Housing Accountability vs. CEQA Accountability: The Next Battle in California's Housing War

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UC DAVIS SCHOOL OF LAW

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1. An Accountability Deficit?

CEQA and the HAA were both designed to solve underlying accountability problems (but in mutually contradictory ways).

1.1 CEQA: “let the people know”

The view from 1970: Gov. Reagan signs CEQA into law

1.1 CEQA: “let the people know”

“CEQA was enacted to advance four related purposes: to (1) **inform the government and public about a proposed activity's potential environmental impacts**; (2) identify ways to reduce … environmental damage; (3) prevent environmental damage by requiring project changes via alternatives or mitigation … when feasible; and (4) **disclose to the public the rationale for governmental approval of a project that may significantly impact the environment**.”

California Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist. (2015) 62 Cal. 4th 369, 382

1.1 CEQA: let people know … reps' values?

"Only by requiring the County to fully comply with the letter of [CEQA] … **will the public be able to determine the environmental and economic values of their elected and appointed officials**, thus, allowing for appropriate action come election day should a majority of the voters disagree."

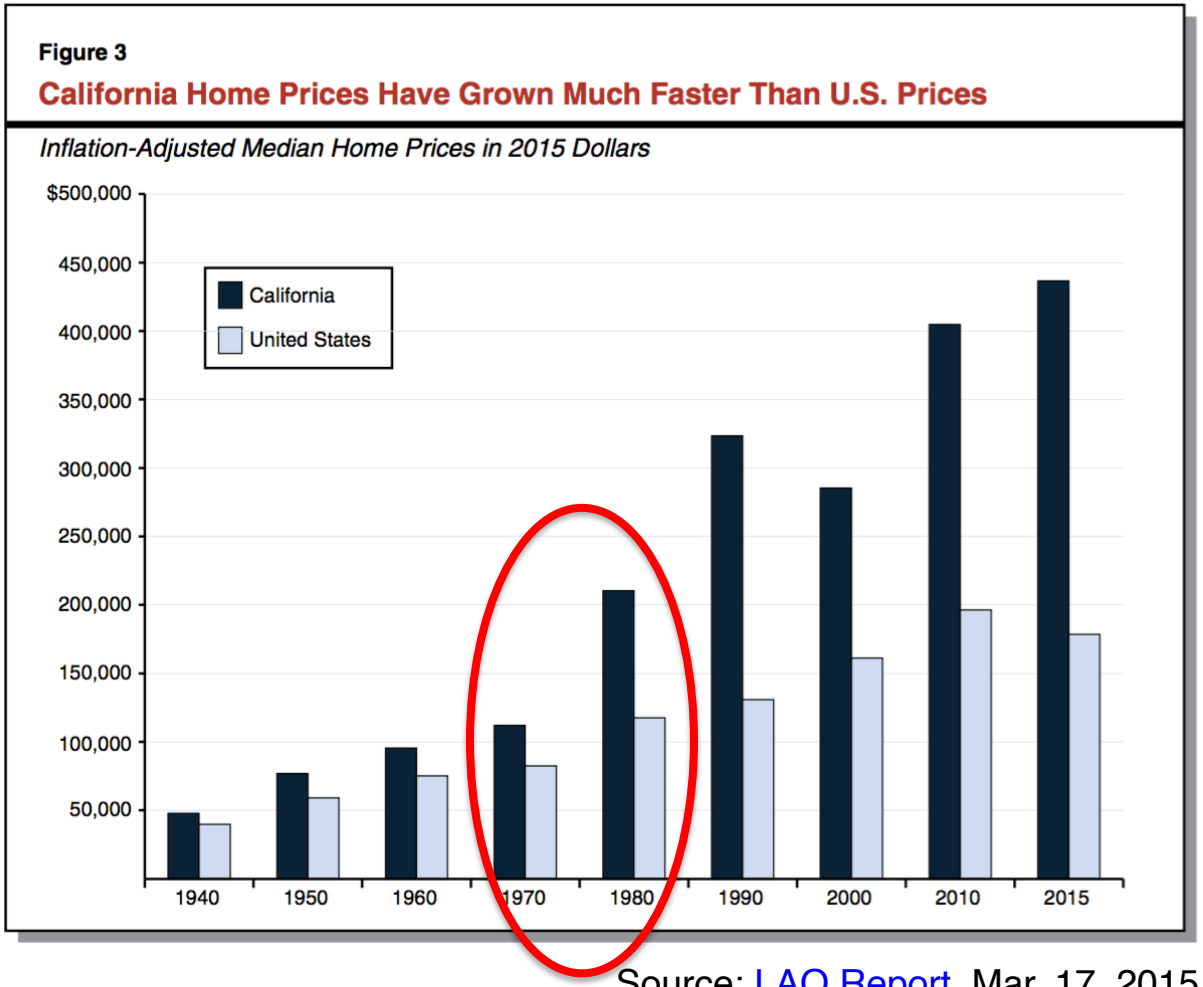
People v. County of Kern (1974) 39 Cal.App.3d 830, 842

1.1 CEQA: let people know … reps' values?

"If a nonelected decision-making body of a local lead agency certifies an environmental impact report, approves a negative declaration … or determines that a project is [exempt], that certification, approval, or determination may be appealed to the agency's elected decision-making body…."

Pub. Res. Code § 21151(c)

1.2 What the 1970s delivered



Source: LAO Report, Mar. 17, 2015

1.3 HAA: municipal accountability to region

1980: Legislature passes Housing Element Law, setting up complicated conveyor belt for regional housing needs

- State quantifies regional need
- Councils of Governments divvy it up among local govts
- Local govts then revise "housing element" of general plan—showing how they'll accommodate their share of region's need—and submit it to HCD for review/approval
- Local govts then update their zoning ordinances to conform to housing element

1982: Leg enacts HAA to block backdoor downzoning

1.3 HAA: municipal accountability to region

65589.5. When a proposed housing development project complies with the applicable general plan, zoning, and development policies in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exist:

(a) The housing development 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.

(b) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to subdivision (a), 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.

1.3 HAA: municipal accountability to region

2016-2019: Legislature strengthens HAA, dramatically

- New Findings
  - "The Legislature's intent in enacting [the HAA] … was to … effectively curb[] the capability of local governments to deny, reduce the density for, or render infeasible housing development projects.... That intent has not been fulfilled." GC § 65589.5(a)(2)(K).
  - "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 … housing**." GC § 65589.5(a)(2)(L).

- New Definition of Compliance w/Plan & Zoning
  - Project complies with applicable zoning & development standards **if a reasonable person could deem it to be compliant.** GC § 65589.5(f)(4).
  - Project is "**deemed to comply**" w/ applicable standards unless city gives written notice, w/in 30-60 days of receiving complete application, of standards the project doesn't meet. GC § 65589.5(j)(2).

1.3 HAA: municipal accountability to region

2016-2019: Legislature strengthens HAA, dramatically

- New Remedies
  - Attorneys' fees
  - Court order approving project if it was denied in bad faith
  - City must post bond to appeal trial court ruling against it
  - Fines (multiplied if city was in bad faith)

Courts then vindicate the legislature's handiwork. E.g., *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820.

2. The Conflict

469 Stevenson St., caught in the CEQA-HAA crossfire

2.1 Warring premises of CEQA & HAA

Virtues of local political discretion

- CEQA: local electeds must hold reins of enviro review, so that city's electorate can hold them accountable for revealed enviro values
  - *California Clean Energy Comm. v. City of San Jose* (2013) 220 Cal. App. 4th 1325 (invalidating local EIR procedure that put planning commission in charge, lest city council be "bound by a [CEQA] finding that it finds flawed")
- HAA: local electeds' political discretion over individual projects must be tightly curtailed
  - Planning staff's initial finding (or failure to find) that a project complies w/ planning and zoning standards is binding on local electeds. GC § 65589.5(j)(2).

2.1 Warring premises of CEQA & HAA

Deliberation vs. speed

- CEQA: Slow down!
  - Full EIR if "fair argument" that project may have "any" significant enviro impact
  - No provision for challenging denial of an exemption to a qualifying project
  - Timelines exist—but have been treated by courts as unenforceable (*Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal. App. 4th 1245)
- HAA: Speed up!
  - Violations of Permit Streamlining Act constitute violations of HAA
  - [Entire housing element framework is organized around timelines w/penalties]

Environmental benefits of preserving local status quo

- CEQA: no enviro review required if project is denied
- HAA: codifies leg finding that lack of new housing causes sprawl, "undermining the state's environmental and climate objectives."

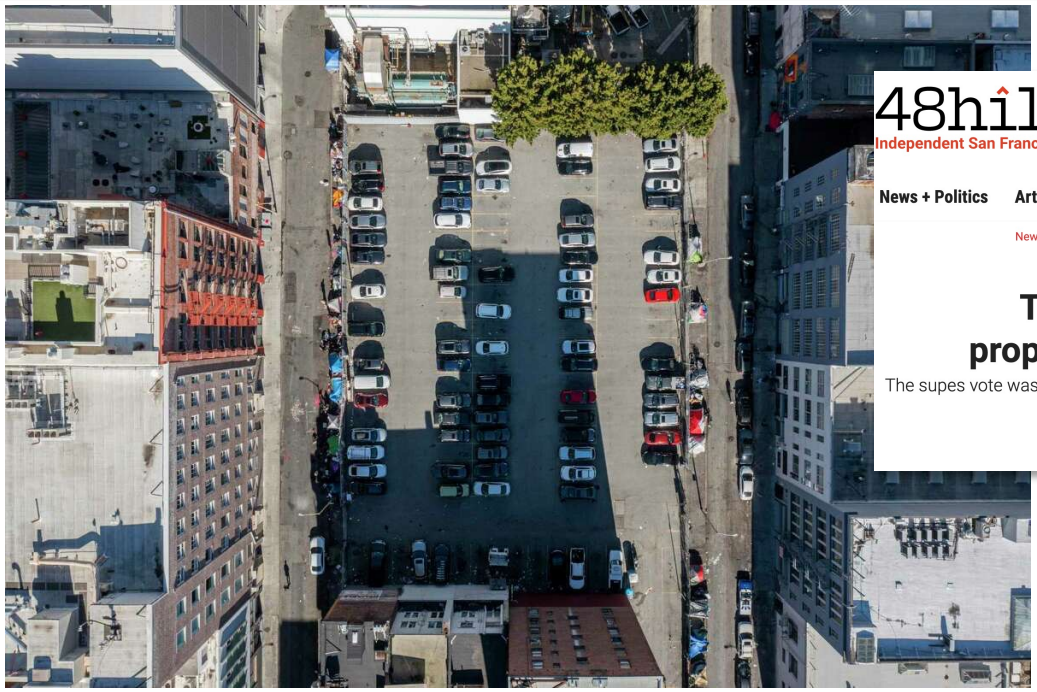
2.2 What happened w/ 469 Stevenson?

BAY AREA // SAN FRANCISCO

State investigating S.F.'s decision to reject turning parking lot into 500 housing units

J.K. Dineen

Oct. 28, 2021 | Updated: Oct. 29, 2021 2:41 p.m.



48hills

Independent San Francisco news + culture

NEWS + POLITICS HOUSING

The facts behind the developer propaganda on Soma housing project

The supes vote wasn't anti-housing; there's a great housing deal on the table that the developer has rejected.

By JOHN ELBERLING DECEMBER 6, 2021

2.2 What happened w/ 469 Stevenson?

BAY AREA // HEATHER KNIGHT

S.F.'s real housing crisis: Supervisors who took a wrecking ball to plans for 800 units

Heather Knight

Oct. 30, 2021 | Updated: Nov. 1, 2021 1:08 p.m.

Melgar and Mandelman phoned to discuss at length their concerns about the project. Melgar said Haney should have negotiated a deal between the developers and TODCO.

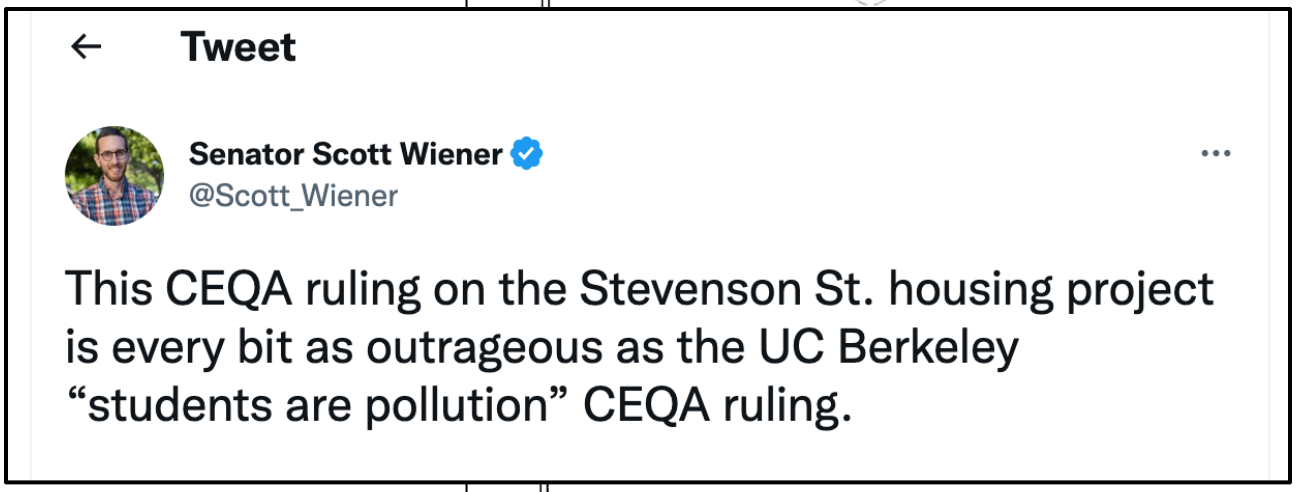
"If this actually is able to become a 100% affordable housing project, I will feel very good about this vote," he said. "If that doesn't happen and 15 years from now it's still a parking lot, then I will not feel good." Sup. Mandelman

2.2 What happened w/ 469 Stevenson?

The Nitty-Gritty

- City couldn't impose TODCO's scheme as a "condition of approval"—that would violate HAA
- So instead of *overtly* violating the HAA, the Supes voted to send the EIR back to Planning for additional study—on basis of frivolous CEQA arguments
  - Historic resources
  - Gentrification
  - Seismic / foundation
- And neither CEQA (as construed by courts) nor background principles of administrative law provide a remedy for delay...

2.3 What the court said



Tweet

Senator Scott Wiener
@Scott_Wiener

This CEQA ruling on the Stevenson St. housing project is every bit as outrageous as the UC Berkeley "students are pollution" CEQA ruling.

FILED
San Francisco County Superior Court
OCT 21 2022
CLERK OF THE COURT
BY: Deputy Clerk

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

YES IN MY BACK YARD, a California nonprofit corporation; and SONJA TRAUSS,

Petitioners and Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO; SAN FRANCISCO BOARD OF SUPERVISORS; and DOES 1-35,

Case No. CPF-22-517661

ORDER RE: DEMURRER

Hearing Judge:	Hon. Cynthia Ming-mei Lee
Time:	9:30 a.m.
Place:	Department 503
Hearing Date:	September 9, 2022

2.3 What the court said

- **Violation of HAA?**
  - Nope. It's formally impossible for a city to disapprove a project or impose conditions of approval until it finishes CEQA review.
- **Violation of SB 330 "5-hearing limit"?**
  - Nope. "At this juncture, CEQA review is still in process." (Also: CEQA likes hearings & SB 330 doesn't mess w/ CEQA)
- **Violation of Permit Streamlining Act?**
  - Nope. PSA clock starts to run only when CEQA review wraps up.
- **Violation of CEQA?**
  - Nope. "[N]othing in [CEQA] authorizes a court to direct any public agency to exercise its discretion in any way."
  - "[A]s no final EIR has been certified, the cause of action is not yet ripe."
  - CEQA time limits are "directory, not mandatory"

3. Solutions

Appeal?
Call the Legislature?
Rally HCD?

3.1 Possible Judicial Solutions (on appeal)

Courts *could* hold that a city's bad-faith denial of a CEQA clearance constitutes a "disapproval" within meaning of HAA

More tenuously, a court *might* hold that HAA by implication transforms CEQA, rendering CEQA timelines enforceable; or that a bad-faith vote to delay is itself reviewable as violation of background admin-law norms

See Elmendorf & Duncheon, "When Super-statutes Collide: CEQA, the HAA & Techtonic Change in Land-Use Law," *Ecology Law Quarterly* (forthcoming).

3.2 Possible Legislative Solutions

Bring back AB 2656! (SPUR & Member Phil Ting's elegant solution)

- After CEQA deadline has passed, developer may call the question of whether draft CEQA document is legally sufficient
- City then has 90 days to make up its mind
- If city's then fails to act, or decides to require further study when the enviro review was in fact sufficient, that violates HAA
- No attorneys' fees against city if city acts in good faith
- Only applies to dense housing on infill sites

3.3 Possible Administrative Solutions

Use housing element update to fix bad CEQA practices

- A housing element must analyze & remove "constraints" to new housing (but statute doesn't define "constraint").
  - Abusive and long-winded CEQA reviews are a constraint in the colloquial sense
  - Egregious failure to comply with "directory" CEQA time limits is plausibly a "constraint" in more legal-technical sense
- However, it's tough (impossible?) for HCD to gauge whether a city is systematically failing to issue exemptions or neg decs to housing projects, or otherwise abusing CEQA systematically.
- And HCD's authority to insist on particular corrective actions is thin, at best.
- Maybe some good will come of HCD's Housing Policy & Practices Review?