearance," we mean an official determination that a project is not entitled, at the time of the determination, to the CEQA approval sought by the developer. This would

“disapproval,” they can order the project approved. That is because the HAA empowers courts to use this supercharged remedy when a city denies a project in bad faith.²²¹

The HAA’s definition of “disapproval” is broad. It includes “any instance in which a local agency . . . votes on a proposed housing development project application and the application is disapproved, including any required land use approvals or entitlements necessary for the issuance of a building permit.”²²² The certification of an EIR or other CEQA clearance is one of many “approval[s]” or “entitlement[s]” that a developer must obtain before eventually landing a building permit, and it is an approval that a city council reversing a CEQA clearance “votes” to deny.²²³

On the other hand, the fact that the HAA does not expressly list “legally inadequate CEQA analysis” as a permissible ground for disapproval of a housing development project suggests that the legislature may not have thought that a city council’s reversal of a CEQA certification would qualify as a housing-project disapproval.²²⁴ Were the HAA an ordinary statute, this missing affirmative defense would cut quite strongly against reading “disapproval” to include bad-faith reversals of CEQA clearances. But the HAA in its current incarnation is meant to be a super-statute, “interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.”²²⁵ This instruction, together with the legislative finding that local governments have for too long evaded the legislature’s intent to “meaningfully and effectively curb[] [their] capability . . . to deny, reduce the density for, or render infeasible housing development projects,”²²⁶ suggests that the legislature wants courts to read the statute flexibly to countermand evasive local tactics.

include a vote to deny a CEQA exemption, a vote to require an EIR instead of approving the negative declaration sought by the developer, a vote against certifying an EIR, or, as in the case of the Stevenson St. project in San Francisco, a vote to reverse a certification of an EIR.

221. CAL. GOV’T CODE § 65589.5(k)(1)(A)(i).

222. *Id.* § 65589.5(h)(6) (emphasis added).

223. The same reasoning would apply with equal force to any other bad-faith denial of a CEQA clearance, such as a decision by a planning commission or city council to deny an exemption or to refuse to certify a negative declaration or EIR.

224. See CAL. GOV’T CODE 65589.5(j)(1) (stating that a local agency which “proposes to disapprove [an HAA-protected] project or to impose a condition that the project be developed at a lower density . . . shall base its decision . . . upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist”: (A) that the project “would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density”; and (B) that “[t]here is no feasible method to satisfactorily mitigate or avoid the adverse impact . . . other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density”).

225. S.B. 167, 2017 Leg., Reg. Sess. (Cal. 2017).

226. CAL. GOV’T CODE § 65589.5(a)(2)(K).

Yet, it cannot be true that every municipal denial of a CEQA clearance is a “disapproval” within the meaning of the HAA.²²⁷ Some denials are meritorious. In other cases, a city council may reasonably believe that a project opponent’s CEQA appeal has merit, even if some judges would disagree. So, at what point does a city council’s reversal of a CEQA clearance become an HAA “disapproval”? The remedial provisions of the HAA point toward an answer: when the CEQA reversal is in bad faith.²²⁸ Like the party to a contract who commits anticipatory breach, the city that denies a CEQA clearance in bad faith fails to perform its legal obligation to approve an HAA-protected project absent violation of objective health or safety standards.²²⁹ That the HAA singles out bad-faith conduct by cities provides a justification for, and a limitation upon, expansive readings of “disapproval.”²³⁰

The HAA provides guidance as to what constitutes bad faith in this context: “For purposes of this section, ‘bad faith’ includes, but is not limited to, an action that is frivolous or otherwise entirely without merit.”²³¹ Thus an objectively frivolous denial of a CEQA clearance should be treated as an HAA disapproval. And because HAA bad-faith “is not limited to” objectively frivolous denials, a city’s refusal to issue a clearance on facts where there are reasonable arguments both ways about the sufficiency of the CEQA review could also violate the HAA—if it is clear that the city was using CEQA with the aim of achieving indirectly what the HAA prohibits the city from doing directly.²³²

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

228. See CAL. GOV’T CODE § 65589.5(1).

229. The analogy to anticipatory breach is not exact, because traditionally anticipatory breach is found only if the breach is express or the repudiating party “puts it out of his power to perform so as to make substantial performance of his promise impossible.” *Taylor v. Johnston*, 123 Cal. Rptr. 641, 646 (1975).

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

231. *Id.* § 65589.5(1).

232. Recall the codified statement of legislative intent: to “meaningfully and effectively curb[] [cities] capability . . . to deny, reduce the density for, or render infeasible housing development projects.” CAL. GOV’T CODE § 65589.5(a)(2)(K). A subtly different question is whether a pretextual denial of a CEQA clearance should be deemed to violate the HAA when the apparent reason for the denial is to induce the developer to agree to a condition that would make the project more difficult to develop, and which the city does not have authority to impose, but which the HAA does not proscribe. For example, building trade unions are notorious for using CEQA to hold up projects unless or until the developer signs a labor agreement with the union. See *infra* note 379 and accompanying text. Federal labor law makes it unlawful for cities to insist on project-labor agreements as a condition of approval. See *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986) (holding that cities may not use taxicab licensing to regulate balance of power between management and labor). However, the HAA allows any condition of approval unless it has the effect of rendering an affordable housing development “infeasible” (CAL. GOV’T

In our running example, appellant John Elberling clearly sought an outcome that the HAA proscribes. After the Board of Supervisors voted to reverse the EIR certification for the Stevenson Street project, Elberling published an op-ed and blog post blaming the project sponsor for not agreeing to a “compromise” under which the developer would donate a third of the parcel to the city, build a smaller project, and let the city bank the donated parcel for future affordable housing if or when money becomes available.²³³ This land transfer would unquestionably violate the HAA if demanded by the city as a condition of approval, as the HAA bars “impos[ing] a condition that the project be developed at a lower density.”²³⁴

The further question is whether a court should impute the appellant’s purpose to the city. Here, the caselaw on racial discrimination is instructive. “The Supreme Court has long held, in a variety of circumstances, that a governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens.”²³⁵ Thus, it is unlawful for a state to designate candidates’ racial identity on the ballot and thereby enable discrimination by voters;²³⁶ for a court to deny a parent custody of their child on the ground that the parent’s interracial relationship would expose the child to societal discrimination;²³⁷ for employers to refuse to hire men because their customers prefer to be served by women;²³⁸ or for a city council to “knowingly acquiesce[] to race-based citizen opposition” in denying a housing project or rezoning.²³⁹

If a court were to conclude that San Francisco had violated the HAA by “knowingly acquiesc[ing]” to Elberling’s goal of using CEQA to achieve what the HAA proscribes, similar blog posts and op-eds by CEQA appellants would likely become a thing of the past. But even if anti-housing activists wise up and refrain from bald admissions of unlawful motive, the courts can still provide a check on municipal acquiescence to unlawful private sentiment. When opponents of affordable housing projects turn out in droves at public hearings to complain about property values, community character, “undesirable” residents,

CODE § 65589.5(d)), or is functionally equivalent to a reduction in density (*id.* §§ 65589.5(j)(1), (g)(7)). The pretextual denial of a CEQA clearance for labor reasons may result in the city running afoul of the CEQA timelines (*see infra* Part II.2), or may violate background principles of state administrative law (*see infra* Part II.3), or may even expose the city to liability under federal labor law or due process via section 1983 (*see* *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989); *Sunset Drive Corp. v. City of Redlands*, 86 Cal. Rptr. 2d 209, 216-17 (1990)). However, it probably should not be held to violate the HAA unless the labor condition the city desires is ruled out by the HAA.

233. *See* Elberling, *supra* note 2; Cabande et al., *supra* note 166.

234. Except in the rare case where doing so is necessary to mitigate a specific, quantified adverse impact on public health or safety in violation of an objective, written standard as it “existed on the date the [developer’s] application was deemed complete.” CAL. GOV’T CODE 65589.5(j)(1).

235. *U.S. v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1224 (2d Cir. 1987).

236. *See Anderson v. Martin*, 375 U.S. 399 (1964).

237. *See Palmore v. Sidoti*, 466 U.S. 429 (1984).

238. *See Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971).

239. *Mhany Management, Inc. v. Cnty. of Nassau*, 819 F.3d 581, 612 (2d Cir. 2016).

and crime, courts have sometimes inferred that racial animus was a “significant factor” behind the opposition, even in cases where opponents avoided “explicitly racial language.”²⁴⁰ So too, when the great mass of public comment at a CEQA hearing focuses on a project’s objectionable scale and socioeconomic impacts, a judicial fact finder should be able to discern that opponents’ real goal is to block the project or reduce its size, not to ensure that environmental impacts are properly studied and mitigated.²⁴¹

Another important precedent for our proposal is the Second Circuit’s decision in *Fortress Bible Church v. Feiner*, which holds that a city’s pretextual use of environmental review can violate the Religious Land Use and Institutionalized Persons Act (RLUIPA).²⁴² RLUIPA forbids a city from imposing a substantial burden on religious practice through an “individualized assessment[] of the proposed uses for the property . . . in the implementation of a land use regulation.”²⁴³ The statute defines “land use regulation” as a “zoning or landmarking law, or the application of such a law, that limits or restricts a claimant’s use or development of land (including a structure affixed to land).”²⁴⁴

In *Fortress Bible Church*, the court found that the Town of Greenburgh violated RLUIPA when it used environmental review to delay and reject a Pentecostal church’s proposed project.²⁴⁵ The court observed that the town had rejected the recommendation of its Planning Commissioner that the project’s impacts did not warrant a positive declaration under New York’s State Environmental Quality and Review Act (SEQRA) and initiated review anyway “after the Church refused to accede to the Town’s demand that it donate a fire truck or provide some other payment in lieu of taxes.”²⁴⁶ The court also noted that a Zoning Board member had told the Planning Commissioner “on multiple occasions” that he should “stop” or “kill” the project and that the Planning Commissioner (who disagreed) was ultimately replaced.²⁴⁷

Although RLUIPA does not mention environmental laws, the Second Circuit concluded that environmental review fell within its scope when it was used “as a vehicle to resolve zoning and land use issues.”²⁴⁸ In short, the court

240. *Id.* at 606–12; *see also* *Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982); *Avenue 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 504–07 (9th Cir. 2016).

241. This inference would be especially straightforward if the CEQA clearance at issue is an EIR or negative declaration because these clearances may not be issued until the project is officially approved or denied. *See* CAL. CODE REGS. tit. 14, § 15025(b). Because of this, a party that wants a legitimate condition of approval (one which doesn’t reduce density) placed on the project can ask for it at the same time they pursue their CEQA argument. If they make flimsy CEQA demands without asking for legitimate conditions of approval, it’s a fair inference that they probably want to achieve through CEQA something that the HAA disallows.

242. 694 F.3d 208, 217–18 (2d Cir. 2012).

243. 42 U.S.C. § 2000cc(a)(2)(c).

244. *Id.* § 2000cc-5(5).

245. *Fortress Bible Church*, 694 F.3d at 217–18.

246. *Id.* at 218.

247. *Id.* at 214.

248. *Id.* at 218.

found bad faith: the town had “disingenuously used SEQRA to obstruct and ultimately deny the Church’s project” and had “manipulated its SEQRA findings statement to ‘kill’ the project.”²⁴⁹

Would reading HAA “disapproval” to encompass the bad-faith denial of a CEQA clearance “relieve[]” cities of complying with CEQA?²⁵⁰ No. Consider the Stevenson Street project again: San Francisco’s planning department prepared a full EIR for the project, which the planning commission certified as complete.²⁵¹ So long as the court concludes that the EIR fully complies with CEQA, an order directing the city to approve the project would do no violence to the HAA’s CEQA-savings clause.²⁵² The court could also allow the Board of Supervisors a brief window of time to decide whether to impose any additional mitigation requirements on the project, in light of the findings of the EIR.²⁵³ This would honor CEQA’s policy that elected officials bear final responsibility for deciding what to do about identified environmental impacts.²⁵⁴

249. *Id.* The Ninth Circuit has noted the argument that an application of CEQA might violate RLUIPA but has not reached the question. *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1036 (9th Cir. 2004). Although no other circuits have squarely considered whether RLUIPA applies to environmental review, they have found that non-land use laws such as building or sewer codes might, citing *Feiner* and noting that “it is not the label that a government puts on its regulation that determines whether RLUIPA applies, but rather *how the regulation actually functions*.” *Redeemed Christian Church of God (Victory Temple) Bowie, Maryland v. Prince George’s Cnty., Maryland*, 17 F.4th 497, 509 (4th Cir. 2021) (emphasis added).

250. CAL. GOV’T CODE § 65589.5(e).

251. S.F. Plan. Comm’n, Motion Nos. 20960 & 20961 (hearing on July 29, 2021), available at https://sfbos.org/sites/default/files/bag102621_agenda.pdf (within item 38 on page 18).

252. We discuss the legislative history of this clause in Part 0, *infra*. By way of preview: there’s no evidence that the legislature gave any consideration to the issues raised in this Article.

253. The HAA specifies that a court which finds a violation “shall issue an order . . . compelling compliance with this section within 60 days, including, but not limited to, an order that the local agency take action on the housing development project or emergency shelter.” CAL. GOV’T CODE § 65589.5(k)(1)(A)(ii). One wrinkle is that the city might use CEQA mitigation requirements pretextually. Recall that the HAA provides that a housing project “shall be subject only to the ordinances, policies, and standards adopted and in effect when a preliminary application” containing the required information is submitted. *Id.* § 65589.5(o)(1). Yet subdivision (o) goes on to provide that a city *can* subject the project to a “ordinance, policy, standard, or any other measure” postdating the preliminary application if that measure is “necessary to avoid or substantially lessen an impact of the project” under CEQA. *Id.* §§ 65589.5(o)(2), (o)(2)(C). Thus, a city might try to impose onerous post hoc “measures” that it insists are “necessary to avoid or substantially lessen” CEQA impacts of the project but that in fact are not. An unlawful mitigation measure could come in at least two varieties: it could either (1) pertain to an impact that is cognizable under CEQA (say, water quality) but not be “necessary to avoid or substantially lessen” it; or (2) be “necessary to avoid or substantially lessen” an impact that is not cognizable under CEQA at all (say, gentrification). In an action brought under § 65589.5(k)(1)(A)(III)(ia), the court would need to determine whether the city’s mitigation requirement runs afoul of subsection (o), likely by engaging in a bad faith/pretext analysis similar to the one the Second Circuit employed in *Fortress Bible Church v. Feiner*.

254. See CAL. PUB. RES. CODE § 21151(c) (providing that if a nonelected decision-making body of a local lead agency certifies a final EIR, the agency must allow the certification to be appealed to the agency’s elected decision-making body, if one exists); CAL. CODE REGS. tit. 14, § 15090(b) (same). It might also be argued that a court must give the Board an opportunity to specify further mitigation conditions, in view of the CEQA provision stating, “[n]othing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way.” CAL. PUB. RES. CODE § 21168.9(c).

Another counterargument against our reading of HAA “disapproval” is that the Board, in voting to reverse the EIR certification, did not actually determine whether the project could go forward or what its density would be. It just said it wanted more information.²⁵⁵ Whether phrased as an argument about finality, ripeness, or exhaustion, this would be a strong retort under general administrative law principles.²⁵⁶ But in taking a practical—and impatient—approach to disapproval, the HAA undercuts it. For example, delay beyond the time limits of the PSA is explicitly an HAA disapproval,²⁵⁷ even though such delay does not entail any *de jure* act or statement of reasons by the city. A formal vote reversing a CEQA clearance looks considerably more final and at least has the trappings of an agency action.

It is also worth emphasizing that while the terms “finality” and “exhaustion” connote on-off switches—a decision is either final or not, a plaintiff has either exhausted their administrative remedies or not—finality and exhaustion in the permitting context are always matters of degree. Thus, courts have long treated a city council’s vote to deny a development proposal as final enough for judicial review, even though the developer could return to the council with a different proposal for the site. This doctrine reflects a practical judgment that requiring developers to suffer multiple defeats at the city council in order to access the courts would strike the wrong balance between, on the one hand, conservation of judicial resources and municipal autonomy and, on the other, protection for the rights of property owners.

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

California’s housing department has signaled support for reading “HAA disapproval” to include pretextual CEQA-clearance reversals.²⁵⁸ In a letter to San Francisco about Stevenson Street and another project, HCD called the Supervisors’ vote an “effective denial” and asked the city to explain its rationale within thirty days.²⁵⁹ The letter emphasized, as we do, that disapproval includes “denial of other required land use approvals or entitlements necessary for the issuance of a building permit.”²⁶⁰ It also noted that, in light of the Supervisors’ “various vague concerns” with the project, it was “unclear what actions these

We disagree. The court order we’re contemplating would be an order issued pursuant to the HAA, not pursuant to CEQA, so the limitations on judicial remedial authority under CEQA would not apply to it.

255. See *supra* text accompanying notes 164–179.

256. See *supra* Part II.A.1.

257. CAL. GOV’T CODE § 65589.5(h)(6)(B).

258. Letter from Shannan West, Housing Accountability Unit Chief, Dep’t of Hous. & Cmty. Dev., to Kate Conner, Manager, Priority Projects and Process, S.F. Plan. Dep’t (Nov. 22, 2021) (on file with authors).

259. *Id.* at 1.

260. *Id.* at 3.

project applicants are required to take to advance these projects.”²⁶¹ If an agency authorized by the legislature to enforce the HAA concludes that bad-faith denials of CEQA clearances are “disapprovals” within the meaning of the HAA,²⁶² a court need not go out of its way to conclude the same.

2. *Enforcing CEQA Timelines in Light of the HAA*

Another way for courts to tackle the problem of CEQA-launders housing denials is to use the legislature’s bolstering of the HAA as an invitation to limit or reject *Schellinger*²⁶³—the case that rendered CEQA’s one-year deadline practically unenforceable.

Under this approach, a court would not order the project approved, per the first solution discussed in this Article. Rather, the court would order the city to certify any legally sufficient CEQA study after the pertinent CEQA deadline has lapsed. By making CEQA’s deadlines enforceable, this approach would also give practical effect to the HAA’s incorporation of the PSA’s timelines into the definition of “disapprove.” This is because the PSA clock starts to run only after the completion of CEQA review.²⁶⁴

As we explained in Part I, *Schellinger* held that judges may not order a city to certify an EIR, as opposed to ordering the city to decide whether to certify it.²⁶⁵ *Schellinger* also said that the project applicant had forfeited its right to enforce the deadline by cooperating with the city and making project revisions well past CEQA’s deadline.²⁶⁶

The most basic problem with *Schellinger* is that it makes a hash of the HAA’s definition of “disapproval.” Recall that the HAA defines disapproval to include noncompliance with the PSA deadlines, but the PSA clock only starts to run after CEQA review is done.²⁶⁷ So, if there is no practical way of forcing cities to comply with CEQA’s deadlines, then the delay-related piece of the HAA definition of disapproval is a dead letter. That does not befit any statute, let alone one that the legislature has declared super.

As for *Schellinger*’s laches holding—that the developer who cooperates past a deadline forfeits her right to enforce it—equitable doctrines are not supposed to be used in ways that “nullify an important policy adopted for the

261. *Id.* at 1–2.

262. CAL. GOV’T CODE § 65585(j)(1) (authorizing Department to notify the local government and, as appropriate, the Attorney General, when it finds “that any local government has taken an action in violation of [enumerated statutes],” the first of which is the HAA).

263. 102 Cal. Rptr. 3d 394, 412 (Ct. App. 2009).

264. CAL. GOV’T CODE § 65589.5(h)(6).

265. *See supra* text accompanying notes 62–64.

266. 102 Cal. Rptr. 3d at 410–412. (A future court might distinguish *Schellinger* on the ground that the project proposal at issue morphed considerably during the long period of CEQA review. *See id.* at 395–99. On the other hand, cities should not be able to evade the CEQA deadlines by pressuring developers into revising their project proposals.)

267. CAL. GOV’T CODE § 65950.

benefit of the public.”²⁶⁸ Whatever might have been said about the HAA when *Schellinger* was decided in 2009, there is no gainsaying that, today, the Act’s policy of expeditious permitting is “important” and inures to the “benefit of the public.”²⁶⁹

CEQA allows one year for the completion of an EIR.²⁷⁰ Yet, a recent study of housing project entitlements in twenty California cities found that the median project in San Francisco took twenty-seven months to entitle; only five percent were entitled in under a year.²⁷¹ Stevenson Street is more of the same. The developer submitted the project application on October 3, 2018.²⁷² The Initial Study, which determined that an EIR was required, was completed almost a year later.²⁷³ By statute, the Initial Study should have been completed within a month, not a year.²⁷⁴ The planning department released its draft EIR for public comment not long after the Initial Study, on March 11, 2020, but the department took ages compiling its response to comments, and the final EIR was not certified by the planning commission until July 29, 2021.²⁷⁵ This was nearly three years after the developer submitted the project application. Then came the appeal to the Board of Supervisors, resulting in further delay.²⁷⁶

Bearing these facts in mind and reading CEQA in light of the newly “super” policy of the HAA, a court might reasonably hold (1) that CEQA’s deadlines are enforceable by mandamus regardless of whether the developer has cooperated with the city past the deadline (contra *Schellinger*); and (2) that if the applicable

268. *Golden Gate Water Ski Club v. Cnty. of Contra Costa*, 80 Cal. Rptr. 3d 876, 890 (Ct. App. 2008) (holding that laches is unavailable for this reason); *Feduniak v. Cal. Coastal Comm’n*, 56 Cal. Rptr. 3d 591, 617–18 (Ct. App. 2007) (holding the same).

269. The laches holding of *Schellinger* is also suspect on traditional equitable grounds. First, the doctrine of laches is only supposed to penalize plaintiffs who “unreasonabl[y]” delay bringing suit. *Conti v. Bd. of Civ. Serv. Comm’rs*, 461 P.2d 617, 622 (Cal. 1969). *Schellinger* failed to ask whether it is reasonable for a developer whose business depends on securing discretionary permits from a city to cooperate with the city’s review process well past any statutory deadline (bringing suit only as a last resort). Second, as an equitable doctrine, the laches defense should have no currency when the city acts in bad faith (has “unclean hands”), as San Francisco appears to have done in reversing the EIR certification for Stevenson St. *See Prang v. Los Angeles Cnty. Assessment App. Bd. No. 2*, 268 Cal. Rptr. 3d 376, 386 (Ct. App. 2020) (“Factually, laches, as an equitable doctrine, is not available to a party with unclean hands.”).

270. CAL. PUB. RES. CODE § 21151.5(a).

271. MOIRA K. O’NEILL ET AL., EXAMINING ENTITLEMENT IN CALIFORNIA TO INFORM POLICY AND PROCESS: ADVANCING SOCIAL EQUITY IN HOUSING DEVELOPMENT PATTERNS 97 (2021).

272. S.F. Plan. Comm’n, Motion No. 20961, *supra* note 251.

273. *See* NOTICE OF PREPARATION OF ENVIRONMENTAL IMPACT REPORT, *supra* note 176.

274. CAL. PUB. RES. CODE §§ 21080.1, 21080.2 (requiring lead agency to make “final” determination of whether to prepare an EIR, negative declaration, or mitigated negative declaration within thirty days of project application being determined to be or deemed complete).

275. *See* S.F. Plan. Comm’n, Motions Nos. 20960 & 20961, *supra* note 251.

276. The Board’s vote occurred in October of 2021, *see supra* note 164, and the revised EIR with the additional studies demanded by the Board was not presented to the planning commission until December of 2022, *see* J.K. Dineen, *Big Fight Over Housing at Nordstrom Parking Lot Appears Over. But Will It Get Built?*, S.F. CHRONICLE, Dec. 8, 2022.

CEQA deadline has passed and a legally sufficient environmental review document has been prepared, the city must certify it.

The latter proposition might seem to depart from the background norm that a court can only order an agency to act, rather than tell the agency how to act.²⁷⁷ Sometimes, though, only one course of action is available to the agency, in which case a court may direct the agency to do what the law requires.²⁷⁸ In short, we are proposing that, in light of the bolstered HAA, courts hold that cities now have a ministerial duty to certify any legally sufficient environmental review document once the CEQA review deadline has passed.²⁷⁹

The courts could also give cities a brief window to decide what changes or mitigation to a project should be required in view of the environmental study. Letting politicians choose mitigation but not compel legally unnecessary environmental study past the CEQA deadline would go a good distance toward reconciling CEQA with the HAA. It would breathe some life into the PSA deadlines, which the HAA incorporates into its definition of disapproval,²⁸⁰ without impinging on municipal authority to impose mitigation conditions on development approvals.²⁸¹

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

Chief Justice Roberts’s opinion in *Department of Commerce v. New York*²⁸² inspires our third solution. Instead of putting an expansive gloss on HAA “disapproval” or battling *Schellinger* to make CEQA deadlines judicially enforceable, a court could hold that a city council’s or planning commission’s vote to deny a CEQA clearance is reviewable for pretext in limited circumstances. Specifically, a plaintiff’s “strong showing of bad faith” would render a decision to require further environmental study reviewable, and, if a

277. CEQA’s remedial provisions authorize courts to order “specific action as may be necessary to bring the [an agency] decision into compliance with” the statute, CAL. PUB. RES. CODE § 21168.9(a)(1), (3), but they also declare, “[n]othing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way,” *id.* § 21168.9(c).

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

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

280. CAL. GOV’T CODE § 65589.5(h)(6).

281. The HAA tolerates most conditions of approval so long as they don’t reduce a project’s density. *Id.* § 65589.5(j)(1).

282. *See* 139 S. Ct. 2551 (2019).

court determined that the city acted in bad faith, the court could hold the city's decision unlawful under background principles of administrative law.

This solution invites a number of questions: First, is it even available in California? Second, if the door opens to pretext inquiries in this context, will they spread across all of state administrative law at a high cost to courts and agencies alike?²⁸³ Third, would this solution be meaningful as a practical matter, given that the standard judicial remedy in CEQA cases is to remand for a new attempt, which may simply invite an agency acting in bad faith to better cover its tracks? Whereas the two solutions we have discussed thus far yield straightforward and effective remedies—a court order directing a city to approve a project or an order to certify a CEQA clearance—it may be trickier to design an effective remedy for pretextual use of CEQA without reference to HAA “disapproval” or CEQA deadlines.

The answer to the first question is “maybe.” Although there is a strong norm against looking behind the official record assembled by an agency, the California Supreme Court has reserved the question of whether there might be a “limited” exception for “agency misconduct.”²⁸⁴ The Court has also allowed extra-record evidence in challenges to “ministerial or informal administrative actions,” on the theory that these actions merit less deference.²⁸⁵

The second question, about whether pretext claims can be cabined, is serious²⁸⁶ but not hard to answer. The HAA and the institutions now being erected to enforce it offer guardrails. Nodding to the HAA's skepticism about municipal good faith, a court could hold that CEQA pretext claims are only available if the environmental clearance concerns an HAA-protected project. Or, going a step further, a court could hold that pretext claims are available only if HCD or the Attorney General makes the preliminary “strong showing of bad faith” or otherwise raises serious concerns about the city's development review processes.²⁸⁷ This holding would limit pretext litigation to cases where a coordinate branch of state government has balanced the benefits and costs and deemed the inquiry worthwhile.

The third question, about remedies, is most concerning.²⁸⁸ If a court finds that a city's CEQA reversal was pretextual, must it give the city another chance to dress up the same decision again? Not necessarily. The California Supreme

283. See sources cited in note 196, *supra*.

284. *W. States Petroleum Ass'n v. Superior Court*, 888 P.2d 1268, 1276 n.5 (Cal. 1995); see also *id.* at 1278 (leaving open the possibility that such evidence may be admissible “under unusual circumstances or for very limited purposes not presented in the case now before us”).

285. *Id.* at 1277; see Michael Asimow, *The Scope of Judicial Review of Decisions of California Administrative Agencies*, 42 UCLA L. REV. 1157, 1234–37 (1995) (discussing and critiquing the use of an “open record” in these cases).

286. See *supra* Part II.A (discussing reasons why courts generally abjure inquiry into pretext).

287. Cf. West, *supra* note 258 (on file with authors) (concluding, “HCD is concerned specifically that the Stevenson Project and O'Farrell Project that have been effectively denied without written findings as well as larger trends in the City/County's review of housing”) (emphasis added).

288. See *supra* text accompanying notes 198–200.

Court has endorsed the “inherent power” of a trial court to send only part of a decision back to the agency while retaining jurisdiction to issue judgment later.²⁸⁹ Perhaps a court in a pretext case could treat a CEQA certification as mostly complete, retain jurisdiction, and allow the city a short period of time to address any legitimate concerns identified by the court on a limited remand. This would light a fire under the city and ensure that the case returns to the same judge.²⁹⁰

Other unusual remedies are also worth exploring. Consider what courts do when a decision maker is found to have prejudged the facts or otherwise manifested bias in violation of due process. Normally, the court disqualifies the biased arbiter and remands for a fair hearing before another hearing officer. The Court of Appeal has said that a city’s “malicious[] or arbitrar[y]” refusal to certify a CEQA document violates due process.²⁹¹ If that is right, a city council’s bad-faith reversal of a CEQA clearance would also violate due process, and a court should disqualify the biased decision maker on remand. If just a few councilmembers were found to be biased, a court could disqualify them and remand for a do-over by the rest of the council (if a quorum remains).²⁹² But a court generally cannot disqualify the whole decision-making body that must decide the case, so there is no analogous remedy if the council minus the biased decisionmakers would lack a quorum.²⁹³ Hence the need for innovation beyond the usual do-over remedy.²⁹⁴ On the other hand, the judicial norm against telling agencies what they must do is very strong, so without specific textual authorization—e.g., the HAA directing courts to order projects approved or CEQA specifying deadlines for completion of environmental review—we fear

289. *Voices of the Wetlands v. State Water Res. Control Bd.*, 257 P.3d 81, 98–99 (Cal. 2011) (stating that administrative mandamus “impose[s] no absolute bar on the use of prejudgment limited remand procedures such as the one employed here”).

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

291. *Sunset Drive Corp. v. City of Redlands*, 86 Cal. Rptr. 2d 209, 216–17 (Ct. App. 1999).

292. *Nasha v. City of Los Angeles*, 22 Cal. Rptr. 3d 772, 781 (Ct. App. 2004) (vacating a decision where the outcome was determined by the vote of a council member who was not a “reasonably impartial, noninvolved reviewer”).

293. See *Caminetti v. Pac. Mut. Life Ins. Co. of Cal.*, 139 P.2d 908, 366–67 (Cal. 1943). But in at least one case, this rule did not apply where there was a legally sufficient underlying decision that the court could let stand. *Mennig v. City Council*, 150 Cal. Rptr. 207, 213–14 (Ct. App. 1978) (disqualifying the city council because it was “embroiled” in the dispute and letting stand the civil service commission’s earlier decision).

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

that judges would be reluctant to deviate from the standard remedy, even in a pretext case.

One more point about remedies is worth mentioning: insofar as bad-faith denials of a CEQA clearance violate due process, the city may be liable for damages.²⁹⁵ The prospect of compensating a developer for holding costs and the expense of additional environmental studies might be enough to discourage some cities from trying to launder housing denials through CEQA.

D. Coda

Shortly before we posted our first draft of this Article, a pro-housing nonprofit filed suit alleging that the Board of Supervisors' decision not to certify the 469 Stevenson Street EIR violated the applicable CEQA deadline and the HAA.²⁹⁶ The case was heard by the designated CEQA judge of the superior court of San Francisco County.²⁹⁷ It did not go well for housing advocates.

Relying on *Schellinger*, the judge tossed the CEQA-deadline claim on the ground that the city was still exercising its CEQA discretion—albeit perhaps “over-exercis[ing]” it²⁹⁸—and that courts lack authority to “compel the exercise [of CEQA discretion] in a particular fashion.”²⁹⁹ “Moreover,” she added, “as no final EIR has been certified, the cause of action is not yet ripe.”³⁰⁰

The HAA claim fared no better. The judge noted that under the official CEQA Guidelines, a lead agency (the city in this case) must certify the EIR prior to approving the project.³⁰¹ She reasoned that because the EIR hadn't been certified, and because the HAA has a CEQA-savings clause, there cannot be a project approval or disapproval within the meaning of the HAA until the lead agency certifies the EIR.³⁰²

This wooden logic has some obvious flaws. Statutory deadlines could never be enforced if deadline claims were not ripe until the agency takes the action the deadline requires of it. And the court was incorrect in assuming that no

295. See *Sunset Drive Corp.*, 86 Cal. Rptr. 2d at 217 (holding that a city's “malicious[] or arbitrar[y] refus[al] . . . to complete [within the statutory time period] an EIR for a project which requires one” violates due process and exposes the city to liability for damages under 42 U.S.C. § 1983).

296. The complaint was filed on Nov. 21, 2021, and the writ petition, which lays out the substance of YIMBY Law's arguments, was filed on Jan. 20, 2002. See <https://www.yimbylaw.org/469-stevenson> (last visited Mar. 4, 2023) (providing links to both documents). We posted the first draft of this Article to the Social Science Research Network on Dec. 14, 2021. See https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3980396 (last visited Mar. 4, 2023).

297. See Order re: Demurrer, *Yes in My Backyard v. City and County of San Francisco*, Case No. CPF-22-517661, Superior Court of Cal., County of San Francisco, Oct. 21, 2022 (noting that oral argument was held in Department 503 on Sept. 9, 2022); <https://www.sfsuperiorcourt.org/divisions/civil/asbestos> (last visited Mar. 4, 2023) (stating that Department 503 is the asbestos and CEQA department).

298. *Id.* at 5.

299. *Id.* at 6.

300. *Id.*

301. *Id.* at 7 (citing CEQA GUIDELINES, § 15090(a)).

302. *Id.* at 7–8.

“disapproval” can occur under the HAA until after an environmental review document has been certified. For example, because CEQA does not apply to a project denial,³⁰³ a city can violate the HAA if it wrongly denies a project and refuses to commence any CEQA process at all.³⁰⁴

The superior court did not engage our arguments about how the HAA and CEQA could be reconciled.³⁰⁵ More fundamentally, it did not ask whether the legislature’s substantive transformation of the HAA, its instruction that the HAA be construed broadly, and the HAA’s reception by the Attorney General, the Governor, and the Court of Appeal might signify something about how courts ought to interpret it.

After a forty-year saga, the HAA is at a moment of truth. Will other courts, nodding to *Schellinger*, old saws about CEQA, and background principles of administrative law, similarly stand by while city councils deny 500-home projects on frivolous “environmental” grounds? Or will they take to heart the HAA’s renunciation of the old ways and stitch it and CEQA together into a new, workable framework for overseeing municipal review of housing development projects?

III. CALIBRATING ENVIRONMENTAL REVIEW TO THE SCOPE OF MUNICIPAL DISCRETION UNDER THE HAA

This Article has focused thus far on whether the HAA, CEQA, or background principles of administrative law can provide a remedy if a city refuses to approve a legally sufficient CEQA clearance for a housing development project. This Part asks what constitutes a legally sufficient CEQA review of an HAA-protected project. We argue that present-day conventions rest on a fundamental mistake about the proper scope of CEQA review. The typical HAA-protected project should trigger only a very narrow review.

CEQA requires state and local agencies that have discretion to choose among possible options to study environmental effects before making their

303. CAL. PUB. RES. CODE § 21080(b)(5) (CEQA does not apply to an action that “disapproves”).

304. For example, a court recently held that if a city refuses to accept a project application because the project is inconsistent with zoning, that refusal constitutes a disapproval for purposes of the HAA. *See* Decision on Petition for Writ of Mandate, at 33, *Yes in My Backyard, Sonja Trauss, and Janet Jha v. City of Los Angeles and City Council*, Case No. 21STCP03883, Superior Court of Cal., County of Los Angeles, July 29, 2022. In such a case, the city has violated the HAA even though it never began, let alone finished, the CEQA review process.

305. Bad faith isn’t even mentioned in the opinion, nor is the possibility that the HAA might have reduced or eliminated city councils’ discretion not to approve a legally sufficient CEQA review once the CEQA deadline has passed. In fairness to the judge, however, it should be noted that our paper was not cited in writ petition. *See* Petition for Writ of Mandate, Prohibition or Other Extraordinary Relief and Complaint for Declaratory Relief, *Yes in My Backyard v. City and County of San Francisco*, Case No. CPF-22-517661, Superior Court of Cal., Cnty of San Francisco, Jan. 20, 2022, *available at* https://drive.google.com/file/d/1BJc292LVrAT1-wkeR6TBtwALZ9_PgjYd/view. Also, the judge did leave the door cracked open to a future “pattern and practices” claim for declaratory relief. *See* Order re: Demurrer, *supra* note 297, at 9–11.

choice.³⁰⁶ In theory, this leads to better agency decisions. But when other laws require an agency to select a particular option, CEQA does not apply.³⁰⁷ There is no reason to write a detailed list of the pros and cons of different options if you know exactly which choice you must make from the start.

When a developer submits a housing proposal, the HAA substantially limits the choices open to the city. You might think that review under CEQA would be limited accordingly. You would, however, be wrong—at least as to current practice.³⁰⁸

So it is that a proposal to build 500 apartments on a downtown San Francisco parking lot, a block from the subway, in a designated “priority development area” under the region’s climate plan ended up mired for years in the most extensive and costly form of environmental review required by CEQA: the EIR. The trigger for an EIR is a “fair argument” about environmental impacts.³⁰⁹ San Francisco’s planning department had concluded, on the basis of a 342-page Initial Study, that a fair argument could be made that the Stevenson Street project might have a significant local environmental impact in the form of shadows, wind, or noise and air pollution during construction.³¹⁰

The Initial Study evaluated the project’s potential impact relative to current environmental conditions nearby.³¹¹ It did not ask whether the project would have a significant marginal impact relative to any other project of the size that the HAA entitles the developer to build on the site.

If the Stevenson Street project’s marginal impact would be close to nil (as is likely), then the EIR was an environmentally pointless exercise. Its real function, apparently, was to give local activists and city officials a way to tie up the project until the developer either walked away or paid off the politically connected nonprofit that led the charge against it.³¹²

This Part argues that the scope of CEQA review of housing development projects should be tailored to the scope of municipal discretion. A housing project should require an EIR only if the city exercises discretion to shape the project in some way that generates a significant marginal impact relative to what

306. CAL. PUB. RES. CODE § 21080(a) (CEQA applies to “discretionary projects proposed to be carried out or approved by public agencies”).

307. KOSTKA & ZISCHKE, *supra* note 18, §§ 4.24–4.26A.

308. *See infra* notes 310–312 and 325 (explaining course of environmental review for Stevenson Street project in San Francisco). Discussions with leading CEQA practitioners have persuaded us that the Stevenson Street project’s EIR is representative of current practice.

309. *See supra* note 49 and accompanying text.

310. *See* NOTICE OF PREPARATION OF ENVIRONMENTAL IMPACT REPORT, *supra* note 176.

311. *Id.* at 2–3, 73–218.

312. *See* Knight, *supra* note 1 (quoting one supervisor who said he would “feel very good about this vote” if the project site becomes “a 100% affordable housing project,” and another who complained that the developer hadn’t struck a deal with a local nonprofit, TODCO); Dineen, *supra* note 2 (profiling the head of TODCO).

the HAA compels the city to approve.³¹³ This approach would not “relieve the local agency from complying with” CEQA.³¹⁴ But it would require overturning or significantly limiting several judicial precedents that have been incorporated into the official CEQA Guidelines.³¹⁵

Our proposal poses a stark test of whether the HAA really is a super-statute—of whether it “sticks in the public culture” and exerts “a broad effect on the law.”³¹⁶ If courts and the gubernatorial appointees responsible for the CEQA Guidelines get behind our approach, then the HAA will, in fact, “meaningfully and effectively curb[] the capability of local governments” to hobble housing development projects.³¹⁷ If they do not, there can be little doubt that NIMBY (“Not in My Back Yard”) cities will become ever more expert at exploiting CEQA to undermine the HAA.

A. *“Effect” Relative to What? Defining a Reference Alternative for CEQA Review of HAA-Protected Projects*

It is senseless to try to characterize the environmental effect of a proposed housing project without comparing it to some alternative use of the site. Consider an analogy: what is the effect of a new drug or medical device? The answer depends on what you use for comparison. Relative to a placebo, the effect of the new drug may be large. On the other hand, compared to the best treatment currently in use, the effect of the very same drug could be small or even negative.³¹⁸

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

CEQA analyses, relying on CEQA caselaw, usually neglect this fundamental point. By convention, they purport to measure the “effect” of a project relative to “current environmental conditions” on the site and in its vicinity.³¹⁹ This is a misleading point of reference if current environmental conditions would change absent the project. No medical researcher would

313. CEQA is not an independent source of municipal discretion. CAL. PUB. RES. CODE § 21004 (“In mitigating or avoiding a significant effect of a project on the environment, a public agency may exercise only those express or implied powers provided by law other than this division.”).

314. CAL. GOV’T CODE § 65589.5(e).

315. See *infra* notes 339–345 and accompanying text.

316. Eskridge & Ferejohn, *supra* note 10, at 1216.

317. CAL. GOV’T CODE § 65589.5(a)(2)(K).

318. These points follow from what is now called the “potential outcomes” framework for causal inference. See generally Donald B. Rubin, *Causal Inference Using Potential Outcomes Design, Modeling, Decisions*, 100 J. AM. STATISTICAL ASS’N 322 (2005).

319. See generally KOSTKA & ZISCHKE, *supra* note 18, §§ 12.16–12.20 (summarizing CEQA caselaw and guidelines about baselines).

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

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

But the current-environmental-conditions baseline is nonsensical when the public decisionmaker lacks legal authority to maintain it. This is precisely the situation that cities face when developers propose HAA-protected housing projects. Cities may place discretionary conditions of approval on such projects, but they may not deny the project or reduce its density.³²⁰ The environmental impact of the project should therefore be gauged relative to a reference-alternative project of the scale the city must by law approve. Because the purpose of CEQA is to guide the exercise of discretion, the only “effects” that belong in a CEQA-mandated environmental review are those that the agency’s exercise of discretion would cause.

How would a CEQA review tailored to the scope of agency discretion work in practice? The first step in CEQA review for non-exempt projects is the preparation of an Initial Study, which determines whether an EIR or a simpler negative declaration will be prepared.³²¹ An EIR is required if the Initial Study reveals any “fair argument” that the project “may” have a significant environmental impact.³²² Current practice elides the question of whether potential impacts are traceable to the agency’s exercise of discretion.

An HAA-informed protocol for CEQA review of housing projects would pose a threshold question at the outset of the Initial Study: does the project as proposed comply with applicable objective general plan, zoning, and development standards, as defined in the HAA?³²³ If this question is answered affirmatively, the project is HAA-protected, meaning that the city may deny or downsize the project only if it violates a written, objective health or safety standard. The Initial Study for an HAA-protected project should gather

320. CAL. GOV’T CODE § 65589.5(j)(1). Again, CEQA is not an independent source of discretion; “a public agency may exercise only those express or implied powers provided by law other than this division.” CAL. PUB. RES. CODE § 21004.

321. CAL. CODE REGS. tit. 14, §§ 15365, 15063.

322. See KOSTKA & ZISCHKE, *supra* note 18, § 6.2.

323. CAL. GOV’T CODE § 65589.5(f)(4). This inquiry should address only those standards of which the city gave proper notice to the developer of noncompliance, as specified in CAL. GOV’T CODE 65589.5(j)(2). Note also that if the project qualifies for a density bonus under state law, this will render some local development standards inapplicable. See generally JON GOETZ & TOM SAKAI, GUIDE TO THE CALIFORNIA DENSITY BONUS LAW (revised Jan. 2021).

information about potential health or safety violations and determine whether a preponderance of the evidence establishes a violation. If this study finds an unmitigable violation, then the HAA does not bar denial,³²⁴ and a conventional CEQA review using a no-project or current-environmental-conditions baseline would be appropriate.

But if the HAA-protected project does not violate health or safety standards, the city's discretion is limited to altering the project with conditions of approval that do not reduce its density, and the CEQA baseline should be defined accordingly.

There are two plausible reference alternatives in this circumstance. First, the analysis could proceed using a project-as-proposed benchmark. The reviewer would inventory any discretionary conditions of approval that the city is considering imposing on the project and then compare (1) environmental conditions if the project goes forward with the discretionary conditions, with (2) environmental conditions if the project goes forward without those conditions. The difference represents the environmental effect of the city's exercise of discretion.

To illustrate, imagine that a city is considering whether to impose a discretionary condition of approval that would require rooftop solar panels on a proposed building. Neighbors express concern about glare from the panels. The Initial Study would investigate whether there is a fair argument that the rooftop solar panels may cause a significant environmental impact in the form of glare, relative to the project as it was proposed.

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

Under either model, it would be the rare HAA-protected project that requires an EIR. Cities do not often impose conditions that reduce environmental amenities in the vicinity of a project, so the project-as-proposed benchmark would yield *pro forma* negative declarations in most cases. As for the green-reference benchmark, developers who anticipate opposition from neighbors, unions, or other interest groups would likely conform their proposal to the green benchmark. If the project as proposed is HAA-protected and uses the green-

324. CAL. GOV'T CODE § 65589.5(j).

reference design, then by construction it would have no environmental effects for CEQA purposes.³²⁵

B. Does CEQA Allow It?

The idea of tailoring the scope of environmental review to the scope of agency discretion has precedent under statutory analogues to CEQA at the national level and in New York. In *U.S. Department of Transportation v. Public Citizen*, the U.S. Supreme Court held that an environmental impact study prepared in connection with the North American Free Trade Agreement need not analyze pollution resulting from an increase in Mexican truck traffic because the Department had no legal authority to exclude Mexican trucks.³²⁶ “[W]here an agency has no ability to prevent a certain effect *due to its limited statutory authority over the relevant actions*, the agency cannot be considered a legally relevant ‘cause’ of the effect” for NEPA purposes.³²⁷

In New York, courts arrived at a similar place by rejecting the “no-build baseline” in cases where the project proponent may build something as of

325. Needless to say, the environmental studies prepared for the Stevenson Street project in San Francisco did not hew to these principles. The HAA was nowhere mentioned in the Initial Study. The study did briefly discuss general plan and zoning standards, noting one potential violation, but it did not distinguish objective from subjective standards or explain whether the city had provided the developer with timely written notice of noncompliance. *See, e.g.*, NOTICE OF PREPARATION OF ENVIRONMENTAL IMPACT REPORT, *supra* note 176, at app. A. Putative effects were assessed relative to current conditions on the site and in the vicinity. *See id.* at 2–3, 59–67, 73–218. Had the analysis proceeded as we recommend, the Initial Study probably would have concluded that no EIR was required, since the city had not proposed (so far as we can tell) any discretionary condition of approval that would damage the environment; since nothing in the Initial Study identified any respects in which the proposed design and materials fell short of any green-design norm; and since the study did not identify an objective, properly noticed general plan or zoning standard, or health or safety standard, that the project arguably violated. The Initial Study did note that the project relied on waivers of several local development regulations, pursuant to state density bonus law. *Id.* at 67–68. However, the HAA protects projects that rely on state density bonus law. CAL. GOV’T CODE § 65589.5(j)(3) (“For purposes of this section, the receipt of a density bonus pursuant to Section 65915 shall not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision specified in this subdivision.”).

326. 541 U.S. 752, 767 (2004)

327. *Id.* at 770 (emphasis added). The current status of this principle under NEPA is uncertain. The Trump Administration issued regulations that read *Public Citizen* broadly. *See* CEQ, Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,305, 43,343–44, 43,375 (July 16, 2020). The Biden Administration then issued regulations that read it quite narrowly—essentially an option that an agency may elect in some circumstances rather than as a constraint on the scope of review. *See* CEQ, National Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453, 23,465 (Apr. 20, 2022) (stating that *Public Citizen* addressed a “unique context” and that the Trump rule “inappropriately transform[ed] a Court holding affirming an agency’s exercise of discretion in a particular factual and legal context into a rule that could be read to limit agency discretion”). *See also id.* at 23,466 (“CEQ also is removing the potential limitations on consideration of . . . effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action”).

right.³²⁸ Specifically, if a developer proposes an office or residential building that would require rezoning on a site where a smaller building is allowed as of right, the effect of the proposed project is analyzed relative to the “as-of-right alternative” rather than the “no-build” alternative” or “current environmental conditions.”³²⁹ Because the city lacks authority to deny the smaller project, an environmental review using a no-project baseline would be uninformative.

Like NEPA and New York’s SEQRA, CEQA exempts ministerial permits from environmental review.³³⁰ Discretion is always the trigger.³³¹ However, the California Court of Appeal has held in several cases that if a city has any discretion to shape a project, the city must analyze and mitigate impacts of the project “as a whole” relative to a current-environmental-conditions baseline.³³² Projects whose permitting is “not wholly ministerial and not entirely discretionary but a compound of both” have been treated as entirely discretionary for CEQA purposes.³³³ In one case, an EIR was produced using a zoning-complaint-project baseline, similar to New York practice, and the California Court of Appeal rejected it out of hand.³³⁴

328. MICHAEL B. GERRARD ET AL., 2 ENVIRONMENTAL IMPACT REVIEW IN NEW YORK § 8A.04(4)(c)(iii) n.82 (2022).

329. *Id.* § 8A.04(4)(c); *id.* § 8A.04(5)(a)(viii); *see also* N.Y.C. MAYOR’S OFF. OF ENV’T COORDINATION, CEQR TECHNICAL MANUAL § 2.7 (Nov. 2020) (“Sometimes, private applicants state an intention to develop their property in the future, with or without approval of a proposed project. . . . If the lead agency determines it is reasonable to assume that the applicant’s stated No-Action scenario would occur in the future without the proposed project, the scenario would constitute the No-Action scenario for analysis purposes.”).

330. CAL. PUB. RES. CODE § 21080(b)(1).

331. *Id.* § 21080(a).

332. *Friends of Westwood, Inc. v. City of Los Angeles*, 235 Cal. Rptr. 788, 797 (Ct. App. 1987). *See, e.g.,* *People v. Dep’t of Hous. & Cmty. Dev.*, 119 Cal. Rptr. 266 (Ct. App. 1975); *Friends of Juana Briones House v. City of Palo Alto*, 118 Cal. Rptr. 3d 324 (Ct. App. 2010). *See also* KOSTKA & ZISCHKE, *supra* note 18, § 4.27. *But see* *McCorkle Eastside Neighborhood Grp. v. City of St. Helena*, 242 Cal. Rptr. 3d 379 (Ct. App. 2018) (holding that limited discretion conferred by city’s design review ordinance does not trigger CEQA review, because the type of aesthetic changes authorized by the code could not mitigate environmental impacts within the meaning of CEQA). Note also that the CEQA Guidelines define “effect” and “impact” (synonymously) to mean “effects which are caused by the project.” 14 CAL. CODE REGS § 15358. Future environmental conditions not caused by the discretionary project are not impacts within the meaning of CEQA. It follows that a CEQA analysis ought to reflect some choice of a reference alternative (as opposed to the “current environmental conditions” baseline), for, as we have seen, it is nonsensical to speak of the “effect” of a course of action without comparing outcomes under that scenario to outcomes under an alternative course of action.

333. *People v. Dep’t of Hous. & Cmty. Dev.*, 119 Cal. Rptr. at 272.

334. *Woodward Park Homeowners Ass’n, Inc. v. City of Fresno*, 58 Cal. Rptr. 3d 102, 120 (Ct. App. 2007) (rejecting EIR whose “bottom-line conclusions . . . emphasized the marginally increased impacts of the proposed project over build-out under existing zoning”). The court faulted the EIR for not “present[ing] a clear or a complete description of the project’s impacts compared with the effects of leaving the land in its existing state.” *Id.* at 121. Left unaddressed was the question of whether the city had legal authority to choose a project alternative that would leave the land in that state. *See also* *City of Carmel-by-the-Sea v. Bd. of Supervisors*, 227 Cal. Rptr. 899, 911 (Ct. App. 1986) (holding that county must consider impacts of rezoning on existing physical environment; comparison of project possible under old zoning with project possible under proposed new zoning “bears no relation to real conditions on the ground”).

This line of cases is rooted in CEQA's traditional premises: that new construction is presumptively bad for the environment³³⁵ and that CEQA should be construed broadly to give "the fullest possible protection" to the environment.³³⁶ The working assumption is that requiring more environmental review and mitigation is the greener way. But, as we have seen, the HAA inverts this premise when it comes housing. The HAA declares new construction of zoning-compliant housing projects to be presumptively good for the environment,³³⁷ and it aims to "meaningfully and effectively curb[] the capability of local governments to deny, reduce the density for, or render infeasible housing development projects."³³⁸ A reading of CEQA that leaves cities with open-ended discretion to require time-consuming studies and costly mitigation of so-called "impacts" not caused by the city's exercise of discretion would do pointless violence to the policy of the HAA.

In the near term, however, any effort to use the HAA to put a limiting gloss on misbegotten CEQA-baseline precedents would be complicated by the fact that those precedents have been incorporated into the official CEQA Guidelines.³³⁹ The Guidelines stipulate that, "[g]enerally, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation [of the EIR] is published."³⁴⁰ This "existing conditions baseline shall not include hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans."³⁴¹

The only exception that the Guidelines presently recognize is that an agency may use a "projected future conditions . . . baseline . . . if it demonstrates . . . that use of existing conditions would be either misleading or without informative value to decision-makers and the public."³⁴² This exception codifies a practice developed around very long-term projects, such as railways.³⁴³ Neither the Guidelines nor any published case approves using a "future-conditions baseline" where the future in question is a build-out of the project site under an alternative development scenario. Then again, neither the Guidelines nor any published case has considered the implications of the HAA for CEQA baselines or causation.

335. See, e.g., *Friends of Westwood*, 235 Cal. Rptr. at 793 ("As applied to private projects, the purpose of CEQA is to *minimize the adverse effects of new construction* on the environment. . . . Thus the touchstone is whether the approval process involved allows the government to shape the project *in any way* which could respond to any of the concerns which might be identified in an environmental impact report.") (emphasis added).

336. *Id.* at 796 ("doubt whether a project is ministerial or discretionary should be resolved in favor of the latter characterization").

337. See CAL. GOV'T CODE §§ 65589.5(a)(1)(C), (a)(2)(A).

338. *Id.* § 65589.5(a)(2)(K).

339. See CAL. CODE REGS. tit. 14, §§ 15369, 15125(a) (citing cases).

340. See *id.* § 15125(a)(1).

341. *Id.* § 15125(a)(3).

342. *Id.* § 15125(a)(2).

343. See, e.g., *Neighbors for Smart Rail v. Exposition Metro Line Construction Auth.*, 304 P.3d 499 (Cal. 2013).

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

We have found only one case in which a court considered the relationship between the HAA and CEQA. *Sequoyah Hills Homeowners Assn. v. City of Oakland* concerned a housing development on vacant land in the Oakland Hills.³⁴⁴ The site's zoning allowed up to eighty-eight single-family homes, but the developer "'pre-mitigated' by proposing to build only 46 homes."³⁴⁵ The city ordered an EIR using a current-conditions baseline and evaluated several alternatives, including one with only thirty-six homes.³⁴⁶ Neighboring homeowners argued that the EIR was insufficient because it failed to analyze additional lower-density alternatives to mitigate the project's visual impact.³⁴⁷ The Court of Appeal sided with the city.³⁴⁸ CEQA only requires consideration of "feasible" alternatives,³⁴⁹ the court said, and the reduced-density alternatives urged by the neighbors were foreclosed by the HAA and therefore infeasible as a matter of law.³⁵⁰

What the court did not point out—perhaps because no one challenged the city's use of a current-conditions baseline—is that an EIR focused on the visual impacts of the Sequoyah Hills project was a waste of time and money. No one disputed that the project "would stand out because of its relatively higher density and its location on a prominent hillside overlooking the existing residential development."³⁵¹ But the city lacked discretion to make the developer choose an alternative with fewer homes, so the impact of the project should not have been characterized as "significant" unless it was shown that a significantly less obtrusive project of the same density could have been built on the site.³⁵²

The logic of *Sequoyah Hills* did not carry the day, however, in the recent case of *Save the Hill Group v. City of Livermore*.³⁵³ *Save the Hill* concerned an

344. 29 Cal. Rptr. 2d 182 (1993).

345. *Id.* at 184.

346. *See id.* at 184–85.

347. *See id.* at 187.

348. *See id.* at 187–89.

349. *Id.* at 187.

350. *Id.* at 187–88.

351. *Id.* at 188.

352. And even that is a stretch, as nothing in the *Sequoyah Hills* opinion suggests that Oakland had open-space-visual-impact guidelines, from which a least-intrusive project design (i.e., the green-reference benchmark) might be adduced. Absent such guidelines, the CEQA review should have used a project-as-proposed benchmark.

353. *See* 292 Cal. Rptr. 3d 120 (Ct. App. 2022).

EIR for a forty-four home project in an area that was eligible to be preserved as parkland.³⁵⁴ The EIR's discussion of the no-project alternative pointed out, however, that the site was zoned residential, and so it was "not necessarily feasible to assume the site would remain undeveloped in the long term."³⁵⁵ The court faulted the EIR for not addressing the feasibility of downzoning the site or buying and preserving it, something the city had recently done with another nearby property.³⁵⁶ Read broadly, *Save the Hill* could require environmental impacts to be evaluated relative to a "current conditions" baseline in every case where the project site might, in theory, be purchased by the city and preserved in its current form. The preservation alternative is in some sense "legally available" if the developer would be willing to sell the parcel at a price the city could pay.³⁵⁷

But *Save the Hill* did not consider the HAA, *Sequoiah Hills*, or CEQA's core distinction between ministerial permits (exempt from environmental review) and discretionary permits (subject to environmental review).³⁵⁸ The decision vitiates CEQA's ministerial/discretionary distinction because a city can always, in theory, purchase any given site on which a project subject to ministerial review has been proposed, thereby transmuting the ministerial project into a discretionary project. Contra *Save the Hill*, discretion in the permitting context must for CEQA purposes mean regulatory discretion, not enterprise discretion, i.e., the discretion a city could exercise if it were to acquire the project site as a market participant.³⁵⁹

At a minimum, courts should limit *Save the Hill* to the circumstances implied by its peculiar facts—specifically, to projects on unusual sites that, in the normal course of events, would probably be acquired and preserved by the city regardless of whether a housing project was proposed.³⁶⁰ Otherwise, a city could foist pointless delays and paperwork (through an EIR) on any project just by establishing a nominal "land preservation fund" and putting enough money in

354. *Id.* at 134.

355. *Id.*

356. *See id.* at 134–36

357. Indeed, if a state or local ordinance authorizes the city to acquire the site by eminent domain, the preservation alternative would be legally available even if the developer is not willing to sell the parcel.

358. *See* CAL. PUB. RES. CODE § 21080(a) (CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies"); *Protecting Our Water & Env't Res. v. Cnty. of Stanislaus*, 472 P.3d 459, 462–63 (Cal. 2020) (explicating the ministerial/discretionary line).

359. *See* Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 396–98 (1989) (exploring distinction in Dormant Commerce Clause jurisprudence between the government as a regulator and the government as a market participant); *cf.* Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 62–63 (1964) (distinguishing between government acting in regulatory and enterprise capacities for purposes of a theory of unconstitutional takings).

360. In *Save the Hill*, the city had two conservation land-acquisition funds that it had recently used nearby, and the project site was eligible for acquisition using these funds. *See* 292 Cal. Rptr. 3d at 134–36.

it to create the theoretical possibility of buying any site on which a housing development happens to be proposed.³⁶¹

Instead of reading *Save the Hill* broadly, future courts should follow another recent case, *Tiburon Open Space Committee v. County of Marin*, which reinforced *Sequoiah Hills* and vindicated the larger principle of tailoring CEQA review to the scope of an agency's regulatory discretion.³⁶² At issue was a low-density residential project nearly as old as CEQA itself. In 1976, litigation between the developer and the county ended with a stipulated settlement that entitled the developer to build forty-three single-family homes on half-acre lots.³⁶³ But nothing comes easy for developers in Marin, and the project went through additional litigation (concluding with a stipulated judgment in 2007) and an EIR process that took nearly a decade.³⁶⁴ Opponents challenged the EIR for not adequately analyzing a reduced-density alternative with thirty-two rather than forty-three homes.³⁶⁵ The court's response was sharp and to the point: the inconsistency of the thirty-two-unit alternative with the 1976 and 2007 settlements rendered it "legally infeasible."³⁶⁶ As such, it "could legitimately have been omitted from the EIR."³⁶⁷

"The scope of environmental review must be commensurate with an agency's retained discretionary authority," the *Tiburon Open Space* court emphasized, "including any limitations imposed by legal obligations."³⁶⁸ *Sequoiah Hills* was said to be "unusually instructive" on this point.³⁶⁹

Tiburon Open Space closes with a remarkable peroration.³⁷⁰ Although "CEQA was meant to serve noble purposes," the court wrote, "it can be manipulated to be a formidable tool of obstruction, particularly against proposed projects that will increase housing density."³⁷¹ The court then critiqued CEQA as a statute that "has not aged well," one which is "worsening California's

361. In discussing the possibility that the city may change the zoning designation at the project site, the Court seemed to assume that the only potential difficulty was the possibility of a Takings Clause lawsuit. *Id.* at 135–36, 136 n.5. But downzoning the project site very likely would violate state law; the HAA requires cities to process housing project applications on the basis of standards in place at time of application, and this takes downzoning off the table. CAL. GOV'T CODE § 65589 5(o). And *Sequoiah Hills* held that an EIR needn't consider "decreased-density alternatives" that HAA doesn't permit. 29 Cal. Rptr. 2d 182, 188 (1993). Moreover, downzoning might separately violate the Housing Crisis Act, which prohibits downzoning unless the city modifies zoning or standards elsewhere in the city to ensure that there is "no net loss in residential capacity." CAL. GOV'T CODE § 66300(h)(2)(i)(1).

362. See 294 Cal. Rptr. 3d 56, 83–88 (2022).

363. *Id.* at 68–69.

364. Draft EIRs were prepared for previous iterations of the project in 1996 and 2001. The draft EIR for the project at issue in *Tiburon Open Space* decision was first circulated in 2011. See *id.* at 70 n.6.

365. *Id.* at 70.

366. *Id.* at 91.

367. *Id.*

368. *Id.* at 83.

369. *Id.* at 86.

370. See *id.* at 780–83.

371. *Id.* at 122.

housing crisis” by serving as “the tool of choice for resisting change that would accommodate more people in existing communities.”³⁷² The opinion concludes:

It must be tough enough when the opposition is purely private. However, when private opposition is joined with official hostility, CEQA becomes an even more fearsome weapon. When the project proponent faces sustained private opposition, plus the combined animus of two levels of local government, the temptation to throw in the towel must be overwhelming.

Something is very wrong with this picture.³⁷³

This is more a sensibility than a prescription, but, paired with the court’s basic insight that environmental review should reflect the scope of agency discretion, it could yield a CEQA that doesn’t pointlessly impede HAA-protected projects.

C. The Governor’s Role

Courts are conservative creatures. It is rare that they upend long-established precedents or, as in *Tiburon Open Space*, editorialize against a statute. Although the newly super HAA provides a very good rationale for courts to revisit and limit the dubious CEQA-baseline precedents, other actors also have important roles to play.

CEQA authorizes the Governor’s Office of Planning and Research and the Natural Resources Agency to issue implementing guidelines.³⁷⁴ At least once every two years, the Office of Planning and Research “shall recommend proposed changes or amendments” to the Guidelines, which the Natural Resources Agency can then certify and adopt.³⁷⁵ If environmental review is to be reshaped by an HAA-informed theory of causation, the Guidelines are an excellent tool with which to do it.³⁷⁶

The Guidelines are a good tool for this purpose because making policy sits squarely in the wheelhouse of agencies—and because of politics.³⁷⁷ Through his

372. *Id.* (quoting Jennifer Hernandez, *California’s Environmental Quality Act Lawsuits and California’s Housing Crisis*, 24 HASTINGS ENV’T L. J. 21, 40 (2018)).

373. *Id.*

374. CAL. PUB. RES. CODE § 21083.

375. *Id.* § 21083(f).

376. The courts give substantial deference to the guidelines. *See* Cal. Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist., 362 P.3d 792, 797 (Cal. 2015) (“Whether the Guidelines are binding or merely reflect the Resources Agency’s interpretation of the statute, we should afford great weight to the Guidelines when interpreting CEQA[False]”).

377. A further point: risk-averse developers will not push the CEQA envelope without a cooperative city partner (one which is willing to roll the dice on a streamlined CEQA review) and a strong basis for thinking that the courts will accept the innovation. Thus, if the Governor doesn’t use the Guidelines to invite HAA-tailored CEQA analysis of housing projects, the courts may never have an occasion to consider whether this type of analysis is legally sufficient. Even if courts adopt our position that a bad-faith denial of a CEQA clearance violates the HAA (*see* Part II.1, *supra*), a developer would not succeed in challenging a city’s denial of a negative declaration (in favor of a full EIR) if the city reasonably relied on existing CEQA precedents about causation and baselines. By contrast, if the Governor does use the Guidelines as we suggest, the interest groups that benefit from the status quo are sure to sue right away,

appointments and directives, the governor can shape the Guidelines.³⁷⁸ And the governor is probably better positioned than any other state-level actor to navigate the politically treacherous waters of CEQA reform.

Though CEQA was spawned at a moment of environmental idealism, the continued strength of CEQA today has much to do with the constellation of interest groups—first and foremost the building trades unions—that have mastered the art of using CEQA to extract costly concessions from developers.³⁷⁹ In expensive housing markets, the threat of CEQA litigation and delay can be used to make developers sign project-labor and “community benefit” agreements with influential unions and nonprofits.³⁸⁰ The building trades wield a lot of power in Sacramento, and in recent years they have derailed almost every legislative proposal for CEQA reform or streamlining unless it required qualifying projects to use union labor.³⁸¹ Not even a trivial bill that would have let churches build affordable housing without CEQA review could escape Labor’s grip.³⁸²

and the courts have held that facial challenges to a new CEQA Guideline may be brought as soon as the Guideline takes effect. *See* *Cmtys. for a Better Env’t v. Cal. Res. Agency*, 126 Cal. Rptr. 2d 441, 446 (Ct. App. 2002), as modified (Nov. 21, 2002) (“At issue in this case is whether the subject Guidelines, which public agencies must follow to implement CEQA, facially violate CEQA statutes and case law. As such, the matter presents a concrete legal dispute ripe for our consideration.”).

378. The Governor has the power to appoint the Director of Planning and Research. CAL. GOV’T CODE § 65038; *see also id.* § 65037 (stating that the Director “shall be responsible to the Governor”). The Secretary of the Natural Resources Agency is appointed by the Governor, subject to Senate confirmation, and “hold[s] office at the pleasure of[] the Governor.” *Id.* § 12801; *see also* Miriam Seifter, *Gubernatorial Administration*, 131 HARV. L. REV. 483, 527 (2017) (noting the “substantial control governors possess over the majority of state agencies that have no constitutional status”).

379. The extent of what is sometimes called “CEQA greenmailing” is impossible to quantify because of nondisclosure agreements, but anecdotal evidence of the practice and, especially, the vehemence with which the building trades lobby against CEQA reform suggest that the problem is substantial. *See generally* Manuela Tobias, *What One Thing Do Republican Recall Candidates Blame for California’s Housing Crisis?*, CALMATTERS (Sept. 7, 2021), <https://calmatters.org/politics/2021/09/newsom-recall-republicans-ceqa-housing/> (canvassing the debate over CEQA); Christian Britschgi, *How California Environmental Law Makes It Easy For Labor Unions To Shake Down Developers*, REASON (Aug. 21, 2019), <https://reason.com/2019/08/21/how-california-environmental-law-makes-it-easy-for-labor-unions-to-shake-down-developers/> (discussing mechanisms and reviewing evidence of CEQA greenmailing); Matt Levin, *Commentary Five Things I’ve Learned Covering California’s Housing Crisis that You Should Know*, CALMATTERS (Jan. 6, 2021), <https://calmatters.org/housing/2021/01/california-housing-crisis-lessons/> (stating, as “Lesson 4,” that “[t]he state construction workers’ union has way more influence than you think it does,” and detailing union’s central role in killing bills that would create CEQA exemptions for housing development); Manuela Tobias, *Is Union Labor Requirement in the Way of Easing California’s Affordable Housing Crisis?*, CALMATTERS (June 16, 2021) (reporting on unions’ success in blocking any housing bill that does not include a “skilled and trained” labor requirement).

380. *See* Britschgi, *supra* note 379.

381. *See* Tobias, *What One Thing Do Republican Recall Candidates Blame for California’s Housing Crisis?*, *supra* note 379; Levin, *supra* note 379; *see generally* Miriam Seifter, *Further from the People The Puzzle of State Administration*, 93 N.Y.U. L. REV. 107, 135–37 (2018) (noting a dramatic increase in state-level lobbying over the last fifteen years).

382. *See* Alexei Koseff, *California Housing Bills Run into Wall of Union Resistance*, S.F. CHRON. (Aug. 25, 2020), <https://www.sfchronicle.com/politics/article/California-housing-bills-run-into-wall-of-union-15514503.php> (describing the demise of SB 899).

But a popular governor should feel much less threatened by the building trades than the average state legislator, who needs campaign donations and advertising by allied groups just for name recognition.³⁸³

Of course, no governor could single-handedly stop the abuse of CEQA to evade or vitiate the HAA. If there were a legislative consensus that project-labor agreements are more important than housing production, the legislature could quickly abrogate any reformist CEQA Guidelines and then override a gubernatorial veto. But it is a fair hope that no such veto-proof consensus exists. California's Republican legislative caucus is no fan of CEQA,³⁸⁴ and Democratic legislators are loathe to override their co-partisan Governor.³⁸⁵ Moreover, politically vulnerable legislators, who would not dare cast a roll call vote against the trades, may acquiesce in the appointment of pro-housing committee chairs who in turn could block any bill that would undo a revision of the CEQA Guidelines. It is also possible that a transparent public debate about CEQA abuse—a debate that would probably accompany any legislative effort to roll back the reformed Guidelines—might itself subtly alter the politics of CEQA reform in a way that gives the HAA the upper hand.³⁸⁶

383. The Governor as of this writing, Gavin Newsom, was elected by a twenty-four point margin, and he defeated a recall attempt by the same margin. See *California's Gubernatorial Election, 2018*, BALLOTPEdia, https://ballotpedia.org/California_gubernatorial_election,_2018 (last visited Nov. 23, 2022); *Gavin Newsom Recall, Governor of California (2019-2021)*, BALLOTPEdia [https://ballotpedia.org/Gavin_Newsom_recall,_Governor_of_California_\(2019-2021\)](https://ballotpedia.org/Gavin_Newsom_recall,_Governor_of_California_(2019-2021)) (last visited Nov. 23, 2022). He has also railed against CEQA, calling it “so damn abused” and blaming Ronald Reagan for it. Manuela Tobías (@manuelatobiasm), TWITTER (May 13, 2022, 11:08 AM), <https://mobile.twitter.com/manuelatobiasm/status/1525176181707837441>.

384. See Tobias, *What One Thing Do Republican Recall Candidates Blame for California's Housing Crisis?*, *supra* note 379.

385. See Joe Garofoli, *Why Lawmakers Won't Override a Veto from Newsom, or Any Other Governor*, S.F. CHRON. (Oct. 15, 2021), <https://www.sfchronicle.com/politics/joegarofoli/article/Why-lawmakers-won-t-override-a-veto-from-Newsom-16535962.php>.

386. A side note: Given the constellation of interests with a stake in the CEQA and housing fight, one might worry that an unexpectedly broad reading of the HAA, or of CEQA, would undermine future legislative reform by making it harder for swing voters in the legislature to have confidence in the compromises they might secure. Professors Rodriguez and Weingast have argued that “expansionist” judicial interpretation of progressive federal statutes passed in the 1960s and early 1970s had exactly this effect vis-a-vis later Congresses. See Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U.L. REV. 1207, 1207–12 (2007). Their argument has a lot of force in cases where an expansionist reading of the statute would disrupt a discernable legislative bargain. But where the statute being read expansively features a codified legislative instruction to read it expansively (like that in the HAA), and where the expansive reading concerns a question that the legislature did not even debate (baselines and causation for CEQA analysis of HAA protected projects), it can't be said that the judiciary or the executive branch is undermining legislative compromise by giving effect to the codified interpretive instruction. Indeed, it is possible that when the legislature added the interpretive instruction to the HAA in 2017, it did so because lawmakers wanted judges to interpret the statute in ways that would achieve pro-housing objectives while saving lawmakers from taking politically “tough” votes against the trades. We don't know whether this is the case any more than we know whether the CEQA-savings clause was added to the HAA in 1990 to propitiate building-trades unions. But in the absence of any information about this, it would be odd for courts to refrain from fitting CEQA and the HAA together in a way that honors the policies of both statutes because of some remote possibility that doing so would unravel a secret legislative bargain.

Although super-statutes on Eskridge and Ferejohn's telling embody great normative principles,³⁸⁷ it appears that CEQA's continued potency owes much to the rent-seeking interest groups that depend on it.³⁸⁸ The generational clash between the HAA and CEQA is about power as much as principle.

CONCLUSION

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

In exploring this family of questions in the context of one state (California) and one area of law (land use), we hope to open some eyes to the world beyond the federal paradigm, a world in which the Big Questions take on different and sometimes surprising hues. For example, the pretext inquiry, which can seem intractable, pointless, or even illegitimate in the context of federal administrative law (where the Administrative Procedure Act offers no textual support and where the agency head is usually the alter ego of the President),³⁸⁹ looks much more appropriate where the agency is an elected city council, the domain is land use, and the council is constrained by a state law whose central premise is that city councils are not to be trusted.

We also hope this Article serves as a useful reminder that super-statutes aren't super for all time. In 1970, in the wake of massive construction projects and rapid development across California, it was reasonable to believe that slowing construction down would help the environment. The foundational CEQA cases were decided accordingly. But today, barriers to development in high-demand places have made housing wildly unaffordable where people want to live, exacerbating socioeconomic and racial inequality. These barriers also undermine today's environmental goals by pushing new housing to fire-prone inland areas from which residents must commute for hours in carbon-spewing cars.³⁹⁰

387. Eskridge & Ferejohn, *supra* note 10, at 1216–17 (stating that super-statutes "occupy the legal terrain once called 'fundamental law,' foundational principles against which people presume their obligations and rights are set," and that such statutes "are both principled and deliberative and, for those reasons, have attracted special deference and respect").

388. As explained in note 219, *supra*, one of the authors of this Article advised on a bill, AB 2656, which would have codified and extended solutions proposed in Part I.I.C, *supra*. In the view of the bill's sponsor, the combined opposition of the building-trades unions and one prominent environmental group ultimately killed the bill.

389. See Nou, *supra* note 196; Gavoor & Platt, *supra* note 196, at 96–98.

390. Chapple et al., *supra* note 35, at 2–4.

In strengthening the HAA, the legislature rejected many of CEQA's normative premises in the context of housing. Courts should take heed.

We welcome responses to this Article. If you are interested in submitting a response for our online journal, *Ecology Law Currents*, please contact cse.elq@law.berkeley.edu. Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.

