

CEQA and Housing: (Re)calibrating the Scope of Environmental Review to the Scope of Agency Discretion

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My Thesis (and a motivating example)

1. The courts are at fault for CEQA's metamorphosis from an environmental review statute to a NIMBY- and labor-leverage statute.

2. The root problem is how the courts have dealt with the class of governmental actions that are discretionary in part, ministerial in part.

- Consider a housing development project that complies with applicable objective standards.
- Under state Housing Accountability Act, the city may not deny project or reduce its density. However, city may impose discretionary conditions of approval that don't reduce density.

What's “the CEQA Project” in a (Zoning-Compliant) Housing Development Project?

Conception 1: “the housing development” considered as a whole

Conception 2: “the discretionary condition(s) of approval” that the city proposes to impose

Why does this matter? B/c to identify an enviro effect, you need a baseline for comparison, and the two conceptions of “the CEQA project” imply different baselines.

- Conception 1 → **current environmental conditions baseline**
- Conception 2 → **project-as-proposed baseline**

The Answer from CEQA First Principles

The “CEQA Project” is the discretionary condition(s) of approval (Conception 2). Why?

1. CEQA only applies to discretionary acts (PRC § 21080)
2. CEQA is supposed to inform state action (PRC § 21061) and it's uninformative to measure the “impact” of a housing development vis-à-vis baseline that the decisionmaker lacks authority to retain

Cf. *Dep't of Transportation v. Public Citizen*, 541 U.S. 752, 770 (2004) (“[W]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant ‘cause’ of the effect. Hence, under NEPA, the agency need not [analyze] these effects....”).

3. Codified leg intent

CEQA: “agencies ... shall regulate [private] activities so that major consideration is given to preventing environmental damage, while providing a decent home ... for every Californian” (PRC § 21000)

HAA: “It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing” (Gov. Code § 65589.5)

The Answer from California's Court of Appeals

The “CEQA Project” is the housing development considered as a whole (Conception 1).

Friends of Juana Briones House v. City of Palo Alto, 190 Cal. App. 4th 286, 302 (2010)

Friends of Westwood, Inc. v. City of Los Angeles, 191 Cal. App. 3d 259, 269 (1987)

People v. Dep't of Housing & Community Dev. (Ramey), 45 Cal.App.3d 185, 194 (1975)

Why? “As applied to private projects, the purpose of CEQA is to minimize the adverse effects of new construction on the environment....” *Friends of Westwood, Inc.*, 191 Cal.App.3d at 269.

The Answer from New York (SEQRA / CEQR)

Under CEQR, the impact of a housing development project that requires a variance or rezoning is evaluated relative to a “project as of right” baseline, rather than a “current environmental conditions” baseline.

Why?

1. State law defines enviro impact as impact relative to a “No Action option” (not “current environmental conditions”)
2. “The No-Action option must always be [one which] is available to the decisionmaker.” CEQR Technical Manual, ch. 1, § 410.
3. Under as-of-right zoning (typical of NYC), maintaining status quo on the site is not a legally available option, so No-Action baseline is defined as a counterfactual no-rezoning project.

Could California Follow New York?

My conjecture:

- Not through the legislature, not anytime soon
- Maybe through the governor, after a landslide election. But this would require a whole new way of thinking about the CEQA Guidelines....