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NOTE

The Uneventful History of Government Code Section 65759

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INTRODUCTION

In 1982, the California legislature observed a "discouraging" trend of rising home prices and declining rates of new home construction.[1] During the previous year, lawmakers had begun to address this trend by strengthening a law requiring cities to implement housing development plans.[2] However, many local agencies appeared unwilling or unable to satisfy these new requirements.[3] In response, legislators introduced Assembly Bill 1612 ("AB 1612"), which established a framework for how interested parties could challenge cities over their failure to comply with land use planning requirements.[4] Governor Edmund Brown Jr. praised the new "commendable" legislation but simultaneously expressed concern that "ambiguities in [the] bill could be misconstrued."[5]

Despite this potential for confusion, Brown passed AB 1612, now codified as article 14 of the California Government Code ("article 14"),[6] after the bill's author had "agreed to clarify such uncertainties."[7] This promised explanation by bill author, Howard Berman, does not appear in the legislative record. Furthermore, neither courts nor legal commentators have stepped in to offer clarification. As a result, forty years later, questions regarding how courts should enforce article 14 and how broadly the law can be applied remain unanswered.[8]

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[1] S. COMM. ON JUDICIARY, GENERAL PLANS: CHALLENGES AND REMEDIES, AB 1612 (Berman), 1981-82 Reg. Sess., at 2 (Cal. 1981) [hereinafter CHALLENGES AND REMEDIES] (on file with the California State Archives).

[2] This 1980 legislation amended the state's housing element law, Act of Sept. 26, 1980, ch. 1143, 1980 Cal. Stat. 3694, 3697-3703, discussed in further detail below. This law applies to cities, counties, and cities and counties. For simplicity's sake, this Note refers to these entities interchangeably as "cities" or "local agencies."

[3] CHALLENGES AND REMEDIES, *supra* note 1, at 2, 7.

[4] Act of Feb. 8, 1982, ch. 27, 1982 Cal. Stat. 46 (codified at CAL. GOV'T CODE §§ 65750-63 (2023)). All references to code sections are to the California Government Code, unless stated otherwise.

[5] Letter from Edmund G. Brown, Governor of the State of Cal., to the Members of the Cal. Assemb. (Feb. 11, 1982) (on file with the California State Archives).

[6] CAL. GOV'T CODE §§ 65750-63 (2023).

[7] Letter from Edmund G. Brown to the Members of the Cal. Assemb., *supra* note 5.

[8] *See infra* Part I.D.1.

California's housing crisis also remains an unresolved issue. Today, Californians spend more on housing than residents of any other state in the continental United States.[9] The high cost of housing correlates with other measures of economic hardship: California has the highest poverty rates in the country and the largest population of unhoused people.[10]

Failure to build new housing drives high housing costs.[11] One major impediment to new housing development is the California Environmental Quality Act ("CEQA").[12] CEQA requires the government to conduct an environmental review before undertaking certain projects, such as rezoning.[13] On paper, this is a sensible precaution. However, in practice, litigation brought under CEQA has hamstrung the state's efforts to develop new housing.[14] CEQA lawsuits target over half of the state's new housing production projects.[15] The most common target of these anti-housing CEQA suits are high-density projects in urbanized areas.[16] These lawsuits are frequently brought in bad faith for

[9] MAC TAYLOR, CAL. LEGIS. ANALYST'S OFF., CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 5 (2015).

[10] JENNIFER HERNANDEZ, CTR. FOR DEMOGRAPHICS & POL'Y, CHAPMAN UNIV., CALIFORNIA GETTING IN ITS OWN WAY: IN 2018, HOUSING WAS TARGETED IN 60% OF ANTI-DEVELOPMENT LAWSUITS 6 (Joel Kotkin ed., 2019) [hereinafter GETTING IN ITS OWN WAY].

[11] TAYLOR, *supra* note 9, at 10.

[12] CAL. PUB. RES. CODE §§ 21000–178 (2023). *See generally* JENNIFER HERNANDEZ, DAVID FRIEDMAN & STEPHANIE DEHERRERA, HOLLAND & KNIGHT, IN THE NAME OF THE ENVIRONMENT: HOW LITIGATION ABUSE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT UNDERMINES CALIFORNIA'S ENVIRONMENTAL, SOCIAL EQUITY AND ECONOMIC PRIORITIES — AND PROPOSED REFORMS TO PROTECT THE ENVIRONMENT FROM CEQA LITIGATION ABUSE (2015) [hereinafter IN THE NAME OF THE ENVIRONMENT] (surveying CEQA lawsuits between 2010 and 2012, concluding that CEQA litigation abuse undermines California's economic goals).

[13] CAL. PUB. RES. CODE § 21080 (2023).

[14] *See generally* HERNANDEZ ET AL., IN THE NAME OF THE ENVIRONMENT, *supra* note 12, at 33.

[15] JENNIFER HERNANDEZ, CTR. FOR JOBS & THE ECONOMY, ANTI-HOUSING CEQA LAWSUITS FILED IN 2020 CHALLENGE NEARLY 50% OF CALIFORNIA'S ANNUAL HOUSING PRODUCTION 1 (2022) [hereinafter ANTI-HOUSING CEQA LAWSUITS].

[16] HERNANDEZ ET AL., IN THE NAME OF THE ENVIRONMENT, *supra* note 12, at 64.

reasons unrelated to environmental protection.[17] Even when a lawsuit lacks merit, the costs of CEQA litigation can derail a project.[18]

The drafters of AB 1612 recognized "the wasteful effects of environmental lawsuits," which created "a significant contribution to the shortage of affordable housing."[19] In response, they included a provision that would later be codified as section 65759. This section kicks in when a court determines that a city must take action to bring its land use plans into compliance with state requirements.[20] Under section 65759, those actions are exempt from CEQA.[21] In place of standard CEQA procedure, section 65759 allows cities to conduct a streamlined form of environmental review.[22] The section lays out parameters for this streamlined review and requires that cities complete the process within a maximum of 240 days of a court order.[23]

Section 65759 was a primary source of the ambiguity that Governor Brown referenced upon the law's enactment.[24] Over the last forty years, little effort has been made to clarify the provision. Section 65759's uncertainties have never been addressed in appellate litigation.[25]

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[17] *See id.* at 6 ("CEQA litigation abuse by parties seeking to advance non-environmental interests is widespread.").

[18] *Id.* at 33 ("The act of simply filing a CEQA lawsuit can kill the most environmentally benign small project, while the destinies of big projects are controlled by the financial appetite of combatants willing to continue writing checks totaling millions of dollars.").

[19] *See* PAUL B. CARPENTER, CHAIRMAN, S. DEMOCRATIC CAUCUS, REP. ON AB 1612 (Aug. 24, 1981) (on file with the California State Archives).

[20] CAL. GOV'T CODE § 65759 (2023). For example, if a court finds that a city has failed to adopt zoning that accommodates its share of the need for affordable housing development, as required by CAL. GOV'T CODE § 65583(c)(1)(A) (2023), the court could order the city to amend its housing element and zoning ordinance so as to satisfy the requirement. *See id.* § 65754 (2023).

[21] *Id.* § 65759.

[22] *Id.* § 65759(a)(1)-(2).

[23] *Id.* § 65759(a)(1)-(2), (b).

[24] *See* Letter from Edmund G. Brown to the Members of the Cal. Assemb., *supra* note 5 ("[T]his bill could be misconstrued to restrict the ability of the courts to require appropriate environmental review . . . .").

[25] *See* online search for Cal. Gov't Code section 65759, LexisNexis (Oct. 27, 2022); online search for Cal. Gov't Code section 65759, Westlaw (Oct. 27, 2022).

Treatises and practice aids mention the section in passing, if at all.[26] As a result, the following questions remain unanswered. How are section 65759's completion deadlines meant to be enforced? Does the provision cover rezoning? And to what extent can subsequent environmental reviews incorporate analysis from a section 65759 review?[27]

This Note does not attempt to provide definitive answers to these questions. Instead, through an analysis of the legislative history of AB 1612, this Note presents section 65759 as it was understood by its drafters. This perspective sheds light on the provision's ambiguities and helps clarify the section's utility in future efforts to create more housing.

CEQA has been described as an insurmountable barrier to California's housing goals.[28] Jennifer Hernandez — a partner at Holland & Knight LLP and head of a team that has analyzed every CEQA lawsuit filed between 2010 and 2015[29] — has proclaimed that the state's "housing goals . . . are fantastical at best under 'environmental' procedures that are imposed by CEQA."[30] However, this Note suggests that section 65759 offers untapped potential to housing advocates seeking to circumvent CEQA's formidable barriers.

Part I provides background into the relevant laws, including California's land use regulations, CEQA, Government Code article 14, and section 65759. Part II first details the legislative history of section 65759, illustrating several insights into the law's intended use. Then Part II reviews two article-14 lawsuits to demonstrate how litigants have implemented the CEQA exemption. Finally, Part III applies the insights gleaned from Part II's historical analysis, first by reevaluating 65759's ambiguities to consider possible resolutions, then by considering the law's present utility.

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[26] *See* 66A CAL. JURIS. *Zoning and Other Land Controls* § 504 n.1 (2023) (making passing reference in a footnote); 7 CAL. REAL EST. § 21:6 (4th ed. 2023) (essentially restating the language in the statute).

[27] Through a process known as "tiering," described in more detail below.

[28] HERNANDEZ, ANTI-HOUSING CEQA LAWSUITS, *supra* note 15, at 3.

[29] *Id.* The Holland & Knight team is currently reviewing all CEQA lawsuits filed between 2019 and 2021.

[30] HERNANDEZ, GETTING IN ITS OWN WAY, *supra* note 10, at 7.

I. LEGAL BACKGROUND

A. Land Use and Housing Element Law

Local agencies have broad discretion to control land use decisions within their borders.[31] Consequently, California relies on local agency participation to allocate new land for housing.[32] The housing element law is the state's most powerful tool to guide that participation.[33]

Every city must have a housing element incorporated into its general plan.[34] The general plan, containing six other mandatory elements,[35] is characterized as a "constitution" guiding the city's land use decisions.[36] State law regulates the contents of the mandatory elements.[37] Uniquely, the housing element is the only aspect of the general plan that cities must update on a fixed, recurring basis.[38] The frequency of these mandatory housing element updates is either five or eight years, depending on several conditions.[39]

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[31] *See* CAL. CONST. art. XI, § 7 (reserving for cities and counties the power to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws"); Bldg. Indus. Ass'n of Cent. Cal. v. County of Stanislaus, 190 Cal. App. 4th 582, 589 (2010) ("The power of a city or county to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state.").

[32] *See* CAL. GOV'T CODE § 65580(d) (2023) (finding that "[l]ocal . . . governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing"); *id.* § 65581 (2023) (recognizing that "each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal, provided such a determination is compatible with the state housing goal and regional housing needs").

[33] CAL. GOV'T CODE § 65580–89.8 (2023); *see* PAUL G. LEWIS, PUB. POL'Y INST. OF CAL., CALIFORNIA'S HOUSING ELEMENT LAW: THE ISSUE OF LOCAL NONCOMPLIANCE, at v (2003) (calling the housing element law "the major tool the state government uses to ensure that [local officials] are planning appropriately for new housing development").

[34] CAL. GOV'T CODE § 65302 (2023).

[35] Those being land use, circulation, conservation, open space, noise, and safety. *Id.* Additionally, general plans must address issues relating to environmental justice, either in a dedicated element or incorporated into other elements. *Id.*

[36] Lesher Commc'ns, Inc. v. City of Walnut Creek, 52 Cal. 3d 531, 539-40 (1990).

[37] CAL. GOV'T CODE § 65000–66499.58 (2023).

[38] *Id.* § 65588(e) (2023).

[39] *Id.*

The updated housing element must make "adequate provision for the existing and projected needs of all economic segments of the community."[40] To that end, the housing element must contain several features: an inventory of developable sites,[41] an analysis of the government-imposed constraints on development,[42] and a schedule of actions, including rezoning, to make plots available for development.[43]

On paper, the updating process requires cities to rezone for more housing, leading, in turn, to housing construction.[44] However, in practice, there are many ways in which the housing element framework fails to satisfy the state's need for housing. For example, commentators have pointed out that the system inefficiently allocates housing to areas with relatively little demand.[45] Others criticize the scheme for failing to create below-market-rate housing.[46] Additionally, and crucially for the purposes of this Note, the housing element law often does not lead to new housing due to non-compliance from cities.[47] According to the Department of Housing and Community Development ("HCD"), over

[40] *Id.* § 65583 (2023). The "housing needs" of a city, formally called the "regional housing need allocation," is determined by a multi-step process involving local agencies and the Department of Housing and Community Development. *See id.* § 65584.05 (2023).

[41] *Id.* § 65583(a).

[42] *Id.* § 65583(a)(5).

[43] *Id.* § 65583(c).

[44] *See id.* § 65581(b) (2023) (stating the intention that "counties and cities will prepare and implement housing elements which, along with federal and state programs, will move toward attainment of the state housing goal").

[45] *See* Christopher S. Elmendorf, Eric Biber, Paavo Monkkonen & Moira O'Neill, *Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework*, 47 ECOLOGY L.Q. 973, 980-85 (2020) ("New housing belongs where people want to live. . . . This is not how California does it.").

[46] *See* PUB. INT. L. PROJECT, CALIFORNIA HOUSING ELEMENT MANUAL 24 (5th ed. 2023) ("This planning mandate has come to be referred to as 'density as a proxy for affordability' . . . [however] high density will not by itself necessarily yield affordable units unless affordability is mandated.").

[47] CHALLENGES AND REMEDIES, *supra* note 1, at 7 (stating that cities' failure to implement adequate housing elements has "made a significant contribution to the shortage of affordable housing").

thirty-six percent of jurisdictions' housing elements are currently out of compliance.[48]

Cities can become non-compliant in different ways: they might fail to submit an updated housing element proposal to HCD for approval;[49] they might fail to revise their submitted proposal following a rejection from HCD; they may have neglected to implement the programs outlined in the housing element, such as rezoning;[50] or the terms in the housing element may be inconsistent with other provisions in the general plan.[51]

In some specific instances, a city's failure to rezone for more housing may in itself invalidate the general plan.[52] Each city's housing element must contain an inventory of land suitable for residential development.[53] When this inventory does not adequately identify sites to accommodate the city's need for affordable housing,[54] the housing element law requires cities to rezone so as to meet their allotted housing need within three years of the deadline for enacting the housing element.[55] In instances like this, the city's failure to plan for adequate housing in the housing element's inventory of housing alone would support an article 14 challenge. However, this affirmative rezoning requirement will become relevant below in Part III.A.2. in addressing

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48 As of December 8th, 2023, according to HCD, which keeps such information up to date on its website. *Housing Element Implementation and APR Dashboard*, CAL. DEP'T. OF HOUS. & CMTY. DEV. (last visited Nov. 26, 2023), https://www.hcd.ca.gov/planning-and-community-development/housing-open-data-tools/housing-element-implementation-and-apr-dashboard [https://perma.cc/6ANA-RD9Y].

49 *See* Peninsula Interfaith Action v. City of Menlo Park, No. CIV 513882, 2012 Cal. Super. LEXIS 12215, at *1 (Cal. Super. Ct. June 13, 2012).

50 Urb. Habitat Program v. City of Pleasanton, 164 Cal. App. 4th 1561, 1567 (2008) ("[HCD] notified the City that it had revoked the City's Housing Element compliance status because the City had not met the June 2004 date for rezoning.").

51 CAL. GOV'T CODE § 65300.5 (2023); *cf.* Concerned Citizens of Calaveras Cnty. v. Bd. of Supervisors, 166 Cal. App. 3d 90, 94 (1985) ("[T]he land use and circulation elements of the General Plan fail to satisfy statutory requirements because they are internally inconsistent.").

52 *See* CAL. GOV'T CODE § 65583 (2023) (detailing the required contents of the housing element).

53 *Id.* § 65583(a)(3).

54 As established by *id.* § 65584 (2023).

55 *Id.* § 65583(c)(1)(A) (citing to the deadline in *id.* § 65588 (2023)).

whether the CEQA exemption provided for in section 65759 applies to rezoning.

Recognizing the threat posed by local agencies' non-compliance with general plan regulations, the state has enabled private parties to challenge non-compliant cities in court.[56]

B. Article 14

AB 1612 established article 14 of the California Government Code, which lays out the framework for challenging a general plan or one of its elements for non-compliance with state parameters.[57] These actions receive scheduling preference over other civil matters so that "such actions [are] speedily heard and determined."[58] Upon a finding that the city has not substantially complied[59] with state requirements, section 65754 of article 14 imposes a timeline for cities to take action to achieve compliance.[60] Local agencies are given 120 days to fix their general plans or mandatory elements of that plan.[61] They are then allowed an additional 120 days to bring their zoning ordinance into consistency with the amended plan.[62] In sum, the city must draft a general plan amendment, receive HCD approval, enact the amendment and rezone accordingly, all within 240 days of final judgment.[63]

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[56] *See* CAL. GOV'T CODE §§ 65750-63 (2023).

[57] *Id.*

[58] *Id.* § 65752 (2023).

[59] "Substantial compliance [means] actual compliance with respect to the substance essential to every reasonable objective of the statute, as distinguished from mere technical imperfections of form." Hernandez v. City of Encinitas, 28 Cal. App. 4th 1048, 1058-59 (1994) (internal quotation marks and citations omitted) (citation omitted) (finding the City's housing element in substantial compliance after considering several alleged deficiencies); *see also* Black Prop. Owners Ass'n v. City of Berkeley, 22 Cal. App. 4th 974, 983 (1994) (finding that rent control ordinance did not violate statutory requirement that housing element reasonably address constraints on housing maintenance, deferring to city's judgment that "rent control has had a positive effect on preserving affordable housing").

[60] CAL. GOV'T CODE § 65754 (2023).

[61] *Id.* § 65754(a).

[62] *Id.* § 65754(b).

[63] *Id.* § 65754.

Prior to article 14's enactment, lawmakers questioned whether this brief timeframe was feasible.[64] Some voiced concern that it often takes years to change land use regulations, largely because of the time, money, and litigation involved in satisfying CEQA requirements.[65] The legislature's solution to this issue was section 65759. To contextualize the importance of section 65759's CEQA exemption, the next section will unpack CEQA itself and its role in stalling development.

C. CEQA

1. Environmental Review Procedure Under CEQA

CEQA has been innocuously described as a "disclosure statute"[66] because, on a basic level, it merely requires an agency to "demonstrate to an apprehensive citizenry that the agency has . . . considered the ecological implications of its action."[67]

CEQA review begins with a "preliminary review," in which the agency determines if its desired action qualifies as a "project" under the statutory definition, thereby requiring review.[68] Amending a general plan or element therein[69] or rezoning[70] is a project requiring review.[71] Next, the city conducts an "initial study," which assesses whether the project has the potential to significantly affect the environment.[72] If such a potential exists, the agency must proceed with a full environmental impact report ("EIR").[73]

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[64] One member of the Senate Committee on Judiciary questioned, "[I]s 120 days, (or even one year) time enough . . . ?" CHALLENGES AND REMEDIES *supra* note 1, at 4.

[65] *See id.* at 9 ("Staff is informed that [CEQA's environmental impact reports] often take up to two years to complete.").

[66] Emmington v. Solano Cnty. Redev. Agency, 195 Cal. App. 3d 491, 502 (1987).

[67] No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 86 (1974).

[68] CAL. CODE REGS. tit. 14, § 15378(a)(1) (2023).

[69] *Id.* § 15378(a)(1).

[70] *Id.* § 15060 (2023).

[71] Except in rare circumstances, such as where a general plan is amended via ballot initiative. *Id.* § 15378(b)(3).

[72] *Id.* § 15063 (2023).

[73] *Id.* § 15063(b)(1)(A).

The EIR is the "heart of CEQA."[74] CEQA requires that EIRs address a number of issues.[75] The "core" features of an EIR, however, are a discussion of the potential alternatives to the intended project and possible mitigation efforts the city could take to offset the project's environmental impact.[76] Local agencies compile this analysis in a draft EIR, then present their findings to the public for comment.[77] Next, agencies respond to public input and certify a final EIR.[78] CEQA requires that agencies complete their EIRs within one year.[79] However, courts have ruled that this timeframe is directory, not mandatory.[80] As a result, EIRs routinely take much longer to complete.[81] Common factors that cause delay include public opposition prompting cities to revise EIRs,[82] consultants failing to prepare reports on time,[83] and litigation.[84]

An important CEQA concept is tiering, which limits the necessary scope of review when projects are nested within other projects.[85] For example, imagine a city amends its general plan, passes a rezoning ordinance, and then issues a conditional use permit for the rezoned plot. Each of these actions would likely require an EIR, and each EIR could presumably cover overlapping material. To avoid redundancy, CEQA allows site-specific EIRs (such as for a use permit) to incorporate by

[74] *In re* Bay-Delta Proc., 43 Cal. 4th 1143, 1162 (2008).

[75] CAL. CODE REGS. tit. 14, §§ 15120-32 (2023).

[76] Cal. Oak Found. v. Regents of Univ. of Cal., 188 Cal. App. 4th 227, 259, 273 (2010).

[77] CAL. CODE REGS. tit. 14, § 15087 (2022).

[78] *Id.* § 15088 (2023); *id.* § 15090 (2023).

[79] *Id.* § 21151.5(a)(1) (2023).

[80] Schellinger Bros. v. City of Sebastopol, 179 Cal. App. 4th 1245, 1255-56 (2009).

[81] *See generally* Arthur F. Coon & Carolyn Nelson Rowan, *When Environmental Review Under the California Environmental Quality Act Becomes "Groundhog Day": What's a Frustrated Developer to Do?*, 20 MILLER & STARR REAL EST. NEWSALERT 431, 445 (2010) (explaining the circumstances that lead to "perpetual EIR preparation, never progressing to completion").

[82] *See e.g.*, *Schellinger Bros.*, 179 Cal. App. 4th at 1252 (where public opposition led to multiple revisions of the draft EIR).

[83] *See* Lake Almanor Assocs. v. Huffman-Broadway Grp., 178 Cal. App. 4th 1194, 1206 (2009) (holding that a consultant did not owe a duty "to a project applicant in the timely completion of a draft EIR").

[84] *See infra* Part II.C.2.

[85] *See* CAL. PUB. RES. CODE § 21094 (2023).

reference the discussion from a prior EIR (such as for rezoning).[86] The site-specific EIR can focus on granular issues specific to that project and rely on the previously certified "programmatic EIR" for more general analysis. Tiering is a vital cost-saving measure for developers, who usually must pay for their project's environmental review.[87]

2. CEQA Litigation Abuse

CEQA's laudable goals are undermined by bad-faith lawsuits. Any interested party may challenge an agency for failing to comply with CEQA.[88] In theory, such actions hold the government accountable for its environmental disclosure obligations. In practice, unscrupulous litigants file CEQA suits for reasons unrelated to environmental protection.[89] If a committed minority opposes a government project, but their opposition does not gain traction via the democratic process, CEQA litigation presents a viable strategy.[90] Merely filing a CEQA suit has been described as "the equivalent of an injunction."[91] The cost and delay of litigation may be sufficient to derail smaller projects.[92] Larger developments are put at risk because lenders become reluctant to finance projects embroiled in litigation.[93] Despite reform efforts by the legislature, there is little preventing parties from bringing frivolous lawsuits that lack merit or are motivated by non-environmental concerns.[94]

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[86] *Id.* § 21094(a), (b), (e).

[87] Coon & Rowan, *supra* note 81, at 436.

[88] Such actions are brought as mandamus actions under the California Code of Civil Procedure section 1086. *See* Save the Plastic Bag Coal. v. City of Manhattan Beach, 52 Cal. 4th 155 (2011).

[89] *See generally* HERNANDEZ ET AL., IN THE NAME OF THE ENVIRONMENT, *supra* note 12.

[90] *See* Ctr. for Biological Diversity v. Cal. Dep't of Fish & Wildlife, 62 Cal. 4th 204, 254 (2015) (Chin, J., dissenting) (observing that "[d]elay [caused by litigation] can become its own reward for project opponents. Delay the project long enough and it has to meet new targets. . . . All this is a recipe for paralysis").

[91] E. Clement Shute, Jr., *Reprise of Fireside Chat Yosemite Environmental Law Conference October 24, 2015*, 25 ENV'T L. NEWS 3, 4 (2016).

[92] *Id.*

[93] HERNANDEZ, GETTING IN ITS OWN WAY, *supra* note 10, at 9.

[94] *See* HERNANDEZ ET AL., IN THE NAME OF THE ENVIRONMENT, *supra* note 12, at 82-83 (analyzing reform efforts to prevent frivolous CEQA lawsuits which "fell short").

CEQA abuse plays an outsized role in perpetuating California's housing crisis. CEQA lawsuits disproportionally target high-density "infill" housing in urban areas.[95] These are precisely the sort of developments that city planners and policy experts identify as the most sustainable solution to the state's housing shortage.[96] CEQA lawsuits also routinely challenge changes to land use policy at the planning stage.[97] A stubborn opponent to a city's push to create more housing may challenge the effort at every step of the process.[98]

Recently, however, the state legislature has moved to deter unfounded environmental litigation. In October 2023, the California legislature passed Senate Bill 439.[99] SB 439 requires plaintiffs who "challenge the approval or permitting of a priority housing development project" (including via CEQA lawsuit) to establish "a probability" that they will win the suit.[100] If a court finds that the plaintiff cannot make this showing, it must grant a motion to strike the claim, and defendants can seek attorney's fees and costs.[101] The law will take effect on January 1, 2024.[102] So, while the impact of SB 439 is uncertain, the bill has the powerful potential to disincentivize baseless anti-housing lawsuits.

Cities are often cast as unwilling participants in the effort to combat the housing crisis.[103] However, their reluctance can be partially attributed to the stifling effect of CEQA abuse.

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[95] *Id.* at 6.

[96] *Id.*

[97] *Id.* at 48.

[98] *Id.* at 49 ("Opponents of land use plans currently have endless 'second bites' at the CEQA litigation approved apple since both the plan, and every project undertaken to implement the approved plan, can be separately litigated by the same party.").

[99] S.B. 439, 2023-24 Reg. Sess. (Cal. 2023) (codified at CAL. CIV. PROC. CODE § 425.19 (2023)).

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *See* LEWIS, *supra* note 33, at 37 (quoting one state senator Joseph Dunn as saying, "Although they won't say so publicly, some of these cities don't care what their assigned [housing goal] numbers are. They just won't do it because they don't want low-income housing in their jurisdictions.").

D. Section 65759

In recognition of the derailing potential of CEQA, the drafters of article 14 included section 65759. Upon final court order or judgment, this provision makes any action necessary to bring a city into compliance with state general plan requirements exempt from CEQA.[104] In place of CEQA, these actions go through an environmental assessment that is "substantially similar" to standard CEQA procedures.[105]

However, there are several key differences between CEQA review and section 65759 review. Under section 65759, cities must complete their review within the time limitations established by section 65754 (240 days at most).[106] This timeframe is ambitious compared to CEQA's often-ignored one-year limit. To make the timeframe feasible, section 65759 takes two additional departures from the standard CEQA procedure. First, a section 65759 EIR need only meet the requirements of a draft CEQA EIR,[107] meaning that the section 65759 EIR is not subject to public comment and subsequent revision.[108] Second, section 65759 EIRs are "only . . . reviewable as provided under" article 14.[109] This means that the judge who found the city non-compliant will be solely responsible for evaluating the sufficiency of the EIR. Consequently, in

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[104] CAL. GOV'T CODE § 65759 (2023).

[105] *Id.*

[106] *Id.* § 65759(b) ("The court for good cause shown may grant not more than two extensions of time, not to exceed a total of 240 days, in order to meet the requirements imposed by Section 65754.").

[107] *Id.* § 65759(a)(2). The requirements for a draft EIR are defined by CEQA. CAL. CODE REGS. tit. 14, §§ 15084-15088 (2023). Notably, section 65759 cites an inaccurate section of the California Code of Regulations when referring to CEQA's draft EIR requirements. CAL. GOV'T CODE § 65759(a)(2) (citing CAL. CODE REGS. tit. 14, § 15140 (2023) (establishing writing requirements for EIRs)). This improper citation is likely a result of CEQA's restructuring one year after section 65759 was enacted.

[108] *See* CAL. CODE REGS. tit. 14, § 15087 (2023) (detailing requirement for public review under CEQA); *id.* (regarding review of public comment, required agency response thereto, and EIR revision).

[109] CAL. GOV'T CODE § 65759(a)(3).

the words of one legislator at the time of the bill's drafting, section 65759 "eliminates the possibility of lawsuits under CEQA."[110]

1. Persistent Ambiguities

The following are three unresolved legal questions relating to section 65759.

First, how are section 65759's completion deadlines meant to be enforced? No case law has established what happens when a city fails to meet the 240-day deadline. As we will see, this question appears to have troubled legislators at the time of drafting.[111] Looking to CEQA for guidance[112] suggests that the deadline is unenforceable. Courts have ruled that CEQA's timeframes are directory, not mandatory.[113] However, as will be discussed in Parts II and III, this interpretation undermines the intent of the legislature and threatens to negate the entire point of streamlining the review process.

Second, does the provision cover rezoning? Under article 14, upon judgment against a city, the city must bring its zoning into accordance with its newly amended general plan.[114] If those required rezoning programs are not exempt from CEQA, protracted environmental review and the threat of litigation could potentially undermine the remedies called for by the article.[115] Section 65759 purports to apply to "any action" necessary to bring a city's general plan or elements therein into compliance with a court order.[116] One could argue that zoning

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[110] Enrolled Bill Report re AB 1612 (Berman) from Donald Terner, Dir. of Cal. Dep't. Hous. & Cmty. Dev., to Off. of Governor Edmund G. Brown, Jr. 2 (Feb. 1, 1982) [hereinafter Terner Report] (on file with the California State Archives).

[111] *See* CHALLENGES AND REMEDIES, *supra* note 1, at 4.

[112] Which is sensible considering that section 65759 procedure is meant to "substantially conform" to CEQA's. CAL. GOV'T CODE § 65759(a)(2).

[113] Schellinger Bros. v. City of Sebastopol, 179 Cal. App. 4th 1245, 1255-56 (2009); *see* Christopher S. Elmendorf & Timothy G. Duncheon, *When Super-Statutes Collide: CEQA, the Housing Accountability Act, and Tectonic Change in Land Use Law*, 49 ECOLOGY L.Q. 655, 665 (2022) (describing CEQA's deadline as "essentially unenforceable").

[114] CAL. GOV'T CODE § 65754(b) (2023).

[115] *See id.* § 65754 (requiring that a city shall bring its zoning ordinance into consistency with its general plan within 120 days of the amendment separately required to that document).

[116] *Id.* § 65759(a).

ordinances are not such an action because zoning changes do not alter general plans.[117] In the words of one court, "the tail [i.e., rezoning] does not wag the dog [i.e., the general plan]."[118] In that sense, if zoning cannot alter the general plan, it cannot be seen as an action to bring the plan into compliance.

However, strong arguments can be made in favor of zoning applicability. Section 65759 allows for 240 days to conduct a review "in order to meet the requirements imposed by section 65754."[119] Section 65754 permits cities a total of 240 days to complete *both* the amendment to the general plan and subsequent rezoning.[120] Therefore, interpreting section 65759 as only applying to general plan and element amendments allows the court to grant a full 240-day extension for that first stage of the process. Such a construction does not "meet the requirements imposed by section 65754."[121]

Third, to what extent does section 65759 review enable tiering? Like the deadline enforceability question, government officials debated this ambiguity prior to enactment.[122] One interpretation suggests that the provision merely shifts the costs of environmental review onto developers who will have less-substantial EIRs to tier off of when reviewing site-specific projects that are subsequently undertaken pursuant to the general plan amendments.[123] Another interpretation offered by proponents of the bill[124] contends that section 65759 EIRs enable tiering to the same extent as standard CEQA EIRs.

117 *See* Lesher Commc'ns, Inc. v. City of Walnut Creek, 52 Cal. 3d 531, 540 (1990).

118 *Id.*

119 CAL. GOV'T CODE § 65759(b).

120 Each step in the process is allotted 120 days, respectively. *Id.* § 65754.

121 *Id.* § 65759(b).

122 *See, e.g.*, Memorandum from Barry Steiner, Off. of Plan. & Rsch., Governor's Off., to Bob Moore, Governor's Off. (Jan. 19, 1982) [hereinafter Steiner Memo] (on file with the California State Archives).

123 *Id.* at 2 (arguing that under the new law, "[t]he full CEQA costs are shifted to the developer").

124 Memorandum from E. Olena Berg, Deputy Dir., Cal. Dep't Hous. & Cmty. Dev., to Bob Moore, Deputy Legis. Sec'y, Governor's Off. (Feb. 5, 1982) [hereinafter Berg Memo] (on file with the California State Archives).

This Note will revisit these questions after a discussion of AB 1612's legislative history, as that history presents insights helpful to analyzing these ambiguities and the present utility of section 65759.[125]

II. HISTORY OF SECTION 65759: IN THE LEGISLATURE AND IN PRACTICE

A. *Legislative History of AB 1612*

Article 14, including section 65759, was established by AB 1612. This section describes the bill's progress through the legislature and across Governor Brown's desk. A survey of the legislative record sheds light on lawmakers' understanding of the bill, its purpose, and its strengths and weaknesses. Furthermore, the legislative history reveals an outsized concern with the CEQA exemption relative to AB 1612's other sections. This disproportionate attention indicates the importance of the provision in the eyes of its authors.

In May of 1981, Assembly Member Howard Berman introduced AB 1612 to the state Assembly.[126] At that time, much like today, legislators were deeply concerned by high housing prices and the lack of new development.[127] The year prior, the legislature had enacted a comprehensive reworking of the housing element law,[128] stressing the "vital statewide importance" of "the availability of housing."[129]

The reworked housing element law was a significant piece of legislation. Nonetheless, legislators recognized that under the present system, it was "increasingly difficult to build housing priced within reach of even middle income working people."[130] AB 1612's committee notes identify two issues constraining the housing element law: non-

[125] *See infra* Part II.A.

[126] 1 CAL. LEG., ASSEMBLY FINAL HISTORY, 1981–82 Reg. Sess., at 1091 (1982), https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/FinalHistory/1981/Volumes/8182vol1_2ahr.PDF [https://perma.cc/Y72B-BU6L] (providing a chronology of the bill's legislative history).

[127] *See* CHALLENGES AND REMEDIES, *supra* note 1, at 2.

[128] Act of Sept. 26, 1980, ch. 1143, 1980 Cal. Stat. 3694, 3697-3703. For further background into the enactment of the housing element law, see PUB. INT. L. PROJECT, *supra* note 46, at 24-28.

[129] CAL. GOV'T CODE § 65580 (2023).

[130] CHALLENGES AND REMEDIES, *supra* note 1, at 2.

cooperative cities and anti-development litigation.[131] Regarding cities, committee notes observe that "many local governments have been slow to implement [an updated housing element] that provides for affordable housing."[132] Moreover, the existing framework for challenging cities over their lack of compliance was ineffectual, as "suits [were] relatively few and remedies [were] uncertain."[133]

Even when cities attempted to comply with housing element requirements, litigation hindered their progress.[134] Lawmakers identified two types of lawsuits as counter-productive: "lawsuits brought under the California Environmental Quality Act" and suits brought "to enforce the General Plan Law."[135] Both of which "made a significant contribution to the shortage of affordable housing."[136]

In response to these issues, California Rural Legal Assistance, an advocacy organization, drafted legislation that Berman brought to the Assembly as AB 1612.[137] The bill aimed to "put teeth into [the] existing law requiring local housing elements,"[138] thereby reducing "the wasteful effects of environmental lawsuits and increas[ing] the speed at which local governments act to adopt adequate general plans."[139]

The bill enjoyed support from a diverse set of organizations.[140] Even the Alameda County Board of Supervisors expressed support for the bill.[141] Their endorsement is surprising, considering the bill intended to

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[131] *Id.* at 7; Terner Report, *supra* note 110, at 3.

[132] CHALLENGES AND REMEDIES, *supra* note 1, at 7.

[133] Terner Report, *supra* note 110, at 3.

[134] CHALLENGES AND REMEDIES, *supra* note 1, at 7.

[135] *Id.*

[136] *Id.*

[137] Terner Report, *supra* note 110, at 3.

[138] ASSEMB. COMM. ON JUDICIARY, BILL DIGEST, AB 1612 (Berman), 1981-82 Reg. Sess., at 2 (Cal. 1981) [hereinafter BILL DIGEST] (on file with the California State Archives) (scrawled in margin).

[139] CHALLENGES AND REMEDIES, *supra* note 1, at 7.

[140] Including the Legal Aid Foundation of Los Angeles, California Housing Council, Inc., California Building Industry Association, Inc., and the Western Center on Law and Poverty. BILL DIGEST, *supra* note 138, at 3.

[141] Letter from Charles H. Cruttenden, Legis. Advoc., Alameda Cnty., to Howard Berman, State Assemb. (Aug. 6, 1981) (on file with the California State Archives).

"put teeth" into a regulation affecting counties.[142] Nonetheless, the Board welcomed the bill's clarification of the procedure governing challenges they might face.[143] Alameda County's support set it apart from other local governments. Initially, the bill faced opposition from the League of California Cities.[144] Legislative records do not indicate this group's specific criticisms of AB 1612. Whatever those may have been, the League ultimately "worked out [its] problems" and withdrew its opposition after "working closely with proponents" of the bill.[145]

AB 1612's committee records underscore lawmakers' intent to expedite the process by which parties could challenge non-compliant general plans.[146] Proponents complained that, at present, "this type of lawsuit may drag on for several years" with no promise of fixing the underlying defects.[147] Proposed provisions attempted to curtail these lawsuits by giving petitioners scheduling priority over other suits[148] and requiring that hearings take place within ninety days of the initial filings.[149] These provisions are notable in that they mandate timeliness even before any wrongdoing has been established. For situations where courts find cities out of compliance, lawmakers proposed narrow post-judgment timeframes: 120 days for a general plan amendment and the same for subsequent rezoning,[150] with environmental review not to exceed those limits.[151]

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[142] Article 14 litigation has subsequently been brought against agencies within Alameda County. *See, e.g.*, Black Prop. Owners Ass'n v. City of Berkeley, 22 Cal. App. 4th 974 (1994) (challenging city ordinance as non-compliant with housing element requirements).

[143] Letter from Charles H. Cruttenden to Howard Berman, *supra* note 141.

[144] BILL DIGEST, *supra* note 138, at 3.

[145] Terner Report, *supra* note 110, at 3.

[146] *See* BILL DIGEST, *supra* note 138, at 3.

[147] *Id.*

[148] CHALLENGES AND REMEDIES, *supra* note 1, at 8 (explaining the provision later codified as CAL. GOV'T CODE § 65752 (2023): "This bill would require that actions . . . 'shall be given preference over all other civil actions.'").

[149] CAL. GOV'T CODE § 65753(a) (2023).

[150] *Id.* § 65754 (2023).

[151] *Id.* § 65759 (2023).

These timeframes were so ambitious that some doubted their practicality.[152] Committee members questioned whether a city could enact amendments within the statutory deadline.[153] Moreover, members expressed doubts regarding the feasibility of the environmental review timeframe:

> Staff is informed that EIRs often take up to two years to complete. Even at half that, the EIR could not be completed in the time provided under this bill. Are these time limits realistic? To make the CEQA option practical, would not the better approach be to allow one year from the date of completion of the proposed general plan revisions for completion of the EIR?[154]

The legislative record does not indicate how proponents responded to these criticisms. However, AB 1612's timeframes were maintained without amendment.[155] Evidently, the bill's proponents believed that the streamlined procedure established by the CEQA exemption would dramatically shorten the time needed for review. Fully aware that CEQA review could take multiple years,[156] they nevertheless found it feasible that cities could complete the streamlined process within four months.

The bill passed through the assembly[157] and the senate[158] with "no known opposition" from the public.[159] However, upon arriving at the Governor's office, the bill faced criticism from the Office of Planning and Research ("OPR").[160]

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[152] *See* CHALLENGES AND REMEDIES, *supra* note 1, at 9.

[153] *See id.* at 4 ("Is 120 days, (or even one year) time enough to complete the complex procedural and political process of redrafting a general plan[?]").

[154] *Id.* at 9 (emphasis omitted).

[155] 1 CAL. LEG., ASSEMBLY FINAL HISTORY, 1981-82 Reg. Sess., at 1091 (1982), https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/FinalHistory/1981/Volumes/8182vol1_2ahr.PDF [https://perma.cc/Y72B-BU6L].

[156] *See* CHALLENGES AND REMEDIES, *supra* note 1, at 9.

[157] The vote took place on June 8th, 1981, with the bill passing fifty-eight to eighteen. 1 CAL. LEG., ASSEMBLY FINAL HISTORY, 1981-82 Reg. Sess., at 1091.

[158] The vote took place on September 15th, 1981, with the bill passing twenty-four to five. *Id.*

[159] Terner Report, *supra* note 110, at 3.

[160] *See* Steiner Memo, *supra* note 122.

OPR laid out its case against AB 1612 in two memos advocating for Governor Brown's veto.[161] OPR found several issues in the bill, three of which involved the CEQA exemption.[162] First, OPR pointed to the ambiguity surrounding AB 1612's timeframes, claiming that the bill "does not specify what would happen if the general plan [were] not adopted within the specified time limit."[163] This, the office argued, presented an "enforcement problem."[164] Second, OPR argued the bill would prevent developers from taking advantage of tiering.[165] The office claimed that, because of the CEQA exemption, there would be "no prior adequate EIR which [could] be incorporated by reference" into future project EIRs.[166] In effect, cities would be permitted to "assess the developer the full costs of preparing these documents."[167] Lastly, OPR argued, almost in passing, that "[t]his bill ignores legitimate environmental . . . issues."[168] It claimed that CEQA-exempt actions under AB 1612 "benefit from the review and environmental mitigation mandated by CEQA."[169] OPR did not address proponents' criticism regarding the "wasteful effects" of environmental litigation.[170]

At the Governor's request,[171] HCD produced two memos responding to OPR's criticisms.[172] First, HCD rejected OPRs contention that AB 1612

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[161] The first, dated January 19th, 1982, was authored by Barry Steiner. Steiner Memo, *supra* note 122. The second, dated February 4, 1982, was signed by Deni Greene, the office's Director, with analysis prepared by Steiner. Enrolled Bill Report re AB 1612 from Deni Greene, Dir. of Off. of Plan. & Res., to Off. of Governor Edmund G. Brown, Jr. (Feb. 4, 1982) [hereinafter Greene Report] (on file with the California State Archives).

[162] *See* Greene Report, *supra* note 161, at 3-4 (other criticisms questioned the necessity of the provision enabling the appointment of a referee, whether AB 1612's prescribed remedies enabled sufficient judicial flexibility, and identified minor technical drafting ambiguities); Steiner Memo, *supra* note 122 (expanding upon Greene Report's criticism regarding prescribed remedies).

[163] Greene Report, *supra* note 161, at 4.

[164] *Id.*

[165] Steiner Memo, *supra* note 122, at 1.

[166] *Id.* (emphasis omitted).

[167] *Id.*

[168] Greene Report, *supra* note 161, at 3.

[169] *Id.*

[170] CHALLENGES AND REMEDIES, *supra* note 1, at 7.

[171] Berg Memo, *supra* note 124 (on unnumbered cover sheet).

[172] *See* Terner Report, *supra* note 110; Berg Memo, *supra* note 124.

would prevent developers from tiering off of streamlined reports: "[A]ny cost savings that might be attributable to a developer by virtue [of tiering], can be achieved by incorporating by reference the environmental assessment called for in AB 1612."[173] In support of this claim, HCD cited OPR's own CEQA guidelines, which broadly permit EIRs to incorporate documents related to "matter[s] of public record."[174] In HCD's view, because streamlined EIRs would fall into this category of public-record documents, they could be incorporated into future EIRs, thus enabling tiering.[175] HCD's argument appears to oversimplify the difference under CEQA between tiering off of a prior EIR and merely incorporating a source into a report.[176] Part III will return to this argument over tiering to further assess the strength of each side.[177]

Hidden in HCD's discussion of tiering is an implicit suggestion that the CEQA exemption did not apply to rezoning. One of OPR's tiering arguments had rested on the premise that the CEQA exemption applied to zoning.[178] HCD countered OPR's point by asserting that "the situation under discussion" is one in which "an EIR has been prepared for a General Plan."[179] OPR was talking about a situation "when an EIR [is] . . . prepared for a '<u>zoning action</u>,'"[180] which is "does not apply" to AB 1612.[181] As discussed in Part III, HCD's understanding that the CEQA exemption did not apply to zoning conflicts with article 14's timeline

[173] Berg Memo, *supra* note 124, at 1.

[174] *Id.*

[175] *Id.*

[176] *Compare* Cal. Code Regs. tit. 14, § 15150(a) (2023) (explaining how documents may be incorporated into EIRs) *with id.* § 15152(a) (2023) (explaining how a prior EIR can be incorporated into a later EIR to achieve tiering).

[177] *See infra* Part III.A.3.

[178] Specifically, OPR had argued that a separate bill AB 1185, which enabled CEQA streamlining for certain site-specific projects, would not be available if a city opted into AB 1612's CEQA exemption because that separate law required a standard zoning EIR to have been prepared in order to permit the site-specific streamlining. Steiner Memo, *supra* note 122, at 1.

[179] Berg Memo, *supra* note 124, at 1.

[180] *Id.* (emphasis in original).

[181] *Id.*

scheme.[182] Nonetheless, it is notable that here — the only passage in the legislative record that discusses the CEQA exemption's applicability to zoning — we find a staunch proponent of the bill presupposing its limited application.

Notably, HCD's memos do not respond to OPR's criticism regarding the enforcement of timelines. While the department emphasized the need for ambitious timeframes — claiming that the "interminable delays" of litigation "can thwart affordable housing projects"[183] — neither HCD memo addresses the unclear consequences of failing to meet those deadlines. Similarly, HCD offered no counterargument to OPR's claim that standard CEQA review was beneficial and desirable in such situations. Like proponents in the legislature,[184] HCD appears to have found the downside of CEQA litigation to outweigh the benefits of CEQA review so heavily as not to warrant a response.

AB 1612's journey through the legislature and the subsequent debate between HCD and OPR yield insights that one can use to interpret the resulting legislation, article 14. The historical record highlights the bill's ambiguities, namely, the questions regarding timeline enforceability and tiering potential. It appears that members of the government were fully aware of the potential for confusion from the beginning. Recall Governor Brown's assurance that the bill's author had "agreed to clarify such uncertainties" after enactment.[185] Setting aside the unanswered question of what happened to this promised clarification, one can view the bill's ultimate passing as evidence of the Governor's endorsement of HCD's and the bill's proponents' construction of the law. This construction involves several core viewpoints: the conviction that CEQA litigation was a primary impediment to the housing element law; the perceived need for rapid redress for non-compliant general plans; a lack of concern for the deadline-enforceability question; and the firm belief that tiering would be possible under section 65759.

Lastly, it is noteworthy how much of the discourse surrounding AB 1612 was concerned with CEQA exemption as opposed to the bill's

[182] *See infra* Part III.A.1.

[183] Terner Report, *supra* note 110, at 3.

[184] *See* CHALLENGES AND REMEDIES, *supra* note 1, at 7 (referring to the "wasteful effects of environmental lawsuits").

[185] Letter from Edmund G. Brown to the Members of the Cal. Assemb., *supra* note 5.

fifteen other provisions.[186] This disproportionate attention supports a view that the provision was not a mere expedience tacked onto the larger package. On the contrary, legislators likely understood — as will be argued in Part III — that without the CEQA exemption, article 14's procedure would be unworkable.[187]

Considering the prominence of the CEQA exemption in the legislative record, one might be surprised by the lack of attention paid to section 65759 ever since.

B. Subsequent Application of Section 65759

In the forty years since California passed AB 1612, section 65759 has enjoyed little attention from appeals courts or legal scholarship. [188] In the absence of scholarly or appellate guidance, this Section will attempt to flesh out the CEQA exemption by considering two article-14 lawsuits resolved at the trial court level. The first, *Peninsula Interfaith Action v. City of Menlo Park*,[189] implemented the CEQA exemption, while the second, *Urban Habitat v. City of Pleasanton*,[190] did not. Discussion of these cases will illustrate how practitioners utilize section 65759 and consider the circumstances that lead parties to forgo the exemption.[191]

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[186] *See supra* note 162 and accompanying text.

[187] *See infra* Part III.B.

[188] *See supra* note 26 and accompanying text.

[189] Peninsula Interfaith Action v. City of Menlo Park, No. CIV 513882, 2012 Cal. Super. LEXIS 12215 (Cal. Super. Ct. June 13, 2012).

[190] Urb. Habitat Program v. City of Pleasanton, 164 Cal. App. 4th 1561 (2008).

[191] These cases do not fully answer the ambiguities inherent in the statute but are included because they represent the most applicable case studies in section 65759 as could be located. The research procedure used in the preparation of this Note, which failed to uncover any more applicable cases, is as follows. First, Lexis and Westlaw were searched for any court document that referenced section 65759. Then, a list was compiled of article-14 lawsuits that were sustained in appellate review at the pleading or summary judgment stage. For a number of the cases on this list, superior court dockets were searched to find final judgments not uploaded to commercial databases.

1. *Peninsula Interfaith Action v. City of Menlo Park*

In *Peninsula Interfaith*, a coalition of activist groups challenged Menlo Park over its long-running failure to implement a housing element.[192] Before the 2012 lawsuit, Menlo Park had last updated its housing element in 1992, despite the state's requirement for an update every seven years.[193] Menlo Park's non-compliance may have continued unchallenged had it not struck a deal with Facebook in 2011, allowing the company to relocate its headquarters to the City.[194]

The new Facebook campus would employ thousands of employees[195] and inevitably disrupt Menlo Park's housing market.[196] Fearing a devastating impact on the City's supply of affordable housing, advocates engaged the City in negotiations.[197] Ultimately, the parties agreed to a deal whereby Menlo Park would update its housing element and rezone for more affordable housing.[198] Notably, advocates filed suit under

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[192] *Peninsula Interfaith*, 2012 Cal. Super. LEXIS 12215, at *1.

[193] Bonnie Eslinger, *Menlo Park to Come Up with 1,975 More Homes Under Terms of Legal Settlement*, MERCURY NEWS (May 17, 2012, 2:24 PM), https://www.mercurynews.com/2012/05/17/menlo-park-to-come-up-with-1975-more-homes-under-terms-of-legal-settlement/ [https://perma.cc/5AWF-A2PQ].

[194] Tom Krazit, *It's Official: Facebook Moving to Menlo Park*, CNET (Feb. 8, 2011, 10:26 AM PST), https://www.cnet.com/culture/its-official-facebook-moving-to-menlo-park/ [https://perma.cc/7J4J-XTUB].

[195] Facebook projected the campus would staff 9,400 employees, 28% of whom would be "lower-income." *Menlo Park Agrees to Welcome 1,000 Units of Affordable Housing*, PUB. ADVOCS., https://www.publicadvocates.org/our-work/housing-justice/affordable-housing/peninsula-interfaith-action-et-al-v-city-menlo-park-menlo-park-city-council/ (last visited Oct. 27, 2022) [https://perma.cc/56XX-7WVY].

[196] *See* Letter from Richard A. Marcantonio, Managing Att'y, Pub. Advocs., to Justin Murphy, Dev. Servs. Manager, Cmty. Dev. Dep't, Plan. Div., City of Menlo Park, at 13 (Jan. 30, 2012) (on file with Public Advocates) (explaining the "significant impacts that are caused or exacerbated by the un-addressed housing need that will be generated by" the new Facebook headquarters).

[197] *See id.*

[198] *Peninsula Interfaith*, 2012 Cal. Super. LEXIS 12215.

article 14 only after the parties had agreed on terms, [199] resulting in the parties filing their pre-negotiated settlement just one day later.[200]

The plaintiffs' attorneys characterized the suit as a precautionary measure for the "unlikely event that the city did not comply with the terms."[201] However, according to Menlo Park's then-City Attorney, William McClure, the decision to proceed with an article 14 settlement was explicitly made so the agreement could incorporate section 65759 and exempt the required housing element amendment from CEQA.[202] In McClure's opinion, had it not been for the CEQA exemption, the "public comment [and] final EIR process . . . would have taken several years to complete."[203] Nonetheless, the settlement did not include rezoning under the section 65759 exemption.[204] The parties noted that the statute did not apply to zoning "per se" and opted not to test the vague applicability in their settlement.[205]

Rather than extend the section 65759 exemption to the rezoning projects, the parties claimed a separate CEQA exemption by labeling those projects "ministerial."[206] Ministerial actions, as opposed to discretionary ones, are fully exempt from CEQA.[207] An action is ministerial when the approval process does not "'allow[] the government to shape the project in any way [by requiring modifications] which could respond to any of the concerns which might be identified'

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[199] Eslinger, *supra* note 193.

[200] Sandy Brundage, *Menlo Park Settles Housing Lawsuit*, ALMANAC (May 17, 2012, 11:16 AM), https://www.almanacnews.com/news/2012/05/17/menlo-park-settles-housing-lawsuit [https://perma.cc/W6EX-4Z33].

[201] Eslinger, *supra* note 193.

[202] Letter from William L. McClure, Former Menlo Park City Att'y, to author (Nov. 20, 2022) (on file with author).

[203] *Id.* (ellipses in original).

[204] *Peninsula Interfaith*, 2012 Cal. Super. LEXIS 12215, at *16.

[205] *See* Letter from William L. McClure to author, *supra* note 202.

[206] *Peninsula Interfaith*, 2012 Cal. Super. LEXIS 12215, at *16.

[207] CAL. PUB. RES. CODE § 21080 (b)(1) (2023). The rationale behind the ministerial exemption is that it would be pointless to conduct an environmental review of less impactful alternatives when the city has no discretion over the project. *See* Prentiss v. City of South Pasadena, 15 Cal. App. 4th 85, 90 (1993).

by environmental review."[208] According to Menlo Park, the housing element, as amended pursuant to the judgment, was "sufficiently specific [in its description of the rezoning parameters] that any follow-up approval [was] limited to a determination of compliance with conditions or provisions set forth" in the housing element.[209] Note the strategy at play here: the housing element amendment's streamlined review analyzed the rezoning programs as they were described therein, and that description was so specific as to make CEQA review ministerially unnecessary when it was time to enact the rezoning. In effect, the parties leveraged section 65759 to make the rezoning CEQA exempt without directly applying section 65759 to the rezoning projects.

The *Peninsula Interfaith* strategy of laying out rezoning parameters in the CEQA-exempted housing element enabled the parties to circumvent section 65759's ambiguous applicability to zoning. However, the city's subsequent rezoning ordinance took a different approach which further exacerbated the zoning applicability question.[210] In contrast to the settlement,[211] the ordinance itself claimed that "[t]he [*Peninsula Interfaith*] Judgment incorporates Government Code Section 65759 . . . . This ordinance is required to bring the General Plan or relevant mandatory elements into compliance with State law and the court ordered Judgment. It is, therefore, not subject to CEQA."[212] So, while the *Peninsula Interfaith* litigants avoided applying section 65759 in this way,[213] fearing such an application was not covered by the statute "per se,"[214] the resulting ordinance itself applied the section 65759 exemption directly to rezoning.[215]

[208] Protecting Our Water & Env't Res. v. County of Stanislaus, 10 Cal. 5th 479, 493 (2020) (quoting Friends of Westwood, Inc. v. City of Los Angeles, 191 Cal. App. 3d. 259, 267 (1987)).

[209] MENLO PARK, CA., ORDINANCE NO. 933 § 4 (2013).

[210] *See id.* (enacting rezoning pursuant to the *Peninsula Interfaith* judgement and claiming CEQA exemption).

[211] Which avoids any explicit discussion of the applicability of section 65759 to rezoning. *See Peninsula Interfaith*, 2012 Cal. Super. LEXIS 12215, at *16.

[212] MENLO PARK, CA., ORDINANCE NO. 933 § 4.

[213] *See Peninsula Interfaith*, 2012 Cal. Super. LEXIS 12215, at *16.

[214] Letter from William L. McClure to author, *supra* note 202.

[215] MENLO PARK, CA., ORDINANCE NO. 933 § 4.

Potentially recognizing the uncertain legality of extending section 65759 to rezoning, the city doubled down on CEQA exemptions. The city claimed that "[i]f this ordinance were subject to CEQA," that is, if section 65759 did not apply, "[t]his ordinance is ministerial in that the Housing Element indicates that the City 'will' take the actions identified in this ordinance" and therefore "[a]s a ministerial action, this ordinance is not a project subject to CEQA."[216] By claiming both a ministerial and section 65759 exception, the Menlo Park ordinance highlights the uncertainty around CEQA's application to rezoning in the article 14 context.

The *Peninsula Interfaith* settlement creatively frontloaded rezoning parameters into the CEQA-exempt housing element amendment to make the actual zoning ordinance ministerially exempt.[217] Does this strategy negate the importance of the question of section 65759's applicability to rezoning? That is, could all article-14 litigation use this workaround and thereby avoid full environmental review for rezoning without having to apply section 65759 directly? Potentially. However, the strategy comes with a significant drawback regarding deadlines. Section 65754 allows cities 120 days to enact a general plan amendment and an additional 120 days for subsequent rezoning.[218] But the *Peninsula Interfaith* approach requires a city to finalize its rezoning parameters within the 120 days allotted for amending the general plan.[219] In this way, the strategy effectively halves the time in which a city can develop plans to update its zoning. This approach was feasible in Menlo Park's case because the settlement agreement, including the rezoning programs, was finalized before the petitioners filed suit.[220] However, former City Attorney McClure speculates that this arrangement, where a lawsuit is brought after the parties agree to terms, is rare in article 14 litigation.[221] Although the *Peninsula Interfaith* strategy presents a creative workaround for the zoning-applicability question, it does not render the

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[216] *Id.*

[217] *See id.*

[218] CAL. GOV'T CODE § 65754 (2023).

[219] Otherwise, the General Plan amendment could not lay out the rezoning programs in specificity sufficient to make subsequent enactment ministerial.

[220] Eslinger, *supra* note 193.

[221] Letter from William L. McClure to author, *supra* note 202.

question moot because the approach might not suit all article-14 scenarios.

Lastly, aside from its relevance to the zoning-applicability question, *Peninsula Interfaith* is notable as an illustration of why article 14 litigation is relatively uncommon. Although HCD presently considers over thirty-six percent of jurisdictions' housing elements out of compliance, cities like Menlo Park can remain non-compliant for years without facing legal challenges.[222] Consider the unique circumstances that led to the *Peninsula Interfaith* settlement. Menlo Park had been flagrantly non-compliant for over a decade; however, advocates successfully bargained for more housing only after a major tech company took up residence in the City. In this way, *Peninsula Interfaith* stands for both the power and the insufficiency of article 14.

2. *Urban Habitat Program v. City of Pleasanton*

Practitioners do not implement section 65759 in every applicable instance. In *Urban Habitat*, a group of housing advocates sued the city of Pleasanton, claiming that a local ordinance, which capped the number of units allowed in the City, invalidated the City's general plan.[223] Initially, the trial court sustained Pleasanton's demurrer to the petition, holding that the claims were time-barred,[224] but the dismissal was reversed on appeal.[225] On remand, Edmund Brown Jr., now serving as state attorney general ("the AG"), intervened on the petitioners' side.[226] Subsequently, the parties reached a settlement agreement requiring the City to repeal its housing cap — which would involve a housing element amendment — and rezone for more housing.[227]

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[222] *Housing Element Implementation and APR Dashboard*, *supra* note 48.

[223] Urb. Habitat Program v. City of Pleasanton, 164 Cal. App. 4th 1561, 1568 (2008).

[224] *Id.*

[225] *Id.* at 1580.

[226] Press Release, Off. of the Att'y Gen., Cal. Dep't of Just., Brown Sues to Invalidate Pleasanton's Illegal Housing Cap (June 24, 2009), https://oag.ca.gov/news/press-releases/brown-sues-invalidate-pleasantons-illegal-housing-cap [https://perma.cc/4M8R-SYJZ].

[227] Urb. Habitat Program v. City of Pleasanton, No. RG 06293831, exhibit A, at *5-6 (Cal. Super. Ct. Aug. 18, 2010) (judgment pursuant to stipulation) (on file with author).

Urban Habitat is frequently cited for its statute of limitations holding.[228] However, the focus here will be the subsequent settlement. The settlement is relevant because it simultaneously embraces some provisions of article 14 while disregarding section 65759.

Urban Habitat's proceedings on remand showcase many of article 14's provisions. Before the settlement, the trial court had applied section 65755 of article 14 to suspend the City's power to issue non-residential building permits.[229] The settlement restored the City's permitting authority,[230] provided it amended its housing element according to the timeframe outlined in section 65754.[231] The court's judgment authorizing the parties' stipulation made the CEQA exemption available.[232] Nevertheless, the settlement required that the City's amendment and rezoning actions undergo standard CEQA review instead of the streamlined procedure.[233] Subsection 65759(a)(4) permits cities to follow standard CEQA procedure if they can still satisfy the statutory timeframes.[234] Because the settlement required that the City complete its review within article 14's timeframes,[235] it appears the parties elected to follow subsection 65759(a)(4)'s standard CEQA option.

It is curious that parties would commit to standard CEQA procedure when a streamlined option was available — even more so for these specific parties. The petitioners were represented by the same attorneys

[228] *See e.g.*, Coastal Act Protectors v. City of Los Angeles, 75 Cal. App. 5th 526, 531 (2022) (declining to follow Urban Habitat's statute of limitations precedent after distinguishing facts); Friends of the Children's Pool v. City of San Diego, No. G053709, 2018 WL 2731698, at *14 (Cal. Ct. App. June 7, 2018) (applying *Urban Habitat* rule).

[229] *Urban Habitat*, No. RG 06293831, exhibit A to exhibit A, at *8 (citing CAL. GOV'T CODE §§ 65755, 65760 (2023)).

[230] *Id.* exhibit B, at *1 (citing CAL. GOV'T CODE § 65754 (2023)).

[231] *Id.* attachment 2 to exhibit A to exhibit B, at *1 (citing CAL. GOV'T CODE §§ 65755, 65760 (2023)).

[232] *See* CAL. GOV'T CODE § 65759(a) (2023).

[233] *Urb. Habitat*, No. RG 06293831, exhibit B, at *2 ("[The] City will conduct appropriate environmental analysis in accordance with CEQA guidelines for actions identified in this Settlement Term Sheet.").

[234] CAL. GOV'T CODE § 65759(a)(4).

[235] *Urb. Habitat*, No. RG 06293831, exhibit D, at *1 (specifying the date for EIR completion within the 120 days of the final court order, satisfying section 65754's timeframes).

who later utilized section 65759 in *Peninsula Interfaith*.[236] The intervenor, the AG, was directly responsible for passing the CEQA exemption into law. Why, then, did the settlement embrace standard CEQA procedure? The answer has to do with a separate, concurrent lawsuit that the AG had brought against Pleasanton, challenging the sufficiency of an EIR the City had finalized for an amendment to its general plan.[237] In the *Urban Habitat* settlement, the AG agreed to dismiss this separate claim, provided the City fix the separately challenged EIR.[238] However, the AG was "insistent" that the general plan amendment EIR undergo standard CEQA procedure.[239] It is likely that the relatedness of the various EIRs called for by the settlement (the housing element EIR was "based on" the general plan EIR)[240] meant it was more practical for all of the EIRs to follow the same procedure.

The *Peninsula Interfaith* and *Urban Habitat* settlements demonstrate how advocates can leverage article 14 to create housing. However, these cases also portray a limited application of section 65759 in practice. In both instances, the parties declined to implement the CEQA exemption to the full extent potentially authorized by law — in *Peninsula Interfaith*, by not applying the exemption to rezoning, and in *Urban Habitat*, by not applying the exemption at all.

Legislators saw the CEQA exemption as an important, if not essential, aspect of AB 1612. However, because the provision has been used sparingly in practice, its ambiguities remain untested. Part III will assess whether insights from the legislative history help to clarify the questions surrounding the provision and reevaluate section 65759's present usefulness.

[236] Attorneys were members of Public Advocates, Inc. and the Public Interest Law Project. *See* Urb. Habitat Program v. City of Pleasanton, 164 Cal. App. 4th 1561, 1565 (2008); Peninsula Interfaith Action v. City of Menlo Park, No. CIV 513882, 2012 Cal. Super. LEXIS 12215, at *1 (Cal. Super. Ct. June 13, 2012).

[237] Petition for Writ of Mandate, California *ex rel.* Brown v. City of Pleasanton, No. RG 09469878 (Cal. Super. Ct. Aug. 21, 2009) (on file with author).

[238] *Urb. Habitat*, No. RG 06293831, exhibit A, at *9.

[239] Email from Michael Rawson, Dir. of Pub. Int. L. Project, to author (Sept. 26, 2022) (on file with author).

[240] *Urb. Habitat*, No. RG 06293831, exhibit D, at *7.

III. REASSESSING SECTION 65759

This Part seeks to reassess the potential utility of section 65759. First, Section A will reconsider the ambiguities present in the CEQA exemption. This discussion does not propose definitive answers to the unresolved questions. Instead, the intention is to consider how the legislative record supports different possible resolutions to the ambiguities. Section B considers section 65759's importance to article 14 litigation and takes a broad view of article 14's role in the current effort to address the housing crisis.

A. Untested Ambiguities

In its analysis of section 65759's ambiguities, this Section will discuss the following topics: first, how to enforce the provision's deadlines; second, the provision's applicability to zoning; and finally, the potential for tiering.

This discussion will apply established principles of statutory interpretation. Accordingly, the "fundamental task [will be] to ascertain the Legislature's intent so as to effectuate the purpose of the statute."[241] To that end, one must "read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness."[242]

1. Timeline Enforcement

How are section 65759's completion deadlines meant to be enforced? Are those deadlines mandatory or merely directory? Recall that before AB 1612's enactment, OPR had homed in on these questions, arguing that the bill's failure to specify consequences for delay created an "enforcement problem."[243] Combine this with the concern held by some lawmakers that the bill's timelines were infeasibly short.[244] The result

[241] Smith v. Superior Ct., 39 Cal. 4th 77, 83 (2006).

[242] Pineda v. Williams-Sonoma Stores, Inc., 51 Cal. 4th 524, 529-30 (2011) (internal quotation marks and citations omitted).

[243] Greene Report, *supra* note 161, at 4.

[244] CHALLENGES AND REMEDIES, *supra* note 1, at 9 ("[T]he [streamlined] EIR could not be completed in the time provided under this bill.").

presents a serious issue: deadlines appeared likely to be missed, and the law allegedly failed to specify the consequences for such scenarios.[245]

If the bill's proponents had an answer to these concerns, it does not appear in the legislative record.[246] Nonetheless, the fact that the legislation passed unamended indicates that a majority of the legislature and Governor Brown understood the bill in such a way that made these concerns non-fatal to the bill's effectiveness. Therefore, the question becomes, how did the majority of the legislature and Governor Brown understand the bill?

The majority likely understood the bill to provide consequences for delay. The plain language of the statute supports this construction.[247] Section 65759 instructs that cities shall conduct their environmental assessments within the specified timeframes.[248] The use of the word "shall" — understood in the ordinary sense of the word — suggests that the instruction was more than merely directory.[249]

One might counter this plain-meaning interpretation by pointing to the rules governing CEQA's deadlines. CEQA ostensibly demands that "each local agency *shall* establish . . . time limits that do not exceed . . . [o]ne year for completing and certifying environmental impact reports."[250] Despite this strong wording, courts have held that CEQA's one-year deadline is directory,[251] meaning that failure to meet the

[245] *See* Greene Report, *supra* note 161, at 4.

[246] Not to mention the case law.

[247] *See* CAL. GOV'T CODE § 65759 (2023); *id.* § 65754 (2023).

[248] *Id.* § 65759.

[249] *See* People v. Standish, 38 Cal. 4th 858, 869 (2006) (noting that "[o]rdinarily, the term 'shall' is interpreted as mandatory"); Conservatorship of Whitley, 155 Cal. App. 4th 1447, 1463 (2007) ("When used in a statute, 'shall' has been found to have 'a peremptory meaning, and it is generally imperative or mandatory.'"). *But see* Bradley v. Lacy, 53 Cal. App. 4th 883, 889 (1997) (exploring factors that would lead a court to interpret "shall" as having a discretionary meaning and concluding that, "there are unquestionably instances in which other factors will indicate that apparent obligatory language was not intended to foreclose a governmental entity's or officer's exercise of discretion") (internal quotation marks and citations omitted).

[250] CAL. PUB. RES. CODE § 21151.5(a)(1) (2023) (emphasis added).

[251] Schellinger Bros. v. City of Sebastopol, 179 Cal. App. 4th 1245, 1260 (2009).

deadline does not result in an automatic certification of the project.[252] In practical terms, this determination has rendered CEQA's deadlines "essentially unenforceable."[253]

Because the section 65759 review process is supposed to substantially conform to Draft CEQA report parameters,[254] could one argue that section 65759's timelines are likewise unenforceable? A broad view of article 14 and consideration of the legislative history indicates otherwise. Section 65759's deadlines are in place "in order to meet the [timeframe] requirements imposed by Section 65754."[255] It wouldn't make sense to apply CEQA's timeline enforceability precedent to section 65759 when the statute makes the exemption's timeframe subservient to section 65754. Given the legislator's conviction to expedite the procedure for correcting cities' non-conforming general plans, it makes more sense that sections 65754 and 65759 should not be held to CEQA's relaxed enforcement standards.

Legislators intended to dramatically reduce the time it took to challenge a city's non-compliant general plan. To that end, they imposed a short deadline to achieve compliance[256] and created an expedited environmental review timeframe that was explicitly in service of the compliance deadline.[257] Failing to enforce the environmental review timeframe would create a situation where cities could not meet the section 65754 deadline, thereby betraying the legislature's purpose.

What, then, should be the consequences for failing to meet the deadlines? One partial answer lies elsewhere in article 14, in section 65755.[258] Upon a judgment of non-compliance, section 65755 requires the court's order to impose at least one of six penalties limiting a city's ability to make land use decisions.[259] For example, the first penalty

[252] *See id.* at 1266 ("A public agency may be directed to comply with CEQA, or to exercise its discretion on a particular subject, but a court will not order that discretion to be exercised in a particular fashion, or to produce a particular result.").

[253] Elmendorf & Duncheon, *supra* note 113, at 11.

[254] CAL. GOV'T CODE § 65759 (2023).

[255] *Id.* § 65759(b).

[256] *Id.* § 65754 (2023).

[257] *See id.* § 65759(b).

[258] *Id.* § 65755 (2023).

[259] *Id.* § 65755(a).

suspends a city's authority to issue building permits.[260] These penalties must remain in place until the city achieves substantial compliance with the general plan requirements.[261] Therefore, if a local agency fails to finish its section 65759 review within the deadline, consequently failing to achieve general plan compliance within section 65754's timeframe, the penalty imposed by section 65755 will continue to constrict the city's planning authority.

So, the city has some motivation to achieve general-plan compliance, if for no other reason than to get out from under the burden of section 65755. However, section 65755 is ultimately insufficient as a deadline enforcement mechanism because the pressure placed on the city remains constant before and after the deadline passes.[262] Missing the deadline does nothing to change the motivational potency of section 65755.[263] In effect, section 65755 enforces compliance but not punctual compliance.

Given the legislature's interest in expediting the article-14 procedure, determining the appropriate enforcement mechanism requires and deserves further research.

2. Applicability to Zoning

Does the CEQA exemption apply to rezoning efforts? Recall that the CEQA exemption purports to apply to "any action necessary to bring [a city's] general plan or relevant mandatory elements of the plan into compliance with any court order or judgment . . . ."[264] Aspects of section 65759 point in contradictory directions regarding the provision's applicability to zoning. The fact that the 240-day deadline for environmental review[265] tracks with the 240-day timeframe for completing *both* general plan amendment and rezoning suggests that the exemption covers zoning.[266] However, the understanding that invalid

[260] *Id.* § 65755(a)(1).
[261] *Id.* § 65755(a).
[262] *See id.* § 65755.
[263] *See id.*
[264] CAL. GOV'T CODE § 65759 (2023).
[265] *Id.* § 65759(b).
[266] *Id.* § 65754 (2023).

zoning generally cannot invalidate a general plan suggests that zoning is not an action necessary to bring a general plan into compliance.[267]

The legislative record accentuates this ambiguity. Individuals at HCD thought the exemption would not cover zoning and alleged that OPR erroneously took zoning applicability for granted.[268] However, if a city's rezoning were subject to full CEQA review and therefore vulnerable to litigation, cities would often be unable to complete their rezone within the 240-day window required by section 65754.[269] *Peninsula Interfaith* demonstrates a workaround whereby cities can exempt their zoning ordinance from CEQA review by fully outlining the rezoning programs in their general plan amendments and conducting a streamlined environmental review of those programs at that stage.[270] However, this workaround strategy further limits the time in which rezoning can be planned,[271] essentially undermining the extra 120 days statutorily allotted to rezoning.[272] Consequently, interpreting the exemption as applying to rezoning is arguably necessary to maintain the overall effectiveness of article 14.

To further complicate the picture, consider that in certain situations, the housing element law explicitly requires cities to rezone in order to gain general plan compliance.[273] For example, government code section 65583(c)(1)(A)[274] states that when a city fails to plan for adequate, affordable housing in its housing element's inventory of housing, the city must rezone to meet its allotted housing need within three years of the deadline for enacting the housing element.[275] Another example of housing element law affirmatively requiring rezoning is section 65588(e)(4)(C)(iii), enacted in 2021.[276] This provision states that when

[267] *See supra* text accompanying notes 114–116.

[268] *See supra* text accompanying notes 176–179.

[269] *See* CHALLENGES AND REMEDIES, *supra* note 1, at 9.

[270] *See* Peninsula Interfaith Action v. City of Menlo Park, No. CIV 513882, 2012 Cal. Super. LEXIS 12215, at *16 (Cal. Super. Ct. June 13, 2012).

[271] *See supra* notes 207–209 and accompanying text.

[272] *See* CAL. GOV'T CODE § 65754 (2023).

[273] *See id.* § 65583(c)(1)(A) (2023); *id.* § 65588(e)(4)(C)(iii) (2023).

[274] *See supra* text accompanying notes 52–56.

[275] CAL. GOV'T CODE § 65583(c)(1)(A) (citing to the deadline in CAL. GOV'T CODE § 65588).

[276] *See* Act on Feb. 23, 2021, ch. 6, 2021 Cal. Stat. 88, 92.

a city fails to enact a housing element within a year of the statutory deadline, its general plan "shall not be found in substantial compliance" with the state law until it rezones to meet its regional share of housing.[277]

Under these provisions, rezoning is necessary to satisfy the housing element law and, therefore, can be seen as an action necessary to bring a city's general plan into compliance. If a city's non-compliance falls under one of these provisions, there is all the more reason to cover its rezoning with section 65759. However, when article 14 and its CEQA exemption were enacted, the housing element law had no provisions affirmatively mandating rezoning.[278] Because the legislature enacted these mandatory rezoning provisions (which make general plan compliance dependent on rezoning) after it enacted the CEQA exemption (applying to actions taken to bring a general plan into consistency), it is unclear whether such actions are meant to be covered by the exemption.

Here we have two inconsistent interpretations, neither cleanly flowing from the plain language of the statue. Each construction can claim the support of a fundamental principle of statutory interpretation. Deferring to the legislative record[279] favors an interpretation that excludes zoning from the CEQA exemption. However, prioritizing the harmony and effectiveness of the larger legislative package[280] supports the conclusion that zoning should be covered. Due to the strength of each argument, this uncertainty likely will need to be resolved through litigation.

3. Tiering

To what extent does the streamlined procedure called for by the CEQA exemption allow future site-specific EIRs to use tiering? Recall

[277] CAL. GOV'T CODE § 65588(e)(4)(C)(iii).

[278] *See* Act of Sept. 26, 1980, ch. 1143, 1980 Cal. Stat. 3694, 3697 (enacting the requirements for the housing element, as they existed at the time the legislature enacted article 14).

[279] As is instructed by *Smith v. Superior Court*, 39 Cal. 4th 77, 83 (2006).

[280] As is instructed by *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524, 529-30 (2011).

that OPR and HCD disagreed over this question as well.[281] OPR expressed concern that section 65759's streamlined EIRs would be inadequate for tiering purposes.[282] In response, HCD argued that a streamlined EIR could be incorporated by reference into future EIRs.[283] "Thus, any cost savings . . . attributable to . . . incorporating by reference a General Plan EIR . . . can be achieved by incorporating by reference the environmental assessment called for in AB 1612."[284] This statement overlooks the fact that, under CEQA, incorporation by reference is not the same as tiering.[285]

HCD correctly points out that site-specific EIRs can incorporate more than just prior programmatic EIRs,[286] as CEQA broadly permits the incorporation of documents in the public record.[287] It is also true that tiering procedure involves "incorporation by reference."[288] However, the CEQA guidelines state that tiering is specifically the incorporation of prior EIRs.[289] Environmental reports commonly incorporate analysis from separate documents, but these reports are not seen as tiered reports if the incorporated material is not an EIR.[290]

By conflating the effects of incorporation by reference with that of tiering, HCD's rebuttal fails to address OPR's concern that section 655759 EIRs would be inadequate for tiering purposes. However, one could argue that section 65759 EIR should be considered an EIR under CEQA's tiering guidelines. The contents of a section 65759 EIR must substantially conform to the substantive requirements of a draft CEQA

[281] *See supra* text accompanying notes 172–176.

[282] Steiner Memo, *supra* note 122, at 1.

[283] Berg Memo, *supra* note 124, at 1 (citing a section of the CEQA guidelines later recodified as CAL. CODE REGS. tit. 14, § 15150(a) (2023)).

[284] *Id.*

[285] *Compare* CAL. CODE REGS. tit. 14, § 15150(a) (2023) (explaining how documents may be incorporated by reference into EIRs), *with id.* § 15152(a) (2023) (explaining how a prior EIR can be incorporated into a later EIR to achieve tiering).

[286] CAL. CODE REGS. tit. 14, § 15150(a).

[287] *Id.*

[288] *Id.* § 15152(a).

[289] *Id.*

[290] *See id.* § 15152(a) ("'Tiering' refers to using the analysis of general matters contained in a broader EIR . . . .").

EIR.[291] Meaning that a 65759 EIR will contain all the same analysis as a standard EIR, with the key differences being the lack of opportunity for public comment and the resulting lack of revision in response to public comment.[292] Forgoing the public comment and revision requirements reduces the time it takes to finalize the report.[293] However, skipping these steps does not necessarily change the general character of the information in the document or its level of detail.[294] Therefore, there is arguably little reason why section 65759 EIRs should not enable tiering.

The legislative history leaves open the question of whether a section 65759 EIR constitutes an EIR as required by CEQA's tiering guidelines. This issue will likely remain unresolved until it is brought up on appeal. Furthermore, if developers cannot tier off section 65759 EIRs, to what extent could they still benefit from incorporating the analysis from the streamlined reports? Answering these questions will improve the effectiveness of article 14 litigation by providing certainty to developers. Rezoning for higher density is a positive step, but actually building homes requires developers to willingly take on new projects.[295] So long as the CEQA exemption's tiering ambiguity makes the cost of environmental review for site-specific projects unclear, it will be harder for cities to engage with developers and, thereby, harder to turn denser zoning into new houses.

Closely reading article 14 and its legislative history sheds light on section 65759's ambiguities. That said, these questions will ultimately need to be resolved through either litigation or legislative amendment.

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[291] CAL. GOV'T CODE § 65759(a)(2) (2023).

[292] *Compare* CAL. CODE REGS. tit. 14 §§ 15122-31 (2023) (detailing the requirements for a draft EIR), *with id.* § 15132 (2023) (describing the additional steps involved in finalizing an EIR).

[293] *See* City of Irvine v. County of Orange, 238 Cal. App. 4th 526, 557 (2015) (noting that "the comment-and-response process can also be abused, . . . becom[ing] an end in itself, simply a means by which project opponents can subject a lead agency's staff to an onerous series of busywork requests").

[294] Evidenced by the fact that, under standard CEQA procedure, cities may ignore public comments that do not raise significant environmental issues. Browning-Ferris Indus. v. City Council, 181 Cal. App. 3d 852, 862 (1986) ("[A] lead agency need not respond to each comment made during the review process, [only] the most significant environmental questions presented.").

[295] *See* PUB. INT. L. PROJECT, *supra* note 46, at 27-28.

The likelihood that an appeals court considers these issues rests partly on housing advocates and developers and their willingness to utilize the CEQA exemption in a manner that implicates its ambiguities. Forty years of uneventful history indicates that there has been little appetite to pursue those issues in court. The following section considers the present usefulness of the CEQA exemption and whether the provision deserves more attention.

B. Section 65759's Utility in the Ongoing Fight for Housing Development

Section 65759 is critical to the effectiveness of article 14 litigation. Furthermore, article 14 has an important role in the legal fight for housing development. Accordingly, this section concludes that section 65759 deserves renewed attention, if for no other reason than to clarify how exactly the provision works with respect to enforcement, zoning, and tiering.

1. Section 65759's Importance to Article 14

Section 65759 is key to the effectiveness of article 14 litigation. Without the CEQA exemption's ambitious deadlines, the primary purpose behind AB 1612 — "increase[ing] the speed at which local governments act to adopt adequate general plans"[296] — is negated. Any action to adopt a compliant general plan cannot proceed without completing an environmental review.[297] So, if that review is permitted to drag out,[298] a city cannot make progress toward compliance.

Furthermore, an integral benefit of section 65759 is that it insulates a city's environmental review from legal challenge.[299] General plan amendments and zoning ordinances are frequently the targets of CEQA litigation.[300] CEQA litigants often feign environmental concern as a pretext for anti-development goals.[301] Without the protection of the

[296] CHALLENGES AND REMEDIES, *supra* note 1, at 7.

[297] *See* CAL. GOV'T CODE § 65759(b) (2023) (acknowledging that environmental review must be complete "to meet the requirements imposed" by article 14).

[298] As is often the case. *See* Coon & Rowan, *supra* note 81, at 436.

[299] CAL. GOV'T CODE § 65759(a)(3).

[300] *See* HERNANDEZ ET AL., IN THE NAME OF THE ENVIRONMENT, *supra* note 12, at 48.

[301] *See id.* at 6.

CEQA exemption, acts taken to bring a city's general plan into compliance are vulnerable to this sort of litigation.

The legislature intended that, upon a finding of non-compliance, cities would adopt adequate general plans and zoning within 240 days.[302] The viability of this proposition depends on section 65759 and how the law's uncertainties are ultimately resolved. Determining whether or not the exemption applies to zoning or whether its timelines are enforceable will substantially affect the likelihood that cities can achieve compliance as quickly as lawmakers intended.

2. Article 14's Importance to Housing Development

Section 65759 plays a crucial role in article 14. Furthermore, forty years after its enactment, article 14 remains a viable tool for housing advocates. A major strength of article 14 is that it takes discretion away from local governments and their constituencies.[303] Politically speaking, it is difficult to create more housing. Often, pressure from vocal residents is an insurmountable hurdle for local governments as they work to enact an adequate housing element.[304] A report on the issue of housing element non-compliance by the Public Policy Institute of California found that "[w]here growth is a hot-button issue, production and affordability goals may take a back seat to political exigencies."[305] Under these circumstances, article-14 enforcement allows local officials — whose pro-development actions are compelled by court order — to simultaneously address their city's need for housing while saving face in front of their growth-averse constituents.

So long as cities fail to maintain adequate housing elements,[306] article 14 litigation will remain a necessary expedient in the fight for housing development, and while litigants continue to use CEQA to stall progress, section 65759 will remain essential to the effectiveness of

[302] *See* CAL. GOV'T CODE § 65754 (2023).

[303] *See, e.g.*, *id.* § 65755(a) (2023) (listing penalties that strip cities of their land use authority); *id.* § 65759 (removing the role of public comment in environmental review).

[304] *See* LEWIS, *supra* note 33, at 42 ("[A] history of disputes between city officials and citizen groups on growth issues, may contribute to community rancor that makes officials wary of advancing a plan for additional housing development.").

[305] *Id.*

[306] *See Housing Element Implementation and APR Dashboard*, *supra* note 48.

article 14. Furthermore, article 14 litigation is potentially growing in importance thanks to recent legislative actions. Over the past seven years, the California legislature has enacted over eighty laws aimed at addressing the state's urgent need for housing development.[307] Many of these laws work by strengthening the requirements and penalties of the housing element law.[308] These changes have been met with optimism by some advocates.[309] At the very least, by strengthening the housing element law, the legislature has potentially created more opportunities for housing element litigation under article 14. With this heightened potential for petitions against non-compliant general plans comes a heightened importance on the provisions meant to bolster those actions, such as section 65759.

However, the full impact of the CEQA exception will remain unclear until its ambiguities are resolved. By implementing section 65759 in ways that test its boundaries, such as by applying it to zoning, demanding the enforcement of its deadlines, or tiering off its reports, housing advocates and developers could bring about litigation that finally clarifies the provision.

CONCLUSION

In a letter to the Governor, a legal advocate with California Rural Legal Assistance complained that "[h]ousing production is at a 35-year low and housing costs are rising in part because of inadequate supply."[310] The letter partly attributed the inadequate supply to CEQA and urged

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[307] HERNANDEZ, ANTI-HOUSING CEQA LAWSUITS, *supra* note 15, at 1.

[308] *See, e.g.*, Act of Sept. 28, 2021, ch. 358, 2021 Cal. Stat. 5733, 57334 (amending the housing element law to "require a local government that fails to adopt a housing element . . . in substantial compliance with state law within 120 days of the statutory deadline to complete [separately required] rezoning").

[309] According to the pro-housing advocacy group, California YIMBY, "[t]he paradigm shift in housing element law. . . could bring about a sea change in how cities meet their mandates for adequate shelter of their constituents." *The Elements of Housing Elements: A Phase Change to Greater Production?*, CAL. YIMBY (Feb. 12, 2021), https://cayimby.org/the-elements-of-housing-elements-a-phase-change-to-greater-production/ [https://perma.cc/E9BS-7QQ4].

[310] Letter from Marcus B. Brown, Jr., Legis. Advoc., Law Offs. of Cal. Rural Legal Assistance, to Edmund G. Brown, Jr., Governor of Cal. (Jan. 28, 1982) (on file with the California State Archives).

the Governor to put a stop to its "lengthy litigation," which sometimes delayed development projects for years.[311] The letter, which encouraged the Governor to support AB 1612, was written forty years ago,[312] but its sense of urgency is evocative of the current discourse surrounding housing in California.

By enacting AB 1612, the legislature and Governor Brown intended to fix the twin problems of cities that failed to comply with the state's housing requirements and CEQA litigants who thwarted cities that were willing to comply.[313] The results have been mixed at best: regarding the former problem, non-compliant cities, over thirty-six percent of jurisdictions currently do not have adequate housing elements;[314] regarding the latter problem, CEQA litigation, section 65759 theoretically provides a solution, but the exemption's persistent uncertainties leave its ultimate effectiveness in question. Clearly, AB 1612's drafters had loftier goals for their bill. Further attention given to section 65759 in litigation would serve those legislative goals.

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311 *Id.*

312 *Id.*

313 CHALLENGES AND REMEDIES, *supra* note 1, at 7.

314 *Housing Element Implementation and APR Dashboard*, *supra* note 48.