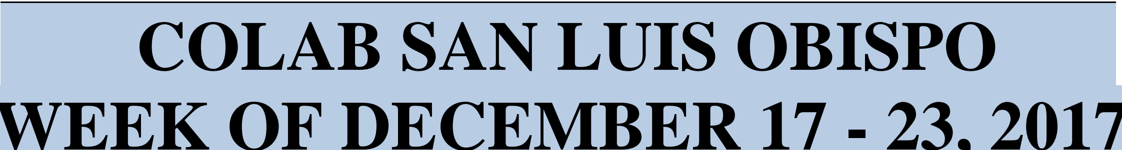
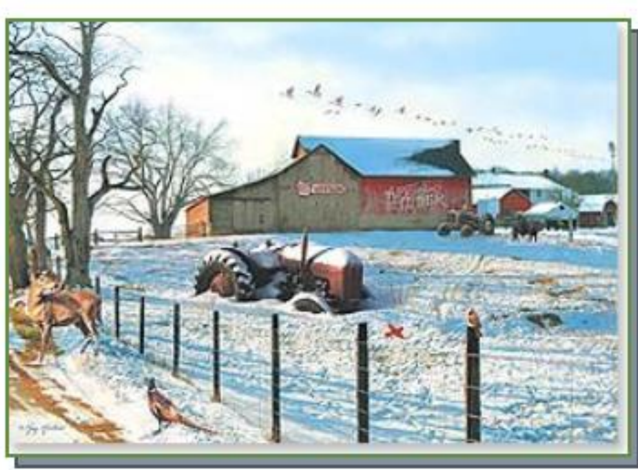


COLAB SAN LUIS OBISPO
WEEK OF DECEMBER 17 - 23, 2017

WARMEST THOUGHTS FOR A WONDERFUL CHRISTMAS SEASON!

2017 WAS AN IMPACTFUL YEAR FOR COLAB SAN LUIS OBISPO COUNTY AND WE CONTINUE TO SEE A BRIGHT FUTURE. WE WOULD LIKE TO THANK EACH OF YOU FOR YOUR TRUST, MEMBERSHIP AND SUPPORT. WISHING YOU A SEASON OF JOY AND LOOKING FORWARD TO CONTINUING OUR SUCCESS IN 2018!

FROM YOUR
COLAB SAN LUIS OBISPO COUNTY



THIS WEEK

NO BOARD OF SUPERVISORS MEETING

LAST WEEK

PUBLIC UTILITIES COMMISSION KICKS DIABLO DECISION TO JANUARY 11, 2018

HOUSING IN LIEU TAX DECEPTION DEFERRED

(AN ANGRY ADAM HILL PUBLICLY CHASTISES HOME BUILDERS, SLO CHAMBER, EVC, AND COLLEAGUES)/THE VITUPERATIVE MIDNIGHT EMAILS FLEW LATER

GIBSON ARGUES MARKET RATE AND CUSTOM HOMES CAUSE HOUSING SHORTAGES – "OWNERS HIRE LOW INCOME WORKERS"

NO DOCTORS, LAWYERS, STOCK BROKERS, PLUMBERS, MECHANICS?

EMPOWER ENERGY SCAM EXTENDED

NEW PLANNING DEPT. PROJECT PRIORITY SYSTEM APPROVED

ROAD FEE EXACTIONS EXTENDED

PLANNING COMMISSION BUSY

(MANY PERMITTING ITEMS BUT NOT HEAVY POLICY)

SLO COLAB IN DEPTH

(SEE PAGE 14)

California's Single-Family Home Gridlock

By Richard A. Epstein

New Holland & Knight Study Links CEQA Litigation Abuse to California Housing Crisis

By Holland & Knight

THIS WEEK'S HIGHLIGHTS

No Board of Supervisors Meeting on Tuesday, December 18, 2017 (Not Scheduled)

The Board will not be meeting on Tuesday, December 18 or Tuesday, December 26, and will be on its winter recess until Tuesday, January 9, 2018.

Local Agency Formation Commission (LAFCO) Meeting of Thursday, December 21, 2017 (Cancelled)

There will be no LAFCO meeting in December.

LAST WEEK'S HIGHLIGHTS

Board of Supervisors Meeting of Tuesday, December 12, 2017 (Completed)

Item 12 - emPower Energy Boondoggle Program Continued for Another Year. The continuation of the program was approved 5/0 on the consent calendar with no discussion. This is a program fomented by Santa Barbara County in 2011, designed to encourage people to convert their homes to solar and/or to install energy saving appliances, insulation, etc. It is funded by the stockholder-owned utilities, which are shaken down by the California Public Utilities Commission to generate the funding. In the end you pay for the program in your electric and gas bills.

Ratepayers will contribute $204,000 in 2018 to the San Luis Obispo County version.

Administration	$29,522
Workforce Education and Training	$90,000
Marketing, Education, and Outreach	$65,000
Implementation	$20,000
TOTAL	**$204,522**

The Board should have rejected this symbolic boondoggle.

Item 26 - Report on Planning Department Board Directed Projects and Consideration of a New Project Prioritization process. This item actually contains some process improvements related to work prioritization. In past years the Planning and Building Department would present a 25-page incomprehensible list of stuff they thought they should be working on. Of course much

of it contained projects designed to further interfere with business, agriculture, and private property.

The Board adopted the system but hedged on getting rid of projects designed to promote community choice electric aggregation and interference with vacation rentals.

Item 29 - Hearing to adopt the Annual Road Improvement Fee Reports for the fee areas of Avila, Los Osos, South County, North Coast, and San Miguel. The good news is that the fees were not raised this year.

Background: The actual fee paid by a particular applicant is derived from a formula based on peak hour trips (PHT's) and the severity of traffic at a particular area's worst intersection. Thus for example Teft at State Highway 101 is used to assess the impact of a new development on peak hour trips in Nipomo.

The number of peak hour trips are calculated on the estimated volume of traffic generated by a particular type of development and are assigned points. Residential units are rated low at 1 point. Small retail is rated at 2.7 points. A high volume fast food restaurant, with a drive through, is rated 31.1 points, and so on. These ratings are then multiplied times the PHT amounts in the table below. Accordingly, a single-family home in Nipomo area 1 will pay $12,011. A small retail establishment will pay 2.7 x $3,336 or $9,007. A fast food restaurant will pay $103,750.

Fee Summary Table

Fee Area	Residential (per pht)	Retail (per pht)	Other (per pht)	Advisory Council Review	Account Balance (as of 6/30/17)	Major Work Effort
Avila Valley	$3,846	$3,846	$3,846	October 2017	$556,620	Avila Beach Drive Interchange Roundabout San Luis Bay Drive Interchange Operational Study
Los Osos	$4,106	$2,023	$3,112	October 2017	$57,288	Traffic Signal – South Bay Blvd. at Nipomo Avenue
Nipomo Area 1	$12,011	$3,336	$5,133	October 2017	$64,365	Tefft Street Interchange Los Berros Road Widening
Area 2	$10,048	$4,539	$6,983		$3,446,764	Willow Road Oak Tree Mitigation
San Miguel	$6,148	$6,148	$6,148	October 2017	$475,617	None
North Coast Area A	$527	$262	$403	October 2017	$36,586	None
Area B	$992	$262	$403			
Area C	$1,267	$262	$403			
Area D	$586	$262	$403			
Area E	$282	$262	$403			

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Chart explanation: Fee is assessed on Peak Hour Trips (PHT).

Item 30 - Hearing to consider: 1) the recommendations of a nexus study regarding the Title 29 fee schedule; and 2) adoption of a resolution approving the Title 29 Annual Report and Action Plan for 2018.

Note: HOUSING IN LIEU TAX DECEPTION DEFERRED

The Board voted 3/2 (Hill and Gibson dissenting) to continue the current fee (really a tax) and not to implement the bait and switch increased fees, which would negatively impact the production of most market rate and all custom homes. Worse yet, the new system, if adopted, would expand from for-profit developer projects to include individual citizens who simply are attempting to build a home on their own lot.

Even more absurdly, the Gibson/Hill-supported version would even tax residents who are conducting major renovations.[1] Ranchers and farmers may have an old home which has been in the family for generations. It may be wearing out and need a new roof, upgraded plumbing and electric systems, new windows and so forth. If the total cost is over $299,000 the Hill/Gibson proposal would impose a tax on the total costs. The proceeds would be distributed to not-for-profit low income housing developers. The County would take a rake off to fund bureaucrats to run the program.

Consideration of the onerous tax package was continued to the Board meeting of April 17, 2018. We can't say for sure at this point but it is likely that the hearing will be at 1:30 in the afternoon. Hill and Gibson will no doubt attempt to mobilize progressive left groups to attend and give an impression of extensive public support. Groups that need to become educated on this home development killing wealth transfer tax include but are not limited to:

1. All citizens who believe in free markets and less government taxation.

2. Those who want to know the truth of why home purchases and rentals are so out of control.

3. Realtors – the Hill/Gibson package undermines their industry. To date they have been absent from the fray.

4. The construction industry.

5. Construction suppliers (lumber, plumbing, electrical, etc.)

6. The County Community Advisory Councils.

7. Neighborhood associations and homeowner associations.

8. Skilled trades.

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[1] Note – the staff, without public discussion or Board direction, determined to prepare the new program. Hill and Gibson immediately supported it. During the meeting the chart below on page 8 suddenly appeared. The chart is more sophisticated than the usual staff analysis. Gibson, a PhD. Geo-Physicist by training, may have requested it. While we cannot have absolute certainty, we are pretty sure that Gibson and perhaps Hill had extensive ex-parte interaction with staff leading up to the sudden appearance of the new program proposal. While it ostensibly results from the nexus study, staff does not typically lead with major new policy and alternatives until after the Board has reviewed a study or information that might call for policy changes and given direction to go ahead. A major issue is: to what extent is the Planning staff in the tank with the Progressive Left in general and Hill and Gibson in particular? Henceforth we will refer to the proposed program as the Gibson/Hill Home Tax Program.

9. Home supply wholesalers and retailers.

10. Appliance and household goods suppliers.

11. Agricultural organizations.

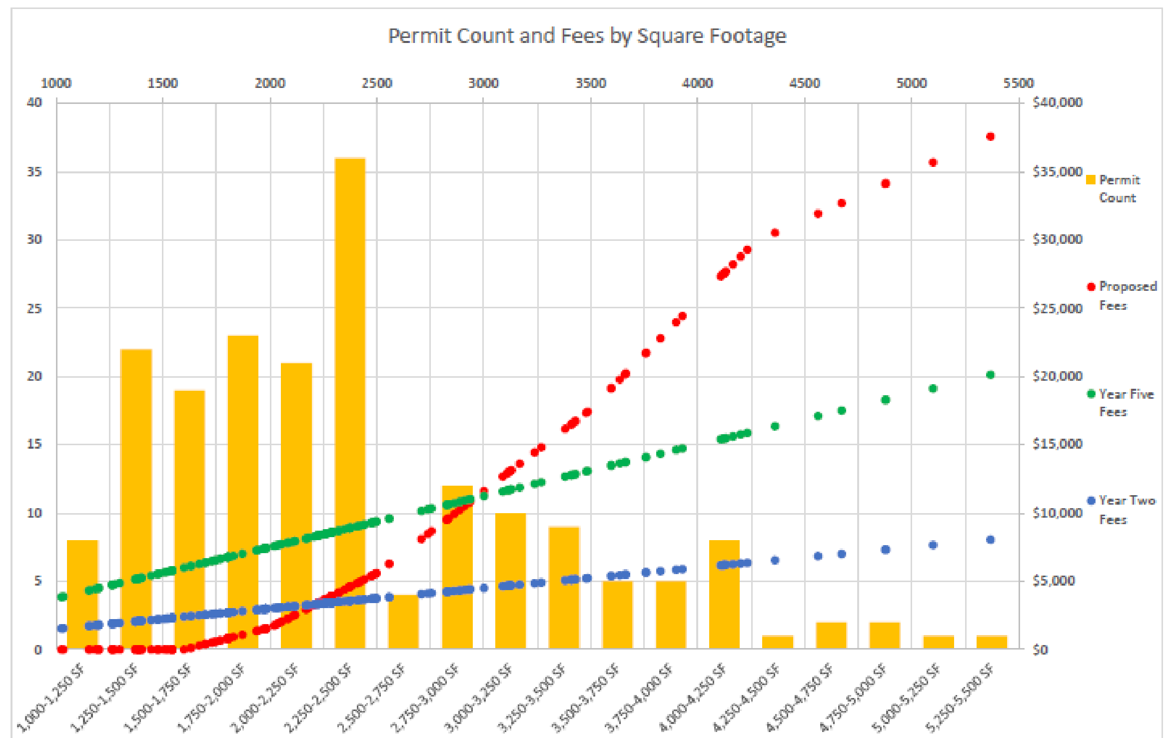
Contact COLAB Government Affairs Director Mike Brown at (805) 944-4274 or at COLABSLO@gmail.com to arrange a briefing for your group.

This Board item appears on the agenda annually in December like last year's recycled stale canned fruitcake. Usually the Board is called upon to consider raising the so-called fee (in reality a tax) on new residential units and on new commercial, retail, and industrial development. See the **NEAR TERM BACKGROUND SECTION** of this article on page 9 below for a quick overview. Readers not familiar with the In Lieu tax will need to read the **DEEP BACKGROUND** on page 12 for the discussion below to make sense.

The chart on the next page (mentioned in footnote 1 above on page 6) compares the current program tax costs (the blue line) with the red line, which is the proposed Hill/Gibson proposal. Note that the red line is lower than the blue line for the smallest homes but then goes up exponentially for everyone else. If Hill and Gibson really cared about affordable housing they would have abolished the lower portion of the red line years ago.

The green line is simply a reference to the level of the existing tax (how it would have impacted properties of various sizes) if it had been allowed to rise per its original schedule. Conservative Board members have prevented those increases from happening.

The yellow bars are the number of permits issued by home size in square feet. Note that most of them are for homes over 2,250 square feet (except for the left most columns).



Houses Built in FY 2016/2017 – Projects with one house and projects with 2 or more houses

Last Tuesday's Board Meeting Atmospherics: Three examples are listed below.

Nexus Failure: As noted below, COLAB raised questions about the validity of the legally required nexus between the cost of a fee and the problem which ostensibly is to be solved. Gibson must have been reading last week's COLAB Update, because he pointedly took time out to pontificate about the alleged nexus between the proposed Hill/Gibson fee (tax) and the problem of insufficient low income and workforce housing.

In an astonishing stretch Gibson asserted that market rate and custom homes actually contribute to the unaffordability problem by expanding low-end service sector jobs for landscapers, pool maintenance guys, house cleaners, nannies, and other home care services.

Of course Gibson has opposed every single project which has been proposed and which expands high paying industrial sector jobs for workers with a high school diploma. These are jobs in the oil and gas industry, mining, railroading, and of course nuclear energy production. Instead of leading support for the retention of the Diablo Nuclear Power Plant, Gibson aided and abetted the opposition who were fomenting hysteria about tidal waves even though the plant is situated on an 85-foot high bluff. He also supports community choice electrical aggregation, a program designed to socialize electrical energy generation and distribution. The proliferation of these programs is one of the major causes of the PG&E decision to close the Diablo Nuclear Power Plant.

Support Failure and Bullying: Hill and Gibson thought that they had the Home Builders Association of the Central Coast (HBACC), SLO Chamber of Commerce, and Economic Vitality Corporation lined up to endorse their tax program. It turned out that all 3 groups were internally conflicted, with some members cautiously and conditionally supporting parts of the program and others in opposition. Hill became infuriated and rushed down from the dais to chastise the organizations' staff representatives who were sitting together in the audience. These professional staffers were astonished at the virulent arrogance of a sitting elected official. The Boards of Directors of the organizations by now should have learned that they are simply being used when the play footsy with Hill. When dealing with a bully they should give no quarter no matter how enticing the promises or how nasty the threats. Better to die on your feet than on your knees. Of course later that night, and as usual, the nasty emails flew.

Conduct Failure: During deliberations Hill became angry with Compton and began shouting at her. Compton correctly and firmly let him know that she would go toe to toe in tone and substance if he persisted. Chair Peschong had to calm the waters. Hill repeatedly has shown disrespect for women and seeks to intimidate them. Nevertheless the County Democratic organization hypocritically continues to support him.

They always support their thugs.

WE REPEAT PORTIONS OF LAST WEEKS ANALYSIS FOR REFERENCE HERE:

Near Term Background: As this article below discusses, the tax is to be expanded beyond housing developments, to cover individual single-family private home construction and home expansions and renovations costing over $299,000. Heck, if you put in a new kitchen, fix the driveway, and redo the roof you could be paying thousands.

This year's plan is different for 3 reasons:

First, the County completed a nexus study to justify amount of the "fee." State law requires that the study be conducted every 5 years to insure that the fee bears a reasonable relationship to the cost of the problem which it is supposed to be fixing. In this case the County paid a consultant (probably hundreds of thousands – the write-up does not disclose) to concoct a rationale to charge homebuilders and developers of commercial, retail, and industrial projects a "fee" to relieve them of the burden of including affordable housing units in their projects. Local government fees are intended to be levied to cover the cost of services that benefit a particular group of the population, for example, public golf fees, street lighting in a particular neighborhood, permit processing fees, and so on.

The program here, which is an alleged benefit to the fee payer (home builder), does not actually benefit the fee payer, but instead raises money which ultimately benefits residents of low and moderate income housing projects. By distorted logic and legal sleight of hand, the State

Legislature, courts, and about 141 city councils and Boards of Supervisors have determined that it's OK to levy this so-called fee.

The 172-page nexus study misses this point entirely and blindly (if not ideologically) equates the fact that low and moderate cost housing is not being produced in sufficient quantity with the idea that market rate housing and commercial development should pay a "fee" to help buyers and renters of low and moderate housing. This is nothing but a blatant wealth transfer tax from better off people (and perhaps thrifty people who save) to less well-off people. Reducing the amount of market housing produced will not help poor and lower income people find housing.

Second, this year's report changes the formula by which home builders and developers of commercial property will be taxed and then expands the coverage of the tax to private individuals who are building a new home on a single lot as opposed to building a development. It provides a no- and low-fee incentive for builders who produce homes under 2100 sq. feet. And in turn it levies a highly progressive tax on homes greater than 2100 sq. feet. The table below illustrates the incentive to build smaller homes and tax the hell out of larger homes. It also shows the per square foot difference between the cost of the current tax and the proposed tax.

Table 7 – Illustration of Recommended Fees for Example Home Sizes

	Proposed Inland Fees		Net Change vs. Existing $1.50/SF Year 2 Rate
	Per Home	Overall Rate Per Square Foot	
900 square foot home	$0	$0.00	$0.00
1,000 square foot home	$0	$0.00	($1.50)
1,400 square foot home	$0	$0.00	($1.50)
1,600 square foot home	$0	$0.00	($1.50)
1,800 square foot home	$800	$0.44	($1.06)
2,000 square foot home	$1,600	$0.80	($0.70)
2,250 square foot home	$3,600	$1.60	$0.10
2,500 square foot home	$5,600	$2.24	$0.74
3,000 square foot home	$11,600	$3.87	$2.37
3,500 square foot home	$17,600	$5.03	$3.53
4,000 square foot home	$25,600	$6.40	$4.90

Remember, not only developers, but individual citizens would be charged. Accordingly, a lot owner (non-developer) building a nice home on acreage of 3500 sq. ft. would have to pay a fee (really a tax) of $17,600 for what benefit? Note that this does not include an average of $12,000 in permit processing fees per home plus thousands of dollars in development impact exaction fees for roads, fire, parks, sheriff, administration, etc. Remember, that in addition you are already paying the highest state income tax, sales tax, motor fuel, carbon taxes, and property taxes in the country.

Third, and as noted above, it is proposed to expand the tax to the construction of new individual homes (not in developments) as well as home renovations and expansions with a cost of over

$299,000. The same data is presented on a per sq. ft. basis in the table 6. Note that this one shows the per sq. ft. costs for both the inland and coastal zones.

Recommended Residential Fee Schedule

Table 6 – Recommended In-Lieu Fee Schedule	
Inland ($/Sq.Ft.)	
First 1,600 Square Feet per Unit	*Exempt*
Square footage from 1,600 to 2,000 SF	$4
Square footage from 2,000 to 2,500 SF	$8
Square footage from 2,500 to 3,500 SF	$12
Square footage above 3,500 SF	$16
Maximum Rate (considering total square feet of unit)	$7
Coastal Zone ($/Sq.Ft.)	
Detached Units	$12
Attached Units	$24

The coastal zone portion contains no exemptions or sliding scale because it is regarded as unsuitable for affordable housing because of the "existing high costs."

The next table below describes the increases in the rates for nonresidential development.

Table 5: Nexus Study Recommended Non-Residential Fees

Existing		Nexus Study Proposal	
Category	**Fee**	**Category**	**Fee**
Commercial/Retail	$1.36	Commercial / Retail / Office / Hotel / Other	$2 - $3 / SF
Commercial Service/Offices	$0.96		
Hotel/Motel	$1.44		
Other Non-Residential	$1.26		
Industrial/Warehouse	$0.58	Industrial/ Warehouse	$0.60 - $1 / SF
Commercial Greenhouses	$0.03	Commercial Greenhouses	$0.05 - $0.10 / SF

An Obvious Ploy:

Essentially the ploy here is to achieve the maximum rates that were proposed in the existing system. They were to be phased in but never were fully implemented because of conservative Board Member opposition. Under this proposal the developers are being presented with a bait-and-switch with lower rates for the smaller units in the hope that that would agree. Similarly, the nonresidential rates are less than the ultimate intended under the current system but are substantially more than the current Year 2 version.

DEEP BACKGROUND: The so-called in lieu "fee" is in actuality a tax on new development. The State passed enabling legislation that allows cities and counties to require that developers provide a specified number of "affordable" homes within their proposed projects as a condition of approval. Often including these homes is physically, financially, and marketing-wise impossible.

The law allows builders to place a specified amount of funds in an affordable housing account "in lieu" of actually building the homes. San Luis Obispo County adopted the program just as the recession hit, and in recognition of the severely depressed housing market and limited commercial development, the County determined to phase the tax in over 5 years. Each year the Board has had to consider if it would raise the tax from the year-1 level to the year-2 level and has demurred because new construction of housing has remained weak.

The bottom line is that over the decades the process of developing residential and commercial property has become so overregulated and expensive that developers cannot afford to produce affordable housing and prefer to develop larger, more expensive units. [2] In turn, the State Legislature made things worse by enabling cities and counties to require that developers include a stipulated number of affordable units in their projects or pay an "in lieu fee," which is really a tax on development. The dollars generated from the "in lieu fee" are accumulated and then given to non-profit housing developers to help finance their affordable projects. This is really a government blackmail program to force homebuilders to charge more for their market units to bail out the politicians' failed public policy.

Homebuilders are required to provide one affordable unit for each five market units or pay a "fee" (tax) into the affordable housing fund in lieu of actually building the unit. The amount of the fee is based on a complex black box study called a nexus study, which analyzes economic and market factors to come up with the base per sq. ft. costs. This data is then manipulated into a standard "fee" (tax) based on the size of the market houses (unsubsidized houses). It is then applied to each market house (per unit fee).

Planning Commission Meeting of Thursday, December 14, 2017 (Completed)

The Commission had a busy day, but no items of earthshaking policy importance are on the agenda. The items mostly involved permit extensions and new permits for cell towers, individual homes, small subdivisions, and a motel in Nipomo. Of course they all involved arduous costly process and anxiety for the applicants.

[2] See the articles in the **COLAB IN DEPTH SECTION** starting on page 14 below detailing this problem.

California Public Utilities Commission (CPUC) Meeting of Thursday, December 14, 2017 (Continued)

Item 54 - PG&E Application to Retire the Diablo Nuclear Power Plant. The matter was calendared on the consent agenda. It was continued to the CPUC meeting of January 11, 2018. The write-up essentially restated the Administrative Law Judge's recommendations:

1. Closure of Diablo is approved.

2. $1.3 billion rate increase to acquire green energy to replace Diablo nuclear energy is referred to a separate and future Integrated Resource Planning proceeding. The Administrative Law Judge had doubts that the replacement green energy proposal could actually work. Instead PG&E might have to acquire more fossil fuel (natural gas energy) in violation of the State's and Commission's GHG policies. The Integrated Resource Planning process would be used to analyze these issues and make further determinations.

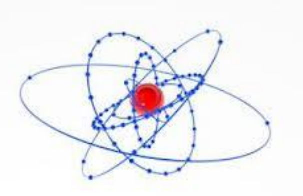
3. Proposed employee retention and retraining program is reduced from $340 million to $140 million.

4. Rejects the $85 million community benefit program for SLO County, schools, and cities.

5. Approves $18.6 million reimbursement for prior costs incurred relative to relicensing.

Ex-parte and oral comments to the Commission will be allowed between December 14th and December 27th, after which they will be cut off.

It is not known how PG&E will react to the denial of most of its proposal.



COLAB IN DEPTH

IN FIGHTING THE TROUBLESOME, LOCAL DAY-TO-DAY ASSAULTS ON OUR FREEDOM AND PROPERTY, IT IS ALSO IMPORTANT TO KEEP IN MIND THE LARGER UNDERLYING IDEOLOGICAL, POLITICAL, AND ECONOMIC CAUSES AND FORCES

California's Single-Family Home Gridlock

By Richard A. Epstein

In his excellent article, "The Great American Single-Family Home Problem," Conor Dougherty, an economics reporter for the New York Times, offers a riveting account of a heated land-use dispute in Berkeley, California. In 2014, a real estate developer purchased a dilapidated home at 1310 Haskell Street in an estate sale. But his plan to rip that structure down to put three modern single-family homes on the lot met with intense local resistance. The neighbors claimed that the new homes would reduce street parking, block sunlight, and change the character of the neighborhood for the worse. Lawsuits delayed construction for several years even though that project complied with all local zoning ordinances. The story illustrates the fatal pathologies that grip land-use regulation in the United States.

Existing 1310 Haskell **Proposed project which was killed.**

In the short run, such regulations produce notable local victories. They slow down the projects and raise the costs of new construction, dulling the ardor of the hardiest developer. But these local victories can become regional disasters, as an acute housing shortage raises the prices of existing units to unaffordable levels, leading first to long commutes over clogged highways and then to outmigration by small businesses and individuals who cannot tolerate the grind. In response to this impasse in California, Governor Jerry Brown has backed a set of administrative reforms designed to prod wayward local governments to expedite issuing building permits. But it is highly unlikely that piecemeal reforms of this nature will make the slightest dent in the current

housing crisis, partly because they are often packaged, as Dougherty notes, with proposals to subsidize affordable housing and demands that construction workers be paid prevailing (i.e.union) wages.

The difficulty stems from a fundamental premise of modern American land-use law that has gone unexamined for decades: namely, that the government has the unquestioned right through its planning processes to impose a stifling array of permits and restrictions that tell the developer what, when, where, how and how much to build on his own property. Indeed, recent work finds that "as much as 40% of the slowdown in economic growth" is attributable to the ever-expanding panoply of land use restrictions. Clearly, the situation has taken a turn for the worse. It is important to understand how a wrong turn in basic legal theory undergirds the current crisis.

The crux of the problem lies in the somewhat arcane issue of what counts as an externality. In its broadest sense, the term signifies any situation in which actions undertaken by one person have a negative impact on the well-being of another. In the context of land-use regulation, the activities of one neighbor routinely infringe on the welfare of another. But it cannot be the case that every externality is powerful enough to justify limiting the freedom of action of everyone else. By that logic, anytime anyone wants to build, he always faces a meritorious claim that his new building blocks the views of his neighbors or changes the character of the neighborhood for the worse. Without some serious qualifications on this elastic notion of externality, all development could be brought to a halt as neighbors hurry to court to save themselves from harms attributable to the activities of others. The exclusive preoccupation with these external harms necessarily ignores the gains for the parties that use and develop their land. A correct social calculus must take into account all gains and losses, and to do so it has to find that *subset* of externalities that should be the source of legal claims by stopping only those activities that produce more external harms than create internal benefits.

That class of illicit activities is usually very small. The common law dealt with these critical trade-offs by resorting to the ordinary law of nuisance, defined to cover the "nontrespassory" invasions of dirt, filth, noises, and smells that so impact a neighbor as to make his situation unlivable. There is no system of land-use regulation which has ever given a free pass to these noxious activities. But the basic prohibition against these invasions has always been tempered by the live-and-let-live rule under which all individuals are forced to tolerate the low-level annoyances from their neighbors in exchange for the right to engage in similar activities of their own—where all parties benefit from the relaxation of the basic prohibition. And these nuisance rules were further modified so that certain *noninvasive* activities—such as removing support from neighboring lands, which would otherwise cave in if one person dug out his own land right up to the boundary line—were also prohibited. In essence, each of these adjustments improves the position of all people subject to the rule.

In the end, therefore, big-ticket nuisances were subject to both damage actions and injunctions, but virtually all other conduct, including blocked views, were treated as *noncognizable* injuries that were ignored by the courts. When consistently applied, this approach tended to maximize the joint value of all property subject to that legal regime. In those few cases where the state wishes to impose some additional unique restriction on certain parcels of land, it can exercise its condemnation power by paying the owner a sum equal to the losses imposed by regulation.

All that changed in the 1926 Supreme Court decision of *Euclid v. Ambler Realty*, in which a zoning scheme broke up a coherent 68-acre commercial plot into adjacent smaller parcels that

were arbitrarily zoned for either single-family homes, apartment houses, or industrial uses. The result was that the value of the parcel was reduced by over 80 percent, without any identifiable gains of that magnitude to the neighbors. Nonetheless, the Supreme Court upheld this exercise in value-destruction in such broad terms that today governments can impose virtually any restriction on land use.

Today, zoning works in such a way that gives the first group to build the political clout to secure ironclad protections against any subsequent development of nearby lands that reduces the incumbent's perceived land values. And so in Berkeley today, the neighbor who grows beans on his land that are worth, say, a few thousand dollars, can successfully block or delay the construction of new homes that are worth a hundred times as much. Instead of categorically rejecting the outlandish claims of the bean grower, the law slips into an endless administrative process that gives that claimant a respectful hearing even though his crops can be raised far more efficiently on agricultural lands that have little or no value for home construction.

Nonetheless, the pattern is now deeply entrenched. The locals vote for the city councils and zoning boards who owe no political favors to the outside developers or future residents that want move into the town. The losses to insiders are real, which is why they have political salience. But those losses are typically tiny compared to the less visible losses that come from the systematic deprivation of the opportunities of outsiders to move into the neighborhood. Hence, as Dougherty reports, "low-density living is treated as sacrosanct," which means that new development is directed toward dense neighborhoods that are likely to be oversaturated. Price rises and housing crunches quickly follow.

California's new administrative reforms place only a small Band-Aid on a gaping wound, for they do not attempt to pare down the capacious definition of externality that drives the entire zoning process. At this point, the only hope for relief is from courts that might give full constitutional protection to development rights from the warped political process that seeks to eviscerate them. But unfortunately, takings jurisdiction is a conceptual muddle because both state and federal courts have exhibited no willingness to stop the state from taking private development rights without providing compensation.

Today, the feeble constitutional protection afforded to property owners rests on the dubious assumption that "mere restrictions" on land use are largely immune from constitutional challenge. Modern judges uncritically accept the supposed expertise of the political branches of government to resolve land-use disputes. But ever since James Madison wrote about the dangers of faction in Federalist Number 10, it has been well understood that we need constitutional protections precisely because political majorities will, given a free hand, use their power to transfer wealth, privileges, and opportunities from outsiders to themselves. So when no one takes a hard stand against these systematic excesses, the political process then tries to offset the relentless uptick in prices by offering subsidies to displaced individuals, thereby creating another entitlement program that does little to control the relentless price increases. Committing two wrongs only creates two distortions that never cancel each other out.

Unfortunately, the lack of appreciation of the underlying conceptual issues has led to gridlock. California may be a lost cause. Let's hope other states learn the dangers of using an overbroad definition of externalities before it is too late.

Richard A. Epstein, the Peter and Kirsten Bedford Senior Fellow at the Hoover Institution, is the Laurence A. Tisch Professor of Law, New York University Law School, and a senior lecturer at the University of Chicago. This article first appeared in the Defining Ideas of the Hover Journal of December 11, 2017.

New Holland & Knight Study Links CEQA Litigation Abuse to California Housing Crisis

Litigation under the California Environmental Quality Act (CEQA) is worsening the state's housing crisis, according to a new study by Holland & Knight. The study, "California Environmental Quality Act Lawsuits and California's Housing Crisis," analyzes all CEQA lawsuits filed statewide between 2013 and 2015 and reveals that housing remains the top target of CEQA lawsuits. It was published in the Hastings Environmental Law Journal and is available here.

The new study uses the same methodology as Holland & Knight's earlier three-year study (2010-2012) of statewide CEQA litigation. All CEQA petitions must be sent to the California Attorney General's office, and the firm was able to obtain copies under the California Public Records Act.

The top target of CEQA lawsuits in both studies were housing projects, with an increase in the share of CEQA lawsuits shown in the new study. The study also includes a more detailed review of challenged housing projects in the Southern California region (Los Angeles, Orange, Ventura, Riverside, San Bernardino and Inyo counties): 14,000 housing units were challenged, 98 percent of the challenged units were located in existing community infill locations, 70 percent were located within one-half mile of transit services and 78 percent were located in whiter, wealthier and healthier areas of the region.

"Given California's extraordinary housing crisis and the shame inherent in having the nation's highest poverty rate in one of the world's most successful economies, our latest research clearly demonstrates the need to update CEQA's litigation rules to bring enforcement of the law into alignment with the state's environmental, equity and economic priorities," said Jennifer Hernandez, the head of Holland & Knight's West Coast Land Use and Environment Group. "CEQA is one of the well-recognized culprits in California's housing supply and affordability crisis. The need to update CEQA litigation rules to end non-environmental abuse of this important California law is stronger than ever."

According to the latest findings, the disproportionate use of CEQA to target housing, especially apartments and condominiums, not only constrains supply, it also perpetuates land use segregation by race and class. California communities have a long history of resisting higher density housing that is affordable to workers earning lower wages, especially workers from minority groups such as African Americans, Latinos and Asians. CEQA elevates this legacy bias to the environmental "baseline" against which new housing proposals are all assessed as "impacts" to the environmental character of these communities. Under CEQA's existing lawsuit rules, anyone can sue – anonymously and repeatedly – to challenge new housing, transit, infrastructure and public service plans and projects that change existing neighborhoods.

Additional key findings include:

- After the Great Recession, even more CEQA lawsuits target projects in existing communities, especially housing.
- Overall, the number of CEQA lawsuits aimed at infill projects in existing communities jumped 7 percent, from 80 percent to 87 percent. Lawsuits targeting greenfields fell to 12 percent of CEQA lawsuits statewide.
- The majority of challenged housing projects were structures containing multiple housing units such as apartments and condominiums, which are located in more urbanized areas in regions with higher population densities and higher wage jobs.
- The Bay Area and Los Angeles region accounted for 58 percent of all CEQA lawsuits filed, up from 53 percent in the initial study. The study also notes that longer commutes by people forced to live greater distances from the coastal jobs centers with the most severe jobs-housing imbalances actually increased transportation-related air pollution and greenhouse gas emissions.
- The percentage of CEQA lawsuits against new private-sector housing projects also increased to 25 percent from 21 percent during the previous three-year period, even as California's housing shortage reached crisis dimensions.
- The next largest category of CEQA lawsuit challenges were agency plans and regulations, primarily local agency plans to increase housing or improve and diversify transportation and infrastructure, accounting for 19 percent of the total.
- Rounding out the top three CEQA lawsuits targets at 15 percent were public service and infrastructure construction projects – taxpayer-funded projects that were mostly located within and designed to serve our existing communities.

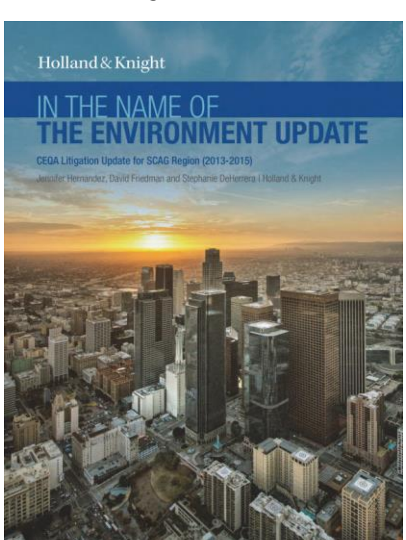
The study recommends updating CEQA's lawsuit rules to help solve the housing and poverty crisis, while continuing to meet the environmental and climate policy objectives of encouraging higher density, transit-oriented communities. These reforms include:

- End anonymous CEQA lawsuits by requiring disclosure of the identity and environmental (or non-environmental) interests of those filing CEQA lawsuits.
- Eliminate duplicative lawsuits aimed at derailing plans and projects that have already completed the CEQA process.
- Expand legislative relief from CEQA lawsuit delays beyond politically favored projects like sports arenas and instead more broadly limit the judicial remedy of vacating project approvals if a CEQA study is deficient to projects that actually could cause harm to the natural environment or public health.

About Holland & Knight LLP*: This bulletin first appeared in the December 13, 2017 edition of PR Newswire. Holland & Knight is a global law firm with more than 1,250 lawyers and other professionals in 27 offices throughout the world. Our lawyers provide representation in litigation, business, real estate and governmental law. Interdisciplinary practice groups and industry-based teams provide clients with access to attorneys throughout the firm, regardless of location.*

Read the devastating full report at the link:
https://www.hklaw.com/files/Uploads/Documents/Alerts/Environment/InfillHousingCEQALawsuits.pdf

The summary states in part:



CEQA litigation has increased in our most recent study period, and in the SCAG region is being used primarily to challenge the higher density, infill housing projects that are most often supported by environmental and climate policy activists. Building new housing is critically needed to help address the acute housing shortage, and housing affordability challenges, that have caused California to have the highest poverty rate in the nation. Using CEQA litigation as a surrogate for unlegislated density and climate policies continues to create compliance uncertainty and judicial unpredictability, and this outcome disproportionately affects the young, the poor and the talented new Californians that need housing – and will help shoulder the tax burdens imposed by the current generation of political leaders. Ending CEQA litigation abuse would be an outstanding legacy that would benefit many future generations inside and outside California and complements the state's global commitment to environmental and climate leadership.

ANNOUNCEMENTS

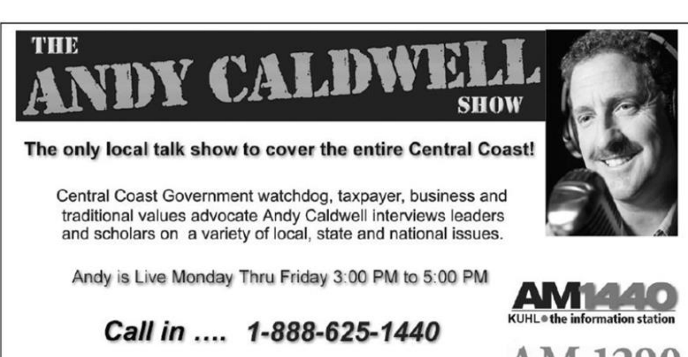
MERRY CHRISTMAS AND HAPPY NEW YEAR

Mystery of winter skies, we thank you in the darkening hour for opening our eyes to see your starlit beauty; for parting the wide heavens to send your gentle light; for offering your word to take our mortal flesh.

This truly human one was promised by those who shared your dream of peace; John the Baptist cleared his way with words of desert fire; Mary and Joseph accepted his coming with tenderness and faith; we know that he draws near again to show us who we really are with honesty and love.

Now we take up the song of hope that we might awaken to his coming among us and the world be touched by the footfall of his glory.[1]

PLEASE MARK YOUR CALENDAR NOW



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See the presentation at the link: https://youtu.be/eEdP4cvf-zA

AUTHOR & NATIONALLY SYNDICATED COMMENTATOR BEN SHAPIRO APPEARED AT A COLAB ANNUAL DINNER

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(Revised 2/2017)