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[Should CEQA Reform be Given a "Fair Hearing?" PART II](#)



By [David Kersten](#)

David Kersten is an independent political consultant who lives in the Bay Area. Kersten is also an adjunct professor of public budgeting at the University of San Francisco.

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The accidental result of the new UC Berkeley academic studies and testimony presented at the March 12 joint legislative hearing appeared to clearly implicate CEQA as a major driver of the state's skyrocketing housing development costs.

The first panel was intended to give an overview of CEQA and its streamlining provisions. It was composed of Terry Rivasplata, a former government employee who drafted many of the changes to the CEQA guidelines in the 1990s, and Justice Ronald B. Robbie, a judge with the 3rd District California Court of Appeal.

The second panel was composed of three UC Berkeley Law School academics who presented the results of an in-depth multicounty study which examined CEQA's role in the development process.

Both panels provided a lot of great insight into CEQA and its potential impact on housing development in California, albeit some participants drew questionable conclusions based on the data actually presented.

Prior to introducing the panels, Senate Judiciary Chair Jackson said the intent of the hearing was to present "empirical studies" by "neutral parties." Sen. Jackson said the goal was to find out if CEQA is the source of problems, but said the hearing was not intended to focus on "how to fix CEQA," suggesting that another future hearing may be held.

Rivasplata kicked off the panel testimony with an in-depth review of the history of CEQA and its role in the local development process.

He said that there are 25 cases of reported CEQA litigation per year and estimated that CEQA applies "somewhere north of 20,000 projects" statewide in a given year.

The EIR process often required by CEQA commonly takes at least a year, but commonly 1-4 years for bigger projects. Rivasplata said there were a number of exemptions for affordable housing projects but they are rarely used because they are cumbersome, complex and have a lot of qualifiers.

Rivasplata was joined by Justice Robbie, who is an expert in CEQA litigation and worked for the state for a long-time before becoming a judge.

With regard to cases that are litigated, Justice Robbie said that negative declarations are often challenged with the plaintiff arguing that a more lengthy and expensive EIR should be prepared instead of a "negative declaration."

Robbie said these cases can typically take three years to litigate, and then another three years to do an EIR, which is why he advises project managers to just do an EIR to begin with, despite the dramatically increased costs and timeline associated with the production of an EIR.

"Sometimes you get multiple lawsuits," Robbie said, adding that projects can keep moving forward while being litigated. He said that CEQA lawsuits are commonly accompanied by lawsuits on other issues such as historic building regulations and general plan compatibility.

In conclusion, Robbie opined that the overall number of total lawsuits is low, with most being settled out of court, and concluded that the CEQA litigation process status quo is fine as is.

This questionable conclusion based on the evidence presented drew the aforementioned question from Sen. Borgeas about whether Governor Newsom was wrong to call for CEQA reform?

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The second panel discussed many of the same issues, but presented additional empirical research and findings.

Moira O'Neill, a senior research fellow at the UC Berkeley School of Law, kicked off the second panel by presenting the results of a multicity study. The study found that housing developments that require environmental impact reports (EIR) take an average 44 months to clear the local development approval process.

Furthermore, most major housing projects require EIRs, and they are the centerpiece of the CEQA review process. In addition, EIRs were the most likely of all projects to be litigated.

O'Neill added that cities have introduced layers and layers of additional regulation for many developments outside of certain project plan areas.

She agreed that the state's "byzantine system" of different local approval regulations and processes is a significant barrier to housing development, providing the example of the City of Oakland that requires an onerous alternative process to avoid strict parking requirements.

UC Berkeley Law Professor Eric Biber presented some very interesting findings on the same study which indicate that local governments keep so little public data on housing development that they do not even know what problems they really have in the development process.

Furthermore, this lack of transparency by local government ensures that the State Legislature and public is kept in the dark about what is really going on with regard to the approval, or more appropriately by my scoring, the lack of approval of housing development in this state, Biber stated.

The UC Berkeley study found that only 3% of CEQA cases were litigated, but Professor Biber agreed that it is hard to determine the impact that the "threat" of lawsuits has on what projects developers bring forward.

Biber also said that a lot of the litigation data is not even publicly available and difficult to access from the courts. He said that many local governments, particularly smaller agency's, push the cost of all the reviews and approvals required by CEQA onto developers, which drives up costs.

One of the most interesting facts presented by Biber is that California local governments can unilaterally decide to reject a development project for no good reason, even if the project has satisfied all applicable local regulations as well as all CEQA requirements.

"If a local government doesn't want to approve a project it doesn't have to," Biber stated, adding that local governments have "full discretionary power" to determine what projects proceed in the process, even at the planning stage.

"I would be shocked if this was significantly different in most cities around the state," Professor Biber concluded.

Upon the conclusion of the panel discussion, the committee chair Sen. Jackson opened the hearing up to brief 2-minute comments from the public and interested parties.

Most of the public comments were essentially boiler plate statements and talking points from social justice and environmental groups praising CEQA for keeping the state's communities safe and protecting kids from cancer.

A representative from the Planning and Conservation League (PCL), an original sponsor of the implementing CEQA legislation in the early 1970s, agreed that the current CEQA process is "challenged" and believed that the time has come to reform CEQA without reducing the benefits it provides.

Apparently, the law was only 4-pages when it first passed, but has become too unwieldy. PCL is currently in the process of bringing together stakeholders to work on an update to CEQA that addresses the settlement deadlines and litigation issues, among other areas of potential reform.

The chair said she looked forward to reviewing what PCL-backed reform coalition comes up with regard to reforming CEQA.

A representative from the California Chamber of Commerce said the "answer for us is somewhere in the middle," adding that "CEQA is not the only problem" when it comes to limiting housing development.

The chamber representative said he used to litigate CEQA issues and knows first-hand that the threat of a CEQA lawsuit is just as impactful as the actual filing of a lawsuit.

At the conclusion of the public comments section, the Senate Judiciary committee chair Hannah Beth Jackson appeared somewhat more open to further CEQA study and getting more updated data on the issues discussed at the hearing.

"We're operating blind here....we need more data," Sen. Jackson said, who at the same time continued to stick to her narrative that most criticism of CEQA is based on misinformation or cherry-picked anecdotal "horror stories."

Sen. Jackson concluded that "California is a nice place to live" and credited CEQA with making that happen.

Serious questions remain about the availability of data and evidence of all the public policy issues surrounding CEQA, particularly the closed-door litigation issues and CEQA-related court cases.

What quickly became clear in the hearing is that CEQA needs significant reform to limit frivolous litigation, shorten regulatory timelines, and ultimately reduce the cost of housing development.

At the same time, the hearing provided a sample of the political difficulty of reaching consensus on how to reform CEQA, and a brief look at other related issues, such as local government regulatory review processes that also drive up the cost of housing development, or prevent housing development all together.

Former Governor Jerry Brown probably put it best—CEQA reform is indeed the "Lord's work," and one of the many California laws that Governor Brown chose not to waste significant political capital to change.

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Brooke Smith

Thanks for reporting on this. I wish more SF & LA metro areas newspapers would cover stories like this, especially in their online content. I truly believe that CEQA reform would have happened a long time ago if voters really understood the problems.

We have many low information voters who think CEQA is simply something that protects the environment and therefore it is "good." They are generally not aware of the extent that CEQA inhibits transit-oriented development and leads to sprawl (few NIMBYs or extremist environmental groups get upset about developments on the outskirts of Livermor... [See More](#)

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