

Falling Flat:

Why the CEQA Affordable Housing Exemptions Have Not Been Effective

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Executive Summary

The California Environmental Quality Act (“CEQA”) requires environmental review for new housing developments. However, as California faces an acute shortage of affordable housing, CEQA appears to have become an impediment to the creation of new affordable housing. To combat this problem, the legislature has enacted statutory exemptions from CEQA review for certain kinds of infill and affordable housing developments. At the same time, the State Resources Agency promulgated a categorical exemption for infill development that can benefit urban affordable housing projects. This study analyzes:

- (1) whether affordable housing developers have been using CEQA exemptions; and
- (2) how affordable housing developers comply with CEQA in general.

For a developer to utilize an exemption, the local planning agency must grant it. Our survey of local planning agencies that reported using the new statutory exemptions in 2004 (12 localities) revealed that most of them are not granting the statutory exemptions for urban infill, but rather the categorical exemptions. Planners generally do not grant exemptions for urban infill because:

- (1) projects are inconsistent with the general plan;
- (2) developers are reluctant to ask for CEQA exemptions;
- (3) counties cannot use the statutory or categorical exemptions in unincorporated land; or
- (4) exemptions are too narrow in scope to cover certain affordable housing projects.

When they do grant exemptions, planners overwhelmingly prefer the categorical exemption because it is more flexible and familiar than the statutory exemptions.

Our survey of developers covered 89 projects that generated at least 6,836 new units of affordable housing in 2004 and 2005. Twenty of these projects (22.47%) utilized CEQA exemptions – usually the categorical exemption for infill and rarely the statutory exemptions. For those projects that underwent CEQA review, the majority received either a negative declaration or a mitigated negative declaration. The developers surveyed expressed a variety of reasons for not utilizing CEQA exemptions. These reasons fit into five main categories:

- (1) local planners were hesitant to grant exemptions;
- (2) the project lacked qualities necessary to be eligible for the exemptions, such as being too large or not within city limits;

- (3) developers did not think exemptions were beneficial;
- (4) developers did not know about the exemptions; and
- (5) developers avoided CEQA without having to use an exemption by utilizing land that had already cleared the CEQA process.

Given the current situation in California regarding affordable housing development, CEQA, and the results of our survey, various policy options exist for improving the CEQA process for affordable housing. The legislature could:

- (1) take no action;
- (2) promote awareness of the exemptions;
- (3) encourage more zoning for multifamily housing;
- (4) streamline the statutory exemptions; and
- (5) codify a modified version of the categorical exemption for infill.

The suggested reforms will likely draw the favor of developers and some environmentalists who favor infill as a solution to sprawl. However, advocates for local government and for environmental justice, as well as environmentalists against any CEQA reform, will likely oppose such recommendations unless the options include a strong local voice in the process and a flexible approach.

Promoting the exemptions would combat the widespread lack of familiarity with the exemptions. Encouraging more multifamily zoning would help affordable housing developers find more available sites to utilize. The state government could offer financial incentives for local governments to rezone and could extend the CEQA exemptions to cover general plan amendments that would result in more affordable housing sites. This solution would encourage more affordable housing without stripping localities of control over such development. Streamlining the statutory exemptions would increase their utilization and promote urban infill. Finally, a statutory version of the categorical infill exemption could be structured to protect against negative environmental impacts while limiting the ability of local planning agencies to torpedo projects based on NIMBY (Not In My Backyard) opposition.

While the opposition to affordable housing is often local, the negative effects of a housing shortage are felt by the entire state. In taking an active role, the state will need to be sensitive to legitimate local and environmental concerns. Local communities will need a voice in the CEQA process without unnecessarily delaying a project's review. In addition, an incentive-based scheme to encourage local governments to zone more land for multifamily housing will be more palatable to local governments. Such a flexible and balanced approach will probably be the most politically feasible way of addressing the affordable housing shortage.

I. Introduction

The California Environmental Quality Act (“CEQA”) has been an important tool for local community groups, environmentalists and environmental justice groups to shape proposed development projects according to their interests. However, CEQA has also impacted the development of affordable housing in California. California has a severe shortage of affordable housing – a problem that affects the quality of life for millions of residents and damages the state’s economy as the price of housing increases dramatically.¹ CEQA has contributed to this shortage by adding uncertainty and expense to the process of building new affordable housing and by making many potential affordable housing sites prohibitively expensive to developers. Affordable housing projects are often unpopular, and many NIMBY (Not In My Backyard) residents threaten to use CEQA to halt the process – sometimes long enough to jeopardize the project’s financing and therefore torpedo the project altogether.

In this context, the California Legislature, along with the State Resources Agency, has sought to ease the burden by creating a number of CEQA exemptions for affordable housing and infill. By increasing the affordable housing stock and locating it as infill within dense urban areas, exemption advocates hope to minimize the impact of new housing on the environment and on the transportation systems on which outlying residents depend, while at the same time providing more housing for low and middle income residents.

This study examines how effective these affordable housing exemptions have been by determining whether affordable housing developers have been able to use the exemptions. We surveyed affordable housing developers across the state, as well as the few local planning agencies that reported using CEQA’s statutory exemptions, to find out whether affordable housing developers have been using CEQA exemptions. Ultimately, we found that developers and planning agencies rarely use the exemptions. Both groups remain largely unaware of the exemptions and their details, and developers often employ creative strategies to avoid lengthy CEQA review without having to use the exemptions. Developers also express doubt that the exemptions will protect them from NIMBY challenges and believe that hostile planning agencies will find ways to avoid granting the exemptions. Finally, many projects do not qualify for the narrowly crafted exemptions.

¹ See generally LITTLE HOOVER COMMISSION, REBUILDING THE DREAM: SOLVING CALIFORNIA’S AFFORDABLE HOUSING CRISIS (May 8, 2002), <http://www.lhc.ca.gov/lhcdir/165/report165.pdf>; Southern California Association of Governments, *The New Economy and the Jobs/Housing Balance in Southern California*, http://www.scag.ca.gov/economy/pdfs/jobs_housing_39_RC_approved.pdf (last visited Dec. 15, 2005).

Section II of this paper presents an overview of CEQA while Section III provides a summary of the CEQA exemptions for urban infill and affordable housing developments. Section IV summarizes how general plans, specific plans, and zoning laws affect the planning process in California.

Sections V and VI contain the findings from our surveys. Section V provides a study on lead agencies' granting of CEQA exemptions for urban infill. Section VI presents our findings concerning affordable housing developers' experience with CEQA.

Finally, Section VII offers various policy proposals for increasing the use of CEQA exemptions by affordable housing developers, and Section VIII considers the political feasibility of these proposals. The appendix contains a draft bill based on these policy options.

II. Overview of CEQA

A. The CEQA Process

In order to understand the importance of CEQA exemptions, one must first be familiar with the overall structure of CEQA. The statutory provisions of CEQA, originally enacted by the state legislature in 1970, are contained in the California Public Resources Code ("Pub. Res. Code"), beginning at § 21000. In addition, the Secretary of the Resources Agency ("Resources Secretary"), a Cabinet appointee of the Governor, has the power to implement guidelines for CEQA under Pub. Res. Code § 21083. The Guidelines for Implementation of the California Environmental Quality Act ("the CEQA Guidelines") are contained in Chapter 3 of Title 14 of the California Code of Regulations. The statutory provisions of CEQA as well as the CEQA Guidelines are binding on all public agencies in California.

CEQA has four main purposes:

- (1) to inform decision-makers about significant environmental effects;
- (2) to identify ways environmental damage could be avoided;
- (3) to prevent avoidable environmental damage; and
- (4) to disclose to the public why a project is approved even if it leads to environmental damage.²

To accomplish these goals, CEQA has created an environmental review process centered on a lead agency's determination of whether a project will have

² CAL. CODE REGS. tit. 14 § 15002 (2005).

significant environmental effects. “Lead agency” is defined in § 15367 of the CEQA Guidelines as “the public agency which has the principal responsibility for carrying out or approving a project.”³ For affordable housing developments, the lead agency would typically be the local planning agency of the city where the development is located. If the development is located in an unincorporated area, then the lead agency would typically be the county planning agency.

The lead agency accomplishes the goals of CEQA through a process that takes up to three steps.⁴ The first step is the lead agency’s determination of whether the action in question is a “project” subject to CEQA.⁵ According to CEQA Regulations §§ 15378(a) and (c), a “project” is “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment” and “which may be subject to several discretionary approvals by governmental agencies.”⁶ This blanket definition covers new construction of affordable housing. Less obviously, the definition also covers general plans, specific plans, and zoning regulations.⁷ Nonetheless, certain projects that would fall under this definition are not subject to CEQA due to the existence of exemptions. If an affordable housing project is found not to be a “project” subject to CEQA, then its CEQA review process ends at the first step.

The second step of the CEQA process is the lead agency’s determination of “whether the project may have a significant effect on the environment.”⁸ Since an action is defined as a “project” under CEQA only if it will potentially change the environment, the lead agency’s determination for the second step of CEQA hinges on whether that potential change or effect is “significant.” Based on California case law, “‘significant effect on the environment’ means a substantial, or potentially substantial, adverse change in the environment.”⁹ This significance determination is made under the “fair argument standard.”¹⁰ There will be a finding of significant impact “whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental effect.”¹¹

³ *Id.* § 15367.

⁴ *Id.* § 15002(k).

⁵ *Id.* §§ 15002(k)(1), 15060(c).

⁶ *Id.* §§ 15378(a), 15378(c).

⁷ *Id.* §§ 15378(a)(1).

⁸ *Id.* § 15002(k)(2).

⁹ *Communities for a Better Env’t v. Cal. Res. Agency*, 126 Cal. Rptr. 2d 441, 446-447 (Cal. Ct. App. 2002).

¹⁰ *Id.* at 446.

¹¹ *Id.* at 446.

The CEQA Guidelines list direct significant effects, such as dust, noise, and increased traffic, and indirect effects, such as air pollution caused by population growth.¹² However, CEQA establishes no formal thresholds of significance to define, for example, what exact level of increased traffic will trigger an “adverse change in the environment,” instead relying on the “fair argument” standard. In fact, CEQA Guidelines that attempted to replace the “fair argument” approach with a “threshold of significance” were struck down in 2002 in Communities for a Better Environment v. California Resources Agency.¹³ The result, as Barbour and Teitz have noted, is that “[r]ather than clarifying substantive environmental standards to be applied in determining specific effects, CEQA’s language instead is vague and flexible.”¹⁴

The lead agency’s significance determinations are made via an initial study conducted by the lead agency.¹⁵ The initial study must contain:

- (1) a description of project location;
- (2) an identification of the environmental setting; (3) a checklist of possible areas of environmental effect;
- (4) a discussion of way to mitigate the significant effects identified, if any;
- (5) an examination of whether the project would be consistent with existing zoning, plans, and other applicable land uses; and
- (6) the names of the persons who prepared the initial study.¹⁶

The initial study can result in a negative declaration, a mitigated negative declaration, or preparation of an environmental impact report.¹⁷ If the initial study reveals that the project will have no significant environmental effects, the lead agency will issue a “negative declaration.”¹⁸ If the lead agency determines that a developer can eliminate all significant environmental effects by changing its project or adopting mitigation measures, the lead agency will issue a “mitigated negative declaration” (“MND”), which requires the developer to take certain steps to mitigate the environmental effects of the project thereby enabling

¹² CAL. CODE REGS. tit. 14 § 15064(d) (2005).

¹³ Communities for a Better Env’t v. Cal. Res. Agency, 126 Cal. Rptr. 2d 441, 449-52 (Cal. Ct. App. 2002).

¹⁴ ELISA BARBOUR & MICHAEL TEITZ, CEQA REFORM: ISSUES AND OPTIONS 4 (Public Policy Institute of California, April 6, 2005).

¹⁵ CAL. CODE REGS. tit. 14 § 15063(a) (2005).

¹⁶ *Id.* § 15063(d).

¹⁷ *Id.* § 15063(c).

¹⁸ *Id.* § 15063(b)(2).

the project to qualify for a negative declaration.¹⁹ An MND is an efficient way for a developer to modify its project to avoid potential significant effects. A lead agency's issuance of either a negative declaration or an MND ends the CEQA process for that project.

If, however, the initial study reveals that the project may have significant environmental effects and a mitigated negative declaration is not issued, then the lead agency will be required to:

- (1) prepare an "environmental impact report" ("EIR");
- (2) use a previously prepared EIR that adequately analyzes the project at hand; or
- (3) determine, pursuant to a program EIR, tiering, or another appropriate process, which of a project's effect were already adequately examined.²⁰

If no previous EIR covers a project, that project will be required to prepare a full EIR.

The preparation of an EIR by the lead agency constitutes the third and most expensive step of the CEQA process.²¹ The project developer, rather than the lead agency, pays the cost of preparing the EIR.²² The EIR costs money and time, and it increases a project's uncertainty, which can damage project financing. According to William Fulton, "The typical EIR costs around \$50,000 to \$100,000 and takes months to prepare."²³ One individual contacted during the course of this study's research said that an EIR can cost \$400,000 or more and immediately delay a project nine to twelve months.²⁴ As a result, the determination that an EIR must be prepared can sometimes effectively kill a project, especially if the developer does not have deep pockets.²⁵

If the EIR reveals no significant environmental effects, the planning agency will approve the project. However, if the EIR exposes significant environmental effects, the lead agency can: (1) deny the project; (2) approve the project once it has been altered to substantially lessen its significant effects; or (3) approve the project in spite of the environmental effects on the basis of overriding considerations.²⁶ At this point, the CEQA review process is over.

¹⁹ *Id.* §§ 15064(f)(2), 15063(c)(2).

²⁰ *Id.* § 15063(b)(1) (2005).

²¹ WILLIAM FULTON, *GUIDE TO CALIFORNIA PLANNING* 166 (Solano Press, 3d ed. 2005).

²² *Id.*

²³ *Id.*

²⁴ Survey Response from Frank Thompson, Marbill Corporation.

²⁵ FULTON, *supra* note 21, at 167.

²⁶ CAL. CODE REGS. tit. 14 § 15092(b) (2005).

B. Influential Players in the CEQA Process

CEQA's "fair argument" legal standard for determining whether environmental effects are significant has important public policy ramifications. Among state agencies, local planning agencies, and private developers, the local planning agencies (acting as the "lead agencies") have the greatest control over the CEQA process as a result of the "fair argument" standard. It is the lead agency that balances environmental, economic, and social goals in determining how environmental standards should be applied to any given project.²⁷ Therefore, as a result of the CEQA framework, the lead agency has significant control over planning in its locality. However, the lead agency's power is not unchecked.

Private citizens enforce the CEQA process through litigation.²⁸ As a result, CEQA's vague requirements for significant environmental impact are both a blessing and a curse for lead agencies. On the one hand, the vague language gives lead agencies planning power superior to state planning agencies and private developers. On the other hand, it makes lead agencies vulnerable to CEQA lawsuits from private citizens. The ambiguity in the CEQA's language can lead to differences in legal interpretation, opening the way for legal challenge.

Local interests and the threat of litigation often influence lead agencies' determinations. The claim that a lead agency has ignored a project's significant environmental impact is adequate grounds for a lawsuit. Private citizens, either out of concern for the environment or an aversion to new development in their neighborhood, can often convincingly threaten a lead agency with such a lawsuit. Even if the litigation is frivolous, it will still cost a local planning agency time, resources, and money. Thus, the ever-present litigation threat often pushes cautious lead agencies to err on the side of doing more environmental review than legally necessary during the CEQA process, leading to a project's "paralysis by analysis."²⁹

The CEQA review process will often reflect a city's interests. Fulton has stated, "If political forces drive a city or county in a certain direction - whether it's an overall pro-development policy or the approval of a specific project - CEQA is not going to change the direction."³⁰ If a city does not want a project to

²⁷ BARBOUR & TEITZ, *supra* note 14, at 5.

²⁸ FULTON, *supra* note 21, at 158.

²⁹ *Id.* at 161.

³⁰ *Id.* at 179.

go forward, the lead agency will interpret CEQA's vague language to the detriment of the project when making "significance" determinations. As a result, "significance determinations" may be exaggerated in relation to the actual environmental impact that the project would have, and the developer will have to conduct more environmental review than is truly necessary. While some may argue that environmental review is never excessive, this extra review comes with a cost in terms of time and money expended. The developer will always bear this cost. When the project is desirable from a statewide utilitarian perspective, all Californians will bear the cost.

Because many localities do not want affordable housing in their communities, CEQA has the potential to disproportionately impact the amount of affordable housing development in California. An affordable housing project will often face local opposition because of the perception that it will have high service costs (in terms of police and fire calls), high traffic rates, and low property values. As a result, a lead agency, facing local pressure and acting under the guise of CEQA, will sometimes increase the costs for such a project by requiring excessive environmental review for the project. If many planning agencies behave this way, then CEQA will depress the production of affordable housing in California.

Some state legislators find the lack of affordable housing in the state to be troublesome and worry that CEQA may be contributing to the problem. Together with legislators who wish to reduce the burden of CEQA on all private property owners, they have tried to address the barriers that CEQA may pose to affordable housing. As a result, the California legislature in the last decade has passed several statutes exempting certain affordable housing developments from CEQA.

III. CEQA Exemptions for Affordable Housing and Infill

Both the California legislature and the Resources Secretary have exempted specific types of projects from CEQA review. They generally have three reasons for granting such exemptions. First, some CEQA exemptions exist because the projects they exempt are desirable from a statewide perspective but undesirable locally. These exemptions address the classic NIMBY conundrum, a problem pervasive in various areas of land use policy. Other CEQA exemptions exist because particularly powerful interest groups, such as the California Building Industry Association, favor them. Finally, some exemptions exist because the projects in question are unlikely to create environmental damage. Even though the CEQA definition of "project" includes all actions that will potentially result in environmental change, not all projects will actually cause environmental damage.

Once an exemption is on the books, the lead agency will make the determination of whether a certain project is subject to that exemption. Exemptions can be categorized as “soft” or “hard” on the basis of how much discretion the lead agency has to grant it. A “soft” exemption is one that contains language that gives the local planning agency the ability to avoid granting it. In contrast, a “hard” exemption lacks much of the vague language giving the lead agency discretion in deciding whether to grant it.

Developers desire exemptions for their projects because they allow them to avoid the costs of CEQA review. However, developers are often unwilling to antagonize the lead agencies by demanding exemptions, especially “soft” exemptions, because they must rely on those same agencies during other steps of the construction process, such as the granting of building permits.

Exemptions can be classified as either “statutory” or “categorical” on the basis of which government entity creates them. Statutory exemptions are created by the state legislature via the passage of legislation. The Resources Secretary creates categorical exemptions when he or she promulgates them in the CEQA Guidelines. The Resources Secretary derives the power to issue categorical exemptions from Pub. Res. Code § 21084(a), which states, “The guidelines...shall include a list of classes of projects which have been determined not to have a significant effect on the environment and which shall be exempt from this division.”³¹

The CEQA Guidelines currently contain 32 categories of categorical exemptions, all listed in Article 19 of the Guidelines. CEQA Guidelines § 15300.2(c) states, “A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.”³² Because the phrase “due to unusual circumstances” is vague, a local planning agency can avoid granting a categorical exemption simply by stating that unusual circumstances are present. As a result, all categorical exemptions are considered “soft” exemptions. If a planning agency wishes to determine if “unusual circumstances” exist, it will require the developer to begin CEQA review and thus defeat the original purpose of the exemption.

While many of the statutory and categorical exemptions could be applied to affordable housing developments, several exemptions specifically address the affordable housing issue.

³¹ CAL. PUB. RES. CODE § 21084(a) (2005).

³² CAL. CODE REGS. tit. 14 § 15300.2(c) (2005).

A. 1998 Statutory Exemptions for Affordable Housing

In 1998, the State Legislature enacted an affordable housing exemption in CEQA to expedite housing production. Pub. Res. Code § 21080.14 contained a 100-unit exemption for affordable housing in urbanized areas that applied if the site (1) was smaller than five acres, (2) was not a wildlife habitat, and (3) was assessed for toxic contaminants and other harmful pollutants. Section 21080.10 provided a 45-unit exemption for farmworker housing.³³ As an important feature, localities retained the discretion to deny both exemptions based on “unusual circumstances,” thus making these exemptions “soft.”

B. 1998 Categorical Exemption for Infill

That same year, Governor Pete Wilson’s Resources Secretary promulgated a categorical exemption in the CEQA Guidelines for infill development.³⁴ Underscoring the politically sensitive nature of changing the CEQA Guidelines, the Secretary made the changes just three months before the Wilson Administration left office.³⁵

The new Class 32 categorical exemption addresses infill development projects within cities that (1) are consistent with the general plan and zoning, (2) are located on sites of less than five acres substantially surrounded by urban uses, and (3) have no value as a habitat for endangered species. In order to qualify, the project must not result in significant “traffic, noise, air quality or water quality” impacts and must have adequate service from utilities and public services.³⁶

In 2000, a number of environmental justice organizations, including Communities for a Better Environment, filed a lawsuit challenging the validity of the Class 32 categorical exemption, along with 12 other sections of the CEQA Guidelines. In 2001, the state Superior Court upheld the Urban Infill Exemption and a unanimous three-judge panel at the Appellate Court affirmed the decision in 2002. The court reasoned that, given the specific limitations contained in the exemption, it was highly improbable that a project qualifying for the exemption could have adverse environmental impacts.³⁷

³³ CAL. PUB. RES. CODE § 21080.14 (2005).

³⁴ CAL. CODE REGS. tit. 14 § 15332 (2005).

³⁵ FULTON, *supra* note 21, at 158.

³⁶ CAL. CODE REGS. tit. 14 15332(d) (2005).

³⁷ *Communities for a Better Env’t v. Cal. Res. Agency*, 126 Cal. Rptr. 2d 441, 463-64 (Cal. Ct. App. 2002).

The decision ushered in greater use of exemptions. Up to that point, the controversy and uncertainty as to their legality had prevented localities from using the categorical and statutory exemptions with confidence.³⁸

C. 2002 Statutory Exemptions for Affordable Housing and Infill

The state's latest attempt to exempt certain categories of affordable housing from CEQA came in 2002. That year the legislature passed SB 1925, a bill that created new statutory exemptions for, among other things, urban infill and affordable housing. Palo Alto Democrat Byron Sher, one of California's most environmentally oriented lawmakers of recent times, introduced the bill.³⁹ The bill received support from much of the environmental community. The California League of Conservation Voters, the Planning and Conservation League, and the Natural Resources Defense Council co-sponsored it.⁴⁰ However, environmental justice advocates, who earlier had challenged the Class 32 categorical exemption, raised concerns that SB 1925 would be detrimental to urban residents because the bill would give them fewer tools to challenge the environmental effects of development in their areas.⁴¹

SB 1925 repealed Pub. Res. Code Sections 21080.7 (exemption for residential infill projects), 21080.10 (exemption for agricultural workers' housing), 21085 (limitation on reducing proposed housing on the basis of CEQA) and 21080.14 (exemption for lower-income residential projects in urban areas) and replaced these sections with Public Resources Code Sections 21159.20 through 21159.24. The new sections breakdown as follows:

- 21159.20. Definitions;
- 21159.21. Project Qualifications for Exemptions Based on 21159.22, 21159.23, and 21159.24;
- 21159.22. Exemption for Agricultural Employee Housing;
- 21159.23. Exemption for Affordable Housing;

³⁸ See Jones & Stokes, "Important CEQA Guidelines Provisions Invalidated," JONES & STOKES ENVIRONMENTAL UPDATE (Nov. 2002), at <http://www.jonesandstokes.com/resource/CEQA-nov02.pdf>; Morrison & Foerster, "Trial Court Upholds Some California Environmental Quality Act Guidelines and Strikes Down Others," Legal Updates & News (May 2001), at <http://www.mofo.com/news/updates/files/update47.html>.

³⁹ FULTON, *supra* note 21, at 161.

⁴⁰ See California Bill Analysis for Senate Bill 1925, Senate Floor, 2001-2002 Regular Session (Aug. 30, 2002), http://info.sen.ca.gov/pub/01-02/bill/sen/sb_1901-1950/sb_1925_cfa_20020830_130439_sen_floor.html.

⁴¹ FULTON, *supra* note 21, at 162.

21159.24. Exemption for Urban Infill.

Based on Section 21159.21, the common qualifying standards for the exemptions created by SB 1925 include: (1) consistency with an adopted general or specific plan; (2) past certification of a community-level environmental review which covers the project site; (3) available utilities and payment of any in-lieu or development fees; (4) absence of wetlands, wildlife habitat value, and harm to special-status species; (5) absence of toxic substances on site or successful completion of remediation activities; (6) no significant effect on historical resources; (7) absence of fire and seismic hazards; and (8) absence of “developed open space.”⁴² Notably, the common qualifications, which apply to sections 21159.23 and 21159.24, do not require an absence of unusual circumstances.

1. Statutory Exemption for Affordable Housing (Pub. Res. Code § 21159.23)

SB 1925 improved the affordable housing exemption for projects with no more than 100 units by replacing the “soft” exemption (which required that the project not have a “significant impact” on the environment) with a more stringent limitation. If “substantial changes” occur to the circumstances of a property once a lead agency certifies it, any subsequent environmental review will be limited to analyzing those changes and not the usual array of environmental impacts that CEQA evaluates.⁴³ Residential projects under this section can contain retail uses not exceeding 15 percent of the project’s total floor area.⁴⁴

The affordable housing project site must be previously developed for qualified urban uses, contain parcels immediately adjacent to the site that are developed with qualified urban uses, and not have been developed for urban uses within 10 years prior to the proposed development.⁴⁵ In addition, the site cannot be larger than five acres and must be located within an urbanized area or within a census-defined place with a population density of at least 5,000 persons per square mile or, if the project consists of 50 or fewer units, within an incorporated city with a population density of at least 2,500 persons per square mile and a total population of at least 25,000 persons.⁴⁶

⁴² CAL. PUB. RES. CODE § 21159.21 (2005).

⁴³ *Id.* §§ 21159.24(b), 21159.24(c).

⁴⁴ *Id.* § 21159.23(a)(2)(D).

⁴⁵ *Id.* § 21159.23(a)(2)(B).

⁴⁶ *Id.* §§ 21159.23(a)(2)(C), 21159.23(a)(2)(D).

Project sites also qualify if they are located within either an incorporated city or a census-defined place with a population density of at least 1,000 persons per square mile.⁴⁷ However, this portion of the exemption, which allows the exemption to be used in less populated regions, is “soft” because it will not apply if there is a “reasonable possibility that the project would have a significant effect on the environment or the residents of the project due to unusual circumstances or due to the related or cumulative impacts of reasonably foreseeable projects in the vicinity of the project.”⁴⁸

2. Statutory Exemption for Urban Infill (Pub. Res. Code § 21159.24)

The underlying goal of the urban infill exemption is to encourage people to live in the city to avoid the negative effects of suburban sprawl, such as more roads, more traffic volume, more air pollution, and less open space. The exemption also intends to encourage more transit-oriented development.

Supporters, such as the Planning and Conservation League, noted, “Even though there is a tremendous need for affordable housing in California, especially in urban areas, builders often prefer to build out in the suburbs where land is cheap, and there are fewer constraints.”⁴⁹ These supporters recognized that building in urbanized areas on small but expensive vacant parcels is “often too time consuming to interest developers.”⁵⁰ In addition to environmental justice advocates, opposition to this exemption came from conservative groups and building associations who wanted much broader CEQA exemptions.

The exemption created by Pub. Res. Code § 21159.24 is quite narrow. To qualify for the exemption, a project must satisfy each of the following ten provisions:

- (1) its site is an “infill site;”
- (2) its site is in an “urbanized area;”
- (3) it qualifies under Pub. Res. Code § 21159.21;
- (4) the community-level review covering it is at least five years old;
- (5) it is not larger than five acres;
- (6) it does not contain more than 100 residential units;
- (7) it meets certain affordability conditions for a portion of the housing it creates;

⁴⁷ *Id.* § 21159.23(b).

⁴⁸ *Id.* § 21159.23(c).

⁴⁹ Planning and Conservation League, “2002 PCL/PCLF Accomplishments,” http://www.pcl.org/pcl/pcl_accomp2002.asp (last visited Dec. 23, 2005).

⁵⁰ *Id.*

- (8) it is within a half-mile of a transit stop;
- (9) it does not include any single-level building that exceeds 100,000 square feet; and
- (10) it meets certain conditions that ensure it promotes “higher density infill housing.”⁵¹

An “infill site” is a site in an urbanized area that was either previously developed for qualified urban uses or that is immediately adjacent to urban uses. The site must not have been developed for urban uses within the past 10 years, and no parcel within the site can have been created within the past ten years.⁵² An “urbanized area” is one that includes a city of at least 100,000 people (which may include the populations of not more than 2 contiguous cities).⁵³ Unincorporated areas may also qualify as urbanized, subject to strict criteria.⁵⁴

To satisfy the affordable housing component of this exemption (§ 21159.24(a)(7)), the developer must sell at least ten percent of the housing it creates to families of moderate income. Alternatively, the developer must rent not less than ten percent of the housing to families of low income or not less than five percent of the housing to families of very low income.⁵⁵

Finally, even if all ten of these conditions for this exemption are met, the lead agency may still not grant the exemption because of other “soft” language. First, the planning agency may determine that a reasonable probability exists that the development will have a project-specific, significant effect on the environment due to unusual circumstances. Second, the planning agency may find that substantial changes or new information with respect to the circumstances under which the project is being developed has occurred since community-level environmental review was certified or adopted.⁵⁶

IV. General Plans, Specific Plans, and Zoning Laws

CEQA also affects affordable housing production through its impact on general plans, specific plans, and zoning laws, and any proposal to increase affordable housing production must address this issue. This section therefore provides an overview of how the process works.

⁵¹ CAL. PUB. RES. CODE § 21159.24(a) (2005).

⁵² *Id.* § 21061.0.5.

⁵³ *Id.* § 21071(a).

⁵⁴ *Id.* § 21071(b).

⁵⁵ *Id.* § 21159.24(a)(7).

⁵⁶ *Id.* § 21159.24(b).

As discussed above, developers cannot use the CEQA exemptions created by SB 1925 unless the proposed project is consistent with the general and specific plan that covers the project site.⁵⁷ Developers can only build affordable housing projects where the zoning, specific plans and general plans authorize such housing to be built. While zoning laws do not directly dictate the affordability of housing, they will dictate the size, density, and multifamily nature of the housing, which will affect the likelihood that housing developed on a site will be affordable. A site zoned for multifamily apartments is much more likely to become affordable housing than a site zoned for one-acre single-family lots. In addition, general and specific plans contain provisions to address how much affordable housing will be built in their jurisdictions, as well as where and how the construction will be done. Thus, general plans, specific plans, and zoning laws determine the amount of available sites for affordable housing.

The general plan, specific plan and zoning laws also provide a form of CEQA immunity for many projects. These local laws undergo CEQA review in order to become effective. If a developer builds affordable housing projects that conform to the existing specific plan, general plan, or zoning law, that developer does not usually have to repeat the CEQA process for their individual project.

For general plans, California Government Code (“Gov. Code”) § 65300 et seq. requires each of California’s 478 cities and 58 counties to devise a “general plan.” The general plan describes the future of the city or county’s development in general terms through a series of policy statements in text and map form. The plan itself must undergo an often expensive and time-consuming CEQA review.⁵⁸ Most cities and counties report spending one-fifth to one-third of their general plan budgets on an EIR for the plan.⁵⁹ Local governments, however, are generally free to choose the policy direction of their general plan.⁶⁰

A general plan is not difficult to change through amendments, which local lawmakers usually design to accommodate a particular development project or alter the plan in some specific way. State law permits amendments four times per year, and any number of individual changes may be grouped into a formal amendment each quarter. As a result, the plan can change at any time as long as a majority of the city council or board of supervisors deems the action appropriate.⁶¹ An approved amendment provides a form of CEQA protection for a project it covers because the amendment has to undergo CEQA review. The

⁵⁷ *Id.* § 21159.21(a).

⁵⁸ FULTON, *supra* note 21, at 103.

⁵⁹ *Id.* at 108.

⁶⁰ *Id.* at 87.

⁶¹ *Id.* at 106.

amendment process therefore becomes a critical tool for affordable housing developers to have their development comply with the general plan.

The CEQA review of general plans and general plan changes has to withstand local litigation challenges. The state does not enforce its laws regarding general plans and instead leaves enforcement to these private legal challenges. Lawsuits challenging the general plan usually result from one of four violations: (1) consistency with other planning documents, (2) internal consistency, (3) compliance with state laws governing general plans, and (4) adequacy of the EIR.⁶² Any update to the general plan also requires compliance with CEQA by way of an EIR. For affordable housing developers, these types of legal assaults on a project are better withstood by the local agency than by the developer and underscore the advantage of having a locality propose the affordable housing components rather than the developer.

Along with the general plan, the state authorizes localities to draw up “specific plans” to implement the general plan in specific geographical areas.⁶³ These specific plans must also comply with CEQA. Once a specific plan has passed CEQA, any affordable housing project that conforms to it generally becomes immune from further CEQA review. Thus, a specific plan authorizing affordable housing construction is of great benefit to developers.

Zone changes are another important tool to provide affordable housing sites for developers. When a project would otherwise not conform to the zoning laws, changing a zoning law is one of the easiest methods of permitting the project on a specific parcel of land. City councils and boards of supervisors are often quite willing to change zoning if the project proposed is something they want built. Zone changes must comply with the provisions of CEQA, so any affordable housing project that conforms to the zoning change will not have to undergo further CEQA review. Like specific plans, zoning changes are therefore another crucial means for developers to avoid having their affordable housing project undergo lengthy, costly and uncertain CEQA review.⁶⁴

V. Planners’ Granting of CEQA Exemptions

In the CEQA exemption process, local agencies have considerable power to decide whether to grant an exemption. Most exemptions are “soft.” Once conditions are met for such exemptions, lead agencies use their discretion to determine whether “unusual circumstances” exist that make the exemption

⁶² *Id.* at 121.

⁶³ *Id.* at 105.

⁶⁴ *Id.* at 134.

inappropriate. A comparison of local agencies' granting of the two types of infill exemptions provides insight into the motivations of planners and developers with regard to CEQA.

The legislature in 2003 enacted record-keeping legislation to track planners' granting of CEQA exemptions. AB 677, which became effective in 2004, requires local agencies to file notice with the Governor's Office of Planning and Research every time they determine that an exemption applies to a given task.⁶⁵ This information can be found in 2004 and 2005 editions of The California Planners' Book of Lists. It provides a useful starting point to learn how effective the exemptions have been.

In 2004, the first year of the reporting requirement, 56 agencies reported using the statutory exemption for urban infill (Pub. Res. Code § 21159.24).⁶⁶ Because California contains 478 cities and 58 counties with planning agencies,⁶⁷ these 56 agencies represented about ten percent of the state's 536 local planning agencies. Soon after these figures were released, Richard Lyon of the California Building Industry Association (CBIA) contacted 28 of these 56 agencies (50%) and found that the majority of these planners confused the *statutory* exemption for urban infill with the Class 32 *categorical* exemption for urban infill.⁶⁸ To underscore Lyon's findings, the following year of 2005 saw the number of agencies reporting use of the statutory exemption for urban infill drop from 56 to twelve – less than three percent of California planning agencies.⁶⁹

The actual number of local planning agencies granting exemptions based on the statutory exemption for urban infill is even lower than the 2005 numbers indicate. Interviews with planners from ten of the twelve agencies revealed that only three of the ten planners granted the statutory exemption for urban infill.⁷⁰ We also contacted two other local agencies that claimed to grant the statutory exemption in 2004.⁷¹

⁶⁵ CAL. PUB. RES. CODE § 21152. 1(a) (2005).

⁶⁶ GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, THE CALIFORNIA PLANNERS' BOOK OF LISTS, 2004 at 80 (2004).

⁶⁷ FULTON, *supra* note 21, at 103.

⁶⁸ Telephone Interview with Richard Lyon (Oct. 24, 2005). Lyon contacted 28 jurisdictions and found that only a "small number" used the infill exemption contained in Pub. Res. Code § 21159.24.

⁶⁹ GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, THE CALIFORNIA PLANNERS' BOOK OF LISTS, 2005 at 79 (2005).

⁷⁰ Of the three jurisdictions that reported using the statutory exemptions, roughly eight projects resulted, totaling 155 units. However, one of these three jurisdictions, Santa Clara County, could not definitely confirm that the statutory exemption had been used and roughly estimated the number of projects and units created.

⁷¹ The two 2004 agencies were San Luis Obispo and Santa Cruz Counties.

Although only a handful of agencies are granting the statutory exemption for urban infill, the categorical exemption for infill, which is much broader in applicability, has seen greater use. Eighty-one agencies, or fifteen percent of all local planning agencies, reported granting the categorical exemption in the 2005 edition of The California Planners' Book of Lists.⁷² Likewise, eight of the twelve planners contacted for this study confirmed using the categorical exemptions.⁷³

These numbers indicate that most local planning agencies are not granting exemptions for urban infill. Furthermore, when planning agencies do grant exemptions for urban infill, they overwhelmingly choose to grant the categorical exemption rather than the statutory exemption. The twelve agencies contacted via telephone for this section offered explanations for these conclusions.

A. Most Planners Grant No Exemptions for Urban Infill

Telephone interviews revealed four primary reasons for why planners do not grant exemptions for urban infill:

- (1) projects are inconsistent with the general plan;
- (2) developers are reluctant to ask for CEQA exemptions;
- (3) counties cannot use the categorical exemption in unincorporated land; and
- (4) exemptions are too narrow in scope to cover certain affordable housing projects.

1. Projects Are Inconsistent with General Plans

One agency reported that it was difficult for projects to qualify for the exemptions because the general plan did not allow for affordable housing and infill developments. Both exemptions require that a project comply with the general plan, and many affordable housing projects must propose amendments to the general plan in order for their project to comply and therefore qualify for an exemption. East Palo Alto remarked, "most residential developments come in with GP amendments, so we need to update the General Plan so more [infill and affordable housing] developments can qualify."

⁷² GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, THE CALIFORNIA PLANNERS' BOOK OF LISTS, 2005 at 78 (2005).

⁷³ Only East Palo Alto did not confirm using the categorical exemption, although the agency did use the statutory exemption.

2. Developers Are Reluctant to Ask for CEQA Exemptions

At least two agencies mentioned a general reluctance on the part of developers to request exemptions. One agency commented, “Applicants are loathe to ask for exemptions because of fears that neighborhood opposition would be even worse” with an exemption. This agency planner felt that “there’s enough NIMBYism as it is. Most [affordable housing developers] are nonprofits, and neighbors don’t like them coming in receiving welfare subsidies to build the housing.” Santa Clara also commented, “Developers don’t go out on a limb with these projects anyway,” indicating a desire by developers to avoid antagonizing neighbors or planners with large and potentially controversial projects. Our survey of affordable housing developers in Section VI supports this confirms that some developers subscribe to this strategy.

3. Counties Cannot Use the Categorical Exemption in Unincorporated Land

California’s 58 counties are responsible for planning the unincorporated areas of the county jurisdiction. Because the infill exemptions are tied to urbanized land and in the case of the categorical exemption requires the site to be within city limits, all three counties we contacted stated that the infill exemptions are not useful to them. Sacramento County commented, “The categorical exemption requires that the project ‘must be within city limits,’ and so no projects fit that description in unincorporated areas. It’s a key point that really hinders us and we talk about it all the time.” Santa Cruz County reported, “We can’t use the [categorical] exemption because we’re not a city, and we’re precluded by state law from using it. We need to change the law.”

4. Exemptions are Too Narrow in Scope to Cover Certain Affordable Housing Projects

Because both the statutory and categorical infill exemptions have a 100-unit maximum and an urbanized area within a city requirement, many affordable housing projects do not qualify for either exemption. Placerville reported, “Larger projects didn’t qualify, such as a 176 unit apartment that received the tax credit allocation. The larger ones also tend to be on the outskirts of town” and therefore outside of the infill area.

The categorical exemption requirement that proposed projects not have “significant effects” also limits the scope of the exemption. This “soft” language gives planners the opportunity to avoid granting the exemption and also reduces

its applicability to larger or more controversial housing developments. In some instances, projects did not qualify for the exemptions because agencies determined they would cause negative impacts that required study. For example, one agency reported, “One project didn’t get the exemption, and they had a mitigated neg dec for noise impacts.” Because the agency determined that local concern over noise from the development constituted a potential significant effect, the agency prevented the project from using the categorical exemption.

B. Planners Favor the Categorical Exemption for Urban Infill Over the Statutory Exemption

Telephone interviews revealed that agencies favor the categorical exemption for urban infill over the statutory exemption because (1) the categorical exemption is more flexible and (2) the statutory exemption is newer and more unknown.

1. Categorical Exemption Is More Flexible

Four of the planning agencies contacted reported not needing to use the statutory exemptions because the categorical exemption covered their needs. Redding reported that the agency “is more familiar with the categorical exemptions, so it’s the first place we look.” Berkeley reported heavy reliance on the categorical exemption, and Sacramento County reported using “the categorical exemption all the time.” Walnut Creek stated that “the categorical exemption gives us a streamlining ability, so we haven’t needed to utilize the statutory exemption.” Berkeley also felt that the “categorical exemption covers us, even though the statutory exemptions are more bulletproof and might make more sense to use for our more controversial projects.”

In contrast, agencies found the statutory exemption to be too narrow and inflexible. Five of the agencies reported the restricted nature of the exemption as the reason they had not granted the exemptions under §21159.24. For example, Berkeley stated, “The statutory exemptions, due to their very specific nature, do not seem to apply to most of the projects we process.”

2. Statutory Exemption Is Newer and More Unknown

At least five of the twelve planners contacted were unsure of what the statutory exemptions were or how the statutory and the categorical exemptions

for urban infill differed.⁷⁴ For example, the Berkeley project tracker computer database contains a checklist box for using the categorical exemption, while no such box exists in their database for using the statutory exemption. Likewise, a planner in Sacramento County knew only of the 1998 statutory exemption and was unaware that the 1998 exemption had been repealed and replaced by the 2002 exemptions. This planner continued to rely on the repealed exemption.⁷⁵

The planners may have been unaware of the statutory exemption because the categorical exemption is older and easier to use with fewer requirements. Planners also may not have had much incentive to learn about new exemptions because developers are usually the ones who benefit from bypassing CEQA. The developers, furthermore, may be more inclined to use the categorical exemption for urban infill over the statutory exemption because of the ease of use and familiarity.

VI. Affordable Housing Developers’ Experience with CEQA

A. Methodology

The previous four sections of this paper have first considered the role of developers and planners in the CEQA process, then identified the relevant CEQA exemptions for affordable housing, and finally examined whether planners are granting exemptions. This section analyzes whether affordable housing developers have been utilizing the CEQA exemptions currently available.

Our first step in this analysis was to identify developers that are currently involved in affordable housing development in California. The developers that applied to the California Debt Limit Allocation Committee (“CDLAC”) in 2004 or 2005 for the tax-exempt housing revenue bonds available to “Qualified Residential Rental Projects” fit this description, and we surveyed them for this study. According to the CDLAC website,

These bonds assist developers of multifamily rental housing units to acquire land and construct new units or purchase and rehabilitate existing units. The tax-exempt bonds lower the interest rate paid by the developers. The developers in turn produce market rate and affordable rental housing for low and very low-income

⁷⁴ The five include East Palo Alto, Placerville, Santa Clara, Berkeley, and Sacramento County.

⁷⁵ The planner worked with Sacramento County.

households by reducing rental rates to these individuals and families.⁷⁶

Developers who seek tax credits from the California Tax Credit Allocation Committee (CTCAC) are also active in affordable housing in California. This state tax credit supplements a federal tax credit that “enables developers of affordable rental housing to raise project equity through the ‘sale’ of tax benefits to investors.”⁷⁷ Developers who sought these tax credits in 2004 and 2005 were also surveyed for this study. Developers seek CDLAC bonds or CTLAC tax credits for specific projects.

Having identified developers involved in affordable housing in California, our next step was to contact them and find out their experience with the CEQA process in 2004 and 2005. For each project that had sought a CDLAC bond or CTLAC tax credit in 2004 or 2005, the individual we contacted was the developer’s employee or consultant. In some cases, the CDLAC or CTCAC websites identified these developer contacts for us. In other cases, another employee of the developer identified the individual as the person who would have the best understanding of how the specific project dealt with the CEQA review process.

For the most part, we surveyed these individuals via email and asked them a uniform group of questions. Appendix B contains an example of our standard list of questions. If developers preferred to answer the questions on the telephone, we asked them the same questions contained in the email and took notes from the conversation. We divided the developers roughly along geographic lines, with one of us contacting Northern California developers and the other contacting Southern California developers. For the remainder of this paper, the individuals who responded to our survey will be referred to as “respondents.” This survey resulted in both quantitative and qualitative findings.

The quantitative findings identify the level of CEQA review done for particular projects, as well as the number of new affordable housing units created by those projects. These specific projects were identified from the CDLAC and CTCAC websites. The quantitative findings are listed in tables 1 through 4 in Appendix A of this report and are described in greater detail in subsections (B)(1) and (B)(2) below.

⁷⁶ California Debt Limit Allocation Committee, “Qualified Residential Rental Projects Application,” <http://www.treasurer.ca.gov/cdlac/applications/applications.asp> (last visited Dec. 23, 2005).

⁷⁷ California Tax Credit Allocation Committee, “A Description of California Tax Credit Allocation Committee Programs” (April 2004), *at* <http://www.treasurer.ca.gov/ctcac/program.pdf>.

The qualitative findings explain why projects did not avoid CEQA review. These findings are based on the respondents' comments about their general experience with CEQA during 2004 and 2005. Some respondents offered their experiences with CEQA and exemptions from earlier projects. We asked the respondents about why they dealt with CEQA in a certain way for the specific project included in the quantitative findings, and we also asked them to explain the strategies they had used to deal with CEQA on other projects. As a result, the qualitative findings cover more projects than the quantitative findings. The qualitative findings are discussed in subsection (B)(3) below and listed in table 5 of Appendix A.

Readers of this survey should recognize that the CDLAC and CTCAC lists may not be representative of the community of affordable housing developers in California. Nonetheless, the data derived from this survey should hopefully be useful for policymakers and should provide an indication of how affordable housing developers are responding to the current CEQA structure.

B. Findings

Overall, we received responses from 69 of the 134 individuals we contacted, a 51.49% response rate.

As a result of our reliance on the CDLAC lists, many of the respondents (and their corresponding development companies) are actually engaged in rehabilitation and acquisition of existing housing sites and are not involved in the construction of new housing. These developers either (1) refinance existing affordable housing to ensure that it remains affordable or (2) purchase market-rate housing and convert it to affordable housing.

These types of projects are not within the scope of our paper and, thus, we excluded them entirely from the "Findings" section and the tables in Appendix A. Acquisition and rehabilitation projects are never subject to CEQA because of the Class 1 categorical exemption for existing facilities.⁷⁸ The problems facing affordable housing developers, discussed in Section II(B) of this paper, only exist for the construction of new affordable housing, which *is* subject to CEQA. Likewise, the recently created statutory exemptions for affordable housing were only intended to help affordable housing developers involved in new construction of affordable housing units. Debate regarding the merits of

⁷⁸ CAL. CODE REGS. tit. 14 § 15301 (2005).

rehabilitation and acquisition as an affordable housing strategy is beyond the scope of this paper.⁷⁹

Completely disregarding responses for rehabilitation and acquisition projects, the summary of findings is based on fifty responses to our survey. A list of these 50 respondents can be found in Appendix C. With regard to quantitative findings, these fifty responses cover 89 specific projects from 2004 and 2005 that are expected to create at least 6,386 units of new affordable housing.⁸⁰

1. Projects That Used CEQA Exemptions

Twenty projects (22.47% of all projects surveyed) utilized a CEQA exemption of some kind. These projects generated 1,220 new units of affordable housing (19.10% of all new units surveyed).

Several projects utilized categorical exemptions. Three projects used the Class 1 categorical exemption (CEQA Guidelines § 15301) for acquisition and rehabilitation of an abandoned building, manufacturing plant and hotel into affordable housing. Four projects used the Class 32 categorical infill exemption (CEQA Guidelines § 15332). One project used categorical exemption § 15061(b)(3), often called the “common sense” exemption for projects that are certain to have no significant impacts.⁸¹

One project utilized two categorical exemptions. The developer asked for and received an exemption from CEQA based on CEQA Guidelines § 15301 (categorical exemption for demolition of up to three commercial structures and

⁷⁹ Some policymakers critique the acquisition and rehabilitation strategy because it only creates new housing by reducing the amount of market-rate housing. In contrast, consider the response to our survey from James Keefe of the BCC Corporation: “The focus should be on using scarce government dollars...on serving as many people as possible. This can be better done by rent subsidy programs and by creating affordable housing through rehabilitation programs on existing properties. Too much of the subsidy for new construction of affordable units goes to land owners, the development industry and to pay excessive (Davis-Bacon) wages and other construction costs. Creating luxury affordable housing for a few lucky households while many go unserved makes no social or economic sense.”

⁸⁰ Not all of the respondents knew the exact number of units created by the affordable housing development at issue. As a result, those units were marked down as zero. Hence, the actual number of units covered by this survey is higher. Charles Brumbaugh of the Corporation for Better Housing estimated that between 3,000 and 5,000 new affordable housing units are created each year in California. If this is the case, our study covers a significant portion of the new affordable housing generated in 2004 and 2005.

⁸¹ For a discussion of this exemption, see *Davidon Homes v. City of San Jose*, 62 Cal. Rptr. 2d 612 (Cal. Ct. App. 1997).

up to six residential units in urban areas) and § 15332 (the class 32 categorical exemption for infill).

Other projects utilized exemptions created specifically for affordable housing. At least three projects utilized the recently repealed § 15280 exemption. CEQA Guidelines § 15280 contained the statutory exemption for lower-income housing projects. While the statutory authority for this exemption (Pub. Res. Code § 21080.14) was repealed by SB 1925 in 2002, this exemption was not removed from the CEQA Guidelines until October 6, 2005. This exemption is no longer available.

One project definitely utilized the new SB 1925 exemption, located in Pub. Res. Code § 21159.23, while the respondents for three other projects guessed they had used it. Many of the developers who used exemptions had difficulty recalling which exemption they had used.

2. Projects That Did Not Use CEQA Exemptions

Sixty-nine projects (77.53% of all projects surveyed) did not use CEQA exemptions. These projects generated at least 5,166 new units of affordable housing (80.90% of all new units of affordable housing).⁸² These projects dealt with CEQA in one of the following ways:

- (1) utilized a previous CEQA determination on their project site and therefore did not have to bear the costs of a CEQA review;
- (2) received ministerial approval;
- (3) received negative declarations;
- (4) received mitigated negative declarations;
- (5) had a full EIR performed as part of a larger development environmental review; or
- (6) underwent a full EIR.

a. Utilized a Previous CEQA Determination

Seven projects (7.87% of all projects surveyed and 10.14% of projects not subjected to CEQA) tacked onto a previous CEQA determination that had been made for a specific plan. These projects generated 405 new units of affordable

⁸² The phrase “at least” is used here because for some of the projects that received negative declarations and MNDs, the respondents could not recall how many affordable housing units were generated.

housing (6.34% of all new units surveyed and 7.84% of new units subjected to CEQA).

To save time and money, many developers avoid CEQA review of their project by coming in after a CEQA determination has already been made for their site, either through a rezoning, specific plan or general plan amendment, or an earlier project. Sections 15152 and 151153 of the CEQA Guidelines authorize this approach. When Urban Partners LLC successfully used this approach for the Wilshire Vermont Station Apartments in Los Angeles, it relied on an EIR that was many years old.⁸³

Some developers actively look to develop projects at sites where an earlier EIR has already been conducted. By selecting these “pre-cleared” sites, the developers remove doubt about the environmental review process for their project and thus find it easier to secure financing. The more certainty a project has, the more likely that project will secure financing.

Regarding the financing aspect, one respondent remarked, “It is a timing issue in that that [CEQA] document gets prepared and approved way in advance of the applications for funding.” By having already cleared the CEQA process, these projects therefore are able to then focus on obtaining financing without concern that CEQA will delay the project and contribute to the project cost. Another respondent commented, “Staff has used existing neighborhood EIR's done originally for their general and/or specific plan areas when a project is within the desires of the specific plan.”

Another stated, “We process General Plan Amendments, Rezones, etc. on most projects because we can't afford to purchase multifamily zoned land. So we're basically ‘exempt’ from using the exemption.” This respondent was therefore able to avoid the CEQA process entirely by using legislative changes such as rezones and general plan amendments to authorize the project on the site. Although these changes would have to undergo CEQA review, the developer would not have to bear the costs of that review.

b. Received Ministerial Approval for the Project

Three projects (3.37% of all projects surveyed and 4.35% of projects not subjected to CEQA), all located in Santa Monica, received local ministerial approvals, making them exempt from CEQA. These projects generated 129 new units of affordable housing (2.02% of all new units surveyed and 2.50% of new units subjected to CEQA).

⁸³ Survey Response from Justin Chapman, Urban Partners LLC.

According to the CEQA Guidelines, “[w]here the law requires a governmental agency to act on a project in a set way without allowing the agency to use its own judgment, the project is called ‘ministerial,’ and CEQA does not apply.”⁸⁴ Rather, CEQA only applies “in situations where a governmental agency can use its judgment in deciding whether and how to carry out or approve a project. A project subject to such judgmental controls is called a “discretionary project.”⁸⁵

The Community Corporation of Santa Monica received ministerial approval for the three projects referenced in this section. One respondent from this firm commented that ministerial approval is probably the best way to make an affordable housing development “bullet proof from lawsuits.”⁸⁶

However, to make a project “ministerial” under CEQA requires a considerable amount of cooperation from the local legislature where the project is located. In 2003, the Community Corporation of Santa Monica successfully lobbied the local City Council to pass an ordinance for ministerial approval of 100% of affordable housing project under fifty units.⁸⁷ One respondent said that the City of Los Angeles provided a similar ministerial exemption. We were unable to confirm this claim.⁸⁸

c. Received a Negative Declaration

Twenty projects (22.47% of all projects surveyed and 28.99% of projects subjected to CEQA) received negative declarations, indicating that the projects would not have a significant environmental impact. These projects generated at least 1,844 new units of affordable housing (28.88% of all new units surveyed and 35.69% of new units subjected to CEQA).⁸⁹ Negative declarations generally indicate that the review process was not difficult. On receiving a negative declaration, one respondent said, “In general the environmental review was not onerous.”⁹⁰

⁸⁴ CAL. CODE REGS. tit. 14 § 15002(i)(1) (2005).

⁸⁵ *Id.* § 15002(i).

⁸⁶ Survey Response from Joan Ling, Community Corporation of Santa Monica.

⁸⁷ *Id.*

⁸⁸ Survey Response from Kasey Burke, Meta Housing Corporation.

⁸⁹ The phrase “at least” is used here because for some of the projects that received negative declarations, the respondents could not recall how many affordable housing units were generated.

⁹⁰ Survey Response from John E. Ghio, Prometheus Real Estate.

d. Received a Mitigated Negative Declaration

Thirty-three projects (37.08% of all projects surveyed and 47.83% of projects subjected to CEQA) received mitigated negative declarations (“MNDs”). These projects generated at least 2,361 new units of affordable housing (36.97% of all new units surveyed and 45.70% of new units subjected to CEQA).⁹¹ In these cases, there were a variety of environmental issues being mitigated.

The Marbill Corporation’s Frank Thompson, who worked on one of the surveyed projects that received an MND, provided the following overview of the MND experience:

Identifying and proposing reasonable mitigation measures which are then incorporated into conditions of approval and a compliance and monitoring plan is usually a constructive step for planners that are trying to facilitate the [CEQA] process and avoid longer delays for focused studies or full EIRs.

The mitigation measures come from City policies (for instance...dust control), and are usually a long list (sometimes over 100 items) of identified impacts which can be mitigated to a level of significance below an established "threshold" (like gals [sic] per minute of increased storm water flow in a storm channel nearing capacity, or new peak hour trips in an intersection with a degraded level of peak hour service), so that it is not necessary to order a separate study or hold any public hearings to become aware of the issue and deal with it reasonably within adopted policies of the City.

These mitigation measures can be very cumbersome and very irksome, but, if you agree to it and the public body, after its environmental hearing on the Negative Declaration agrees to them, you can develop your project and avoid a lengthened process. Disgruntled members of the public that are dissatisfied with the level of impact...after mitigation, or the nature of the mitigation, if they have participated in the process, can then file an action challenging the factual determination and stop the project until the court hearing.

⁹¹ The phrase “at least” is used here because for some of the projects that received MNDs, the respondents could not recall how many affordable housing units were generated.

For the most part, this system works, unless a City is bent on abusing the law either in favor of development interests or against.⁹²

For one project, the issues being mitigated were storm water flows off-site, construction noise, dust control, water pollution control during construction, hours of construction activity, lighting glare and street lighting. Another project had to mitigate these same issues in addition to mitigating concerns over signage (which needed to be limited), public safety (which required more fire lanes and fences), waste (which required more recycling), and tree removal (which required more tree preservation or replacement). One of the other projects had to deal with mitigating environmental damage to wetlands, since its building site was located in a flood plain.

e. Full EIR Performed as Part of a Larger Plan's CEQA Review

Five projects (5.62% of all projects surveyed and 7.25% of projects subjected to CEQA) went through a full EIR process as part of a larger plan's CEQA review. These projects generated 392 new units of affordable housing (6.14% of all new units surveyed and 7.59% of new units subjected to CEQA).

One project, the 72-unit Sage Canyon Apartments in San Marcos, was part of the Master Plan Community of San Elijo Hills. The Master Plan did an EIR for the entire community, so Sage Canyon did not require its own EIR or a CEQA exemption. Likewise, the 63-unit West Gateway Apartments in Long Beach are part of a much larger redevelopment project that had a full EIR. While the full EIR delayed these projects, the developers did not bear the EIR's cost. As a result, this type of EIR is much less expensive for an affordable housing developer than an EIR paid for by the affordable housing developer alone.

f. Required to do a Full EIR (Without Being Part of a Larger Plan)

One project (1.12% of all projects surveyed and 1.45% of projects subjected to CEQA) went through a full EIR process by itself. This project, the Greenfield Apartments in Bakersfield, generated 35 new units of affordable housing (0.55% of all new units surveyed and 0.68% of new units subjected to CEQA).

⁹² Survey Response from Frank Thompson, Marbill Corporation.

3. Reasons Projects Did Not Use CEQA Exemptions

The respondents for these specific projects, as well as other respondents to this survey, expressed a variety of reasons for why they did not utilize CEQA exemptions. Many respondents provided more than one answer. The reasons they expressed fit into five main categories:

- (1) local planners are hesitant to grant exemptions;
- (2) the project lacked qualities necessary to be eligible for the exemptions.
- (3) developers does not think the exemptions are beneficial;
- (4) developers did not know about the exemptions; and
- (5) developers avoided CEQA without an exemption.

a. Local Planners Are Hesitant to Grant Exemptions

Seven of the fifty respondents (14%) commented that local planners are often hesitant to grant exemptions from CEQA. By and large, these individuals cited hostility to affordable housing as the main reason for planners' reluctance to grant exemptions.

Four respondents stated that local planners never offered them exemptions, and they did not feel that planners would be offering exemptions anytime soon. One developer, a husband and wife team, commented simply that the "local jurisdiction just informed us they were doing the review; there was no exemption as an option."⁹³ Another individual, Cynthia Iwanaga at South County Housing, stated, "It seems that CEQA enforcement and attention to detail really depends upon the municipality that we are working in. Some jurisdictions are more strict than others. It seems to be as much a political process as an environmental process."⁹⁴ Finally, David Cooke of the nonprofit Community Housing Improvement Systems and Planning Association, Inc. (a Northern California affordable housing developer that develops about three to four projects per year⁹⁵), responded, "It seems the decision makers always will choose a conservative route and deem it not non-exempt if it is not crystal clear. We would like to see some expansion for more exemptions for affordable housing projects. My guess is that very few projects actually get an exemption

⁹³ Survey Response from Mrs. David Cordes, Willow Pointe Apartments.

⁹⁴ Survey Response from Cynthia Iwanaga, South County Housing Corp.

⁹⁵ Community Housing Improvement Systems and Planning Association, Inc., <http://www.chispahousing.org/> (last visited Dec. 23, 2005).

from CEQA.”⁹⁶ These comments reveal the unpredictable nature of planners’ use of CEQA exemptions and of their overall attitude toward affordable housing.

Some planners who have sought exemptions for their projects have received a cold reception from city planners. Ginger Hitzke, a senior project manager at Affirmed Housing, which has developed at least fifteen affordable housing projects in recent years,⁹⁷ was able to use a CEQA exemption but did not believe planners in general would grant exemptions unless the project in question received local support. She expressed disbelief that the existence of the exemption would provide developers with a guarantee of its use. She commented, “We’ve only used the CEQA exemption on one project. However, had that project had an opposition from local residents or property owners, I can guarantee you that the City would have found a way to not have allowed us to use the exemption.”⁹⁸

Some of the negative reception by planners to the request for exemptions may stem from their unfamiliarity with the exemptions and how they work. Caleb Roope, a developer at Pacific West Communities, has been able to use exemptions on at least four projects but has been unsuccessful in obtaining exemptions for three other projects. He reported, “Most of the challenges I’ve faced are around educating public officials of the availability of the exemptions.”⁹⁹ If these officials are not aware of the exemptions, they may be less likely to feel comfortable granting them to developers.

Planners also may be hesitant to grant CEQA exemptions when an affordable housing project faces local opposition. Charles Brumbaugh of the Corporation for Better Housing, which since 1995 has had 18 new construction projects generating around 400 new units of affordable housing, says that his firm has tried to use exemptions, but the response from planners has been tepid.¹⁰⁰ According to Brumbaugh, “No one seems to want to go down that road.”¹⁰¹ He believes that most local agencies do not like affordable housing because it reduces property taxes while increasing infrastructure costs for a locality, in the form of increased police, fire and 9-1-1 calls.¹⁰² He has worked on projects “from Oakland through Orange.” His firm does business in most populated areas of the state, with projects about evenly split between rural and

⁹⁶ Survey Response from David Cooke, Community Housing Improvement Systems and Planning Association.

⁹⁷ Affirmed Housing Group, <http://www.affirmedhousing.com/> (last visited Dec. 23, 2005).

⁹⁸ Survey Response from Ginger Hitzke, Affirmed Housing Group.

⁹⁹ Survey Response from Caleb Roope, Pacific West Communities.

¹⁰⁰ Survey Response from Charles Brumbaugh, Corporation for Better Housing.

¹⁰¹ *Id.*

¹⁰² *Id.*

urban areas. In his experience, most agencies will not go out of their way to help affordable housing developers move quickly through CEQA.

Another respondent, Paul Ainger at the nonprofit Community Housing Opportunities Corporation, which has developed over 1,100 units of affordable housing,¹⁰³ commented, "The real issue is low income apartments which the neighbors often disdain. CEQA is a convenience that adds legitimacy to the opposition." The developer saw no reason why lead agencies should be able to avoid offering an exemption based on concerns about significant effects. He argued, "If a project is developed in an area with proper zoning, then I see no additional impact that an apartment or low income subdivision could possibly impose on traffic, sewer, water, and storm drain systems since most of this infrastructure should be developed to meet the zoning capacity of the land." He complained about lead agencies' reluctance to grant exemptions, reporting that the "the key here is to reduce the opportunity of opponents of low income housing to use CEQA challenges when, in fact, all they really want is to get rid of housing for poor families."¹⁰⁴

Frank Thompson of the Marbill Corporation, believes that certain city planners, usually planners from "exclusive" counties and cities, abuse the "soft" language of exemptions. He said that these planners use mitigation measures as a method of conditioning approvals for projects in order to better control the impact of a project. He noted, "[Planners] have a harder time conditioning approvals to do that if [they] grant exemptions from CEQA." Even with relatively small projects, Thompson says that some planners will resist granting exemptions. "Most of these cities and neighborhood groups do not buy the argument that there is a minimum project size or parcel size below which there are no significant impacts. These groups will fight about a single family home on an in-fill lot." Thompson also commented that city planners sometimes actively try to create a controversy that will trigger greater CEQA review, even when no controversy originally exists.¹⁰⁵ He explained the behavior as follows:

[C]ities have made determined efforts not to use the CEQA exemptions, on my projects. I have had cities schedule public hearings to then use the 'public controversy' section to require an EIR....It is just a slap. In most instances, a mitigated ND or focused study could have done the job.¹⁰⁶

¹⁰³ Community Housing Opportunities Corporation, "About CHOC," <http://www.chochousing.org/aboutchoc.html> (last visited Dec. 23, 2005).

¹⁰⁴ Survey Response from Paul Ainger, Community Housing Opportunities Corporation.

¹⁰⁵ Survey Response from Frank Thompson, Marbill Corporation.

¹⁰⁶ *Id.*

Thompson's comments illustrate the perception that many planning agencies are hostile to affordable housing.

This situation, however, is not the case for all cities. Santa Monica grants ministerial approval to certain development projects. Other cities, including Los Angeles, allow developers to seek exemptions "over-the-counter," by simply filling out a form. According to Jackie Yount of Los Angeles WORKS, while an over-the-counter CEQA exemption is always desirable, most projects need some type of MND associated with them.¹⁰⁷ Nonetheless, she has found city planners in Los Angeles to be "by and large very supportive of affordable housing."¹⁰⁸

But even in Santa Monica, one respondent felt that the city was hesitant to grant more exemptions for fear that "cumulative impact" language in the CEQA Guidelines, which applies to all categorical exemptions, would make them susceptible to lawsuits.¹⁰⁹ This individual said that Santa Monica was hesitant to exempt projects creating between 50 and 100 units because the city was worried about being sued for being too generous in granting "soft" exemptions and disregarding significant environmental impacts.¹¹⁰

b. The Project Lacked Qualities Necessary to be Eligible for the Exemptions

Twenty-two respondents (40%) commented that projects often do not qualify for exemptions. Of these developers, the projects were often too large, located in unincorporated areas or had other specific environmental or historic district issues that prevented them from qualifying for the exemptions.

1. The Project Was Too Large

Thirteen respondents (26%) had projects that were too large to qualify for exemptions. Karen Saunders at South County Housing, a developer of over 2,000 affordable housing units,¹¹¹ stated, "We've never gotten a CEQA exemption...our projects are too big." The five-acre size limit prevented one 5.25-

¹⁰⁷ Survey Response from Jackie Yount, Women Organizing Resources, Knowledge and Services (W.O.R.K.S.).

¹⁰⁸ *Id.*

¹⁰⁹ CAL. CODE REGS. tit. 14 § 15300.2(b) (2005).

¹¹⁰ Survey Response from Robin Raida, Community Corporation of Santa Monica.

¹¹¹ South County Housing, "Accomplishments," <http://www.scounty.com/success.htm> (last visited Dec. 23, 2005).

acre project and another 5.82-acre project from using the Class 32 infill exemption.

2. The Project Was On Unincorporated Land

Four respondents had projects located in unincorporated land that the exemptions do not cover. For example, Bret Helgren of the Housing Authority of Kern County commented that projects in semi-rural areas or areas transitioning from rural to urban, such as Kern County, do not often fit into exemption requirements.

Karen Saunders reported that her “project is not within a city boundary” and suggested, “If the definition of infill project could be expanded,” then her projects would be able to take advantage of the exemptions. In her case, the project is “surrounded by fully built out development” but cannot be considered urban infill because it is on unincorporated county land. She reported that her county planner suggested changing the definition in the statute.¹¹² She would like the definition of “infill project” to be expanded “to apply to county areas and not just within cities.”

3. Project had Environmental/Historic Issues

Five respondents did not qualify because the projects involved unique environmental or historic district issues. Cynthia Iwanaga of South County Housing reported, “Our projects rarely fall under CEQA's categorical exemptions because they are typically new construction and there are almost always mitigation measures required of the projects, e.g., noise impact or traffic impact.”¹¹³ Iwanaga’s statement represents the challenge for new construction affordable housing projects to avoid having “significant effects” which disqualify them from the exemption. New construction will almost always generate neighborhood disruption that a hostile planning agency can use as a justification for not granting an exemption.

Other environmental impacts are more unique to the particular project at issue and its location. For example, Thái-Ân Ngô, of the Chinatown Community Development Center in San Francisco, cited the fact that her “project is located in an historic district” as a reason for not qualifying for the exemption. This project is also “located in what is called a Maher Ordinance Area” which is an environmental zone “associated with the original SF coastline and landfill/soil

¹¹² Survey Response from Karen Saunders, South County Housing Corp.

¹¹³ Survey Response from Cynthia Iwanaga, South County Housing Corp.

issues.”¹¹⁴ Unique projects like these may never fit into a category of CEQA-exempt developments.

Dennis McCray of the Solano Affordable Housing Foundation did not qualify for the exemption because of a lingering environmental problem unique to his property. His story illustrates the importance of developers choosing project sites that will not encounter CEQA difficulty.

There’s a piece of land that’s driving me crazy. It is a 5-acre infill site in the middle of Fairfield, surrounded by existing housing and railroad tracks. I went in for approvals, for the CEQA process, and the city told me they wanted to see if there were wetlands there. I hired a consultant who thought there might be wetlands on one acre. I had two options: test for two years for wetlands or assume there were wetlands and get an off-site replacement. The consultant said to concede that there were wetlands, so I applied for an Army Corps of Engineers permit to replace it. That was four years ago. We would do a two-for-one, and we said we would like a replacement. We did what we were supposed to do. It took the Corps two years to process the application, and finally they said no permit unless the replacement is in the San Francisco district. But there were no land banks available there. That’s still the situation we’re looking for wetlands approval. Meanwhile, the water quality control board said two years later that our application was incomplete, even though they hadn’t taken action in over a year, and by law it is deemed approved. They never got me a letter though, and now they’re foot-dragging for marginal wetlands. They want more analysis. Between the two agencies, they’re holding up 92 units of affordable housing.¹¹⁵

McCray’s story shows why developers try to choose land strategically if they cannot take advantage of CEQA exemptions.

c. Developers Do Not Think the Exemptions Are Beneficial

Seven respondents (14%) commented that the exemptions are not beneficial for developers.

¹¹⁴ Survey Response from Thái-Ân Ngô, Chinatown Community Development Center.

¹¹⁵ Survey Response from Dennis McCray, Solano Affordable Housing Foundation.

Andy Blauvelt exemplifies the findings that developers sometimes do not have confidence in the exemptions. He is a project manager at EAH Housing, one of the largest nonprofit affordable housing developers in California, which has developed over 5000 affordable units and currently manages over 6000 units.¹¹⁶ He found that for his particular project, “an exemption wasn't used because the limited nature of the exemptions makes it not worth the difficulty in the real world of getting a project approved outside the normal process.” Indicating a lack of faith in the effectiveness of the exemptions, he reported, “Perhaps we are wrong and are merely ignorant of their potential value, but the perception among my EAH colleagues is that the exemptions don't really amount to much.” Blauvelt’s comments reveal potentially widespread lack of familiarity with, and confidence in, the CEQA exemptions.¹¹⁷

Echoing Blauvelt’s sentiments are the comments of Carl Steinberg of the Bermant Development Company. Steinberg said that for some projects, planners will require “full environmental studies for traffic, noise, hazardous materials, archeology, etc, before recommending an exemption.” In such a case, Steinberg commented, “We might as well have gone thru [sic] an EIR.”¹¹⁸

Stephan Daues of Mercy Housing California, the second largest producer of self-help housing in the United States with over 1,324 units of affordable housing,¹¹⁹ reported not using the exemption out of fear that avoiding CEQA would raise the ire of neighbors who do not want affordable housing in their area. Daues commented, “in some cases with a friendly jurisdiction, we just do the CEQA anyways to provide us with back-up to defend the project against future NIMBY assaults.”¹²⁰ Echoing this sentiment, Martha Putnam of the Core Companies (a group of affordable housing developers in Northern California),¹²¹ stated, “The main tool the neighbors use to hold you up is traffic congestion, even when you have a legitimate report that claims no mitigation is needed, you usually end up being forced to do something.”¹²² These responses indicate that developers fear future lawsuits or neighborhood opposition if they avoid the CEQA process. The uncertainty this fear generates gives developers an incentive to undergo the CEQA process, regardless of the existence of an exemption that would shortcut the process.

¹¹⁶ EAH, <http://www.eahhousing.org/> (last visited Dec. 23, 2005).

¹¹⁷ Survey Response from Andy Blauvelt, EAH Housing

¹¹⁸ Survey Response from Carl Steinberg, Bermant Development Company.

¹¹⁹ Mercy Housing California, <http://www.ruralisc.org/mhc.htm> (last visited Dec. 23, 2005).

¹²⁰ Survey Response from Stephan Daues, Mercy Housing California.

¹²¹ The Core Companies, <http://www.thecorecompanies.com/> (last visited Dec. 23, 2005).

¹²² Survey Response from Martha Putnam, The Core Companies.

Charles Brumbaugh of the Corporation for Better Housing finds “soft” exemptions to be useless. Even if his firm has a valid claim for an exemption, they have no real way of challenging the lead agency. If they were to sue an agency for not being granted an exemption, the project would be delayed even further, and the agency would no longer look upon the developer favorably when disbursing redevelopment funds or reviewing future projects. Therefore, challenging an agency’s determination is not a realistic option. The end result for Brumbaugh is that his projects typically face an MND or a limited scope EIR as a result of the CEQA process.¹²³

Bill Witte of The Related Companies of California takes the position that he is comfortable with the cost of MNDs and sees no need to seek exemptions. He says, “We have never used a CEQA affordable housing exemption. Generally speaking, residential projects in general, and smaller, affordable projects in particular, do not require EIRs, so CEQA per se is rarely an issue.”¹²⁴ His company is very active in affordable housing construction, averaging each year five or six projects which generate 500 to 700 new affordable housing units. While his projects still may face MNDs, he does not find them to be cumbersome in terms of time and cost.

Other respondents, however, do not agree. One commented, “I think the exemptions are a good idea – this is a costly and time consuming process, and providing affordable housing does not come without a cost to developers. Therefore, whatever can be done to expedite these processes is welcome.”¹²⁵

d. The Developers Did Not Know About the Exemptions

Five survey respondents (10%) said they did not know about the CEQA exemptions or were unfamiliar with them. Martha Putnam of The Core Companies in Northern California stated, “I am unaware of CEQA exemptions for affordable housing projects, and they haven't been mentioned by staff.”¹²⁶ Andy Lief of South County Housing commented, “I was personally not aware the exemptions even existed” and recommended that policy makers make “sure the local jurisdiction knows” they exist.¹²⁷ Comments like these, from employees of two large affordable housing developers, indicate that many developers may not be aware of potentially helpful exemptions.

¹²³ Survey Response from Charles Brumbaugh, Corporation for Better Housing.

¹²⁴ Survey Response from Bill Witte, The Related Companies.

¹²⁵ Survey Response from Justin Chapman, Urban Partners, LLC.

¹²⁶ Survey Response from Martha Putnam, The Core Companies.

¹²⁷ Survey Response from Andy Lief, South County Housing Corp.

Just as many of the planners were not clear on the different CEQA exemptions, many of respondents were unaware that the existing exemptions would benefit their housing projects. To underscore this ignorance, at least two developers out of the 50 that responded to the survey had never heard of CEQA before.

e. The Developers Avoided CEQA Without an Exemption

Thirteen of the respondents (26%) stated that they sometimes do not use CEQA exemptions because they can avoid CEQA another way. As discussed in 2(a) above, many developers utilized an existing CEQA determination for their project and did not have to undergo CEQA review of their individual affordable housing project. Instead, they relied on previous CEQA determinations conducted by a local government, ministerial approvals provided by local governments, and CEQA determinations made for master developments. These strategies represent other means of avoiding CEQA review for a single affordable housing project without having to utilize exemptions.

Darren Brobowski, whose company develops between six to ten projects each year of new construction, resulting in 750 and 1,000 affordable housing units, never uses exemptions because they are “too narrow.” “We could a lot more projects if the exemptions were broader,” he stated. “Make them broader in applicability. We’re always fighting NIMBY issues, and people go after the environmental impacts to stop a project.” With Brobowski’s large projects, he has to choose project sites that do not need “full CEQA review.” He said:

Developers won’t risk a full environmental review because there are too many other risks at issue anyway to take it on. Mostly we find land zoned accordingly in the plan for that area to be able to build without a full EIR. It would be beneficial if more land were zoned that way, but the problem starts at the zoning.

Brobowski’s comments reveal the difficulty that large affordable housing developers have in using exemptions, as well as their efforts to overcome CEQA’s burdens by strategically choosing land that CEQA will not negatively affect.¹²⁸

¹²⁸ Survey Response from Darren Brobowski, Phoenix Park.

VII. Proposals for Policy Makers: **The Proposal**

Given the current situation in California regarding affordable housing development, CEQA and the results of our survey, various policy options exist for improving the CEQA process for affordable housing. The legislature could:

- (1) take no action;
- (2) promote awareness of the exemptions;
- (3) encourage more zoning for multifamily housing;
- (4) streamline the statutory exemptions; and
- (5) codify a modified version of the Class 32 categorical exemption.

These policy options are described in detail and considered below. Appendix D contains a draft bill and bill analysis applying these proposals.

A. Take No Action

The legislature could take no further action with respect to CEQA reform. Affordable housing developers seem adept at avoiding the CEQA process by selecting sites that have already passed the CEQA process through rezoning, general plan amendments, specific plans or other previous EIRs. Their only complaint appears to be the lack of availability of such sites. Of the affordable housing developers contacted for this study, nearly all of those who underwent CEQA review received negative declarations or MNDs and reported having little trouble with the process. One respondent to the survey commented that an MND is simply an expected part of the process for constructing new affordable housing.¹²⁹ Furthermore, the Class 32 categorical exemption (CEQA Guidelines § 15332) appears to be of use to planning jurisdictions that want to encourage affordable housing infill. Finally, due to the newness of the statutory exemption for affordable housing (Pub. Res. Code § 21159.23), perhaps developers and planners will become more familiar with these provisions over time and make greater use of them.

B. Promote Awareness of the Exemptions

The legislature could strive to promote awareness of the existing exemptions among planning agencies and developers. Such a solution would be

¹²⁹ Survey Response from John Webb, Foundation for Social Resources.

relatively cheap and politically palatable. Informing planners and developers about the exemptions should be a top priority. For exemptions to be successful, planners and developers need to be comfortable with their details and applicability and should be familiar with how to use them.

The Governor's Office of Planning and Research could prepare a brief annual newsletter explaining the exemptions simply and quickly. This newsletter could be sent via mail or email to all planning agencies as well as to all the developers who applied for CDLAC bonds or CTCAC tax credits in the previous year for affordable housing projects.

C. Encourage More Zoning for Multifamily Housing

Affordable housing developers need localities to zone more sites for multifamily housing. The legislature should encourage localities to develop general plans, specific plans and zoning that designate more multifamily and affordable housing. Once these sites have been approved for multifamily dwellings, developers can often avoid the CEQA process, or at least avoid intense and protracted CEQA battles. Currently, developers have to propose amendments and rezones first before they can propose their project, which delays the projects and drives up costs.

One method for encouraging zoning would be for the legislature to exempt rezones, general plan amendments or specific plans from CEQA that increase the acreage of multifamily areas or that designate more housing to be affordable. The exemptions could cover small increases of multifamily acreage in order to minimize political opposition. The legislature could also require cities to zone a certain portion as multifamily housing with general plans that increase the percentage of affordable units.

The legislature could also offer financial incentives to encourage localities to rezone more land as multifamily housing and to include more affordable housing in their general and specific plans. Such incentives could include using the state's provision of grants and forgivable loans for land use planning that includes more land zoned to assist affordable housing development. The grants could offer planning assistance funds for cities to engage in this process and the attendant CEQA review. The state could also dedicate funds from locally generated property taxes to pay for this program of planning grants and assistance. These fiscal incentives would encourage more affordable housing sites and would assist developers by placing the burden of CEQA review on the planning jurisdictions up front. This advanced review would eliminate

uncertainty and developer costs – two major barriers to increased affordable housing production.¹³⁰

As a modest first step, the state could introduce a pilot program utilizing this incentive scheme. For example, the state could set a goal of 100 new specific plans with affordable housing components or choose a few planning jurisdictions to begin the program. By offering financial incentives for a few select localities to undergo CEQA review of these specific plans in order to clear sites for more affordable housing, the state would provide more affordable housing and would have the opportunity to evaluate the financial incentives program on a small scale.

D. Streamline the Statutory Exemptions

The legislature could either remove or separate many of the narrow requirements in the statutory exemption for affordable housing (Pub. Res. Code § 21159.24). For example, the statute could remove the rigid definitions of what constitutes urban land and how many years have passed since the parcel was created. The legislature could also remove the “significant effect” language of Pub. Res. Code § 21159.23(c) and § 21159.24(b)(1). This language adds a “soft” component to the affordable housing and infill exemptions that can hinder its effectiveness.¹³¹ A simple and more streamlined exemption would be easier to use and have greater certainty for affordable housing developers who need to secure financing early in the process.

Separating some of the narrow requirements in the statutory infill exemption into separate exemptions might preserve the policy goals while at the same time allowing greater use of the exemptions. For example, the requirement in Pub. Res. Code § 21159.24(a)(8) that the developments occur within a half-mile of a transit stop represents an intelligent approach to placing affordable housing developments in infill parcels in which new residents will not have to rely on cars and roads to travel. Neighbors may therefore feel less burdened by new developments. However, planners will have a difficult time utilizing this provision because it is combined with the many other requirements contained in the exemption. The likelihood of a project meeting this transit requirement as well as all of the other specifications is minimal. Furthermore, because not many transit stops exist in car-dominated California, this provision essentially

¹³⁰ For more information on this type of proposal, see PUTTING THE PIECES TOGETHER: STATE ACTIONS TO ENCOURAGE SMART GROWTH PRACTICES IN CALIFORNIA 13-17 (Urban Land Institute, 2002).

¹³¹ CAL. PUB. RES. CODE § 21159.23(c) (2005).

undermines the entire infill exemption. A better plan would be to give this provision its own separate exemption so that developments located near a transit stop can still have the benefit of a CEQA exemption.

Another possibility would be to streamline the review process in cases of “significant effects” or “unusual circumstances.” Rather than eliminating the “soft” language, this option would maintain the local discretion while outlining a reduced review period to address these conditions. For example, a streamlined EIR in cases of “significant effects” could include a shortened 30-day comment period, limited judicial review possibilities with heightened judicial deference to the lead agency’s decision, and a 30-day statute of limitations for challenges. In addition, this streamlined EIR could cover only specific issues with clear standards, such as parking, traffic, community design and open space. Such a minimal review would offer local communities a chance to provide their input and concerns without torpedoing the entire affordable housing project.¹³²

E. Codify a Modified Version of the Class 32 Categorical Exemption

The legislature could codify and expand the Class 32 categorical exemption for urban infill (CEQA Guidelines § 15332). The new legislation would solidify the current exemption, removing any lingering doubt over future legal challenges. Codification would also protect the exemption from being modified by future unilateral actions of the Resources Secretary, an appointee of the Governor.

If the legislature took such action, the new exemption would complement the current statutory exemption for infill, located in Pub. Res. Code § 21159.24. As Section V of this study describes, planners and developers seeking an infill exemption currently use the categorical exemption for urban infill and almost never use the present statutory exemption for urban infill. Therefore, codification would be an acknowledgment of the effectiveness of the categorical exemption and a recognition that Cal. Pub. Res. Code § 21159.24 is useful only in narrow circumstances.

Codification could also include the “hardening” of the Class 32 categorical exemption. Currently, the CEQA Guidelines § 15300.2 prevent the Class 32 exemption from being used when (1) the cumulative impact of the project and other projects is significant; (2) unusual circumstances exist; (3) a scenic highway

¹³² For more information on this type of proposal, see PUTTING THE PIECES TOGETHER: STATE ACTIONS TO ENCOURAGE SMART GROWTH PRACTICES IN CALIFORNIA 20 (Urban Land Institute, 2002).

may be effected; or (4) historical resources are damaged.¹³³ Local planning agencies are the ones who make the determination of whether these conditions exist. Removing some or all of these limitations on the exemption would give local planning agencies less discretion in deciding whether a project should receive the exemption.

To make up for this lost environmental protection of the exemption, the codified Class 32 exemption could be amended so that one of its requirements is compliance with the extensive criteria of Pub. Res. Code § 21159.21. Section 21159.21 contains more restrictions than the current vague criteria found in CEQA Guidelines § 15300.2. Notably, section 21159.21 contains no “unusual circumstances” language. As a result, Section 21159.21 provides local planning agencies with less discretion in granting exemptions while still affording important local environmental protections. Therefore, the new statutory exemption would still protect against specific negative environmental impacts while limiting the local discretion that torpedoes many affordable housing projects.

The legislature could make other changes to the codified Class 32 exemption to make it more expansive. Currently, the exemption covers only proposed developments that occur “within city limits on a project site of no more than five acres.”¹³⁴ County planning agencies have expressed frustration that they cannot use the exemption on unincorporated land that is often as dense as any city in the state. Developers express similar sentiments, especially when their unincorporated project site is surrounded by urbanized development. The legislature could change the categorical exemption’s reference to proposed developments that occur “within city limits” to any area of a certain minimum density. This density minimum could be 1,000 people per square mile. Such a minimum would mirror the density requirement found in the draft bills for the statutory infill exemption (Pub. Res. Code § 21159.24).¹³⁵

The legislature could also remove subsection (d) of the categorical exemption, which requires that the project not result in “significant effects” relating to traffic, noise or air and water quality. Removing this “soft” part of the exemption would limit local planning agencies’ broad discretion to deny the

¹³³ CAL. CODE REGS. tit. 14 § 15300.2 (2005).

¹³⁴ *Id.* § 15332(b).

¹³⁵ The original version of the bill used a density definition that covered unincorporated land. It was later removed for subsequent versions of the bill. *See* California Bill Analysis for Senate Bill 1925, Assembly Floor, 2001-2002 Regular Session (July 2, 2002). By August 28, 2002, the unincorporated land inclusion disappeared in the Senate Rules Committee. *See* California Bill Analysis for Senate Bill 1925, Senate Floor, 2001-2002 Regular Session (Aug. 30, 2002).

exemption for essentially any reason. Subsection (a) of the exemption already specifies that the project must be consistent with the general plan designation and the zoning regulations. This language protects cities and counties against having to grant an exemption to an incompatible project. Removing this section would protect developers from hostile planners who are beholden to NIMBY types in their jurisdiction.

VIII. Political Feasibility of the Policy Proposals: **The Political Memo**

Issues of CEQA reform bring close attention from a diverse group of interested parties. They include: (1) developers, (2) advocates for local government, (3) environmental justice advocates, (4) environmentalists, and (4) fiscal conservatives.

A. Developers

All of the policy proposals described above represent attempts to loosen CEQA's review requirements and encourage the granting of more exemptions. They will likely gain immediate allies in the developer community, particularly among affordable housing advocates. Developers may complain that the exemptions do not go far enough, but they will probably support any genuine CEQA reform that loosens environmental restrictions.

B. Advocates for Local Government

Cities and counties may oppose efforts to remove their discretion from the local planning process. The League of Cities, for example, will strongly oppose any efforts by Sacramento to place local planning requirements on cities and counties.

The proposals to encourage more zoning for multifamily housing, to streamline the statutory exemptions, and to codify and possibly expand the Class 32 exemption all contain an element of either "hardening" an existing exemption or creating new, fairly "hard" exemptions. As a result, advocates for local government will likely oppose these exemptions.

However, the financial incentives option to encourage more multifamily zoning may be more palatable to local governments. The incentive scheme does not require a local government to take action but simply rewards them with funds if they do.

C. Environmental Justice Advocates

Environmental justice (EJ) advocates will most likely oppose attempts to weaken CEQA's ability to restrict infill development. EJ groups often represent low-income urban residents who want to maintain a voice in the kind of projects that get built in their neighborhoods. Efforts to streamline or reduce the environmental review process may be more acceptable to them, rather than outright attempts to eliminate the environmental review process on certain types of infill projects. If EJ advocates maintain a voice in the process, even if streamlined, they may be less resistant.

D. Environmentalists

Environmentalists may fall on either side of the debate regarding the expansion of CEQA exemptions for affordable housing. They could side with public transit groups and support the exemptions, particularly those targeting infill. Infill preserves open space from sprawling development and often reduces vehicle miles traveled per person. Housing and low-income advocates will also support efforts to improve the affordable housing stock. On the other hand, environmentalists may see any expansion of exemptions as a part of an overall attempt to weaken CEQA. These environmentalists would be concerned that a "hardening" of exemptions would allow more unrestrained development to take place and would weaken the ability of localities to challenge the environmental consequences of development and restrict sprawl.

E. Fiscal Conservatives

Except for the proposal to promote awareness of the exemptions through use of a newsletter and the granting of financial incentives to local governments, these proposals do not cost money or increase government regulation. As a result, fiscal conservative and other advocates of small government will not likely oppose these proposals.

IX. Conclusion

The CEQA process is complex and retains many powerful allies within the environmental, environmental justice and homeowner communities. At the same time, California faces a severe housing shortage and is in desperate need of more affordable housing – especially affordable housing located in urbanized areas where residents will not have to rely on the automobile for transportation

or open space for new housing areas. The affordable housing exemptions discussed in this study represent the state legislature's attempts to balance these needs.

This study has demonstrated that both the statutory and categorical exemptions do not allow the majority of affordable housing developers to avoid a sometimes hostile CEQA process. Statutory exemptions with rigid requirements have seen only minimal use by developers. However, developers have been able to utilize the broader categorical exemptions more frequently, which provide a good starting point for further CEQA reform.

Planners who are friendly to infill and affordable housing tend to rely on the Class 32 categorical exemption instead of any statutory exemption. These planners are generally unaware of the existence and details of the statutory exemptions and often find them to be too rigid to be useful. County planners complain that unincorporated land does not qualify under the exemption despite having high-density land. Finally, hostile planners refuse to grant exemptions if there is significant local resistance.

Meanwhile, developers employ the strategy of avoiding CEQA by using sites that have passed the CEQA process (such as through a rezoning, specific plan or general plan). These builders, like many planners, are often unaware of the existence and scope of the exemptions. When they are familiar with the exemptions, they often express disbelief that an exemption will protect them from future neighbor opposition. Sometimes developers are afraid to ask for exemptions from planners because they do not want to antagonize the planners that they rely on for assistance. Finally, many developers' projects do not qualify for the exemption because they are too big or are on unincorporated or environmentally sensitive land.

The challenge for state policy makers will be to address these stumbling blocks in order to encourage more use of the exemptions. While the opposition to affordable housing is often local, the negative effects of a housing shortage are felt by the entire state, from our economy to our quality of life. The current legislation has not solved the affordable housing crisis in California. The state will most likely need to take a more active role in resolving this dilemma while still being sensitive to legitimate environmental concerns.

Appendix A: Summary of Findings

Table 1. Response Rate (Including Acquisition/Rehabilitation Housing)

Number of Responses to Survey	69
Number of Individuals Contacted	134
Response Rate	51.49%

Table 2. Response Rate (Excluding Acquisition/Rehabilitation Housing)

Number of Responses to Survey	50
Number of Individuals Contacted	115
Response Rate	43.48%

Table 3. Level of CEQA Review (by New Affordable Housing Projects)

	Projects	% of Total Projects	% of Projects Subject to CEQA Review
Projects That Used CEQA Exemptions	20	22.47%	N/A
Projects Not Subject to CEQA Review	69	77.53%	100.00%
<i>Type of Review:</i>			
Utilized a Previous CEQA Determination	7	7.87%	10.14%
Received Ministerial Approval for the Project	3	3.37%	4.35%
Received Negative Declaration	20	22.47%	28.99%
Received MND	33	37.08%	47.83%
Full EIR Performed as Part of Larger Plan's CEQA Review	5	5.62%	7.25%
Full EIR (Without Being Part of a Larger Plan)	1	1.12%	1.45%
Total Projects	89		

Table 4. Level of CEQA Review (by New Affordable Housing Units Created)

	Units	% of Total Units	% of Projects Subject to CEQA Review
New Housing Unites From Projects That Used CEQA Exemptions	1220	19.10%	N/A
Projects Not Subject to CEQA Review	5166	80.90%	100.00%
<i>Type of Review:</i>			
Utilized a Previous CEQA Determination	405	6.34%	7.84%
Received Ministerial Approval for the Project	129	2.02%	2.50%
Received Negative Declaration	1844	28.88%	35.69%
Received MND	2361	36.97%	45.70%
Full EIR Performed as Part of Larger Plan's CEQA Review	392	6.14%	7.59%
Full EIR (Without Being Part of a Larger Plan)	35	0.55%	0.68%
Total New Housing Units	6386		

Table 5. Reasons for Projects Not Using CEQA Exemptions (by Respondents)

	Total Respondents	% of Total Respondents
Local Planners Are Hesitant to Grant Exemptions	7	14%
Project Lacked Qualities to be Eligible for Exemptions:	22	44%
1. Project was too large	13	26%
2. Project was on unincorporated land	4	8%
3. Project had environmental/historical issues	5	10%
Developer Doesn't Think the Exemptions were Beneficial	7	14%
Developer Did Not Know About the Exemptions	5	10%
Developer Avoided CEQA Without an Exemption	13	26%
Provided no answer	6	12%
Total Respondents	50	

NOTE: Some respondents provided more than one reason.

Appendix B: Example of the Questions Asked to Affordable Housing Developers

- 1) You applied for a 2004 CDLAC bond for the Tara Village Apartments in Cypress. Can you tell me if the project used a CEQA exemption?
- 2) If so, which exemption?
- 3) How many affordable housing units were or would be created from the development?
- 4) If the project did not use an exemption, why not?
- 5) If the project did not use an exemption, in what stage of CEQA review is the project (Full EIR, Mitigated Neg Dec, etc.)?
- 6) What, if any, challenges have you faced in using CEQA exemptions?
- 7) What changes to the CEQA exemptions would make them more effective for you?
- 8) Do you have any general comments about your experiences with CEQA and the exemptions?

Appendix C: Respondents to the Survey of Affordable Housing Developers

	<u>Developer</u>	<u>Survey Respondent</u>
1	Affirmed Housing Group	Ginger Hitzke
2	Bermant Development Company	Carl Steinberg
3	BRIDGE Housing	Betsy Wilson
4	Burbank Housing	Sue McQuiddy
5	Charities Housing	Kathy Robinson
6	Chinatown Community Development Center	Thái-Ân Ngô
7	Community Corporation of Santa Monica	Robin Raida
8	Community Corporation of Santa Monica	Joan Ling
9	Community Housing Improvement Systems and Planning Association, Inc.	David Cooke
10	Community Housing Opportunities Corporation	Paul Ainger
11	The Core Companies	Martha Putnam
12	Corporation for Better Housing	Charles Brumbaugh
13	Devin & Gong, Inc. (Consultant)	Paul Carney
14	Domus Development	Sirena McCart
15	EAH Housing	Andy Blauvelt
16	EAH Housing	Benny Kwong
17	Easter Hill Phase II	Dalila Sotelo
18	Eden Housing	Marian Gushiken
19	Fairfield Affordable	Tim Wray
20	Forest City Residential	Scott Carlson
21	Foundation for Social Resources	John Webb
22	Hollywood Community Housing Corporation	Maura Johnson
23	Housing Authority of Kern County	Bret Helgren
24	Inclusive Homes, Inc.	Perla Eston
25	Islas Development	David Beacham
26	Marbill Corporation	Frank Thompson
27	Mercy Housing California	Stephan Daves
28	Mercy Housing California	Sharon Christen
29	Mercy Housing California	Ben Phillips
30	Meta Housing Corporation	Kasey Burke
31	Mid-Peninsula Housing Coalition	Jane Royer Barr
32	Mid-Peninsula Housing Coalition	Mara Blitzer
33	Norwood Avenue	Janet Rice
34	Pacific West Communities	Caleb Roope
35	People's Self-Help Housing Corporation	Mark Wilson
36	Phoenix Park	Darren Brobowski
37	Prometheus Real Estate	John E. Ghio
38	Public Initiatives Development Corporation	Erin Carson
39	The Related Companies	Kim McKay
40	The Related Companies	Bill Witte

41	Solano Affordable Housing Foundation	Dennis McCray
42	South County Housing Corp.	Cynthia Iwanaga
43	South County Housing Corp.	Andy Lief
44	South County Housing Corp.	Karen Saunders
45	South County Housing Corp.	Sandi Hollenbeck
46	TMG Partners	Andrew Hudacek
47	Urban Partners LLC	Justin Chapman
48	USA Properties Fund, Inc.	Royce Sanders
49	Willow Pointe	Mrs. David Cordes (wife)
50	Women Organizing Resources, Knowledge and Services (W.O.R.K.S.)	Jackie Yount

Appendix D: Draft Bill and Bill Analysis

I. Draft Bill

An act to add to Division 13, Chapter 4.5, Article 6 of the Public Resources Code, relating to environmental quality.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 21159.28 is added to the Public Resources Code to read:

211529.28. Notification to Planning Agencies and Developers of CEQA Exemptions

(a) Each year the Governor's Office of Planning and Research shall prepare a notice that:

- (1) lists the statutory and categorical exemptions to CEQA; and
- (2) explains the statutory and categorical exemptions to CEQA simply and clearly.

(b) The notice described in subsection (a) above shall be:

- (1) sent via mail or email to all city and county planning agencies on the first of January each year;
- (2) sent via mail or email to the listed contact person of each developer who applied in the previous year to the California Debt Limit Allocation Committee for the tax-exempt housing revenue bond available to "Qualified Residential Rental Projects;"
- (3) sent to the listed contact person of each developer who applied to the California Tax Credit Allocation Committee for a tax credit in the previous year; and
- (4) posted on the website of the Governor's Office of Planning and Research; and
- (5) made available generally for public inspection.

SECTION 2. Section 21159.29 is added to the Public Resources Code to read:

(a) Any locality that enacts a rezone, a general plan amendment, or a specific plan amendments which adds more multifamily zones to the area in question shall receive funds for planning equal to 1% of the planning budget for every 5 acres of multifamily areas added.

(b) The funds for planning will come from the state's provision of grants and forgivable loans.

(c) For purposes of this section, "funds for planning" means funds allocated to the locality's planning agency.

(d) For purposes of this section "planning budget" means the budget for the previous fiscal year allocated to the locality's planning agency.

SECTION 3. Section 21159.30 is added to the Public Resources Code to read:

21159.30. In-Fill Development Projects

(a) This division does not apply to any development project that meets the following criteria:

(1) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.

(2) The proposed development occurs on a project site of no more than five acres in an area with a population density of at least 1,000 people per square mile.

(3) The project site has no value as habitat for endangered, rare or threatened species.

(4) The site can be adequately served by all required utilities and public services.

(5) The project satisfies the criteria of Section 21159.21.

SECTION 4. Section 21159.23(c) is amended so that the phrase "due to unusual circumstances or" is deleted.

SECTION 5. Section 21159.23(a)(2) is amended so that the word "five" is replaced with the word "four."

II. Bill Analysis

Section 1 of this bill is meant to promote awareness of CEQA housing exemptions to city planners, affordable housing developers, and the public at large.

Section 2 of this bill creates incentives for local planning agencies to create more multifamily zones in their jurisdictions.

Section 3 of this bill codifies the Class 32 Categorical Exemption (contained in § 15332 of the CEQA Guidelines) and modifies the exemption in a number of ways. Section 2 modifies the Class 32 Exemption by eliminating the phrase “within city limits” from § 15332(b). This change will allow the exemption to be used in unincorporated areas. Section 2 also replaces the phrase in that reads “substantially surrounded by urban uses” in § 15332(b) with the phrase, “in an area with a population density of at least 1,000 people per square mile.” This change eliminates ambiguous language in the Class 32 exemption and also mirrors the density requirement of Pub. Res. Code § 21159.23(b). In addition, Section 2 removes § 15332(d) of the categorical exemption which made the Class 32 exemption “soft” and gave lead agencies’ broad discretion to deny the exemption. Finally, Section 2 adds language requiring any project which uses this exemption to also comply with Pub. Res. Code § 21159.21. This requirement will alleviate concerns that this “hard” exemption ignores legitimate environmental issues.

Section 4 eliminates a phrase that has made § 21159.23 a “soft” exemption, subject to lead agencies’ broad discretion.

Section 5 makes § 21159.23 only available for sites as large as four-acre sites. This is meant to serve as a compromise to those who do not want § 21159.23 to be a hard exemption.

III. Integrating the Draft Bill with the Current Legislation

The following draft statute integrates the proposed changes from the draft bill above. The text that is in bold, underlined font represents the proposed changes. The rest of the text represents the current statutory language.

PUBLIC RESOURCES CODE
DIVISION 13. Environmental Quality
CHAPTER 4.5. Streamlined Environmental Review
ARTICLE 6. Special Review of Housing Projects
Cal Pub Resources Code §§ 21159.23

§ 21159.23. Applicability to projects consisting of residential housing affordable to low-income households

(a) This division does not apply to any development project that consists of the construction, conversion, or use of residential housing consisting of 100 or fewer that is affordable to low-income households if both of the following criteria are

met:

(1) The developer of the development project provides sufficient legal commitments to the appropriate local agency to ensure the continued availability and use of the housing units for lower income households, as defined in Section 50079.5 of the Health and Safety Code, for a period of at least 30 years, at monthly housing costs, as determined pursuant to Section 50053 of the Health and Safety Code.

(2) The development project meets all of the following requirements:

(A) The project satisfies the criteria described in Section 21159.21.

(B) The project site meets one of the following conditions:

(i) Has been previously developed for qualified urban uses.

(ii) The parcels immediately adjacent to the site are developed with qualified urban uses, or at least 75 percent of the perimeter of the site adjoins parcels that are developed with qualified urban uses and the remaining 25 percent of the perimeter of the site adjoins parcels that have previously been developed for qualified urban uses, and the site has not been developed for urban uses and no parcel within the site has been created within 10 years prior to the proposed development of the site.

(C) The project site is not more than ~~four~~ **five** acres in area.

(D) The project site is located within an urbanized area or within a census-defined place with a population density of at least 5,000 persons per square mile or, if the project consists of 50 or fewer units, within an incorporated city with a population density of at least 2,500 persons per square mile and a total population of at least 25,000 persons.

(b) Notwithstanding subdivision (a), if a project satisfies all of the criteria described in subdivision (a) except subparagraph (D) of paragraph (2) of that subdivision, this division does not apply to the project if the project is located within either an incorporated city or a census defined place with a population density of at least 1,000 persons per square mile.

(c) Notwithstanding subdivision (b), this division applies to a project that

meets the criteria of subdivision (b), if there is a reasonable possibility that the project would have a significant effect on the environment or the residents of the project ~~due to unusual circumstances or~~ due to the related or cumulative impacts of reasonably foreseeable projects in the vicinity of the project.

(d) For the purposes of this section, "residential" means a use consisting of either of the following:

(1) Residential units only.

(2) Residential units and primarily neighborhood-serving goods, services, or retail uses that do not exceed 15 percent of the total floor area of the project.

Appendix E: Talking Points Memo

Basic Media Argument for Expanding CEQA Exemptions for Affordable Housing

California faces a severe shortage of affordable housing. Housing costs in this state have skyrocketed, and families are spending more and more of their budgets on housing. Most families cannot even think about affording to buy a house in many parts of the state. And for poor families with children in particular, this shortage is especially painful.

Meanwhile, our recent efforts to cut the red tape associated with new affordable housing projects have been too narrow and ineffective. We need to encourage small affordable housing developments by exempting them from complicated government review. These projects are by definition low impact; they take up only a few acres and create less than 100 units of residences. They will occur in already built-out areas where their impacts on the environment and on our overcrowded roads will be negligible. This is a sensible and pragmatic solution for an enormous problem. It is time to streamline the review process for small affordable housing developments.