The Problem

The AB 1633 Solution

The AB 1633 Bonus

Closing Thought

# AB 1633 Webinar

## Solving the CEQA-HAA Conflict

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# 1. The Problem

**CEQA caselaw invites cities to delay *w/o limit* the same projects the Housing Accountability Act says they may not deny.**

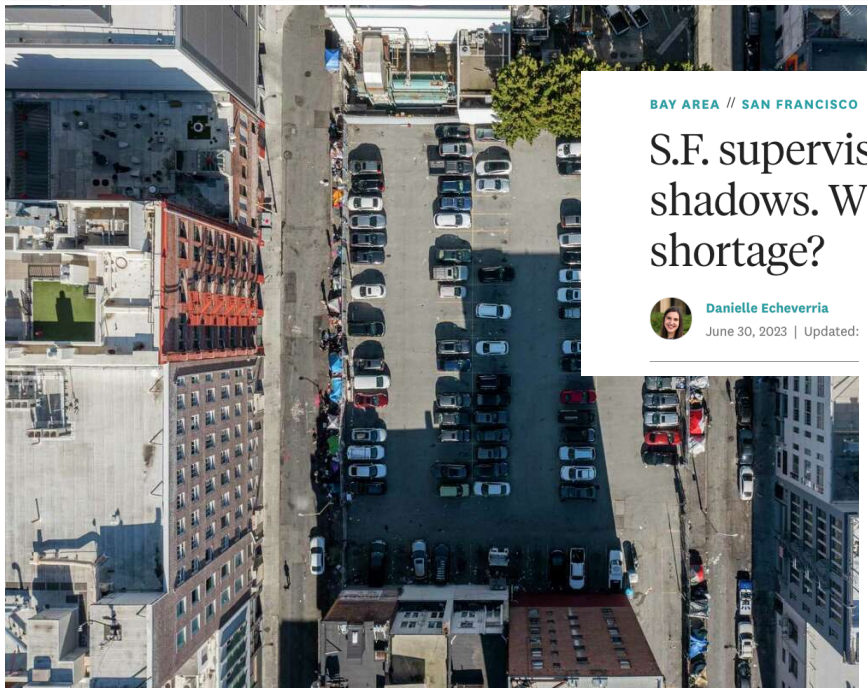
# 1.1 San Francisco was the poster child

BAY AREA // SAN FRANCISCO

## State investigating S.F.'s decision to reject turning parking lot into 500 housing units

J.K. Dineen

Oct. 28, 2021 | Updated: Oct. 29, 2021 2:41 p.m.



BAY AREA // SAN FRANCISCO

## S.F. supervisors shelved townhome project because of shadows. What does it mean for the city's housing shortage?



Danielle Echeverria

June 30, 2023 | Updated:

1151 Washington Street overlooking the Betty Ann Ong Recreation Center, rendering by Macy Architecture

# 1.2 CEQA has time limits, but…

**CEQA provides no meaningful remedy for violation of its time limits.**

If a city sits for years on a completed EIR, court may order city to take *some action*—to certify it, or to order further study—but if city says further study is ongoing, courts won't address CEQA compliance until city declares that its enviro review is "done."

- *Schellinger Brothers v. City of Sebastopol* (Ct. App. 2009)
- *Yimby Law v. City & County of San Francisco* (SF Sup. Ct. 2022)

Even retrospectively, cities face no consequences for "too much" CEQA review (only for too little).

# 2. The AB 1633 Solution

**Declare the abuse of CEQA to be an HAA violation.**

# 2.1 The Crux

**New Mechanism to Enforce CEQA Time Limits**

- AB 1633 takes substance of CEQA as given (no new exemptions; no change to standard for what's a legally sufficient EIR, neg dec, or exemption finding)
- AB 1633 also takes CEQA's time limits as given (w/ a few small revisions & clarifications): 60 days for exemption, 180 days for neg dec, 1 year for EIR, 180 days for anything else
- **After the applicable time limit has passed, AB 1633 authorizes the project applicant (not 3rd parties) to call the question of whether project is exempt or whether a legally sufficient enviro review has been conducted.**

# 2.2 How It Works

**If applicant thinks project is exempt…**

- Applicant must prepare everything that city would normally include in a Notice of Exemption and give this to the city, along with "excerpts from the record" showing that project is exempt
- City then gives public notice of applicant's calling of the Q
- From date of applicant's calling of the Q, city has 90 days (extendable to 180) to make a final decision on whether project is exempt.
- A failure to decide w/in the 90/180 day period, or a failure to issue the exemption if there's substantial evidence in record that would allow a reasonable person to find the project exempt, violates the HAA.

**Bottom line: exemptions will be mandatory!**

# City Attorney Alert

**Check your muni code re: exemptions & internal appeals—it may need updating!**

- CEQA designates the elected city council or county commission of a local government as the official CEQA decisionmaker. All CEQA determinations must be appealable to it. Pub. Res. Code § 21151(c).
- Under background legal principles, an agency decision isn't "final" if it's subject to internal appeal. See, e.g., AIDS Healthcare Found. v. State Dep't of Health Care Servs. (2015) 41 Cal. App. 4th 1327, 1337–38 ("A decision attains the requisite administrative finality when the agency has exhausted its jurisdiction and possesses no further power to reconsider or rehear the claim.")
- Thus, to safely comply with AB 1633, a city needs to be able to get a project's CEQA determination before city council w/in the 90/180 day period.

# City Attorney Alert

**San Francisco as an example**

- Public notice of exemption is provided only upon approval of a project. SF Admin Code § 31.08(f).
- Exemption is appealable to Bd of Supervisors only within "30 days after the Date of the Approval Action." SF Admin Code § 31.16(e)(2)

Practically, to comply with AB 1633, SF must either:

(1) drastically accelerate the approval of projects, once applicant calls the question on exemption;

(2) enact a "pre-project-approval" notice & internal appeal process for CEQA exemptions for AB 1633 projects; or

(3) make Supes the front-line decisionmaker on exemptions, once applicant calls the question

# Practice Tip! (for project applicants)

**Include *"Mahon"* notice when you call the question**

- Permit Streamlining Act says that a project becomes "deemed approved" if city fails to approve or deny it within short period following conclusion of CEQA process (60 days for exempt projects)
- The Court of Appeal has held that this provision operates only if applicant or city gave public notice that project *could* become approved by operation of law. *Mahon v. County of San Mateo* (2006), 139 Cal. App. 4th 812.
- Until now, "deemed approved" permits have been an afterthought, b/c cities wouldn't finalize a CEQA exemption until they had approved the project.
- Upshot: AB 1633 is a gamechanger.

# 2.2 How It Works

**If applicant concedes that project is not exempt…**

- Applicant may call the question only after city has held a public hearing at which draft neg dec or EIR was on the agenda and could have been adopted.
- City again has 90 days to make up its mind.
- HAA is violated if city fails to act, or if city requires further study when:
  - (1) there's no "fair argument" about potentially significant enviro impact (neg dec), or
  - (2) the city can't point to "substantial evidence" that the additional study is "legally required" by CEQA (EIR).

(These legal standards give benefit of doubt to the city, in contrast to how AB 1633 treats exemptions.)

# 2.3 Statutes of limitation

- While a city is procrastinating, applicant can take as long it wants to call the Q.
- But if city makes an official decision to deny an exemption, or to order further study rather than approving a neg dec or certifying an EIR—*whether before or after the CEQA deadline has passed*—then applicant has only 35 days from notice of decision to call the Q.

# 2.4 Substantive Limitations

## Geography & housing type

- Project must consist of dense housing (min. 15 du/acre), in "urbanized area" as defined by Public Resources Code, that qualifies for HAA protections

## Environmental criteria

- Site must not be environmentally sensitive per SB 35/423 criteria
- Site must not be in "high" or "very high" fire severity zone
- Site must satisfy one of several affirmative green criteria (bordered on 3 sides by urban uses, very-low VMT, ½ mile walk to transit corridor, "proximal to 6+ amenities")

# 2.5 Remedies

**HAA Remedies (slightly qualified)**

- Plaintiff who sues for AB 1633 violation can get all the HAA remedies, except fee shifting (city pays for plaintiff's attorney) is only available if court finds that city acted in bad faith
- Standard HAA remedy: a court order "compelling compliance within 60 days," backed by court retaining jurisdiction and threat of fines for noncompliance.
- Bad-faith HAA remedy: a court order directing city to approve the project

# 3. The AB 1633 “Bonus”

**A disincentive for NIMBY litigation.**

# 3.1 City wants project, NIMBYs don't?

- NIMBYs may tie up project with CEQA litigation, general plan / zoning claims, etc.
- If they win—even on a procedural formality—they often get attorneys fees under balancing test of Code Civ. Pro. § 1021.5, especially if claim was brought by an NGO
- But AB 1633 says:
  1. That in balancing interests, court shall give "due weight" to whether the local agency's decision "furthers the policies of the HAA."
  2. That that if city in good faith approved a dense infill project on a site that meets the bill's enviro criteria, an award of fees to plaintiffs who challenged the project's approval is "rarely, if ever" appropriate.

# 4. Closing thought

**It's time for OPR to write an "objective standards" infill exemption.**