Testimony for Little Hoover Commission on the California Environmental Quality Act

Moira O'Neill, Associate Professor of Law, General Faculty, University of Virginia
Eric Biber, Professor of Law, University of California at Berkeley

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Brief Speaker Biographies
I, Moira O'Neill, am a professor who teaches land use law, local and state government law, and community development courses within the law school and department of urban environmental planning at the University of Virginia. I also have a research appointment at UC Berkeley in the Institute of Urban and Regional Development and at the Center for Law, Energy, and the Environment. My empirical research examines how local governments apply their own and state land use regulation to proposals to build housing and mixed-use development. Prior to academia, I represented public entities throughout California in appellate and writ matters, and in complex litigation. I was also a consultant for local governments. I am admitted to practice in California.

I, Eric Biber, am a professor who teaches land use law, property law, public lands and natural resources law, and energy law, among other related courses at the University of California at Berkeley School of Law. My empirical research examines how local governments apply their own and state land use regulation to proposals to build housing and mixed-use development. Prior to academia, I was a litigator at Earthjustice. I am admitted to practice in California and Colorado.

Description of Our Research Methods and Limitations
In 2016, we jointly launched a study on how local governments in California apply their own land use regulation and state land use regulation to proposals to develop five or more units of housing. This study, the *Comprehensive Assessment of Land Use Entitlements Study* (CALES) has grown in its geographic coverage over the years. Today, we have completed in-depth study of 28 local governments in California, including 8 of the state's largest cities. Among our research topics and questions is whether environmental review delays or blocks residential or mixed-use development within our study jurisdictions.

Each time we study a jurisdiction, we start with legal research. In California's cities, that typically involves reviewing the largest-scale planning tools (the General Plan) and then drilling down to the smallest-scale level (use and development controls found in ordinances, zoning maps, and specific plans). We also use spatial analysis of zoning and planning to complement our legal research. We call this our base zoning analysis–where we use zoning maps and the text of ordinances (or maps and texts associated with specific plans) to group use and density controls into simplified categories. In California, we created and defined these categories using state law definitions for what zoning allows for housing for all income levels. This is a necessary (but insufficient) condition to build affordable housing. We then explore whether the zoned land within a jurisdiction we are studying would allow housing for all income levels without a project proponent asking the jurisdiction to change its existing land use rules.

This spatial zoning analysis allows us to calculate how much land jurisdictions make available for multi-family affordable housing and to compare how jurisdictions zone their

land. It is a fast way to examine how much zoned land is available for more dense housing types.

To better understand approval processes, we complement our legal research by gathering data on how jurisdictions have applied land use regulation over years. We focus on data that illustrates how jurisdictions approve all residential or mixed-use developments of five units or more approved by our study jurisdictions. The data we gather includes documents that detail how planners and local elected officials have applied local and state land use regulation. Importantly, this part of our work allows us to study how these 28 local governments apply the California Environmental Quality Act, or CEQA, to proposals to build housing.

By studying and coding staff reports, board agendas and meeting meetings, we can draw on many objective data points to tell us not only what type of housing a jurisdiction approved, but what the pathway to approval required. We then found and added in the geographic coordinates for each proposed development. All of this work allows us to look at how jurisdictions applied land use law using maps, to determine timeframes to approval, and to determine the frequency of different approval steps in relationship to types of proposals to development housing or location.

We also interviewed stakeholders in the development process (attorneys, planners, developers—affordable and market rate, government staff, community-based organization leadership) in twenty of our jurisdictions.

Our research approach collects data from a variety of sources, including housing approval data from actual entitlements cities and counties issued over four years, diverse stakeholder interviews, GIS zoning data, and legal texts. Our approval dataset relies on uniquely detailed information of individual housing development approvals. For example, we can analyze and compare how similar development (in terms of affordability or project characteristics) navigated approval processes within and across jurisdictions. Our interviews with stakeholders from various stakeholder groups in each study jurisdiction allowed us to gather different perspectives on each research question. In sum, we can provide a detailed picture of each study jurisdiction's regulatory environment and offer some insight into which regulations most likely influence housing development outcomes in those places. In these ways, our study is unique because of the degree of detail we have on each study jurisdiction and because we use mixed methods and we triangulate data points to answer questions—including objective data points on how cities and counties apply their own and state law.

But there are some important limitations to our data and the related analysis. Some of those limitations are pertinent to the March 16, 2023 Hearing on the Effects of the California Environmental Quality Act.

First, we are sharing findings for specific cities in California for approvals issued in 2014, 2015, 2016, and 2017 that cannot be extrapolated to other jurisdictions. Where we discuss the implications for statewide policy, we qualify our statements appropriately.

Second, our dataset does not include denials—or data on how and when jurisdictions deny proposals to build housing. Our study only examines those projects that made it to entitlement, allowing us to understand the conditions jurisdictions impose and project approval delays on the path to approval, but not denials.

Third, our data does not allow comparisons between timelines for discretionary and ministerial projects; we would need more data because ministerial projects end with a building permit, and discretionary projects end with the entitlement that happens prior to getting a building permit. (For recent work exploring the impact of ministerial processes on approval timeframes, check out UCLA's Lewis Center's recent brief examining the impact of the City of Los Angeles' Transit Oriented Communities program on processing times.)

Fourth, the stakeholder interviewees for the qualitative portion of the data volunteered. Voluntary participation in interviews increases selection bias and limits the generalizability of findings from interviews, even within the study's geographies.

Fifth, we did not study litigation of specific plans or general plans. According to some of the stakeholders we interviewed, litigation related to either could be an issue in California related to rezoning and/or planning efforts at a neighborhood or area level.

We call out these study limitations to address a significant issue within the body of research examining the effects of CEQA on housing development. Specifically, we note that we are limited to sharing our understanding of

(1) the amount of land area within our study jurisdictions that is zoned for multi-family housing, and dense multi-family housing, in particular;
(2) the direct impact of CEQA on delaying successful housing approvals measured by the intensity of the CEQA compliance pathway;
(3) the direct impact of local regulation in determining whether CEQA applies to development that complies with all local density and use provisions in local zoning and planning; and
(4) the frequency of both local administrative appeals of housing approvals, and challenges in court to housing approvals, using CEQA and other land use law.

We emphasize here that although trying to understand whether CEQA deters developers from proposing housing development projects entirely is an issue of tremendous public importance, research to explore that question would face significant methodological challenges that would bring into question the reliability and credibility of any findings. First, to explore the question of whether CEQA deters development proposals entirely would require identifying possible proposals to develop that would successfully navigate the local regulatory hurdles that local planning and zoning impose—but for CEQA. Finding observations of the projects never proposed would likely depend on the stakeholders that claim that they have declined to propose projects because of CEQA voluntarily stepping forward. Voluntary participation in any study increases selection bias and limits the generalizability of the findings. Second, research on this question would not likely be able to triangulate the responses of any voluntary participant against another, objective, data source because the project did not proceed.

Third, detangling the impact of CEQA from the impact of local regulation on deterring a developer from proposing a project rests on a questionable assumption that CEQA, alone, deters at least some developers from proposing projects. Our findings, which we discuss below, indicate that the same local regulation that dictates whether a development proposal requires CEQA review also imposes uncertainty of local government approval under local law, and risks administrative appeal and litigation of local approvals for controversial projects. Thus, it would be difficult for a researcher to identify projects developers will not propose because of CEQA that would otherwise successfully overcome local regulatory obstacles to entitlement.

Summary of Key Findings

Local zoning regulates how property can be used, as well as the height, density, and spacing of buildings. Cities use zoning to constrain or incentivize certain types of housing development. State law requires that all local communities zone at least some land for all income levels. In urban cities, that requires cities and counties zone at least some land for 30 dwelling units per acre.

One of our most important findings is that despite state law that requires all cities and counties zone land for all income levels, local zoning remains a core constraint on new multi-family housing. This directly impacts what type of housing developers propose—and whether they propose any housing development at all. Most infill cities we studied zone less than 10% of zoned land for multi-family housing at a density sufficient to allow for housing across all income levels. Figure 1 shows some of our state's largest cities zone less than 5% of their zoned land for all income levels—including Long Beach, San Diego, and San Jose. In interviews with affordable housing developers, participants described the unavailability of land zoned for affordable development as being the first obstacle to increasing affordable supply.

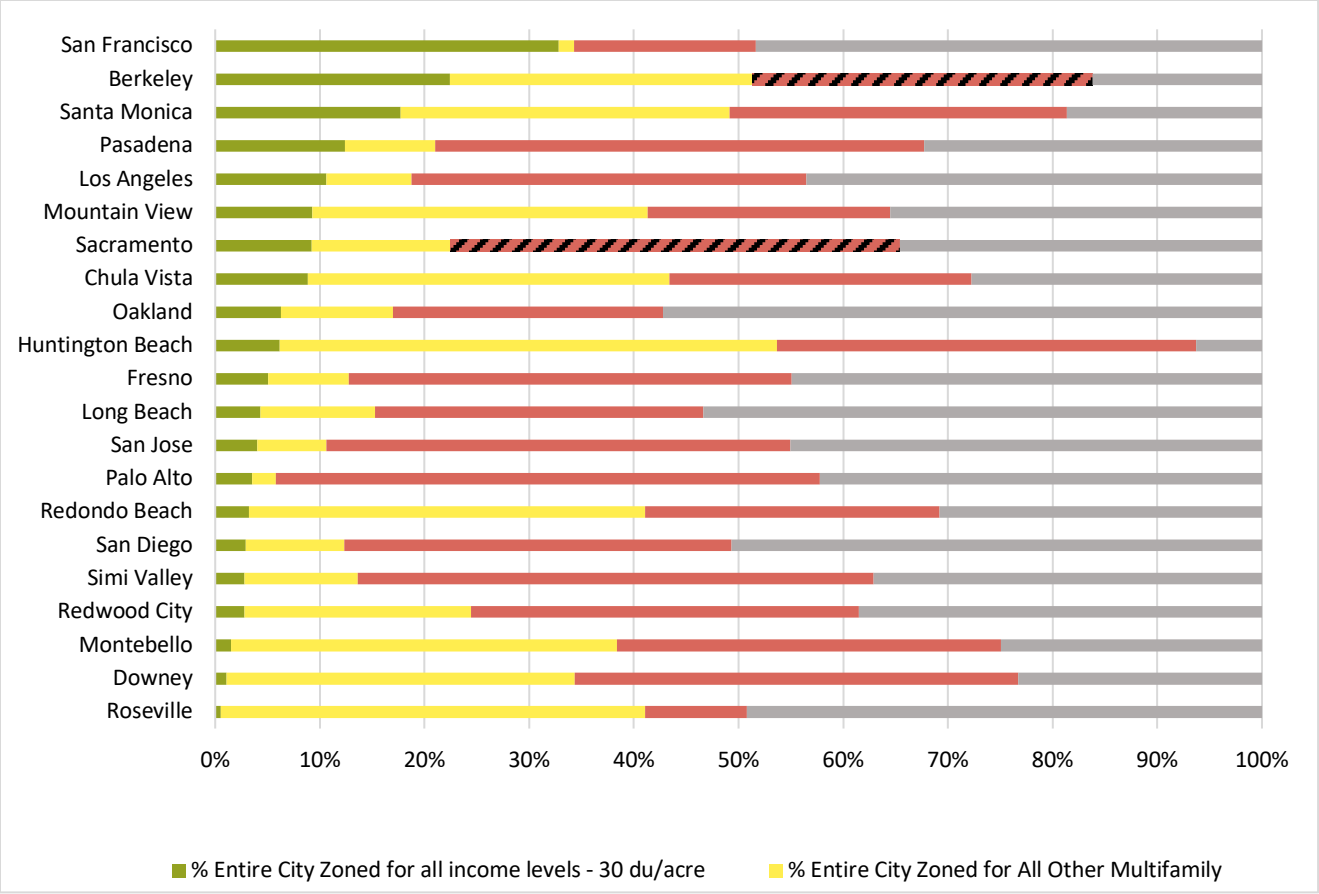

Figure 1 Comparison of Density Constraints in Local Zoning

Local constraints on density and use (base zoning) are not the only obstacles to dense development. For example, San Francisco has the most permissive base zoning of all of our larger study cities, as this city zones ~34% of its zoned land area for 30 dwelling units per acre or more. But San Francisco also exemplifies how California cities may use procedural requirements to delay (and possibly deter) housing development. San Francisco applies a discretionary approval process to all proposals to develop housing, and that discretion extends to building permits (which many presume would be ministerial).

Discretionary review refers to the power to impose subjective standards or conditions when deciding whether to approve proposed development.[1] Ministerial review, in contrast, involves using an objective standard that requires a local government to approve a proposed development, so long as the development conforms to the relevant objective standards.[2] Ministerial review involves a local government agency applying law to fact without using subjective judgment.[3] It necessarily involves a proposed development that

1. *See Friends of Westwood*, 235 Cal. Rptr. at 794–98 (discussing characteristics of a discretionary action and explaining that when city employees can set standards and conditions for many aspects of a proposed building, the approval process is discretionary).
2. *See, e.g.*, Slagle Constr. Co. v. County of Contra Costa, 136 Cal. Rptr. 748, 750 (Ct. App. 1977) (finding that a building permit was not ministerial because the county code said a building inspector "may" withhold issuance of a building permit).
3. *See* Prentiss v. City of South Pasadena, 18 Cal. Rptr. 2d 641, 644 (Ct. App. 1993) (discussing a ministerial duty to issue a building permit and asserting that CEQA does not apply to ministerial projects).

conforms to underlying base zoning (density and use controls). But complicating matters, cities may *choose* to use discretionary processes when approving development that conforms to underlying base zoning (density and use controls). Importantly, when cities choose to use discretion when deciding whether to approve or deny a development, that local choice triggers the application of CEQA. CEQA does not apply to ministerial approvals.

Nearly *all* of our 28 study jurisdictions have local law that requires use of discretionary review processes to approve proposals to develop five or more housing units. Often this local law required a discretionary process to approve proposals to develop housing that complied with all zoning and planning requirements. Seven of our twenty-eight jurisdictions had ministerial pathways to approval for development of five or more units written into their local law, yet we could only find examples of ministerial development approvals in two jurisdictions—the City of Los Angeles and the County of Los Angeles.

Our dataset of over 2,300 approvals allows us to observe how these discretionary processes add time, uncertainty, and expense to the approval process through multiple datapoints. For example, San Francisco's local law makes all approval processes discretionary. San Francisco also has, by far, the longest time frames to approvals. The median timeframe to approval within San Francisco is nearly 27 months. San Francisco's time frames represent an outlier not just within the metropolitan region, which had median time frames ranging from ~5 months (Oakland) to ~21 months (Berkeley), but also across all of our study cities. We can triangulate these median timeframes with data from interviews with stakeholders. Stakeholders report that San Francisco remains a very difficult place to develop whereas Oakland is comparatively easier. Stakeholders attribute these distinctions to local regulation, planning, and politics.

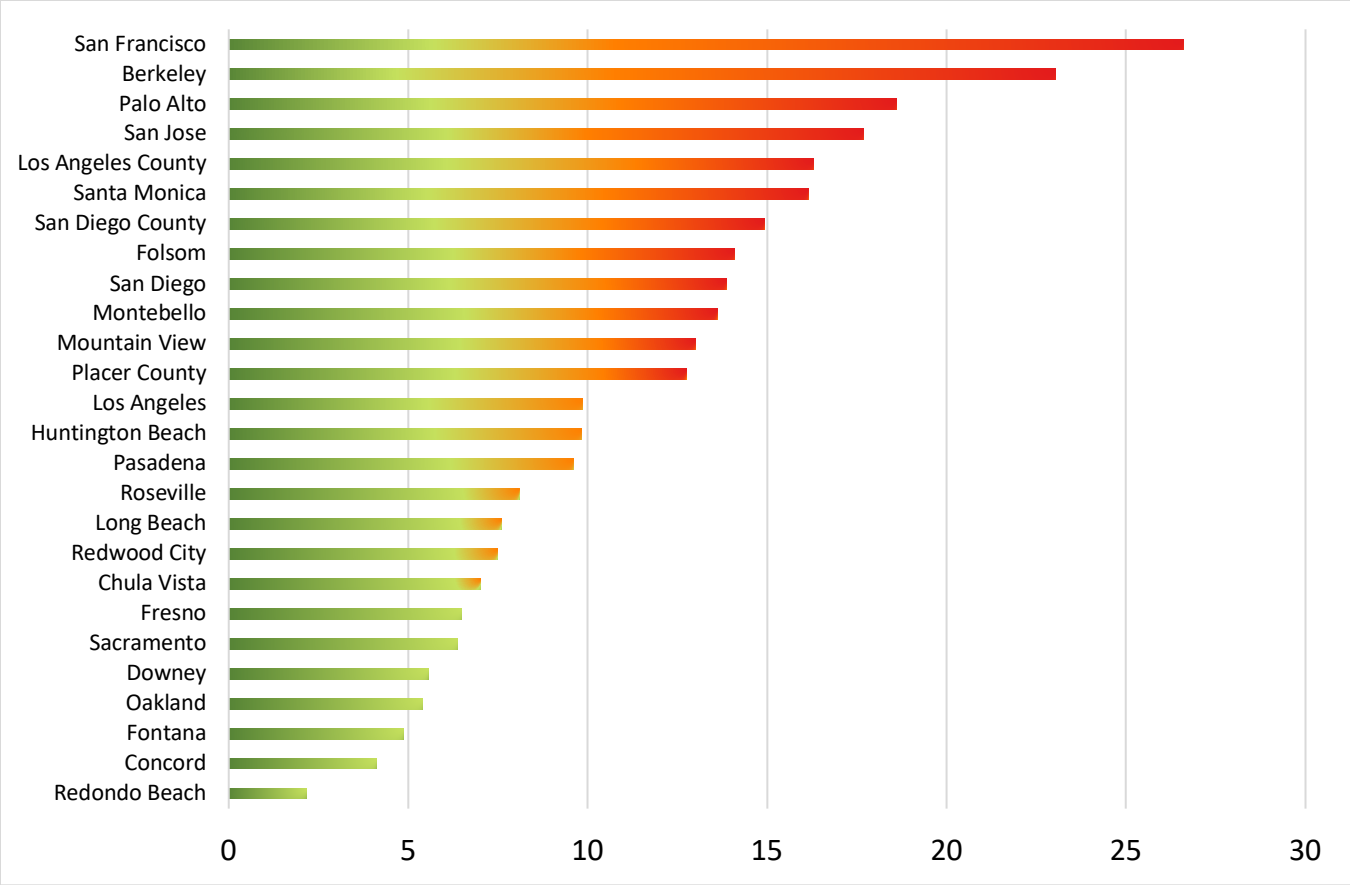

Figure 2 Median Timeframe to Entitlement, 5 or more units, approvals issued 2014-2017

Our data also allows us to observe how CEQA operates across cities for similar proposals to develop housing. For example, several study cities approved multi-family housing that was exempt from CEQA. We still see tremendous variability across timeframes to approval. Figure 3 illustrates that developments in some cities, like San Francisco or San Jose, that are exempt from CEQA do not necessarily experience substantial reductions in timeframes, whereas developments in other cities—like Berkeley—that are exempt from CEQA do see reduced timeframes.

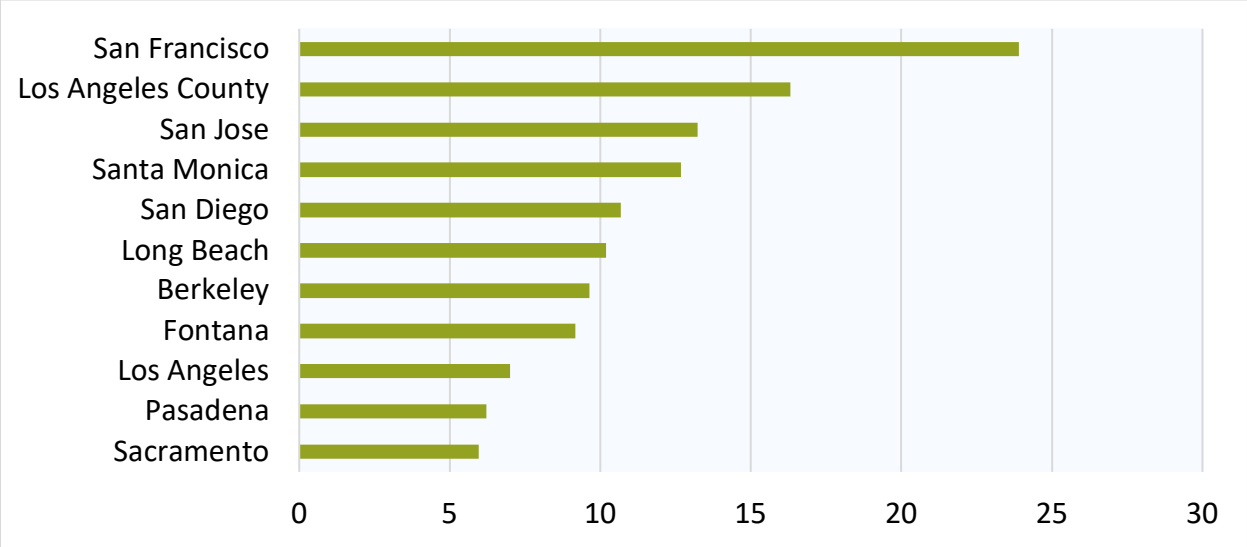

Figure 3 Median Timeframes 5-49 units apartment buildings exempt from CEQA

Timeframes to approval vary for developments that are similar in terms of project size, local level approval requirements, zoning and planning designations, and how they comply with CEQA also vary across cities. Sometimes the difference between timelines in neighboring urban cities that use identical environmental review processes for similar housing developments were extreme—one city might take less than 6 months and another over 2 years.

Across all jurisdictions, most development required less intensive environmental review. In other words, Environmental Impact Reports were uncommon—across all 28 jurisdictions. Importantly, there was also no consistent or substantial difference between how cities applied environmental review to infill and exurban development in terms of environmental review pathways.

We also examined our data to see how frequently project opponents used CEQA litigation as a tool to block development. Overall, we found that less than 3% of ~2,000 development approvals faced community opposition through litigation. Litigation rates were higher in Southern California cities than in the rest of the state. Litigation rates in urban cities and in exurban areas were nearly identical.

In the instances when litigation occurs, California Environmental Quality Act (CEQA) claims are common—but most lawsuits (almost 3 out of 4) could proceed even if the plaintiff or petitioner could not bring a claim under CEQA. 30.19% of the projects in all twenty jurisdictions that faced litigation were challenged under CEQA alone, another 66% were challenged using claims under CEQA as well as under other laws – usually claims that the project violated the local government's general land-use plan or provisions of the local government's zoning code.

Of all the projects challenged by lawsuits, petitioners or plaintiffs rarely won on the merits. Petitioners were more likely to reach a settlement with the defendant. Of all lawsuits, more

than half were settled. For projects that were litigated, the data revealed extensive delays, particularly when there was an appeal of the trial court decision.

Implications of Our Findings for CEQA Reform

As our data make clear, local control is central to how well the land-use regulatory system and CEQA facilitate housing production in California. Our writing so far has put forward proposals for policy change that focus on local control – on the ability and incentives that local governments have to either deter or facilitate housing production and the need for state intervention into some local control to advance housing affordable to multiple income groups. Our data indicates that reforming CEQA without addressing local regulatory obstacles to housing development may not facilitate or accelerate increased housing production.

We agree, generally, that CEQA requires reform. Our primary proposal is to streamline CEQA review within core urban areas to facilitate infill residential development through the designation of "infill priority areas." In these locations, residential development proposals (and mixed-use development proposals that are primarily residential) would generally be exempt from CEQA review. The same exemption would also apply to local rezoning decisions that increase the capacity for housing production. This exemption would build on existing law in a few critical ways.

First, while there is currently an abundance of exemptions from CEQA for a range of residential projects, those exemptions are scattershot, often byzantine in their application, and can be subject to exceptions that are ambiguous in their scope. This complex web of exemptions imposes costs on project proponents and the public to understand what projects are exempt from CEQA. Ambiguous exceptions – especially for the exemptions in the CEQA guidelines – can impose significant cost and uncertainty on applicants that undermines the very purpose of CEQA exemptions.

Second, the exemptions generally apply to individual residential development proposals, but not to rezoning proposals. Our data, as shown in Figure 1, suggests that some (possibly many) local governments seeking to significantly increase housing production – and to comply with more rigorous RHNA targets – will need to do significant amounts of upzoning. Applying CEQA exemptions to rezoning proposals is therefore important.

Third, under current law, local government decisions to refuse to apply a CEQA exemption to a qualifying project are essentially unreviewable in court. In contrast, local government decision to apply a CEQA exemption can be reviewed. The result is that local governments may face substantial pressure to avoid applying CEQA exemptions to controversial projects, even when those projects qualify. In addition, the lack of accountability for local governments that refuse to apply CEQA exemptions means that local governments that wish to use CEQA as a way to evade state laws supporting housing production, such as the Housing Accountability Act, and to block unpopular projects, can do so, even if a CEQA exemption should apply.

We propose changing the law to address each of these three limitations in current law. First, we propose developing a map of "infill priority areas" across the state – areas where housing production would be beneficial from an economic and environmental perspective.

These areas would exclude important natural resources that warrant state-level protection, such as wetlands, endangered species habitat, and prime agricultural lands. Infill priority areas would also be areas where development would not contribute to an increase in vehicle miles traveled, and thus would advance California's climate goals. The relative simplicity and clarity of the map-based system would reduce the uncertainty and costs that project proponents currently face in seeking to identify what exemptions a project would qualify for.

Second, we suggest that the law should set a high bar – higher than current law – for any exception to the infill priority area exemption. Only if a reasonable person could determine, based on the record compiled for the project, that significant impacts would likely result from the project, would any further analysis be required, and that analysis would be limited only to the impacts identified in the record. Reciprocally, if a reasonable person could conclude that there are no significant impacts that would likely result from the project, the exemption would apply. Critically, the burden of proof would be on project opponents to meet this standard.

Third, we propose that the law provide for an enforcement mechanism whereby a local government decision not apply the infill priority area exemption to a project would be reviewable. This creates more incentive for local governments to use incentives, where warranted, and also provides a check on local governments that might seek to evade the application of this CEQA exemption because of local opposition to a project. Review might be judicial or by a state administrative agency – administrative review might be speedier, but would require significant resources from the legislature to create a new system. And review could be sought not just by a project proponent, but also by the state attorney general, or through a citizen suit mechanism (as in current CEQA law).

Conclusion

The above content summarizes our methods, data, findings, and policy reform proposals. More detailed writing on each topic is available at the website landuseinsights.org.