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## YALE LAW & POLICY REVIEW

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### When a Statute Loses Its Way: Fulfilling the Original Intent of the California Environmental Quality Act

*Rigel Robinson\**

*The California Environmental Quality Act (CEQA) provides for significant public input on public projects, analysis of a project's environmental harms, and the opportunity for private actors to sue if they believe they will be negatively impacted by a project. Increasingly, this landmark legislation is being abused to manipulate the public process, resulting in harmful delays to projects that may be essential to the state's housing and climate goals. Policymakers must consider the extent to which this tool of direct democracy and accountability has become a tool for special interests and individuals to exert veto power over public projects. In the case of the recent UC Berkeley enrollment lawsuit, the potential for CEQA abuse to result in clear negative impacts has reignited an important conversation about the role of the law. Reforms are necessary to ensure that CEQA can fulfill its original intent as a protection against environmental harms, rather than as a tool for private actors to delay or defeat public projects.*

#### INTRODUCTION

In February 2022, the California Environmental Quality Act (CEQA) became a household name to families across the state. News broke out that the University of California, Berkeley ("UC Berkeley" or "the University") was being forced to cut enrollment for its upcoming class by over three thousand students because of environmental constraints, leading to

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widespread consternation.<sup>1</sup> CEQA was enacted in 1970 with noble intentions, designed to mitigate environmental harms caused by major infrastructure projects. This enrollment crisis, however, demonstrated the ways that one of California's signature pieces of environmental legislation is unfortunately susceptible to manipulation that obstructs public progress. Reforms are necessary to ensure that CEQA is able to fulfill its original intent and serve as a protection against environmental harms, rather than being used as a tool for private actors to delay or defeat public projects.

In response to a lawsuit filed by a Berkeley neighborhood group called *Save Berkeley's Neighborhoods*, the California First District Court of Appeal issued a decision that required UC Berkeley to turn away one out of every three undergraduate students who would have otherwise been admitted for the 2022-23 academic year.<sup>2</sup> The central issue at play was CEQA. *Save Berkeley's Neighborhoods* argued that under CEQA, the growth of the University, and the resulting increase of students and residents in the neighborhood, represented an environmental harm that needed to be mitigated. The remedy imposed by the court was to slash enrollment.<sup>3</sup>

What followed was a political scramble unlike any seen in recent California history. The decision sparked immediate public outrage.<sup>4</sup> The University quickly filed a stay request, hoping to prevent the

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1. Teresa Watanabe, *UC Berkeley May Be Forced by Court to Cut 3,000 Undergraduate Seats, Freeze Enrollment*, L.A. TIMES (Feb. 14, 2022), <https://www.latimes.com/california/story/2022-02-14/uc-berkeley-may-be-forced-to-cut-3-000-freshman-seats-under-court-order-to-halt-growth> [<https://perma.cc/8N72-DL6V>].
  2. Maria Cramer, *U.C. Berkeley Says It May Have to Cut Student Admissions by Thousands*, N.Y. TIMES (Feb 17, 2022), <https://www.nytimes.com/2022/02/16/education/uc-berkeley-admissions-court-ruling.html> [<https://perma.cc/B3XF-8H5B>]; Bay City News & Jodi Hernandez, *UC Berkeley Officials Appeal Court Ruling Freezing Enrollment*, NBC BAY AREA (Feb. 15, 2022), <https://www.nbcbayarea.com/news/local/east-bay/uc-berkeley-officials-appeal-court-ruling-freezing-enrollment/2812896/> [<https://perma.cc/2CMJ-6PWH>].
  3. Josh Moody, *Berkeley Must Cap Enrollment*, INSIDE HIGHER ED (Mar. 7 2022), <https://www.insidehighered.com/admissions/article/2022/03/07/california-supreme-court-rejects-appeal-berkeley> [<https://perma.cc/U22Y-PJ2N>].
  4. *See, e.g.*, Max Schlosberg, *Getting Into UC Berkeley Was My Dream. Some Locals Turned It Into a Nightmare*, S.F. CHRON. (Feb. 18, 2022), <https://www.sfchronicle.com/opinion/openforum/article/Getting-in-to-UC-Berkeley-was-my-dream-Some-16930140.php> [<https://perma.cc/99WS-QNQM>].

implementation of the enrollment cap while its appeal of the lawsuit carried on.

The Berkeley City Council—which had itself been recently involved in litigation with the University over its growth plans—filed an amicus brief to the state supreme court in support of the University, arguing that capping enrollment was not a solution to the challenges between town and gown.<sup>5</sup> California Governor Gavin Newsom filed an amicus brief as well, stating, “We can’t let a lawsuit get in the way of the education and dreams of thousands of students who are our future leaders and innovators.”<sup>6</sup>

The state supreme court, however, was unmoved. It concluded that the lower court’s proposed remedy, to cut enrollment for the upcoming year, was appropriate. The stay request was rejected, and accordingly, the University began preparations to cut its enrollment, just weeks before admissions decisions were expected to be delivered to prospective students.

The case raised an important set of questions about one of California’s landmark pieces of legislation: how was a neighborhood group able to use CEQA—a statute intended to protect the environment—to prevent the top public university in the country from educating more students? And just as importantly, why?

WHILE THE UC BERKELEY ENROLLMENT FIASCO CAPTURED THE ATTENTION OF RESIDENTS UP AND DOWN THE STATE, IT REPRESENTS JUST THE TIP OF THE ICEBERG OF CEQA ABUSE.

CEQA provides for significant citizen input on public projects and establishes important requirements for analysis of environmental impacts of projects. CEQA defines a “project” as follows:

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5. Frances Dinklespiel, *It Once Sued Cal Over Rising Enrollment. Now the Berkeley City Council Will Go to Court to Defend the University*, BERKELEYSIDE (Mar. 3, 2022), <https://www.berkeleyside.org/2022/02/17/berkeley-city-council-opposes-uc-berkeley-enrollment-cap> [https://perma.cc/YJC7-C6BK].
  6. Press Release, Gavin Newsom, Governor of California, Governor Newsom Files Amicus Brief in UC Berkeley Enrollment Case, Arguing for College Access and Affordability 18 (Feb. 18, 2022), <https://www.gov.ca.gov/2022/02/18/governor-newsom-files-amicus-brief-in-uc-berkeley-enrollment-case-arguing-for-college-access-and-affordability/> [https://perma.cc/TU6J-3UTR].

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(a) “Project” means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:

(1) An activity directly undertaken by any public agency including but not limited to public works construction and related activities clearing or grading of land, improvement to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100-65700.

(2) An activity undertaken by a person which is supported in whole or in part through public agency contacts, grants subsidies, or other forms of assistance from one or more public agencies.

(3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.<sup>7</sup>

This definition is, notably, rather broad. CEQA, as a result, applies to virtually all major public and private projects in California. The focus of this piece, however, is in the pathways built into CEQA to allow for private enforcement of the state environmental law. Individuals and organizations who feel that they have been impacted or will be impacted by a project can sue the public agency or developer under CEQA.

The vast majority of CEQA’s impacts are positive, and significant environmental harms across the state have been lessened through its processes. The legislation is frequently cited as an essential tool for advancing goals of environmental justice.<sup>8</sup>

However, it is becoming increasingly apparent that the statute is susceptible to abuse. What was intended to function as a tool of direct

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7. *CEQA Portal Topic Paper*, CEQA 1 (2020), <https://ceqaportal.org/tp/CEQA%20Project%20Description%202020%20Update.pdf> [https://perma.cc/7MUG-8BYQ].

8. Heather Dadasi, *Why CEQA Is a Useful Tool for Environmental Justice Communities in California*, LEGAL PLANET (Feb. 23, 2022), <https://legal-planet.org/2022/02/23/why-ceqa-is-a-useful-tool-for-environmental-justice-communities-in-california/#:~:text=CEQA%20requires%20state%20and%20local,reduce%20or%20eliminate%20environmental%20impacts> [https://perma.cc/3EQT-9V4W].

democracy and accountability has instead become a tool for special interests and individuals to exert veto power over public projects.

Policy makers should take this abuse of one of California's most significant and omnipresent laws seriously. CEQA is routinely weaponized to delay or disrupt major public projects, even projects that will result in new housing or greener infrastructure. Ironically, the state's flagship environmental law at times becomes an instrument to sabotage the state's progress towards its emissions goals.

The misuse and abuse of CEQA undermines the original intent. Too many individuals and organizations are able to weaponize CEQA to obstruct projects when it is in their self-interest, for reasons that need not have any basis in environmental protection.

This dynamic necessitates reform, urgently. The status quo, while to a certain extent politically comfortable, is inhibiting meaningful progress in the state. Recent legislative efforts have nibbled at the edges of CEQA, for example, by exempting certain mobility infrastructure projects and sports stadiums. However, more comprehensive reform is necessary to ensure that California has a strong statewide environmental law that requires essential review and mitigation of environmentally destructive projects without imposing unnecessary and costly obstacles on critical projects. Policymakers ought to pursue a combination of legislative and administrative fixes, both by strategically expanding exemptions to CEQA and by making process adjustments to this legislation. Most fundamentally, CEQA needs to be reshaped to consider the impacts of population growth differently in urban as opposed to wildland settings.

The exercise of considering reforms to CEQA is a precarious balancing act. The need to ensure protections for groups fighting against environmental harm is paramount, as is the need to limit opportunities for litigants to needlessly sabotage the public process. There are lessons to learn from the recent enrollment crisis at UC Berkeley, triggered by CEQA.

#### JE NE CEQA

When the California Supreme Court voted to reject UC Berkeley's stay request, the court was not unanimous. In his dissent joined by Justice Groban, California Supreme Court Associate Justice Goodwin Liu wrote, "California and our broader society stand to lose the contributions of leadership, innovation, and service that would otherwise accrue if several

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thousand students did not have to defer or forgo the benefit of a UC Berkeley education this fall.”<sup>9</sup>

CEQA guidelines mandate that a lead agency should consider impacts to population and housing when considering a project.<sup>10</sup> Lead agencies are asked whether a project would induce substantial growth, both directly and indirectly. The purpose of CEQA, as presented by the Office of Planning & Research, is to:

(1) inform government decisionmakers and the public about the potential environmental effects of proposed activities; (2) identify the ways that environmental damage can be avoided or significantly reduced; (3) prevent significant, avoidable environmental damage by requiring changes in projects, either by the adoption of alternatives or imposition of mitigation measures; and (4) disclose to the public why a project was approved if that project has significant environmental impacts that cannot be mitigated to a less than significant level.<sup>11</sup>

In his dissent, Justice Liu notes that CEQA does not explicitly call for disapproval of a project with a significant environmental impact, nor does it require an alternative that best protects the “environmental status quo.” Rather, it leaves open the opportunity to conclude that the benefits of a project outweigh the environmental damage. Justice Liu argued that the colossal harms to the city and the state that would follow from an enrollment cap were sufficient justification to grant the stay request, while allowing the appeal to be considered by the court.

While the imposition of an enrollment cap seemed novel, in a sense it was also remarkably ordinary. It is common practice for a CEQA remedy to require that “the project” be halted. In this case, however, the “project” itself was enrollment. Imposing an enrollment cap was an unprecedented event. The logic behind it, however, is the same that is applied to CEQA cases that have halted “projects” up and down the state.

Writing for the *Sacramento Bee*, UC Berkeley School of Law Dean Erwin Chemerinsky argued that the decision to cap enrollment represented an unprecedented shift of authority over academic enrollment decisions from school administrators to judges. Dean Chemerinsky wrote, “The practical

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9. *Save Berkeley’s Neighborhoods v. Regents of Univ. of Cal.*, 264 Cal. Rptr. 3d 864 (2020).

10. CAL. CODE REGS. tit. 14, § 15126.2(a), I (2021).

11. *CEQA 101*, GOVERNOR’S OFF. RSCH. & PLAN., [https://opr.ca.gov/ceqa/docs/20210809-CEQA\\_101.pdf](https://opr.ca.gov/ceqa/docs/20210809-CEQA_101.pdf) [<https://perma.cc/348D-8S48>].

effect of the trial court ruling, if left undisturbed, is that any campus building project—even one that provides much-needed housing—can be used as a tool to interfere with public schools' enrollment decisions simply by invoking CEQA."<sup>12</sup>

Central to the UC Berkeley enrollment debate is the question of whether population growth is good or rather an environmental harm in need of mitigation. However, the environmental impacts of population growth vary significantly depending on where that population growth occurs. Population growth in rural, wildland, and even suburban regions may mean expanding development into natural areas, a clear environmental harm and wildfire risk. Population growth and infill housing in urban areas, however, is more likely to have a positive environmental effect, as residents are more likely to be able to get around in less carbon-intensive ways than if they lived in suburban or rural areas. Residents of cities generally have smaller carbon footprints than residents in suburban or rural areas. As UC Davis Law Professor Chris Elmendorf noted in response to the UC Berkeley enrollment decision, "Someone in Berkeley—a city with great public transit, in a temperate climate with minimal heating and cooling costs—is going to have less of an environmental footprint than if they were living elsewhere in California."<sup>13</sup>

CEQA was signed into law in 1970 by Governor Ronald Reagan, motivated by a desire to mitigate the environmental harms of major projects across the state, from dams to freeways.<sup>14</sup> Today, however, CEQA has attracted significant criticism because it is frequently abused to obstruct projects for private, rather than environmental, reasons. The UC Berkeley enrollment issue, where the growth of the state's flagship public university was held hostage by a handful of litigious Berkeley neighbors, is just one recent high-profile example. Across the state, significant public projects, ranging from housing to public transportation to renewable energy have been obstructed, delayed, or outright defeated by lawsuits filed under the

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12. Erwin Chemerinsky, *Court's UC Berkeley Enrollment Freeze Is Incorrect*, SACRAMENTO BEE (Feb. 21, 2021), <https://www.sacbee.com/article258428098.html> [<https://perma.cc/E4Z7-M2S9>].
  13. Shawn Hubler, *California Lawmakers Have Solved Berkeley's Problem. Is CEQA Next?*, N.Y. TIMES (Mar. 15, 2022), <https://www.nytimes.com/2022/03/15/us/berkeley-enrollment.html> [<https://perma.cc/STA4-ZR6A>].
  14. Alastair Bland, *Weakling or Bully? The Battle Over CEQA, the State's Iconic Environmental Law*, CALMATTERS (May 14, 2019), <https://calmatters.org/economy/2019/05/weakling-or-bully-ceqa-environmental-law-california-development-battles/> [<https://perma.cc/L83C-9JS4>].

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terms of CEQA. Further, the mere threat of a CEQA lawsuit often results in similar delays. Unfortunately, the scale of this chilling effect is impossible to quantify, meaning CEQA lawsuits may represent only a small portion of a much larger impact on the state's efforts to address pressing issues.

In California neighborhoods, from Venice Beach to Redwood City, residents have made headlines using CEQA lawsuits to challenge plans to build homeless shelters.<sup>15</sup> Projects can fall apart or be reduced in scale before being approved because of these lawsuits, resulting in fewer housing units and services being provided to those residents in need.

In San Francisco, a CEQA lawsuit led to an injunction that prevented the city from installing bike lanes for four years.<sup>16</sup> Bicycle infrastructure is an essential component of California cities' efforts to incentivize sustainable modes of travel and minimize cyclist deaths due to unsafe road conditions. Opponents used environmental litigation to hold up San Francisco's bicycle plan, arguing that the project must study the environmental impact of bicycle lanes. This argument is environmentally nonsensical and likely to cost lives that could have been saved by safer infrastructure.

#### RESEARCH ANALYZING CEQA LAWSUITS IN THE AGGREGATE REFLECTS THESE ISSUES.

Eighty percent of CEQA lawsuits target "infill" projects, which are generally more productive towards the state's emissions goals, rather than "greenfield" projects, which are more likely to result in environmental harms to undeveloped areas. Further, the vast majority of CEQA lawsuits are filed by litigants with no history of environmental advocacy, such as NIMBYs or business competitors of the project they are challenging.<sup>17</sup> While there ought not be any advocacy prerequisite for litigating against projects

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15. See, e.g., Liam Dillon, *Homeless Shelter Opponents Are Using This Environmental Law in Bid to Block New Housing*, L.A. TIMES (May 15, 2019), <https://www.latimes.com/politics/la-pol-ca-ceqa-homeless-shelter-20190515-story.html> [<https://perma.cc/C4RN-GJLW>].

16. Bryan Goebel, *Cyclists Cheer as Judge Finally Frees San Francisco from Bike Injunction*, STREETS BLOG S.F. (Aug. 7, 2010), <https://sf.streetsblog.org/2010/08/06/cyclists-cheer-as-judge-finally-frees-san-francisco-from-bike-injunction> [<https://perma.cc/92PD-BLE3>].

17. Jennifer Hernandez, David Friedman & Stephanie DeHerrera, *In the Name of the Environment*, HOLLAND & KNIGHT 23 (2015), [https://issuu.com/hollandknight/docs/ceqa\\_litigation\\_abuseissuu?e=16627326/14197714](https://issuu.com/hollandknight/docs/ceqa_litigation_abuseissuu?e=16627326/14197714) [<https://perma.cc/Q2HD-BM2E>].

posing environmental harm, it is deeply concerning that many projects challenged under this law would advance environmental goals.<sup>18</sup>

These CEQA lawsuits have a number of consequences. Some worthy projects are approved at a reduced scale, others are approved only after significant and costly delays, and some die in the process.<sup>19</sup> Only four states have environmental-review processes comparable to California's.<sup>20</sup> It is unclear whether today's reality lives up to the noble legislative goals underpinning CEQA. Just recently, in the case of UC Berkeley, CEQA showcased its potential to do serious, irrevocable harm.

In the aftermath of a uniquely public debacle that cast a spotlight on the misuse of CEQA, there may be renewed political momentum to address the historic environmental legislation's shortcomings.

#### BERKELEY BOUND

When the decision of the California First District Court of Appeal came down, UC Berkeley sent a letter informing applicants of the court's decision. For thousands of students, their admission and their futures hung in the balance.

The University of California was established in 1868, exactly opposite the Golden Gate. A decade later, the town around the university campus was chartered and the City of Berkeley was born. In Berkeley, town truly grew out of gown, but they have grown together since then and will for generations to come.

Today, the City of Berkeley is a bastion of environmentalism and progressive ideals. Berkeley built the first public curb cuts,<sup>21</sup> established one of the nation's first curbside recycling programs,<sup>22</sup> adopted some of the

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18. *Id.*

19. *See, e.g., id.*

20. Gabriel Petek, *Considerations for Governor's Proposals to Address Homelessness*, LEGIS. ANALYST'S OFF. 3 (Feb. 2019), <https://lao.ca.gov/reports/2019/3942/consid-governors-proposals-homelessness-022119.pdf> [<https://perma.cc/XRF9-GYXN>].

21. Cynthia Gorney, *Episode 308: Curb Cuts*, 99% INVISIBLE (Apr. 27, 2021), <https://99percentinvisible.org/episode/curb-cuts> [<https://perma.cc/4V7Q-DJFU>].

22. *Berkeley Curbside Recycling*, ECOLOGY CTR., <https://ecologycenter.org/recycling> [<https://perma.cc/5XC9-ZHS7>].

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most ambitious measures to build new housing to undo the legacy of residential segregation,<sup>23</sup> and more.

Today, the University is an engine of upward mobility for first-generation and low-income Californians. At UC Berkeley, a higher percentage of students in each class are Pell Grant recipients than at any campus in the Ivy League.<sup>24</sup> Californians have access to a world-class education at this flagship public institution and, in recent years, new classes have been more diverse than the prior.<sup>25</sup>

A freeze on UC Berkeley's enrollment would be a shocking disruption in the trajectory of access to higher education in California. A freeze could, and likely would, change the lives of thousands of potential students. For UC Berkeley, the decision would result in significant impacts on the campus's ability to serve students, with over \$50 million in lost tuition. This loss could affect financial aid, teaching, student services, and facilities maintenance.<sup>26</sup> For the City of Berkeley, thousands of young residents who drive the local economy would never arrive. And for California, this freeze would represent a reversal of the progress made in improving access to higher education for residents across the state. These outcomes are not grounded in issues of environmental quality.

#### NOT IN MY BACKYARD

It's true that, as the plaintiffs argued, enrollment growth at UC Berkeley impacts the City of Berkeley in ways that need to be addressed. More

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23. See Nico Savidge, *From Downtown to Single-Family Blocks, Berkeley Eyes Big Zoning Changes*, BERKLEYSIDE (Mar. 18, 2022), <https://www.berkeleyside.org/2022/03/18/berkeley-zoning-housing-downtown-single-family> [https://perma.cc/YNN4-ZYDH].
  24. *Pell Grant Awards as a Peer Metric*, U.C. BERKELEY (May 2013), <https://opa.berkeley.edu/sites/default/files/2011-12PellGrantComparison.pdf> [https://perma.cc/9U57-HXND].
  25. Janet Gilmore, *In a Pandemic Year, UC Berkeley Admits Another Outstanding, More Diverse Class*, BERKELEY NEWS (July 19, 2021), <https://news.berkeley.edu/2021/07/19/in-a-pandemic-year-uc-berkeley-admits-another-outstanding-more-diverse-class> [https://perma.cc/Q8Y4-N6FR].
  26. *UC Berkeley Statement on Court Decision Affecting 2022-23 Academic Year Enrollment*, BERKELEY NEWS (Feb. 14, 2022), <https://news.berkeley.edu/2022/02/14/uc-berkeley-statement-on-court-decision-affecting-2022-23-academic-year-enrollment> [https://perma.cc/CLR4-TVW5].

students means more city residents, which raises the burden on city services, from infrastructure to refuse collection. Perhaps most importantly, an increase in residents raises demand for emergency services, including police and fire services.

This discussion was the focus of earlier CEQA-centered litigation between the University and the City of Berkeley. The University had sought to fold its analysis of its own enrollment growth into the environmental-review documents of a housing project, rather than initiating a complete environmental-impact report for the campus's growth. The city sued the campus, arguing that the campus's moves were an effort to hide the impacts of the campus's significant enrollment growth.<sup>27</sup> This led to successful settlement negotiations—the City of Berkeley sought financial compensation from the University to accommodate the impact of population growth on city services. Between campuses and their host cities, such agreements to address the municipal burden of a growing population have precedent.<sup>28</sup> In the summer of 2021, the city and University announced a historic agreement: the University more than doubled its financial contributions to the city, funding homeless services and public infrastructure projects in the campus area.<sup>29</sup>

The City of Berkeley, however, did not seek a limiting of the University's enrollment.

It was the position of the City Council and this author that the City of Berkeley should not seek to limit enrollment growth but rather work with the campus to plan for the campus community's sustainable growth. An increase in residents creates new needs. But enrollment growth—at least in

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27. Frances Dinkelspiel, *City Sues UC Berkeley for Not Studying Impacts of 30% Student Enrollment Hike*, BERKELEY NEWS (June 17, 2019), <https://www.berkeleyside.org/2019/06/17/city-sues-uc-berkeley-for-not-studying-impacts-of-34-student-enrollment-increase> [https://perma.cc/2GM4-4VB].

28. *See City of Davis, Yolo County and UC Davis Agree to Memorandum of Understanding on Partnership and Growth*, U.C. DAVIS (Sept. 25, 2018), <https://www.ucdavis.edu/news/city-davis-yolo-county-and-uc-davis-agree-memorandum-understanding-partnership-and-growth> [https://perma.cc/U2UW-3R6F].

29. Jesse Arreguín & Rigel Robinson, *Opinion: New Campus Agreement Is an \$80M Win for the City*, BERKLEYSIDE (Aug. 2, 2021), <https://www.berkeleyside.org/2021/08/02/op-ed-new-campus-agreement-is-an-80-million-win-for-the-city> [https://perma.cc/V28F-D4VK].

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the eyes of this city councilmember—is unequivocally, unquestionably, holistically good.<sup>30</sup>

As in so many university towns, in the City of Berkeley, there has been tension between certain long-time residents and new construction for years. Here, this conflict centers on the need for growth and the preservation of neighborhood character. In recent years, this antigrowth movement has earned a name: “Not In My Backyard,” or NIMBY.

In the City of Berkeley, new housing construction, particularly dormitories for students, can be controversial. In the 1970s, the City Council passed a neighborhood preservation ordinance to limit the growth of new construction.<sup>31</sup> Today, individual neighbors and groups such as Save Berkeley Neighborhoods, routinely object to the size or scale of new student-housing projects.

For years, the University has not sufficiently prioritized the development of its own student housing.<sup>32</sup> Fortunately, with new university leadership, that has finally changed. The current Chancellor, Carol Christ, launched her Housing Initiative, seeking to assess all potential sites for development of university housing and, therefore, beginning the building process on each of them.<sup>33</sup>

While homeowners’ property values have certainly benefited from the restricted supply in a hot market, students and tenants have not. No other campus in the UC system houses a smaller share of its student population.

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30. Even as educating more Californians is clear and necessary, the state must have an important conversation about how to maintain quality education at the University of California: though students and their families are increasingly bearing the costs of higher education, per-student spending at the University of California has declined by 21% since 1990. *See Accountability Report 2021*, UNIV. CAL., <https://accountability.universityofcalifornia.edu/2021/chapters/chapter-12.html> [<https://perma.cc/4AEK-NB5A>].
  31. *See* Ben Bartlett & Yelda Bartlett, *Opinion: Berkeley’s Zoning Laws Wall Off Communities of Color, Seniors, Low-Income People and Others*, BERKELEYSIDE (June 13, 2017), <https://www.berkeleyside.org/2017/06/13/opinion-berkeleys-zoning-laws-wall-off-communities-color-seniors-low-income-people-others> [<https://perma.cc/2MUE-G8J3>].
  32. *See* Frances Dinkelspiel, *Why Hasn’t UC Berkeley Built More Student Housing?*, BERKELEYSIDE (May 8, 2022), <https://www.berkeleyside.org/2022/05/08/uc-berkeley-student-housing-building> [<https://perma.cc/C27L-5S6F>].
  33. *See* Office of the Chancellor, *Housing Initiative*, U.C. BERKELEY, <https://chancellor.berkeley.edu/housing-initiative> [<https://perma.cc/8P9Q-Y32C>].

Recent survey data suggests that ten percent of UC Berkeley students experience housing insecurity at some point during their time on campus.<sup>34</sup> The current shortage of student housing in the City of Berkeley results in new residents needing to look further and further from campus to find housing they can afford, often competing with long-time residents. Building new student housing closer to campus is one of the city's most urgent needs to curb the gentrifying effect of the campus community. In fact, building new student housing near campus is an anti-displacement measure.

Deciding to outright limit enrollment at UC Berkeley, the court's decision was an unambiguous victory for the anti-growth movement in the city and across the state. Perhaps most importantly, though, it was a visible reminder of CEQA's potential to hinder progress.

#### THE ROAD TO REFORM

Recent legislative efforts to exempt certain categories of projects with clear environmental benefits from CEQA are a step in the right direction. Signed into law in 2020, SB 288 created exemptions to CEQA for certain transportation projects.<sup>35</sup> SB 866, which creates exemptions for certain student housing projects, was approved in 2022.

Additionally, recent legislation has sought to create specific CEQA exemptions for large-scale projects, such as sports stadiums. The existence of these legislative efforts points towards frustration with the measures that CEQA process frequently imposes on large projects.

However, merely exempting additional categories of projects will not address the structural issues with CEQA. CEQA requires more comprehensive reform to design an effective system of environmental protections—a system with meaningful safeguards for the environment that does not jeopardize projects that create unambiguous public and environmental value.

If policymakers allow the status quo to continue, private actors will continue to abuse the California Environmental Quality Act at the expense of the public. CEQA abuse importantly causes significant delays in important public projects, occasionally kills projects entirely, and spurs an incalculable

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34. Office of Planning & Analysis, *Housing Survey Findings*, U.C. BERKELEY 10 (2017), [https://housing.berkeley.edu/wp-content/uploads/HousingSurvey\\_03022018.pdf](https://housing.berkeley.edu/wp-content/uploads/HousingSurvey_03022018.pdf) [<https://perma.cc/ZT4A-X3VE>] (finding that “10% of all respondents self identified as having experienced homelessness at some point since arriving at UC Berkeley” and “the rate was double for postdocs”).

35. CAL. PUB. RES. CODE. § 21080 (West 2014).

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chilling effect on potential new proposals. Additionally, the uncertainty and unpredictability that current CEQA abuse brings to project timelines has serious ramifications for project financing.

Reforming CEQA would mean political conflict with the law's most significant users, including authentic environmental advocacy organizations, labor unions, and anti-growth homeowner and neighborhood associations.<sup>36</sup> Any proposal to meaningfully reform CEQA would have to tread carefully to navigate these turbulent political waters. Unfortunately, to many, CEQA remains the most effective tool for extracting concessions—environmental or otherwise—from developers and public agencies. As a result, while narrow CEQA exemptions for particular projects have remained popular among state legislators,<sup>37</sup> broader CEQA reform has not.

Subsequent legislative efforts to address CEQA abuse could seek to more broadly exempt projects or streamline CEQA processes for projects that would advance California's housing and climate goals. For example, new infill and mixed-use housing could be guaranteed a smoother approval process if applicants had met certain conditions, such as criteria designed around a project's density, affordability, or level of public transit access.<sup>38</sup> Policymakers should consider whether they should promise a streamlined CEQA review process for proposed housing that contributes to a municipality's Regional Housing Needs Assessment goals.<sup>39</sup> Further, the Governor's Office of Planning & Research (OPR) could support a path forward for broader exemptions from CEQA review for housing by creating a framework for statewide growth management.<sup>40</sup> By developing comprehensive plans and designations to identify "growth areas" and "non-

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36. *See generally* Dan Walters, *Environmental Exemptions Yes, But Reform No*, CALMATTERS (Sept. 13, 2020), <https://calmatters.org/commentary/2020/09/california-environmental-quality-act-legislators-reform> [<https://perma.cc/3C3H-PXNU>].

37. *See, e.g.*, Michael Hiltzik, *California Special Exemption for NFL Stadium Not So Special*, L.A. TIMES (Sept. 13, 2011), <https://www.latimes.com/business/la-xpm-2011-sep-13-la-fi-hiltzik-20110914-story.html> [<https://perma.cc/L25P-Y5B2>].

38. *See* Elisa Barbour & Michael Teitz, *CEQA Reform: Issues and Options*, PUB. POL'Y INST. CAL. (Apr. 6, 2005), [https://www.ppic.org/wp-content/uploads/content/pubs/op/OP\\_405EBOP.pdf](https://www.ppic.org/wp-content/uploads/content/pubs/op/OP_405EBOP.pdf) [<https://perma.cc/WW5W-5PWR>].

39. *Id.* at 40.

40. *Id.*

growth areas,” policymakers would ensure that CEQA exemptions could be more carefully applied to infill housing projects, which are likely to reduce emissions.<sup>41</sup>

Municipalities’ housing element updates and other long-range planning processes may already include much of the important analysis necessary to design such frameworks. CEQA streamlining or exemption efforts could be designed to parallel or supplement existing local planning processes. For example, a CEQA exemption could be designed to apply to new housing developments that meet certain criteria in Priority Development Areas. Similarly, strict and thorough CEQA analysis could be considered mandatory for any new construction in any and all of Cal Fire’s Very High Fire Hazard Severity Zones, where new development is likely to carry clear environmental risks.

These sorts of considerations have been previously pondered. As part of a 1998 revision to CEQA, the Office of Planning & Research established a narrowly tailored infill development exemption called Class 32.<sup>42</sup> This exemption, however, has been sorely underutilized. OPR staff have indicated that this may be partially due to a lack of knowledge of the exemption and how people can use it to plan more effectively.<sup>43</sup> Certain municipalities, such as Oakland, use it routinely. There is a larger role for OPR to play, ensuring that existing streamlining opportunities are utilized and considering further administrative revisions to exemptions designed around infill housing. The Class 32 exemption should be updated and expanded to reflect current needs and worsening housing and climate crises.

Most fundamentally, CEQA must evolve to treat population growth differently in urban and rural contexts and to distinguish between infill and greenfield projects. As previously demonstrated, this objective could be achieved in several ways. While such an undertaking could require a significant retooling of the law, the shortcomings of CEQA today suggest that it is necessary.

Equally as important are various procedural adjustments to improve the fairness of CEQA process for all actors. These procedural adjustments

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41. *Id.* at 41.

42. See Casey Shorrock Smith, *Streamlined Yet Underutilized: CEQA’s Class 32 Urban Infill Exemption*, RAMY MOOSE MANLEY LLP, <https://www.rmmenvirolaw.com/streamlined-yet-underutilized-ceqas-class-32-urban-infill-exemption> [<https://perma.cc/X3MZ-9CWG>].

43. *Id.*

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should target repeat offenders, improve transparency in the public process, and disincentivize frivolous or groundless CEQA lawsuits.

For example, legislation that explores procedural adjustments to CEQA could consider establishing limits on duplicative lawsuits challenging projects that have already completed CEQA process. Such legislation ought, broadly, to identify adjustments that could minimize delays of the CEQA process. Existing law establishes goals of CEQA lawsuits being wrapped up within nine months, though these are seldom enforced. Financing resources to enforce these existing parameters may bring meaningful relief to the process.<sup>44</sup>

Additionally, new legislation could devise more creative ways to make existing CEQA timelines enforceable. AB 2656, for example, which was until recently being considered by the legislature, sought to make CEQA timelines enforceable through the Housing Accountability Act for projects that meet certain “good for development” criteria. Efforts such as this are an important step in the right direction to improve CEQA process and limit its abuse.

#### CHECKS AND BALANCES

The California legislature has shown it can be responsive to CEQA’s failings.

When the California Supreme Court rejected UC Berkeley’s stay request, the University began making preparations to implement the court’s order. However, in Sacramento, Berkeley’s own State Senator Nancy Skinner was devising a solution.

On Friday, March 11th, Skinner—a UC Berkeley graduate, former Berkeley City Councilmember, and current Chair of the State Senate Budget Committee—introduced SB 118, a bill that sought to remedy the UC Berkeley enrollment crisis.<sup>45</sup> California state law requires that a law be in print and published on the Internet for at least seventy-two hours before it

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44. See Ron de Arakal, Opinion, *Op-Ed: Five Ways to Reform California’s Landmark Environmental Law Without Ruining the Earth or the Middle Class*, L.A. TIMES (Sept. 14, 2017, 5:00 AM PT), <https://www.latimes.com/opinion/op-ed/la-oe-de-arakal-ceqa-reform-20170914-story.html> [https://perma.cc/A4C6-AURA].

45. Press Release, Nancy Skinner, Sen., Cal. State S., SB 118, Budget Bill to Enable CA Student Enrollment to Proceed, Passes Legislature Unanimously (Mar. 14, 2022, 6:30 PM), <https://sd09.senate.ca.gov/news/20220314-sb-118-budget-bill-enable-ca-student-enrollment-proceed-passes-legislature-unanimously> [https://perma.cc/23UR-CM8S].

can be voted on by both chambers.<sup>46</sup> On the morning of Monday, March 14th, SB 118 was passed unanimously by the Senate and the Assembly.<sup>47</sup> That afternoon, it was signed into law by Governor Newsom. It was a political frenzy, and an important moment for California's democratic process. "It was never the intent of the legislature for students to be viewed as environmental pollutants," said Senator Skinner as the bill moved forward.<sup>48</sup>

With its passage, SB 118 resolved the immediate enrollment crisis at UC Berkeley. The legislation, narrowly tailored to respond to the fiasco at hand, rendered unenforceable "any current court injunction that orders a freeze or a reduction of student enrollment, including the injunction affecting UC Berkeley."<sup>49</sup> While the legislation maintained the need for CEQA review for campus expansions, including for long-range development plans or new campuses, it explicitly clarified that "enrollment or changes in enrollment, by themselves, do not constitute a project."<sup>50</sup>

A few weeks later, admissions decisions were delivered, and a full class was enrolled at UC Berkeley for the fall 2022 semester. If not for the swift legislative override, several thousand students would not be at Berkeley.

A number of conclusions can be drawn from this moment. First, Senator Nancy Skinner is a powerhouse legislator. Second, Californian parents are a powerful constituency and vocal lobby that can mobilize legislative action against harmful decisions. Third, and most importantly, CEQA is in need of reform—reform that is genuinely achievable.

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46. Chris Micheli, *'Final Form' and the 72-Hour Rule*, CAPITOL WKLY. (June 16, 2017), <https://capitolweekly.net/final-form-prop-54-72-hour-rule/> [https://perma.cc/L3LQ-TH25].

47. Skinner, *supra* note 45; Press Release, U.C. Off. President, UC Statement on Passage of Legislation Protecting Enrollment Spots for Prospective UC Berkeley Students (Mar. 14, 2022), <https://www.universityofcalifornia.edu/press-room/uc-statement-passage-legislation-protecting-enrollment-spots-prospective-uc-berkeley> [https://perma.cc/3EG2-LX6T].

48. Press Release, Nancy Skinner, Sen., Cal. State S., UC Berkeley May Avoid Enrollment Freeze if New Legislation Passes Quickly (Mar. 12, 2022), <https://sd09.senate.ca.gov/news/20220312-uc-berkeley-may-avoid-enrollment-freeze-if-new-legislation-quickly-passes> [https://perma.cc/H2D5-WWAN].

49. Skinner, *supra* note 45.

50. S.B. 118, 2021-22 Leg., Reg. Sess. (Cal. 2022).

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While the UC Berkeley enrollment crisis was ultimately resolved, it was a reflection of deeper issues with the law. If left unattended to, these issues will continue to create obstacles for critical public projects across the state—many of which we need to protect our environment.

## CONCLUSION

In the UC Berkeley enrollment case, abuse of CEQA nearly resulted in an immense impact on the state of California and the futures of thousands of young people. As the flagship public university of the state, UC Berkeley has a duty to meet the needs of each new generation. The tensions between town and gown in Berkeley are paralleled in cities across the country. When growth raises challenges, cities and campuses should work together to embrace new residents and plan for sustainable growth, rather than seeking to limit new residents and rob the next generation of academic opportunities. In the enclaves where the urge to oppose new development with a cry of “Not In My Backyard” is strongest, city leaders must have the courage to build the infill housing that is necessary to address the housing and climate crises. Cities must learn to say yes.

At the same time, California must recognize that good laws that are being exploited to obstruct necessary changes have to be rewired, lest they become instruments of regression. CEQA, a critical safeguard against environmental harms, too often functions as an obstacle to environmental progress. The climate crisis demands not only that we say no to environmentally harmful projects, but also that we enthusiastically say yes to projects that will improve our energy systems, reduce our dependence on automobiles, and house our residents more sustainably. Though CEQA was enacted with noble intentions, it is time for lawmakers to open their eyes to the present reality. The law in its current form can too easily be weaponized to impede projects that are necessary to advance real environmental quality.

Through a series of legislative and administrative reforms, CEQA can live up to its mission. Expanded considerations of where population growth can actually be an environmental—and communal—benefit can help ensure that CEQA lawsuits target those projects that actually merit mitigation. And process adjustments can ensure predictability for municipalities and project applicants, while also reducing the impacts of frivolous, dishonest, or even malicious lawsuits.

Without reforms, the UC Berkeley enrollment crisis will have been but a canary in a coal mine. We must hold on to the original intent of our environmental laws but acknowledge where they have fallen short. CEQA and the legislature must adapt to respond to the urgency and severity of the

housing and climate crises facing California today. The future of the state depends on it.