Lockey, Heather@CNRA

From: Nick Cammarota <ncammarota@cbia.org>
Sent: Thursday, March 15, 2018 3:25 PM
To: CEQA Guidelines@CNRA
Subject: Comments on Proposed Updates to the CEQA Guidelines
Attachments: Coments on Proposed Updates to the CEQA Guidelines 31518.pdf

Chris:

Please find our comments attached. Feel free to contact me if I can be helpful.

Many thanks.

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SOUTHERN CALIFORNIA LEADERSHIP COUNCIL

VIA EMAIL: CEQA.Guidelines@resources.ca.gov

March 15, 2018

Christopher Calfee
Deputy Secretary and General Counsel
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

RE: Comments on Proposed Updates to the CEQA Guidelines

Dear Mr. Calfee:

On behalf of the above-mentioned organizations (Coalition), thank you for providing us with the opportunity to comment on the Proposed Updates to the CEQA Guidelines (Updates). These Updates address a myriad of complex topics and we appreciate the substantial time and energy that was put into drafting the Updates and soliciting feedback from the Coalition and other stakeholders.

In this letter, we approach our comments with fundamental purpose of the CEQA Guidelines in mind: to make the CEQA process comprehensible to those who administer it, to those subject to it, and to those for whose benefit it exists. To that end, we focus our comments only on provisions that we believe could use some further clarification, strengthening or redaction, as born out of the nearly 45 years of experience that members of the Coalition have with respect to CEQA compliance. On the provisions on which we are silent, we both appreciate and commend the Agency's work done there and look forward to engaging with you and other stakeholders as the iterative process of finalizing the Updates continues.

In this letter, our comments are divided into three parts: (1) Comments on the text of the Guidelines; (2) Comments on the Standardized Regulatory Impact Assessment; and (3) Comments regarding the *Technical Advisory on Evaluating Transportation Impacts in CEQA* (November 2017) (TA).

I. COMMENTS ON TEXT OF THE GUIDELINES

Guideline sections 15064 and 15064.7: Using Regulatory Standards in CEQA

As drafted, it appears that the Updates will substantially complicate the use of adopted thresholds. The Updates do this by taking evidentiary requirements that apply to the *adoption* of thresholds and extending

those same standards to the *use* of thresholds, even when there is no fair argument or evidence presented contrary to the threshold.[1]

Specifically, as applied, the Updates to section 15064 would require every use of a threshold in an initial study to be explained. That substantially expands the work required to complete initial studies. For example, in addition to determining whether a project meets an adopted air quality threshold (such thresholds often are adopted by regional air districts with subject matter expertise), the initial study would need to provide substantial evidence supporting use of an air quality threshold in the first instance – in effect, a short form re-do of what the air district did when it adopted the threshold.

This goes well beyond the case law cited as the basis of the amendment, which said that, notwithstanding a threshold, an agency must consider any fair argument of impact. (See, *Amador* at 1109.) Therefore, we request that the second sentence of section 15064(b)(2) be deleted.

The Updates to section 15064.7 raise the same issue as they again apply the same standards that agencies must meet when they adopt thresholds to the subsequent use of those thresholds. There is no reason to require agencies to re-do their process and evaluation each time a threshold is used. That is contrary to the purpose of thresholds. Therefore, we request that the references in section 15064.7 to making these standards apply when an agency is "using" a threshold be deleted. Specifically, we request the deletion of "or using" in subdivision (c) and the third sentence of subdivision (d).

Also with respect to the third sentence of subsection (d) in section 15064.7, we request that "reduce" be used in lieu of "avoid" (i.e., "… reduce project impacts…to a less-than-significant level….") in order to improve clarity.

As to subsection (d)(1) of section 15064.7, we request that the list of qualifying requirements also include standards that are set in statute or guidance documents of agencies with subject matter expertise.

Finally, as to subsection (d)(2) of section 15064.7, we note that some standards, such as building codes, are adopted principally for health and safety purposes, not for the purpose of environmental protection. However, building codes address an environmental effect caused by projects; e.g., energy consumption and corresponding emissions. (See, *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912.) Inclusion of the subsection (d)(2) requirement would arguably eliminate the use of building codes as relevant environmental standards, even though such codes have resulted in an almost 70% increase in the stringency of energy efficiency since 2002. We think it is better to focus on environmental effects, rather than the ostensible purpose or intent of a particular regulatory standard. Because the criteria of subsection (d)(2) would be adequately covered by subsection (d)(3), we request that subsection (d)(2) be deleted.

<u>Guideline 15152. Clarifying Rules on Tiering</u>

We are concerned that the Updates in subsection (h) constrain the options and flexibility currently built into CEQA with respect to the use of tiering. The proposed third sentence of subsection (h) states that, where other methods for streamlining environmental review are more specific, those more specific provisions *shall* apply, thereby seemingly eliminating other tiering tools as an option. However, as

[1] The primary case cited in support of these amendments is *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099 *(Amador)*, a case addressing significance determinations in an EIR. However, there is already a statutory provision and a Guideline requiring a brief explanation for EIR significance conclusions (and these are cited in *Amador*, 116 Cal.App.4th at 1111), so there is no need to add anything to the Guidelines to reflect the *Amador* case.

recognized in the proposed fourth sentence of subsection (h), where multiple streamlining methods are applicable, lead agencies have the discretion to select the preferred streamlining method(s). Therefore, in order to avoid internal tension within subsection (h), we recommend that the third sentence of subsection (h) – beginning, "Where other methods …" – be deleted.

Guideline 15301. Existing Facilities

We recommend that *North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94 be added to the authority citations for this section, as this case further supports the language in the Guideline.

Appendix G Checklist

Aesthetics

In order to minimize potential ambiguity, we recommend that question c) be revised as follows to improve clarity:

> c) In non-urbanized areas, s~~S~~ubstantially degrade the existing visual character or quality of public views of the site and its surroundings? (Public views are those that are experienced from a publicly accessible vantage point.) If the project is in an urbanized area, would the project conflict with applicable zoning and other regulations governing scenic quality?

Air Quality

With respect to the proposed Updates to question d), we request that the reference to "or dust" be removed as the term "dust" – in the air quality setting – largely is redundant of the regulated criteria pollutant referred to as "particulate matter." The impacts of a project's particulate matter emissions already are covered by questions a), b), and c) of the Appendix G checklist. As such, it does not seem appropriate to characterize it again as some "other" emission in question d).

Biological Resources

With respect to question c), project proponents, practitioners and lead agencies are familiar with the definition of wetlands, as contained in Section 404 of the Clean Water Act, and know how to apply it in the CEQA context. We believe that it would cause confusion, uncertainty and litigation to delete the reference to that statute. In addition, it would be helpful to specify that the definition in state law of wetlands is contained in the Porter Cologne Water Quality Act. Therefore, we request that question c) be revised as follows:

> c) Have a substantial adverse effect on state wetlands as defined in the Porter Cologne Water Quality Act or federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?

Hydrology and Water Quality

We request that question b) be revised to track more closely the actual language contained in the Sustainable Groundwater Management Act, as follows:

b) Substantially deplete groundwater supplies or interfere substantially with groundwater recharge such that the project would impede the sustainable yield of the local groundwater basin ~~may impede sustainable groundwater management of the basin~~ (e.g., the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted)?

In question (c)(iii), we also request that the "or provide substantial additional sources of polluted runoff" verbiage be deleted because that potential impact is already captured in the new addition to question a), which asks whether the project would "otherwise substantially degrade surface or ground water quality".

Land Use and Planning

We object to the elimination of "applicable" from question b). It is well established in case law that inapplicable plans, such as draft plans, are not relevant to project-specific CEQA analysis. (See, e.g., *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134.) And, the proposed deletion of that verbiage is likely to result in a flurry of litigation over a universe of inapplicable plans that is large and undefined.

We relatedly request that the verbiage specifying that applicable plans are those "of an agency with jurisdiction over the project" be retained because deleting it will be interpreted to mean that, in addition to those agencies with jurisdiction over the project, the plans, policies or regulations of even foreign governments, among others, would need to be considered. This would expand the scope of CEQA analysis beyond the bounds of practicality and common sense. For example, the proposed change would facilitate arguments from project opponents that the general plan policies of a completely different jurisdiction in a completely different part of California are relevant to the environmental analysis of a project before a lead agency. This is an absurd result. The CEQA Guidelines must continue to recognize and require that there be some nexus between the planning framework considered in CEQA and the project undergoing environmental review.

Transportation

With respect to question a), we request that the "applicable" qualifier be retained. (See related discussion in "Land Use and Planning" immediately above.) This maintains some predictability and rationality to the environmental review and planning processes.

Utilities and Service Systems

With respect to question b), this provision imports and extends the requirements of the water supply assessment and verification statutes to all CEQA analysis, including that associated with initial studies. (See, Wat. Code § 10910; Gov. Code § 66473.7.) However, those laws only apply to projects of a certain size – projects defined in Water Code section 10912. We relatedly did not find a water supply requirement that includes normal, dry and multiple dry years in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412. While it is mentioned in some cases, those cases address urban water management plan law, not CEQA.

Adding "reasonably foreseeable future development" to question b) also is confusing and is inconsistent with the proposed amendments to section 15155. "Future development" to the project applicant community means all future projects in the jurisdiction of the lead agency (and potentially other agencies) – a universe far beyond the project that is the subject of the application. Historically, what is "reasonably foreseeable" only applies to a cumulative impacts analysis, which comes into play after a lead agency has

determined to prepare an EIR. (See, Guideline section 15130.) Therefore, we believe that this level of detail is inappropriate at the initial study checklist stage and request that it be deleted.

Additionally, the language of question b) focuses on future development rather than impacts. In *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 434, the California Supreme Court stated that the "ultimate question under CEQA is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable *impacts* of water supply to the project." (Emphasis added.) A focus on impacts rather than development projects is also consistent with section 15155.

For these reasons, we believe the Updates to question b) are inappropriate for the initial study checklist since the information could only be known after a water supply analysis was produced for the project. Therefore, we request that the proposed Updates to question b) be eliminated.

Wildfire

To begin, SB 1241 is limited to projects located *on* lands classified as state responsibility areas or very high fire severity zones. (See, Public Resources Code section 21083.01.) Therefore, we request that the use of "or near" verbiage in the introductory clause be eliminated.

Additionally, with respect to question a), a standard of "substantially" impair should be set forth, so that insignificant impairments (e.g., hairline cracks in road pavement, etc.) that do not affect a response or evacuation would not trigger a significant impact.

Therefore, we request the following:

a) Substantially impair ~~Impair~~ an adopted emergency response plan or emergency evacuation plan?

Of note, new development has a track record of *preventing* the spread of wildfires. This is due largely to new fire safe building codes, defensible space requirements, and indoor fire sprinklers, among others things. Some of the fire prevention measures used by new development may be found at: http://www.fire.ca.gov/fire_prevention/fire_prevention_wildland_codes.php

As noted above, the prevention of wildfires – and the prevention of the greenhouse gas emissions they cause - is a beneficial impact on the environment, not an adverse impact. Indeed, new housing being built in California is the model to follow for protecting against wildfires. Numerous examples of the success of this kind of fire protection were featured in every major newspaper in the state including the LA Times, the San Diego Union Tribune, the Sacramento Bee, and the Orange County Register. Copies of these articles were previously submitted to OPR and attached to our Coalition's comment letter on the previous version of the Proposed Preliminary Draft of these Guidelines and are incorporated herein by this reference.

The recent case of *Clews Land and Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161 (*Clews*), validated the approach of defensible space (brush management), incorporated fire-resistant materials, interior sprinklers and tempered glass – all part of applicable fire codes – and found that as a result, the project would not "expose people or structures to a significant risk of loss, injury or death involving wildland fires." (*Clews,* at 174.)

With respect to question c), roads, fuel breaks and emergency water sources are measures to mitigate the impacts of wildfires and should not be considered as potential significant impacts of a project that may cause fires. In, *Clews*, the Court upheld the following finding of mitigation measures that reduced the

project's impacts to a less-than-significant level: "City staff identified several project design features that *reduced* the potential for fire hazard impacts, including fire-resistant building materials, brush removal, a *new water line and fire hydrant serving the project site*, and an annually reviewed evacuation plan." (*Clews*, at 175. Emphasis added.) Roads and fuel breaks (brush removal) are also used a defensible space. Fire prevention and management strategies/practices should not be an indicator of a significant impact.

Therefore, we request the following revision:

c) Require the installation or maintenance of associated infrastructure (such as ~~roads, fuel breaks, emergency water sources,~~ power lines or other utilities) that may exacerbate fire risk or that may result in temporary or ongoing impacts to the environment?

Guideline 15234. Remedies and Remand

As an initial matter, we support the intent of adding guidance relating to remands. With some modification, this Guideline can bring much needed clarity to an area of CEQA often misunderstood or misapplied.

With respect to subdivision (c), we believe the language at the end of the sentence goes beyond statutory and case law by suggesting that an agency may proceed with a project or activities during remand *only* in instances where the environment will ostensibly be given a greater level of protection if the project is allowed to remain operative. This language may improperly interfere with the judicial branch's exercise of its equitable powers and is considerably more restrictive on the judiciary's equitable powers than Public Resources Code section 21168.9. Although the circumstances identified may be a factor in a particular court's remedial order in a specific case, it is not a precondition for a court to remand a matter while leaving project approvals in place or practical effect.

Therefore, we request that subdivision (c) be revised to read:

> (c) An agency may also proceed with a project, or individual project activities, during the remand period where the court has exercised its equitable discretion to leave project approvals in place or in practical effect during the period ~~because the environment will be given a greater level of protection if the project is allowed to remain operative than if it were inoperative during that period~~**.**

Subdivision (d) also is confusing. Res judicata is an important rule of law. Consideration of issues that were raised, or that could have been raised, in the litigation leading to the prior judgment would undermine the finality of that judgment and is barred by principles of res judicata or collateral estoppel. "Res judicata bars the litigation not only of issues that were actually litigated but also issues that could have been litigated." (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 324.)

Yet, subdivision (d) and the Explanation of Proposed Section 15234 seems to conflict with res judicata principles by allowing additional environmental review of those portions of an environmental document that a court found complies with CEQA. While *Silverado Modjeska Recreation and Parks Dist. v. County of Orange* (2011) 197 Cal.App.4th 282 discusses res judicata, it does not appear to authorize a reopening of issues under the principles of res judicata.

To the extent that *Silverado* discusses new information, it is not a part of the analysis of res judicata but is instead a question of whether there is a need for a subsequent or supplemental EIR or re-notification. The court in *Silverado* did not find that there was new information requiring any of these, whether pursuant to

section 21166 or section 21092.1 of the Public Resources Code. We believe section 15234(d) would avoid this confusion if it was modified to read:

> (d) As to those portions of an environmental document that a court finds to comply with CEQA, additional environmental review shall ~~only~~ not be required ~~as required~~ by the court consistent with principles of res judicata.

Guideline 15126.2. Analysis of Energy Impacts

We believe that it would be helpful – and consistent with the operation of CEQA – to slightly restructure the first full sentence of subdivision (b) in two ways.

First, the syntax of the sentence seems to require analysis of energy use *after* determining that the project may result in significant environmental effects. To enhance consistency with CEQA, we request that the organization of the sentence be re-structured to first require the analysis of energy use and, if there is a significant impact (due to wasteful, inefficient, or unnecessary energy use), then consider mitigation.

Second, subdivision (b) provides that the EIR "shall…mitigate…" a project's energy use. CEQA, however, does not establish an absolute mitigation requirement but limits mitigation to what is feasible (among other limitations) – and, even if there remain significant impacts, a statement of overriding considerations may be made. Some acknowledgement of these limits should be made in subdivision (b).

Therefore, we request that the second sentence of subdivision (b) be modified as follows:

> If, after analyzing the project's energy use the project may result in significant environmental effects due to wasteful, inefficient, or unnecessary consumption of energy, the EIR shall ~~analyze and~~ mitigate that energy use consistent with Section 15126.4.

Guideline 15064.3. Analyzing Transportation Impacts

It is now common for projects to take decades, rather than years, to get through the land use entitlement process in California. Therefore, in developing VMT-related mitigation, projects should be encouraged to use bike lanes, car-pooling, ride-sharing or community shuttles to and from existing *and* planned major transit stops. To encourage these VMT mitigation measures, the Guideline should include reference to *planned* major transit stops and *planned* high quality transit corridors. This is consistent with the definition of transit priority area in subsection (a)(7) of section 21099 of the Public Resources Code. Moreover, section 15125 proposes to include "conditions expected when the project becomes operational, that are supported by substantial evidence" in the definition of existing conditions. For these reasons, we believe proposed subsection (b)(1) should be revised to refer to "planned" major transit stops and high-quality transit corridors, rather than only existing transit facilities.

Additionally, as to projects locating within one-half mile of such transit facilities, the modifier "generally" should be deleted from the presumption of a less than significant impact as it is duplicative of the very nature of a "presumption" and, therefore, unnecessary.

Similarly, "existing conditions" in the third sentence of subsection (b)(1) should be replaced with "baseline conditions", in order to allow for consideration of projected future conditions that are supported by substantial evidence in the record. (See, Text of Proposed Amendments to Section 15125.)

In light of the above, we request that subsection (b)(1) be modified as follows:

> Land Use Projects. Vehicle miles traveled exceeding an applicable threshold of significance may indicate a significant impact. ~~Generally, p~~Projects within one-half mile of either an existing or planned major transit stop or a stop along an existing or planned high quality transit corridor should be presumed to cause a less than significant transportation impact. Projects that decrease vehicle miles traveled in the project area compared to ~~existing conditions~~ baseline should be considered to have a less than significant transportation impact.

These changes incentivize projects to pursue viable VMT-related mitigation, in lieu of simply making a statement of overriding considerations, which seems contrary to the purpose of this proposal.

Additionally, subsection (b)(3), Qualitative Analysis, addresses the analysis of construction traffic and states that "For many projects, a qualitative analysis of construction traffic may be appropriate." This statement implies that a *quantitative* analysis of construction traffic is appropriate for all other projects. Preliminarily, this is the only reference to the analysis of construction-related VMT in the proposed Guideline or the TA – no further guidance on the subject is provided. Moreover, the requirement to include *any* VMT analysis of construction traffic beyond that analysis already required in connection with air quality and greenhouse gas emissions does not further SB 743, which required the Resources Agency to develop a different way to measure transportation impacts that would to lead to fewer GHG emissions, more transportation alternatives, facilitate infill development, and result in a new method of transportation analysis that is simpler and less costly to perform.[2] As noted, construction traffic-related GHG emissions are already considered in separate analyses, and, unlike the vehicle trips generated by land use projects, analysis of VMT associated with construction traffic would not lead to more transportation alternatives, would not facilitate infill development, and would not be simpler and less costly to perform.

For these reasons, we recommend that the referenced sentence be deleted. Alternatively, we recommend that the sentence be revised as follows:

> For ~~many~~ all projects, a qualitative analysis of construction traffic shall ~~may~~ be appropriate

It is our understanding that the implementation deadline of July 1, 2019 included in subsection (c), Applicability, was a "typographical error" and that the correct date is January 1, 2020, as presented in the November 2017 text released by OPR. Please confirm the January 1, 2020 date is correct and, if not, we strongly recommend that the date be revised to January 1, 2020, consistent with OPR's recommendation.

Finally, as set forth below, because this new Guideline will actually increase the cost of all housing which results in increased, not decreased VMT and greenhouse gas emissions, we believe the Guideline would be more effective and less costly by limiting the new Guideline to transit priority areas:

> (c) Applicability.

[2] Notice of Proposed Rulemaking, California Natural Resources Agency, January 26, 2018, p. 8.

> The provisions of this section shall apply prospectively as described in section 15007. A lead agency may elect to be governed by the provisions of this section immediately. Beginning on ~~July 1, 2019~~ January 1, 2020, the provisions of this section shall apply in transit priority areas only~~statewide~~.

Guideline 15155. Water Supply Analysis in CEQA

As to proposed subsection (f)(2), we are concerned that the use of the term "life" in the proposed amendment will cause confusion and believe the term generally is ambiguous. Even amongst our Coalition, some viewed it as simply the time it takes to reach an approval or denial. While the Description of Proposed Amendments to Section 15155 sheds light on the meaning, lead agencies, environmental consultants and project applicants do not typically look to the legislative history of the Guidelines to apply the language. We would suggest that the language from the explanation be incorporated into section 15155 so that there is an understanding that the analysis should be looking to the time it takes to build and occupy all phases of the project. Therefore, we recommend the following:

> (f)(2) An analysis of the reasonably foreseeable environmental impacts of supplying water ~~throughout the life~~ until all phases of the project are built and occupied.

We also request that the last sentence of the Description of the Proposed Amendments to Section 15155(f)(4) be deleted since it does not describe any language in subsection (f)(4).

Guideline 15064.4. Analyzing Impacts from Greenhouse Gas Emissions

Consistent with *Association of Irritated Residents v. Kern County Board of Supervisors* (2017) 17 Cal.App.5th 708, the following sentence should be added at the end of subsection (b)(3):

"Project-related greenhouse gas emissions resulting from sources subject to the cap-and-trade program shall not be considered when determining whether the project-related emissions are significant."

Guideline 15126.2. Consideration of Significant Effects and Hazards in the CEQA Guidelines

First, as the Background acknowledges and the California Supreme Court in *CBIA v. BAAQMD* (2015) 62 Cal.4th 369 (*CBIA*) held, "agencies subject to CEQA generally are not required to analyze the impact of existing environmental conditions on a project's future users or residents." (*CBIA* at 377.) This general rule should be included in the text of section 15126.2 to accurately capture the Court's decision. Inclusion of the general rule will also provide context to the exception that is currently contained in the Updates.

Second, the Court in the *CBIA* decision upheld the following language currently contained in section 15126.2(a):

> The EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected.... Similarly, the EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas.

The Court, in upholding these two sentences, qualified their validity by stating that they are only "valid to the extent they call for evaluating a project's potentially significant exacerbating effects on existing environmental hazards." *CBIA* at 388. Following *CBIA v. BAAQMD,* the court in *Clews Land and Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, found that even in wildfire risk areas, the general rule of CEQA that considers the project's impacts on the existing environment is applicable. (See, *Clews* at 193-194.) For these reasons, we believe that the statement of the general rule adopted by the Supreme Court in *CBIA v. BAAQMD* should also be incorporated into the text of section 15126.2.

Third, we believe that the reference to *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal. 4th 435, 455, in the Explanation of Proposed Amendments to Section 15126.2(a), ("so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible") should be removed. The reference creates the impression that any land use restriction or regulation is valid, provided it bears a reasonable relationship to the public welfare. The quotation ignores many other statutory provisions that restrict the police power. The citation to Section 7, Article XI of the California Constitution should be sufficient authority.

Finally, we think the Authority for the changes to this Guideline should reference *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal. 4th 369.

Therefore, we believe the text of section 15126.2 should be modified as follows:

> The Significant Environmental Effects of the Proposed Project. An EIR shall identify and focus on the significant ~~environmental~~ effects of the proposed project on the environment. In assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or where no notice of preparation is published, at the time environmental analysis is commenced. Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects. The discussion should include relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human use of the land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resource base such as water, historical resources, scenic quality, and public services. In general, CEQA does not require an analysis of the impact of existing environmental conditions on a project's future users or residents. However, if a project has potentially significant exacerbating effects on existing environmental hazards, the ~~The~~ EIR shall also analyze any significant environmental effects the project might cause or risk exacerbating by bringing development and people into the area affected. For example~~, an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there. Similarly~~, the EIR should evaluate any potentially significant direct, indirect or cumulative environmental impacts of locating development in ~~other~~ areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas), including both short-term and long-term

> conditions, as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas.

Guideline 15125. Baseline

We are concerned that the second sentence of subsection (a)(1) may be interpreted to require a lead agency to choose a baseline comprised of *either* historic conditions or conditions expected when the project becomes operational, not both. This seems to run contrary to the assumption upon which subsection (a)(2) is based and may also be contrary to the principle that "[t]he public and decision makers are entitled to the most accurate information on project impacts practically possible, and the choice of a baseline must reflect that goal". (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 455.) We request, therefore, the following modification to subsection (a)(1):

> Where existing conditions change or fluctuate over time, and where necessary to provide the most accurate picture practically possible of the project's impacts, a lead agency may define existing conditions by referencing historic conditions, or conditions expected when the project becomes operational, or both, that are supported with substantial evidence.

Additionally, *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 326, made a distinction that should be included in the Updates to maintain accuracy: CEQA's rules relating to the existing conditions baseline do not apply when agency action involves modification of a project previously evaluated under CEQA. Therefore, we request that subsection (a)(3) be modified as follows:

> (3) A lead agency may not rely on hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans, as the baseline, unless the project was previously evaluated under CEQA and is undergoing additional environmental review pursuant to sections 15162 or Public Resources Code section 21166.

Finally, we believe that *Association of Irritated Residents v. Kern County Bd. Of Supervisors* (2017) 17 Cal.App.5th 708, supports section 15125 and should be included in the authority cited.

Guideline 15126.4. Deferral of Mitigation Details

The Explanation of Proposed Amendments acknowledges that the adoption of specific performance standards is an alternative to listing possible mitigation measures, i.e., that section 15126.4(a)(1)(B)(2) does not additionally require meeting the requirements of section 15126.4(a)(1)(B)(3).

> Further, OPR proposes to clarify that when deferring the specifics of mitigation, the lead agency should either provide a list of possible mitigation measures, or adopt specific performance standards. …Alternatively, the lead agency may adopt performance standards in the environmental document….
> (Explanation of Proposed Amendments, p. 99).

We agree with this analysis of the case law and request that the second sentence of subsection (a)(1)(B) be modified as follows to match the stated intent of the Updates:

> The specific details of a mitigation measure, however, may be deferred when it is impractical or infeasible to include those details during the environmental review and the agency (1) commits itself to the mitigation, and (2) adopts specific performance standards the mitigation will achieve~~, and (3)~~. Additionally, the agency may list ~~lists~~ the potential actions to be considered, analyzed, and potentially incorporated in the mitigation measure.

Immediately following the second sentence, we believe it would be helpful and consistent with case law (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275; and *Sacramento Old City Association v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1030) to insert the following sentence:

> A lead agency may allow a project proponent to determine which mitigation measure should be satisfied when an environmental impact report or a mitigated negative declaration has identified alternative feasible mitigation measures, each of which will reduce an environmental impact to less than significant.

Guideline 15087. Responses to Comments

We suggest including a provision to make clear that a comment on the adequacy of a response to a comment is required to preserve the issue for judicial review. The Court in *Towards Responsibility in Planning v. City Council* (1988) 200 Cal.App.3d 671, 682 stated:

> TRIP's comment to the EIR consisted of a letter submitted during the circulation of the first draft. City's response was contained in the first supplement to the EIR. As noted above, TRIP did not object to City's response to its comment at either the planning commission meeting or the city council meeting where such questions were open for discussion. Nor did it submit any written objections prior to these meetings. We are inclined to agree with City that the time for complaining about the inadequacy of City's responses was when the issue was before the agency and any alleged deficiency could be explained or corrected.

This may be accomplished by adding a new subdivision (j) to section 15087, as follows:

(j) A comment on the adequacy of a response to a comment is required to preserve the issue for judicial review.

Guideline 15004. Pre-Approval Agreements

We request that the following two cases be listed in the cited authorities as they support the Updates: *City of Irvine v. County of Orange* (2013) 221 Cal. App. 4th 846; and *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150.

Guideline 15082. Posting Notices with the County Clerk

We believe that the timing of sending or posting the notice of preparation provided in section 15082(a) conflicts with subsection (b)(1) of section 21092of the Public Resources Code, which provides:

> [T]he notice shall specify the *period* during which comments will be received…the *date, time and place* of any public meetings or hearings…where copies of the *draft*

environmental impact report … and all documents referenced in the draft environmental impact report…*are available.*

(Emphasis added.)

Guideline section 15082(a) would require the notice to be sent and filed with the county clerk of each county in which the project will be located, "*immediately after deciding that an environmental impact report is required for a project.…*"

The public comment period, the date and time of any public meetings or hearings are not known immediately after deciding an environmental impact report is required. Moreover, the draft EIR or negative declaration does not exist at that time, so they cannot be available (the statute states "*are* available). The information required by subsection (b)(1) of section 21092 can only be known once the draft EIR or negative declaration are fully prepared.

In order to make this workable, we request that the word "Immediately" be deleted from subdivision (a) of section 15082.

Guideline 15370. Conservation Easements as Mitigation

We agree with the background explanation that conservation easements *may* be used as mitigation. However, there are a variety of resources that may be mitigated through conservation easements, some of which may be temporary, e.g., BDCP/California WaterFix has a 30-year time period. Additionally, even with respect to agricultural land mitigation, climate change and climate adaptation may make some land currently used in agricultural production no longer suitable for that purpose. We believe that temporary conservation easements should also be an option.

Therefore, we request that subdivision (e) be modified as follows:

(e) Compensating for the impact by replacing or providing substitute resources or environments, including through ~~permanent~~ protection of such resources in the form of conservation easements.

II. STANDARDIZED REGULATORY IMPACT ASSESSMENT

A. Standardized Regulatory Impact Assessment: CEQA Guidelines Updates - Cost Impacts of Using the VMT Metric

Since a significant amount of the Standardized Regulatory Impact Assessment (SRIA) is devoted to the costs associated with the VMT Guideline, we address that portion of the SRIA here and will address the SRIA analysis of the cost of other proposed Guideline sections at the end of this comment letter. In our view, the SRIA significantly understates the cost of both preparing a VMT analysis and fails to analyze the costs of mitigation associated with VMT and associated litigation (see, below).

The cost to develop and build infill projects is considerably higher than greenfield projects. That is a function of higher land costs, increased costs associated with taller buildings, and higher litigation risk. For this reason, greenfield projects have been, and will continue to be, notwithstanding the proposed guideline, the preferred housing option of those struggling to afford a home in California. Those most highly burdened by housing costs are communities of color. (See, below.)

We tested the impact of the new guideline. We compared infill projects with greenfield projects and found that while greenfield projects would have to achieve greater reductions in VMT to meet the threshold suggested by the Technical Advisory, infill projects had very significant and expensive reductions in VMT that would be required. The infill project (which is detailed below) required a surprising 26% reduction in VMT and the greenfield project required a 35% reduction. To us, this does not suggest that the new guideline will incentivize infill projects. Instead, we believe it will make all housing projects more expensive. That will push people into making longer commutes as they search for less expensive housing.

We looked at an approved 240-unit multifamily project located in Orange County across the freeway from the John Wayne Airport. Here is what our analysis found:

> The project exceeds the established VMT per capita threshold by 30 percent. In order to reach the 20.98 VMT per capita threshold, the VMT will need to be reduced by approximately 26 percent. The project does contribute to improved traffic flow; however, no range of effectiveness is quantified in CAPCOA. The project also adds a sidewalk on the project frontage that connects to the existing sidewalks west of the project, which aligns with CAPCOA Mitigation Measure 3.2.1: Providing Pedestrian Network Improvements and the associated 1 percent reduction in VMT. The remaining 25 percent VMT reduction can come from a variety of combinations of mitigation measures. With the assumption that the location and land use of the project is inflexible, we recommend the following as a potential mitigation strategy:
>
> - **3.3.1:** Limit Parking Supply (8.75 percent)
> - **3.3.2:** Unbundle Parking Costs from Property Cost (7.8 percent)
> - **3.4.4:** Implement Subsidized or Discounted Transit Program (10.15 percent)
>
> It should be noted that the City of Costa Mesa has been approving intensified residential developments with reduced parking requirements. Since then, the eastern portion of Costa Mesa has been experiencing an overflow of parking onto city streets. This impact has resulted in community backlash and the City reviewing parking needs. Ultimately, the exacerbation of parking is contrary to the context of the project and the community of Costa Mesa, which raises questions about the appropriateness and feasibility diminished parking as mitigation. This shows that not all mitigation measures listed in CAPCOA may be consistent with the goals of the jurisdiction.[3]
>
> To implement a subsidized or discounted transit program and reach the 10.15 percent average VMT reduction, *100 percent of the residents must be eligible for a 10.15 percent discount on transit.* Again, it is difficult to determine compliance with these strategies to accurately anticipate the VMT reduction.[4]
>
> (Emphasis added.)

[3] This will generate controversy over the project, making litigation almost certain. The cost and delay due to litigation (assuming the lead agency were to agree to it) is greater than the cost savings attributable to reduced parking. Like most of the recommendations in the CAPCOA document, this mitigation suggestion is futile.

[4] If this were an owner-occupied building where an endowment would be required, this measure would make the project profoundly more expensive or would be infeasible. See, Provide Transit Passes, below.

We believe the application of the new guideline to infill development will only (1) increase the costs to produce infill housing, (2) increase the likelihood of being denied approval, and (3) increase litigation risks for such projects. All of which will increase VMT.

1. Costs Associated with Preparing A VMT Analysis

Underestimating the cost of preparing a VMT analysis begins with the statement that, "[t]he update related to transportation, however, will replacement [sic] one study methodology with another" (See, SRIA p. 4). As the SRIA views the VMT Guideline, VMT entirely replaces LOS.

However, the Frequently Asked Questions Regarding the Proposed Updates to the CEQA Guidelines, November 2017 (FAQ), states the contrary:

> **If level of service can still be used for planning purposes, isn't the proposal related to transportation analysis just adding another layer of study?**
>
> Because SB 743 preserves local government authority to make planning decisions, LOS and congestion can still be measured for planning purposes. In fact, many general plans and zoning codes contain LOS requirements. The proposed Guidelines would not affect those uses of LOS. LOS may also still be used to measure roadway, including highway, capacity projects. And while traffic studies may be required for planning approvals, those studies will no longer be part of the CEQA process. (FAQ, p.2)

We agree with the FAQ and highlight the statement that "LOS may also still be used to measure roadway, including highway, capacity projects". Thus, to the extent that the "Transportation Projects" component of the proposed guidelines (section (b)(2)) will require analysis of roadways to be constructed as part of a "Land Use Project," the analysis of "Land Use Projects" will often necessarily require an LOS analysis for the proposed roadways. Moreover, as the FAQ points out, LOS and congestion may still be considered by local governments as part of the planning process. Therefore, the SRIA should not indicate a cost savings for no longer preparing an LOS analysis.

Moreover, we anticipate that project opponents will maintain that Guideline section 15125(d), along with Appendix G section XI(b), requires projects to analyze potential inconsistencies with general plans, regional transportation plans and congestion management plans, where LOS is contained. They will argue that LOS does measure an environmental impact – air emissions caused by congestion and delay. Although section 21099(b)(2) of the Public Resources Code (SB 743) tries to exclude these, they will argue that subsection (b)(3) brings them in because it states that, "This subdivision [(b)] does not relieve a public agency of the requirement to analyze a project's potentially significant transportation impacts related to air quality…." Additionally, subsection (4) states that "This subdivision does not preclude the application of local general plan policies…." Again, this brings LOS back into the *CEQA process*.

The cost analysis ignores that CEQA lead agencies are political bodies, largely representing existing voters and they will respond to their concerns. Auto delay and congestion, and the need to mitigate them, will not magically go away just because a law is passed. As described above, these concerns will continue to be raised in the CEQA process and will continue to result in additional cost and litigation.

As the Resources Agency knows, mitigating congestion and delay are most frequently accomplished through measures that increase VMT, e.g., adding roadway capacity or other

measures that speed up traffic flows. This will compound the cost of mitigation for projects – particularly in infill areas that are already congested or experience high levels of auto delay.[5] Therefore, we do not believe that these Updates will spur more infill.

Our traffic engineers and consultants point out that none of the case studies in the SRIA provide a conclusion (beginning at p. 9). The analyses provided simply indicate what are the possible next steps. The analyses never show what the regional averages are, how they were derived and what is the project's VMT compared to the regional average. The greatest cost and uncertainty is in the definition of region and the methods to estimate that threshold. These regional estimates must use traffic models at present. These models are generally held by the metropolitan planning organization or regional transportation agency. These agencies charge fees for developing model output.

Our traffic engineers and consultants also note that VMT studies are not less expensive than LOS studies. The estimate of $5,000 for a VMT study assumes that a VMT study for SB 743 purposes is no different than what is currently required to measure GHG emissions associated with project traffic impacts, where the direct output of CalEEMod or URBEMIS can be disclosed. But SB 743 asks for much more than a single CalEEMod or URBEMIS run. The practitioner must identify the project trip generation, project service population, and project trip length, then estimate the regional average using traffic models and ultimately compare the project VMT with the existing VMT. In effect, the actual practice is to conduct all the elements of an LOS analysis and add the VMT to the end. It is an additive, not reductive, process.

Therefore, in discussing the new VMT Guideline or analyzing its costs, we believe it is inappropriate to characterize adding a VMT analysis as a cost savings.

2. Costs of VMT Mitigation

In addition to the extra costs associated with the VMT impacts analysis, mitigation in many cases will be required, which has yet to be demonstrated as a cost efficient or financially feasible practice. What may work in San Francisco, likely does not hold true in other areas around the state.

The mitigation guidance to comply with the VMT Guideline is the 2010 CAPCOA report, *Quantifying Greenhouse Gas Mitigation Measures*, *A Resource for Local Government to Assess Emission Reductions from Greenhouse Gas Mitigation Measures.* Both the SRIA and the *Technical Advisory on Evaluating Transportation Impacts in CEQA* (November 2017) (TA) refer to it.

There are two fundamental problems with using the CAPCOA report: 1) it measures all VMT mitigation in terms of greenhouse gas reductions – not including the development of multimodal transportation networks and a diversity of land uses as required by section 21099(b)(1), and 2) many of the proposed mitigation measures would not be economically feasible and, if implemented, would increase community opposition to the project, which makes it substantially more likely the project would be denied. Both problems increase litigation risk. The second problem will also increase the number of hearings, consultant and staff time with their associated delay and cost.

The following discusses a few of the potential mitigation measures and project alternatives associated with VMT reduction included in the TA as examples and the cost implications, financial or otherwise, associated with each:

[5] The SRIA notes that increasing density increases congestion locally. See, SRIA p.15.

Incorporating affordable housing into the project. In a recent study, *Inclusionary Zoning – Good Intentions, Bad Results*, April 2016, Genest & Williams, analyzed the cost impact on market rate homes due to inclusionary requirements. On average, inclusionary zoning adds $66,562 to the average market priced home in California. At the time of the study, that represents a 10.6% tax on new home buyers or new home renters who are already struggling to afford a home in California. (A copy of the study is attached as Exhibit 1). In the Bay area, it added $97,614 or 11.7% to the cost of a new home. Moreover, the 2010 CAPCOA report limits the maximum reduction in VMT to 1.2% for incorporating inclusionary HOUSING into a project (*Quantifying Greenhouse Gas Mitigation Measures*, *A Resource for Local Government to Assess Emission Reductions from Greenhouse Gas Mitigation Measure, p. 176*), making reduction extremely disproportionate to the cost.

Affordable housing is also strongly opposed by neighbors to the project. (See, e.g., A California For Everyone, describing community opposition to a Habitat for Humanity project, https://vimeo.com/242696428).

The only way for inclusionary housing to work to satisfy the desire for affordable housing is if there is an ever-greater number of home buyers and renters who can subsidize affordable homes. Yet there is no evidence that this is the case. All the evidence is to the contrary. In 2016, a $1,000 increase in home cost prices out 15,328 households from being able to afford a roof over their head. See, NAHB Releases the 2016 "Priced Out" Estimates, http://eyeonhousing.org/2016/12/nahb-releases-the-2016-priced-out-estimates/. Therefore, the greater the increase in the price of a home (whether to subsidize affordable housing or any other reason), the fewer number of qualified people there are available to purchase or rent.

Public subsidies, where there is a political will to provide them, would come with a prevailing wage requirement, making all of the homes within the project even more expensive. A recent study indicated that prevailing wage requirements add $84,000 to the statewide average cost to construct a new home. (See, http://www.mychf.org/uploads/5/1/5/0/51506457/prevailing_wage_20170824.pdf.)The prevailing wage requirement would apply not only to the subsidized homes but also to the non-subsidized homes that are included in the project.

Limiting parking supply. As an example, the City of Costa Mesa has been approving intensified residential developments with reduced parking requirements. Since then, the eastern portion of Costa Mesa has been experiencing an overflow of parking onto city streets. This impact has resulted in community backlash. This too increases neighborhood opposition which makes it either litigation bait or unlikely to be adopted.

Provide transit passes. It is very expensive to accomplish this seemingly benign and potentially effective measure. In the past, transportation districts have attempted to require new home construction to pay a fee – calculated as an endowment – to mitigate VMT impacts. (See, e.g., AB 1627 (2011-Dickinson). (http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB1627).) This is based on a shared belief that there are no other means of financing transit subsidies for owner-occupied housing. Endowments require a high amount of principle to throw off enough income to cover the annual cost of a bus pass. Because there is inflation over time, the endowment must include enough to cover inflation. As of February 16, 2018, the 10-year Treasury Inflation Protected Securities (TIPS) are implying a 10-yr inflation rate of 2.11% which means that after inflation the real yield is .79%. (See, https://fred.stlouisfed.org/series/T10YIE and https://fred.stlouisfed.org/series/DFII10.)

In the Sacramento Regional Transit District, a monthly bus pass costs $110. This means that for every passenger, an endowment of $167,088 would be required. Each home in the Sacramento area has an average of 2.76 people per household (2012-2016 are the latest numbers reported by the US Census Bureau). (See,

https://www.census.gov/quickfacts/fact/table/sacramentocountycalifornia/HSD310216#viewtop.) This means that the cost of the bus pass per household is $461,165. If only 10% of the households are subsidized by bus passes or all residents receive a 10% discount that would represent an additional $46,116 added to the cost of a new home.

Increasing density. Higher density means higher construction costs due to increased engineering, insurance, labor, materials and building code compliance costs. Taking a two-story, single family home as the norm, a three-story home is 1.3-1.5 times more expensive, a four-story home is 2x more expensive, a five-story is 3-4x more expensive, and 8-50 stories is 5.5-7.5x more expensive than a single-family home. (See, *In the Name of the Environment*, 2015, Holland & Knight, p.68. Available at: http://issuu.com/hollandknight/docs/ceqa_litigation_abuseissuu?e=16627326/14197714.)

Additionally, new housing projects are the most frequent target of CEQA lawsuits for which there is a private sector applicant. In the most recent data (2013-2015) 25% of new housing projects were subjected to CEQA lawsuits – that's up 4% from 2010-2012. The percentage of CEQA lawsuits challenging higher density multifamily/mixed use housing projects like apartments and condominiums also increased—from 45% to 49%. (See, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, Jennifer Hernandez, Hastings Environmental Law Journal, Volume 24, No. 1, Winter 2018, p.29, http://journals.uchastings.edu/journals/websites/west-northwest/HELJ_V_24_1.pdf.) Adding a VMT analysis and more density to housing projects that have a high propensity to be targets of CEQA litigation due to their density is not going to result in lower priced housing or any additional housing at all, particularly with the congestion and auto delay that accompany them.

Increase location efficiency/locate in an infill area. While the proposed Guideline hopes to increase infill – and we hope it does – we don't believe that this proposal will result in more infill. According to the most recent data, the percentage of CEQA lawsuits aimed at infill projects has jumped from 80% (2010-2012) to 87% (2013-2015). One hundred percent of Bay Area CEQA housing lawsuits and 98% of the LA region's CEQA housing lawsuits target infill housing. Seventy percent of the LA region's CEQA litigation targeted transit oriented higher density housing. (See, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, Jennifer Hernandez, Hastings Environmental Law Journal, Volume 24, No. 1, Winter 2018, p. 28, 30, 32. (http://journals.uchastings.edu/journals/websites/west-northwest/HELJ_V_24_1.pdf).) Adding a VMT analysis designed to move projects to infill areas that have a high propensity to be targets of CEQA litigation due to their infill nature, is not going to result in more infill housing.

While there is a general desire to reduce commutes in the abstract, the means to accomplish this outcome have largely failed because there has not been an understanding of why people are so willing to endure long commutes. (See, *This Mom Has a Six Hour Daily Commute, Here's Why She Does It*, https://www.nbcnews.com/video/this-mom-has-a-six-hour-daily-commute-here-s-why-she-does-it-1146643011898 and http://www.latimes.com/local/california/la-me-lopez-commute-cherry-20171216-story.html.) It is a rarified part of the market that has unlimited financial resources to expend on shelter. Even a lawyer and her husband, a software engineer moved 40 miles away from her job in Palo Alto to be able to afford a home in Santa Cruz. (See, *Lawyer quits Palo Alto planning board over housing costs; monthly rent in shared house was $6,200*, ABA Journal, August 22, 2016. Available here, http://www.abajournal.com/news/article/lawyer_quits_planning_board_over_housing_costs_monthly_rent_shared_with_ano/.)

As project applicants, we always begin a project with the end in mind. This means we must understand what the consumer wants constrained by what they can afford. No one will commit resources to a project for which there is no market. Based on our experience as project proponents who entitle, construct and sell or rent projects to consumers who have limited funds, we find that the proposed regulations will

increase the cost to consumers. Those increased costs will come from the uncertainty created by the thresholds contained in the TA, the cost of preparing the VMT analysis and the mitigation measures imposed, the increased time to get controversial projects approved, and the increased litigation risk.

Higher housing costs increase, rather than reduce, VMT. This fact has been acknowledged by the Center for Jobs report and the Legislative Analyst's Office, as noted above. High housing costs causes a form of leakage that occurs within California, not just outside of the state. This fact has also been noted in Government Code section 65589.5(a)(2)(A) and (I). Less expensive transit options or the elimination of vehicles (assuming such a social outcome could be achieved in more than a handful of places) does not make up for the increases in housing costs. While we do agree that looking at both housing costs and transportation costs are important in determining affordability, unfortunately, we do not find the Center for Neighborhood Technology (see, SRIA, p. 23) to be a reliable source of data. As just one example, they indicate that the average monthly housing cost in San Francisco is $2,036. (See, https://htaindex.cnt.org/fact-sheets/?lat=37.750345295506&lng=-122.42480220956969&focus=place&gid=2017#fs.) The California Association of Realtors Current Sales & Price Statistics indicates that San Francisco ended 2017 with a median sales price of $1,475,000. (See, https://www.car.org/marketdata/data/countysalesactivity/.) According to the Center, San Francisco has an annual transportation cost of $9,501 compared to $14,643 for Fairfield. (See, https://htaindex.cnt.org/fact-sheets/. And according to Realtor.com, the median sales price of a home in Fairfield is $435,000. See, https://www.realtor.com/local/Fairfield_CA.) As you can see, the difference in housing costs far outweigh the difference in transportation costs.

3. Suggestions for Making the SRIA More Accurate

The cost analysis should be revised so as not to treat LOS analysis as something that is eliminated – even in the CEQA context. For the reasons stated above, the VMT analysis to be required by the proposed revisions will result in is a cost increase not a reduction with respect to the additional analytic and mitigation requirements.

In addition, the SRIA should note that a requirement to provide more information in the form of the new VMT analysis comes with more public hearings and staff time, more issues to argue over in court, more attorneys' fees that the project proponent must pay for (fees for the petitioner if the petitioner prevails, for intervenors if they prevail, the attorney's fees for the lead agency which are always required through indemnity agreements regardless of who prevails, and for the project proponent defending the approval as well). Attorneys' fees alone run into the millions of dollars for most projects. Cost analysis should also include the additional costs of delaying the project, both the cost of funds for lenders and investors (rates of return are considerably higher than construction or take-out financing, commensurate with the risk[6]) during the litigation delay[7], the added costs due to new regulations that have been adopted that now apply to the delayed project, either as a result of changes to CEQA, the development of science, or to new design, marketing, construction, financing, and liability requirements for the project.

[6] For example, litigation delays led to the bankruptcy filing for many project proponents, including one in which CalPERS lost its entire $970 million investment. See, http://articles.latimes.com/2010/oct/04/business/la-fi-calpers-blackrock-20101004. The project endured an increasingly common occurrence of multiple rounds of CEQA litigation spanning decades.

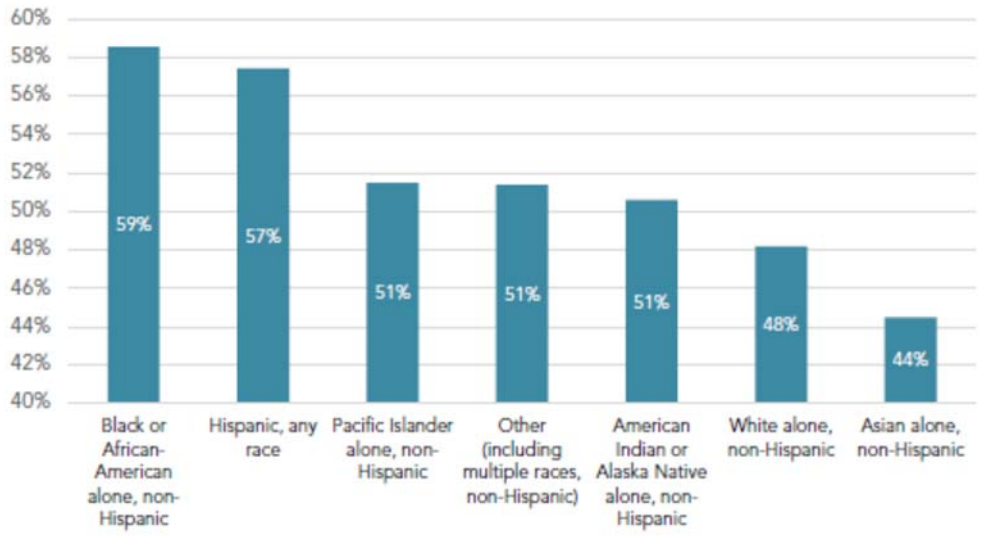
[7] Note that the single-family residence that was the subject of *Berkeley Hillside Preservation v. City of Berkeley*, was in litigation for more than 8 years.

4. Disparate Impact on Communities of Color, Increase Homelessness, and Dependence on Government-Subsidized Services.

According to the California Department of Housing and Community Development's State Housing Assessment (SHA), http://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf, (February, 2018), those hardest hit by high housing costs are communities of color:

> Housing cost burden is experienced disproportionately by people of color. Figure 1.22 [below] looks across all income levels in the state and shows that the percentage of renters paying more than 30 percent of their income toward rent is greater for households that identify as Black or African-American, Latino or Hispanic, American Indian or Alaska Native, or Pacific Islander, compared to renter households that identify as White. This may become an even greater factor in the need for affordable housing as population trends suggest that California will become increasingly diverse in the coming decades.

Figure 1.22
Housing Cost Burden Is Distributed Unevenly Across Race and Ethnicity
Average Housing-Cost Burden by Race and Ethnicity 2009-2013



Source: HUD CHAS Data Sets based on 2009-2013 ACS. Graphic by HCD.

See, SHA, p.28.

This fact has been recognized in the codification of Government Code section 65589.5(a)(2)(F)

> (F) Lack of supply and rising costs are compounding inequality and limiting advancement opportunities for many Californians.

High housing costs are also a significant cause of homelessness:

> In 2015, nearly half of the homeless population surveyed in San Francisco responded they were still homeless because they could not afford rent.
>
> Respondents were also asked what prevented them from obtaining housing. The greatest percentage (48%) reported they could not afford rent. Twenty-eight percent (28%) reported a lack of job or income. Most other respondents reported a mixture of other income or access related issues, such as the lack of available housing (17%), difficulty with the housing process (13%), or an eviction record (6%). Twelve percent (12%) of respondents reported that a criminal record prevented them from obtaining housing, and 8% reported a medical illness. Eight percent (8%) of respondents reported they did not want housing. (San Francisco, 2015)
>
> Regulation & Housing: Effects on Housing Supply, Costs & Poverty (May 2017), p. 34-35. See, https://centerforjobs.org/wp-content/uploads/center_for_jobs_regulation_and_housing_study_may_2017.pdf

And high housing costs deprive people of health care and make them more dependent on government subsidized services:

> When Californians have access to safe and affordable housing they have more money for food and health care, they are less likely to become homeless and need government subsidized services, their children are apt to do better in school, and businesses do not have as hard a time recruiting and retaining employees.
>
> SHA, P. 48.

The Equal Protection Clause of the United States' and California's constitutions and the many laws implementing them will likely become a legal barrier to implementing VMT as a transportation metric.

For these reasons also, we believe the TA should be withdrawn.

B. Costs Associated with Guidelines other than Guideline 15064.3

We believe that the SRIA should also analyze the costs of:

1. Per our comments on Guideline sections 15064 and 15064.7, the proposed Updates go far beyond existing case law and would require providing substantial evidence for the *use* of another agency's thresholds in an EIR or an explanation when *using* thresholds in an initial study. This is a new, added CEQA compliance cost.
2. By limiting the tools for tiering, as proposed in the Updates to Guideline section 15152, subsequent projects that wish to tier off a previous CEQA document will now have to analyze and explain why every more specific tiering option does not apply. This is a new, added CEQA compliance cost.
3. As discussed in our comments on the Land Use and Planning and Transportation elements of the Appendix G Checklist, there will be increased costs arising out of applying inapplicable plans, policies, etc., and from agencies without lawful jurisdiction over the project. Similarly, the proposed Updates to the Utilities and Service Systems element of the Appendix G Checklist would increase costs by uniformly expanding the parameters of water supply analysis to projects of all sizes and types.

III. COMMENTS REGARDING THE TECHNICAL ADVISORY (TA)

To preface, our coalition includes project proponents who have projects within and outside transit priority areas; we also build on infill sites, suburban sites, greenfield and rural areas. We do not approach the proposed revisions with a preconceived preference for any particular kind of development. Instead, we look for solutions that address valid issues in a way that helps all projects, or at least does not harm them.

As more fully set forth below, we do not find the TA to be helpful to any type of project – whether infill or greenfield. More importantly, we think the proposed new guideline, which necessarily includes the TA will increase cumulative VMT and increase costs for all projects, rather than result in a reduction for some. The principal reasons for this, are: 1) SB 743 does not effectively eliminate community concerns about auto delay and congestion; 2) LOS will still play a role even in CEQA, through general plans, regional transportation plans and/or congestion management plans; 3) in order to conduct the kind of VMT analysis necessary to satisfy SB 743, an LOS analysis must be conducted first; and 4) congestion and delay will still need to be mitigated but will now require VMT mitigation for the LOS mitigation. Therefore, we believe the proposed revisions will add significant costs to projects which will increase housing costs, especially for infill projects, pushing people into longer commutes.

For the reasons contained in this letter, we believe that the TA should be withdrawn.

In addition, we believe that the TA incorporates a number of inconsistencies, both internally (see, #2, #5, below) and with other laws (see #1 and #3, below), is vague and ambiguous (see, #4, below), and will therefore result in more litigation and its associated costs.

1. The TA is Inconsistent with SB 375

The TA recommended threshold for residential projects provides as follows:

> A proposed project exceeding a level of 15 percent below existing VMT per capita may indicate a significant transportation impact. Existing VMT per capita may be measured as regional VMT per capita or as city VMT per capita. Proposed development referencing city VMT per capita must not cumulatively exceed the number of units specified in the SCS for that city and must be consistent with the SCS. (TA p. 12.)

First, it is clear from the language of SB 375 that Sustainable Communities Strategies (SCSs) were not intended to be mandatory – either on the part of a local land use agency (cities and counties) or on the part of project applicants. SCSs do not regulate the use of land or supersede the land use authority of cities and counties. Nor are general plans or land use policies required to be consistent with an SCS. Both applicants and local land use agencies moved from opposed to support of the bill when SCSs became incentive based rather than mandatory. One of the most obvious indications of this may be found in Government Code section 65080(b)(2)(K):

> Neither a sustainable communities strategy nor an alternative planning strategy regulates the use of land, nor, except as provided by subparagraph (J), shall either one be subject to

> any state approval. Nothing in a sustainable communities strategy shall be interpreted as superseding the exercise of the land use authority of cities and counties within the region. …. Nothing in this section shall be interpreted to authorize the abrogation of any vested right whether created by statute or by common law. Nothing in this section shall require a city's or county's land use policies and regulations, including its general plan, to be consistent with the regional transportation plan or an alternative planning strategy.

These provisions are acknowledged by MPOs. For example, Plan Bay Area 2040 (http://2040.planbayarea.org/cdn/farfuture/u_7TKELkH2s3AAiOhCyh9Q9QlWEZIdYcJzi2QDCZuIs/1510696833/sites/default/files/2017-11/Final_Plan_Bay_Area_2040.pdf) provides:

> Local Control
>
> It is important to emphasize that the region's cities and counties retain local land use authority and that local jurisdictions will continue to determine where future development occurs. Plan Bay Area 2040 is supported by through implementation efforts such as neighborhood-level planning grants for PDAs and local technical assistance. The plan does not mandate any changes to local zoning rules, general plans or processes for reviewing project; nor is the plan an enforceable direct or indirect cap on development locations or targets in the region. As is the case across California, the Bay Area's cities, towns and counties maintain control of all decisions to adopt plans and to permit or deny development projects.
>
> Plan Bay Area 2040, p. 44.

The alternatives analysis done for the EIRs for SCSs also show that dramatically different land use patterns can achieve the SB 375 GHG targets other than the preferred alternative in the final SCS. Therefore, deviating from the SCS will not necessarily undermine achievement of its regional targets.

The incentive that is provided for a project that is consistent with an SCS is provided in Public Resources Code section 21159.28:

> (a) If a residential or mixed-use residential project is consistent with the … sustainable communities strategy … and if the project incorporates the mitigation measures required by an applicable prior environmental document, then any findings or other determinations for an exemption, a negative declaration, a mitigated negative declaration, a sustainable communities environmental assessment, an environmental impact report, or addenda prepared or adopted for the project pursuant to this division shall not be required to reference, describe, or discuss (1) growth inducing impacts; or (2) any project specific or cumulative impacts from cars and light-duty truck trips generated by the project on global warming or the regional transportation network.
>
> (b) Any environmental impact report prepared for a project described in subdivision (a) shall not be required to reference, describe, or discuss a reduced residential density alternative to address the effects of car and light-duty truck trips generated by the project.

There is no mandate that a project be consistent with an SCS; instead, if a project is consistent with an SCS then there are limitations on what needs to be discussed in CEQA analysis with respect to tail-pipe emissions. There is no population limit, no limit on the number of units, no constraint on the location of projects, either in the CEQA provisions of SB 375 or in Government Code section 65080.[8] A SCS is not a limit on population or housing.

Moreover, it is beyond question that establishing limits on the number of housing units and constraining their location, drives up the cost of those residential projects lucky enough to survive our complicated and litigious entitlement process. Higher housing costs are what drives increases in VMT as residents with limited financial resources drive until they can qualify. Neither the private nor the public sector can afford to provide the subsidies necessary to meet our affordability needs. Cost reductions are the surest means of reducing VMT. Higher costs create leakage on a regional, statewide and international (*below*) scale and serve to increase, rather than reduce GHG. This is contrary to the purpose of SB 743. (See, Public Resources Code section 21099(b)(1).)

Just last year, the California Legislature found and declared that:

> *(A) California has a housing supply and affordability crisis of historic proportions. The consequences of failing to effectively and aggressively confront this crisis are* hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and *undermining the state's environmental and climate objectives.*
>
> (B) While the causes of this crisis are multiple and complex, the absence of meaningful and effective policy reforms to significantly enhance the approval and supply of housing affordable to Californians of all income levels is a key factor.
>
> (C) The crisis has grown so acute in California that supply, demand, and affordability fundamentals are characterized in the negative: underserved demands, constrained supply, and protracted unaffordability.
>
> (D) According to reports and data, California has accumulated an unmet housing backlog of nearly 2,000,000 units and must provide for at least 180,000 new units annually to keep pace with growth through 2025.
>
> (E) California's overall homeownership rate is at its lowest level since the 1940s. The state ranks 49th out of the 50 states in homeownership rates as well as in the supply of housing per capita. Only one-half of California's households are able to afford the cost of housing in their local regions.
>
> (F) Lack of supply and rising costs are compounding inequality and limiting advancement opportunities for many Californians.
>
> (G) The majority of California renters, more than 3,000,000 households, pay more than 30 percent of their income toward rent and nearly one-third, more than 1,500,000 households, pay more than 50 percent of their income toward rent.

[8] See, TA p. 12.

(H) When Californians have access to safe and affordable housing, they have more money for food and health care; they are less likely to become homeless and in need of government-subsidized services; their children do better in school; and businesses have an easier time recruiting and retaining employees.

(I) *An additional consequence of the state's cumulative housing shortage is a significant increase in greenhouse gas emissions caused by the displacement and redirection of populations to states with greater housing opportunities, particularly working- and middle-class households. California's cumulative housing shortfall therefore has not only national but international environmental consequences.*

(California Government Code section 65589.5(a)(2). *Emphasis added*.).

According to Regulation & Housing: Effects on Housing Supply, Costs & Poverty, California Center for Jobs & the Economy[9]:

> California's current high housing costs have resulted in longer commutes as Californians seek housing they can afford in outlying areas. Previous analyses by LAO found that a 10% increase in a metro area's rental costs produced a 4.5% in commuting times. (P.5).
>
> And…
>
> *California Commuters Continue Reliance on their Own Cars*
>
> In spite of decades of investments in public transit, carpool lanes, and other alternative modes for commuting, California commuters have continued to show a clear preference for the privacy, security, and flexibility of single occupant vehicles as the housing choices they can afford move further away from the urban cores. (P. 43).

For these reasons, we believe that the TA would make the proposed VMT Guideline inconsistent with existing law (SB 375) and undermines the purpose of reducing GHG emissions. Therefore, we believe the TA should be withdrawn.

2. A Non-Binding Advisory May Not Include Mandates

The recommended thresholds in the TA are expressed as mandates when the TA is declared to be not binding. The TA states that "OPR's guidance is not binding on public agencies" (TA, p.8), but includes mandates by using "must". For example, we found the following:

(a) "Proposed development referencing city VMT per capita *must* not cumulatively exceed the number of units specified in the SCS for that city, and *must* be consistent with the SCS. (TA, p.12)
(b) "In MPO areas, development in unincorporated areas measured against aggregate city VMT per capita (rather than regional VMT per capita) *must* not cumulatively exceed the population or number of units specified in the SCS for that city because greater-than-

[9] https://centerforjobs.org/wp-content/uploads/center_for_jobs_regulation_and_housing_study_may_2017.pdf

planned amounts of development in areas above the regional threshold would undermine achievement of regional targets under SB 375." (TA, p. 12).

(c) "A transportation project which leads to additional vehicle travel on the roadway network, commonly referred to as "induced vehicle travel," *must* quantify the amount of additional vehicle travel in order to assess air quality impacts, greenhouse gas emissions impacts, energy impacts, and noise impacts." (TA, p.16).

(d) Additionally, the TA provisions addressing RTP-SCS Consistency (All Land Use Projects), are based on the assumption that a project *must* be consistent with an SCS (TA, p. 15).

The recommended thresholds that require consistency with an SCS or RTP-SCS are inappropriate because they illegally treat SCS's as land use documents and limits on population.[10]

In order to be non-binding, the TA would have had to say that lead agencies are free to choose a threshold that is less (or more) stringent than what is suggested by the TA. We believe that for these reasons also, the TA should be withdrawn.

3. What Substantial Evidence Supports the TA Thresholds?

Because CEQA is ultimately based on substantial evidence, to the extent that anyone may rely on the TA, the 15% reduction below existing VMT references multiple public and private sector entities as sources for the 15% suggestion. It is unclear whether simply referencing these other standards constitutes substantial evidence (see, e.g., comments above regarding the use of regulatory standards) or whether or not those standards were arrived at based on substantial evidence.

Additionally, it appears that the referenced sources use varying baselines, so it is not clear what baseline to use if a lead agency were to adopt the TA's suggested threshold. Does the Scoping Plan[11] use a 2010-2012 baseline? What are the baseline assumptions for the SB 375 targets for each of the MPOs? Is the appropriate baseline the VMT per capita in 1990 as contained in AB 32, SB 32, the Executive Orders cited in the TA and SB 391? What baseline is used for CAPCOA? What is the data indicating per capita VMT for whatever year is used?

We ask these questions because the TA states that "based on OPR's extensive review of the applicable research and literature on this topic, **OPR finds that in most instances a per capita or per employee VMT that is fifteen percent below that of existing development may be a reasonable threshold.**" (TA, p. 8). The lessons learned from, *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 842 [invalidating an EIR that based significance determination in part on comparing the project's emissions to statewide emissions], and *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 228 [invalidating an EIR because the lead agency did not provide sufficient evidence that "the Scoping Plan's statewide measure of emissions reduction can also serve as the criterion for an individual land use project"] make reliance on state agency standards risky without fully knowing the substantial evidence to back it up. Moreover, that risk has become greater with the California Supreme Court's caveat, "we do not hold that the analysis of greenhouse gas impacts employed by SANDAG in

[10] We note that inconsistency with a plan is not automatically an environmental impact. Limiting population within an SCS and limiting residential sites to those identified in an SCS would simply displace that demand and thereby increase VMT.

[11] The Scoping Plan does not set a VMT reduction goal for 2020, but rather establishes a statewide 7.5% reduction by 2035 and a 15% reduction by 2050.

this case will necessarily be sufficient going forward. CEQA requires public agencies like SANDAG to ensure that such analysis stay in step with evolving scientific knowledge and state regulatory schemes." (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 504, 519.) For this reason, we request that the TA be withdrawn.

4. The TA Thresholds Are Inconsistent with the State's Zero Emission Vehicle Goals

VMT as a metric treats zero emission vehicles (ZEVs) the same as any other vehicle. The inclusion of ZEVs in calculating a project's VMT undermines the Governor's Executive Orders (B-48-18 and B-16-12) and calls into question whether this Guideline is about greenhouse gas reduction. This has the effect of punishing the conversion to ZEVs. We believe that the TA should be withdrawn for this reason as well.

5. Transportation Projects and Induced Travel

There is some concern that subsection (b)(2) may require an analysis of induced travel. The concern arises from this statement: "The proposed changes also provide that the analysis of certain transportation projects *must* address the potential for induced travel." (See, TA, p. 1, and references to induced travel or induced VMT also found at pp. 2, 16, 19, 20, 21, 27, 28 and 29). Since the TA looks like a mandate while claiming to be non-binding, we believe the TA should be withdrawn.

Conclusion

We wish to express our gratitude to you for reviewing these comments. We appreciate the time and effort you give to considering and responding to them. We hope that these comments will make the finished product the best it can be for all those affected by their use.

EXHIBIT 1

Inclusionary Zoning — Good Intentions, Bad Results

April 2016

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This report evaluates the potential impacts on new developments and housing affordability that would result from adopting a statewide inclusionary zoning (IZ) policy in California. It does so by (1) estimating the potential magnitude of IZ subsidies and the corresponding "taxes" on new market-rate homes in each county, and (2) projecting the impacts these would have on home prices and affordability, rents, and poverty rates throughout the state. Below we provide background on IZ policies and a summary of our key findings. In Appendices 1 and 2, we provide a more detailed description of the methodology as well as the county-by-county results of our analysis. We conclude that IZ would actually worsen California's home affordability problems and increase poverty.

Background

Low-Income Californians Are Hurt Most By the State's Dysfunctional Housing Markets

It is well-documented that California's home prices and rents are among the very highest in the country.[1] As the Legislative Analyst's Office (LAO) reported last year, an average California home was priced two-and-a-half times the national average while rents were 50 percent above average. While some of California's higher prices can be attributed to the inherent desirability of living in the state, most of the problem is due to a severe shortage of housing that results from insufficient building of new houses to keep up with the demand, especially along the coast.

The LAO also noted that low-income Californians are disproportionately hurt by the state's high housing costs: "California households in the bottom quarter of the income distribution … report spending four times more of their income (67 percent, on average) than households in the top quarter of the income distribution (16 percent, on average)." When housing costs are taken into account, California's poverty rate jumps from 16 percent to 23.4 percent, making it the highest in the nation.

Programs to Help Low-Income Californians With Housing Costs Have Limited Potential To Solve the Problem

In California, local, state and federal governments operate a variety of programs to help low-income residents with their housing costs, both through subsidizing the construction of low-income housing and through direct and indirect rent subsidies. However, as the LAO indicated in a report this year, "the number of low-income Californians in need of assistance far exceeds the resources of existing federal, state, and local affordable housing programs."[2] Moreover, expanding these programs to cover all low-income housing needs would be so expensive as to be entirely impractical.

Inclusionary Zoning — An Effective Way to Providing Low-Income Housing?

As a result, some policymakers have looked to Inclusionary Zoning (IZ) as a way of helping low-income Californians to find affordable housing. IZ can take many forms, but often requires developers, as a condition of being allowed to build new housing, to set aside a share of the houses to be priced at "affordable" rates. As one study noted, IZ is "politically attractive because (it is) viewed as a way to promote housing affordability without raising taxes or using public funds." [3]

The same study, however, noted that the actual impacts of IZ are decidedly mixed: "Standard economic theory … suggests that such programs act like a tax on housing construction. And just like other taxes, the

[1] California's High Housing Costs, Causes and Consequences", LAO report, March 17, 2015.

[2] "Perspectives on Helping Low-Income Californians Afford Housing," LAO report, February 9, 2016.

[3] "Housing Market Impacts of Inclusionary Zoning," National Center for Smart Growth Research and Education, February, 2008.

burdens of inclusionary zoning are passed on to housing consumers, housing producers, and landowners. As a result, inclusionary zoning policies could exacerbate the affordable housing problem that they are designed to address."[4] By raising the cost and reducing the supply of market-rate housing, IZ policies make housing less affordable and attainable for households at all income levels - including those in the lower income ranges that IZ policies are purportedly designed to help.

The LAO's 2016 study suggests that this may be the case in various San Francisco Bay Area communities it examined. As part of its analysis, the LAO considered whether IZ policies had a significant impact on the amount of displacement of low income households in these communities over time. It found that IZ policies were *not* a determinative factor. Rather, the key factor was the level of new construction. Communities with higher levels of new construction had less price growth and less low-income household displacement than their counterparts with less new construction. This was the case regardless of whether IZ policies were being pursued.[5]

If the key to affordability is a greater supply of new housing, IZ is exactly the wrong policy. By taxing new construction, it raises its cost and discourages its supply, thereby making housing less affordable over time.

A series of lawsuits has raised questions about local governments' authority to continue implementing IZ in California. As a result, there have been legislative proposals by IZ advocates to allow its continuation. One that is currently pending in the Legislature is AB 2502. It would encourage local governments to adopt IZ requirements. Under AB 2502, a local jurisdiction could require - as a condition of a residential project's approval - that the developer set aside a certain percentage of units to be sold or rented at below-market prices that are affordable to households that are classified as "low-income", "very low income", and "extremely low income," as defined in current law.[6] One likely approach to using the three income categories would be to set aside 15 percent of any new development - divided equally among the three categories.

Our evaluation of the potential impacts of such an IZ policy is based on a hypothetical application of such a set-aside requirement to all new housing built in the California in 2015, the most recent year for which actual data is available.

Quantifying The Impacts of Inclusionary Zoning

We quantify the effects of adopting a statewide IZ requirement in California in two steps. First, we show its impact on new home prices in developments subject to the requirement. Specifically, for each county we calculate the size of subsidies that would be needed to satisfy the IZ requirement for buyers in the three low-income categories. We then show the the increased price in market-rate units that would be required to offset these subsidies.

Second, we model in each county how the implied "tax" on the unsubsidized units would work through the market over time. We show the effect that it would have on overall housing prices, housing affordability, rents, and poverty rates. Our results are summarized by major geographic region in Tables 1

[4] ibid.

[5] See,"Perspectives on Helping Low-Income Californians Afford Housing," February 2016. Specifically, the LAO found that "… market rate housing construction appears to be associated with less displacement *regardless* of a community's inclusionary housing policies. As with other Bay Area communities, in communities without inclusionary housing policies, displacement (of low income households) was more than twice as likely in low–income census tracts with limited market–rate housing construction than in low–income census tracts with high construction levels.

[6] A "low income" household is generally defined as one having up to 80 percent of the median income for all households of the same size within the county. A "very low" income household has up to 50 percent of the median income, while an "extremely low " income household has income equal to or less than 30 percent of the median. These levels are subject to a variety of other constraints.

and 2 below. The appendices to this document display our county-by-county estimates and the detailed explanation of our calculations.

The IZ Subsidies and implicit taxes would be substantial. Table 1 summarizes the results of our calculations for each of four county groupings and for the statewide average. The left hand columns display the number or new homes sold in 2015 as well as their median sales prices. The remaining columns show (1) the amount of subsidy needed for affordable units in each income category, and (2) the implicit tax rate needed on the non-subsidized units to offset the cost of the subsidies.

As the table shows, the subsidies would be substantial, ranging from about $60,000 for low-income units in the inland and northern counties to over $300,000 per subsidized unit for extremely low-income households in the Bay Area. Subsidies of this magnitude would impose a tax burden on the 85-percent of units that could be sold at market rates under an IZ regimen ranging from 8.4 percent (about $30,000) in the inland and northern counties, up to 12 percent (almost $100,000 per unsubsidized unit) in the Bay Area.

IZ would price more households out of the housing market, raise rents, and increase poverty. Table 2 summarizes our estimates of the long-term economic impacts of a statewide IZ program. While IZ policies would benefit the targeted low-income households fortunate enough to purchase the subsidized homes, the great majority of prospective homebuyers would experience the negative effects of the IZ "tax" - specifically, fewer market rate homes and higher prices. The mechanism by which higher prices in the new home developments will spill over into the broader single family home and rental markets is discussed in Appendix 2. However, the bottom line is that the IZ tax on new housing will put upward pressure on all segments of the real estate markets, especially those in coastal regions of the state that are already experiencing excess demand and depressed supply. Higher home prices and rental rates will have two main effects.

- First, the increase in housing prices will cause an additional 405,000 (or 3.5 percent) of households statewide to be priced out of the real estate market.
- Second, the higher rents will push about 125,000 additional households below the poverty threshold in California.

As indicated in Table 2, the effects will be most pronounced in the coastal counties of California, due to the high home prices and rents and generally tight real estate conditions that currently exist in those regions.

Table 1
IZ Subsidy and Tax Rates

			Amount of Subsidy Per Unit			"Tax" Impact On Average Market Priced Unit	
Region	Sales	Median Price	Extremely Low	Very Low	Low	Amount	Percent
Bay Area	6,789	$806,378	$311,004	$215,497	$76,720	$97,614	11.7%
South Coast	8,685	$682,750	$237,265	$152,881	$47,780	$80,766	11.7%
Central Coast	1,840	$541,000	$258,700	$181,581	$61,631	$57,569	10.5%
Inland and Northern Counties	17,711	$342,739	$187,659	$151,125	$59,559	$30,301	8.4%
Statewide	**35,025**	**$593,217**	**$248,657**	**$175,271**	**$61,423**	**$66,562**	**10.6%**

Table 2
Economic Impacts — Less Affordability, More Poverty

Region	Households Priced Out of Home Buying Market		Households Falling Below Poverty Line	
	Amount	Percent	Amount	Percent
Bay Area	100,212	4.2%	33,090	1.3%
South Coast	194,279	3.8%	65,818	1.2%
Central Coast	28,051	4.0%	7,514	1.1%
Inland and Northern Counties	82,414	2.5%	18,184	0.5%
Statewide	**404,956**	**3.5%**	**124,606**	**1.0%**

Comparison of Our Findings to Past Empirical Studies

There have been two relatively recent empirical studies examining the effects of IZ policies as they existed in California in past years. The findings of both studies are generally consistent with our results. Specifically, the National Center for Smart Growth Research and Education published a study in 2008 that found that home prices in communities having IZ policies were 2-3 percent higher than those not adopting such policies.[7] For higher priced homes (which characterizes much of California's real estate market) the differential was over 5 percent.

Similarly, a study produced by authors associated with the Furman Center for Real Estate and Urban Policy in 2009 found higher prices in communities with IZ policies during rising economic conditions, which was the case in most years.[8] Interestingly, they also found lower prices in communities with IZ policies during declining markets. The study also found that price effects were the largest for communities where IZ policies had been in effect for longer periods of time. This makes sense, as the cumulative impact of IZ policies on prices and availability of market rate homes would be expected to increase with the passage of time.

The price effects found in these studies were less than the amounts shown in Appendix Tables A-1 through A-4, which show price effects exceeding 10 percent in some counties. However, it is important to recall that the computations in our Appendix tables represent the direct impact of IZ policies on market-rate homes in new developments. In contrast, the results from the empirical studies reflect the policies' impacts on community-wide prices, which we would expect to be somewhat less in typical communities, depending on market conditions. (The lower "pass-through" rates on existing home markets are reflected in our calculations of affordability and poverty rates shown in Appendix Tables A-5 through A-8.) Also, the IZ regimes studied were varied in terms of set-aside amounts, often included allowances for off-site fulfillment or fee reduction, and often were enforced in a non-uniform way across the jurisdictions studied. All of these factors would produce smaller price effects than our examples, which are based strictly on set asides - with no mitigating factors - consistent with the language of AB 2502.

[7] "Housing Market Impacts of Inclusionary Zoning." The National Center for Smart Growth Research and Education. February 2008.

[8] "Silver Bullet or Trojan Horse? The Effects of Inclusionary Zoning on Local Housing Markets', Schuetz,Meltzer and Been, Furman Center for Real Estate and Urban Policy New York University, October 2, 2009.

Appendix 1 — Subsidy and Resulting "Tax" Calculations

The following tables display our calculations of the subsidies that would be needed to offset an IZ requirement that 5 percent of new housing units be priced to be affordable by buyers in each of the state's three official low-income categories, i.e., low, very-low and extremely low.

One way to view IZ policies is as a tax on new housing developments. For example, a recent study by Schuetz, Meltzer, and Been[9] states that "mandatory IZ programs are essentially a tax on new residential development, and as such, we would expect them to raise the prices and reduce the quantity of housing. The size and incidence of the impacts will depend on a variety of factors, including… the relative elasticities of housing supply and demand."

In Appendix 2, we discuss how the markets would likely allocate the "tax burden" of IZ between purchasers and developers. In this Appendix we focus on quantifying the size of the subsidies for "affordable" housing under IZ requirements, and the resulting "tax" that would be levied on the un-subsidized units in a typical project. To do this, we use California's housing market experience in 2015 as a basis for our calculations. Therefore the tables below reflect the hypothetical of applying a mandatory, 15-percent set aside IZ program to all housing production in California in 2015.
Our estimates are based on the following:

County groupings. The table displays counties in four groups:

- Bay area. These are the nine counties that make up the Association of Bay Area Governments. As a group, these counties have the highest median prices for new housing units in the state at $806,378. The high prices result from limited supply and high demand.
- South coast, covering San Diego, Orange, and Los Angeles counties. These three counties also have relatively high median prices for new housing units, averaging $682,750.
- Central coast, which include the counties starting at Ventura in the south to San Benito in the north. These six counties have an average median price for new housing units of $541,000.
- Inland and northern, which start in Imperial County, include Riverside and San Bernardino, the great majority of the central valley and foothill counties, and a few northern counties, including Humboldt. These 22 counties have an average median price for new housing of $342,739. The table does *not* include 18 very small counties for which either no housing data were available or the data showed fewer than 20 new units built in 2015.

New home sales and median prices. The first column displays the number of new units constructed in each county during 2015. These data are from CoreLogic, "a property information and analytics company that compiles public records, proprietary and contributed data including county assessor and county recorder data".[10] The units displayed include both detached homes and apartment/condominium units. The next column is the median price of new homes sold in each county in 2015.

Income levels. In a memo dated April 15, 2015, the California Department of Housing and Community Development published "State Income Limits for 2015." The income limits are used to calculate affordable housing costs for families of four in three income ranges, extremely low, very low and low. These income levels are then used to calculate the prices that would be affordable in each county of each income grouping.

[9] "Silver Bullet or Trojan Horse? The Effects of Inclusionary Zoning on Local Housing Markets', Schuetz,Meltzer and Been, Furman Center for Real Estate and Urban Policy New York University, October 2, 2009.

[10] Quotation is from CoreLogic marketing material.

Sales price of subsidized units at each income level. This reflects our estimate of the price that buyers in each of the income levels could afford. Affordability is calculated based on the assumption that a family can afford to spend 30 percent of its income for mortgage payments, property taxes and insurance. The 30-percent limitation is a commonly used standard for loan qualification and other purposes by the government and real estate industry (although lower income households often spend 50 percent of their incomes for rental housing). To calculate the affordable prices for each income group, we assumed a 30-year mortgage at 4.2 percent interest, property taxes of 1.14 percent of sales price[11] (California's current statewide average rate) and insurance of 0.38 percent of the home's value. We also assumed that the family would be able to come up with an additional amount equal to a 20 percent down payment. If instead, we calculate the affordable prices based on zero down, the affordable prices would have to be reduced by an additional 16 percent. For illustrative purposes, the table shows what the impacts would be if IZ were applied to all of the homes sold in each county in 2015. Thus, we assume that 15 percent of the homes would be sold at prices affordable to low, very low, and extremely low-income households, and the remaining 85 percent would be sold at "market prices."

Subsidy amount. In the tables displayed in the text of this document, we show the amounts of the subsidies needed for each income level. Here, we display the sales prices of the subsidized units. The subsidy amount is simply the median price in each county less the "affordable" price for each income group in that county.

"**Tax" impact on un-subsidized units.** In order recover the cost of the 15 percent of units sold below market, the developer would need to raise the prices on the remaining 85 percent of the units sold. The tables display this effective "tax" as an amount per unit and as a percentage of the pre-IZ county-wide median price per unit.

Table A-1
Bay Area Counties

			Sales Price of Subsidized Units at Each Income Level			"Tax" Impact On Average Market Priced Unit	
County	Sales	Median Price	Extremely Low	Very Low	Low	Amount	Percent
Marin	46	$1,066,550	$168,369	$280,694	$449,542	$135,356	12.7%
Napa	60	$764,250	$125,498	$209,084	$334,342	$95,519	12.5%
Sonoma	96	$517,250	$118,792	$197,827	$311,350	$54,340	10.5%
San Mateo	277	$1,140,100	$168,369	$280,694	$449,542	$148,335	13.0%
San Francisco	674	$1,097,000	$168,369	$280,694	$449,542	$140,729	12.8%
Solano	768	$444,500	$118,792	$197,827	$311,350	$41,502	9.3%
Alameda	1,189	$878,750	$134,360	$223,933	$342,964	$113,823	13.0%
Contra Costa	1,636	$566,000	$134,360	$223,933	$342,964	$58,632	10.4%
Santa Clara	2,043	$783,000	$152,801	$254,589	$406,671	$90,291	11.5%

[11] The Constitutional property tax rate in California is one percent. Local jurisdictions are allowed to add increments for voter approved bonds and taxes. As a result, the current average, effective rate in California is 1.14 percent.

Table A-2
South Coast Counties

County	Sales	Median Price	Sales Price of Subsidized Units at Each Income Level			"Tax" Impact On Average Market Priced Unit	
			Extremely Low	Very Low	Low	Amount	Percent
San Diego	2,301	$627,500	$118,792	$197,827	$316,619	$73,486	11.7%
Los Angeles	2,838	$577,500	$122,624	$204,533	$327,157	$63,423	11.0%
Orange	3,546	$843,250	$138,431	$230,639	$369,070	$105,389	12.5%

Table A-3
Central Coast Counties

County	Sales	Median Price	Sales Price of Subsidized Units at Each Income Level			"Tax" Impact On Average Market Priced Unit	
			Extremely Low	Very Low	Low	Amount	Percent
Santa Cruz	52	$717,000	$144,898	$241,416	$386,314	$81,081	11.3%
San Benito	88	$529,000	$116,637	$194,235	$308,476	$56,921	10.8%
Monterey	240	$524,000	$116,158	$173,638	$277,820	$59,081	11.3%
Santa Barbara	392	$400,250	$116,158	$192,079	$307,279	$34,426	8.6%
San Luis Obispo	482	$571,750	$116,158	$184,655	$295,543	$65,817	11.5%
Ventura	586	$504,000	$130,288	$216,987	$347,275	$48,085	9.5%

Table A-4
Inland and Northern Counties

County	Sales	Median Price	Sales Price of Subsidized Units at Each Income Level			"Tax" Impact On Average Market Priced Unit	
			Extremely Low	Very Low	Low	Amount	Percent
Sutter	34	$390,750	$116,158	$142,263	$227,525	$40,371	10.3%
Humboldt	49	$279,500	$116,158	$138,671	$221,777	$21,288	7.6%
Nevada	59	$425,000	$116,158	$183,697	$293,627	$40,089	9.4%
Colusa	61	$238,500	$116,158	$140,587	$224,891	$13,757	5.8%
Yuba	113	$290,000	$116,158	$142,263	$227,525	$22,591	7.8%
Shasta	121	$287,250	$116,158	$141,305	$226,088	$22,247	7.7%
Imperial	151	$271,500	$116,158	$138,671	$221,777	$19,876	7.3%
Madera	152	$211,750	$116,158	$138,671	$221,777	$9,332	4.4%
Merced	193	$281,000	$116,158	$138,671	$221,777	$21,553	7.7%
Butte	213	$318,000	$116,158	$140,587	$224,891	$27,786	8.7%
Yolo	217	$467,000	$116,158	$184,176	$294,585	$47,417	10.2%
Kings	250	$248,500	$116,158	$138,671	$221,777	$15,817	6.4%
Stanislaus	256	$299,500	$116,158	$148,490	$237,584	$23,310	7.8%
El Dorado	257	$590,500	$116,158	$182,260	$291,711	$69,492	11.8%
Tulare	829	$249,000	$116,158	$138,671	$221,777	$15,906	6.4%
San Joaquin	1,300	$427,000	$116,158	$158,789	$254,110	$44,232	10.4%
Placer	1,386	$454,000	$116,158	$182,260	$291,711	$45,404	10.0%
Sacramento	1,619	$408,500	$116,158	$182,260	$291,711	$37,375	9.1%
Kern	1,746	$280,000	$116,158	$138,671	$221,777	$21,376	7.6%
Fresno	1,871	$293,000	$116,158	$138,671	$221,777	$23,670	8.1%
San Bernardino	2,101	$442,000	$116,158	$160,465	$256,744	$46,626	10.5%
Riverside	4,733	$388,000	$116,158	$160,465	$256,744	$37,096	9.6%

Appendix 2 — Affordability and Poverty Calculations

Appendix tables A-5 through A-8 show our detailed calculations of the effects of IZ policies on housing affordability and poverty over time by county. The regional breakouts are the same as described in Appendix 1. The following paragraphs describe the key assumptions and methodologies used to develop the calculations.

Effect of IZ policies on broader market prices for new and existing homes. Over time, IZ policies will affect markets beyond just new construction. The increase in project costs for new market-rate homes will spill over into existing owner-occupied home prices through two main channels: First, prospective buyers facing higher prices on new newly constructed homes will turn to lower-priced alternatives in the existing home resale market, thereby driving up demand and prices in this segment. Second, builders unable to pass along the higher IZ-related costs because of local market conditions may eliminate, delay, or scale back new projects. The resulting loss of new supply will likewise drive up prices over time.

The magnitude of the increase in market-wide prices will vary from community to community, depending on local conditions. Generally speaking, the price adjustment will be large in communities with high household incomes, population growth, and supply constraints due to environmental restrictions or limited developable land. It will be relatively less in areas with lower household incomes, less population growth, or fewer restrictions on new development.

Empirical studies of of the price elasticity of demand and supply for housing suggest that in typical markets, builders would be able to pass forward a significant portion, but not all, of a cost increase to consumers.[12] For purposes of our estimates on affordability, we assume that 60 percent of the IZ tax will be reflected in higher market prices for housing in the inland and northern counties of California. We assume a higher 90-percent pass-through in the coastal regions, however, because of the development restrictions and excess demand that already exists in many of these regions.

Affordability estimates. To determine the impacts of higher market-rate prices on affordability, we adapted a methodology used by the National Association of Realtors for this purpose. Specifically, we calculated the annual costs for mortgage payments, insurance, and property taxes on entry level homes, which are assumed to cost 85 percent of the median home price in each county. Utilizing American Community Survey (ACS) data we compared the annual costs of ownership for these houses to the distribution of household incomes in each county. We then calculated the number of households that could afford the home, assuming that mortgage payments, property taxes and insurance payments can be no more than 30 percent of household income. We made these calculations first assuming current law, then assuming the IZ-driven increase in market prices. The reduction in the number and percentage of qualifying household is shown in the left panel of Appendix tables A-5 through A-8.

The reductions in affordability resulting from higher market-rate home prices would be mitigated to a degree by the positive impact of the IZ subsidies on low-income households. However, the number of buyers receiving these subsidies, while 15 percent of newly constructed homes, is quite small compared to the overall housing market in a community. Over time, the cumulative number of individuals benefiting from the subsidies will grow, but it will take many years for this offset to reach even 10 percent of the number of buyers being squeezed out of the unsubsidized housing market.

[12] See, for example, "What is the Price Elasticity of Housing Demand?" Eric A Hanushek and John M. Quigley. *Review of Economic and Statistics*, August 1980.

Poverty estimates. In the right hand panels of Appendix tables A-5 through A-8, we show the impact of IZ policies on household poverty rates in each county. The estimates reflect the impacts of IZ policies on the estimated level of the Supplemental Poverty Measure (SPM) in each county. This measure, which has been published by the U.S. Census for the past several years, takes into account regional differences in shelter costs. In doing so, it explicitly recognizes the effects of regional variances in rental costs on the limited resources that low-income households have to cover other basic necessities, such as food, clothing, and medical care.

As noted above, IZ-related policies will affect both owner-occupied homes and rental markets, by limiting the supply of market-rate housing in both areas. Rental rates are also affected by the impacts that reduced home affordability has on people attempting to move from rental units into the home ownership ranks. By stemming the flow of individuals from the rental markets into owner-occupied markets, IZ policies will put further upward pressure on demand and lease rates in rental units.

We estimated the impacts of higher home prices on rents by utilizing a "user cost of housing" equation. This equation is used by economists and industry analysts to estimate the relationship between equilibrium home prices and rents, by taking into account a variety of economic, tax, and financial variables. These include the real interest rate, property tax rates, tax rates on income and capital gains, tax depreciation rates, annual maintenance costs, and expected appreciation of the property's value over time.[13] Based on these inputs, we then estimated the increase in median rents that would result from IZ-related price increases in the single-family home market.

The next step was to calculate the impact of the higher median rents the SPM in each county.[14] We then compared the increase in poverty threshold to the ACS data on the distribution of household income to determine the number of households that would fall below the thresholds as a result of the IZ-related increase in market rents in each community.

[13] For a description, see "To Buy or Not to Buy? The Changing Relationship Between Manhattan Rents and Home Prices," in *Current Issues in Economics and Finance*, Federal Reserve Bank of New York, Volume 18, Number 9, 2012.

[14] For a description of the formulas used to determine the SPM in each region, see"Supplemental Poverty Measure: A Comparison of Geographic Adjustments with Regional Price Parities vs. Median Rents from the American Community Survey," *SEHSD Working Paper No. 2014-22*, U.S. Census Bureau, March 2014)

Table A-5
Impact of IZ Policies on Affordability and Poverty
Bay Area Counties

County	Households Priced Out of Home Buying Market		Households Falling Below Poverty Line	
	Amount	Percent	Amount	Percent
Marin	4,011	3.9%	1,527	1.5%
Napa	2,257	4.6%	599	1.2%
Sonoma	7,338	4.0%	1,877	1.0%
San Mateo	7,100	2.8%	3,948	1.5%
San Francisco	11,905	3.5%	4,990	1.5%
Solano	3,628	2.6%	690	0.5%
Alameda	20,703	3.8%	8,407	1.6%
Contra Costa	14,461	3.9%	4,436	1.2%
Santa Clara	28,808	4.8%	6,615	1.1%
Total Bay Area	**100,212**	**4.2%**	**33,090**	**1.3%**

Table A-6
Impact of IZ Policies on Affordability and Poverty
South Coast Counties

County	Households Priced Out of Home Buying Market		Households Falling Below Poverty Line	
	Amount	Percent	Amount	Percent
San Diego	33,935	3.2%	13,188	1.2%
Los Angeles	112,918	3.5%	40,593	1.3%
Orange	47,425	4.8%	12,037	1.2%
Total, South Coast	**194,279**	**3.8%**	**65,818**	**1.2%**

Table A-7
Impact of IZ Policies on Affordability and Poverty
Central Coast Counties

	Households Priced Out of Home Buying Market		Households Falling Below Poverty Line	
County	Amount	Percent	Amount	Percent
Santa Cruz	3,364	3.6%	1,096	1.2%
San Benito	750	4.5%	156	0.9%
Monterey	5,156	4.1%	1,489	1.1%
Santa Barbara	4,822	3.4%	1,329	0.9%
San Luis Obispo	4,353	4.3%	1,146	1.1%
Ventura	9,607	3.6%	2,298	0.9%
Total, Central Coast	**28,051**	**4.0%**	**7,514**	**1.1%**

Table A-8
Impact of IZ Policies on Affordability and Poverty
Inland and North Counties

County	Households Priced Out of Home Buying Market		Households Falling Below Poverty Line	
	Amount	Percent	Amount	Percent
Sutter	933	2.9%	179	0.6%
Humboldt	1,044	2.0%	297	0.6%
Nevada	985	2.4%	260	0.6%
Colusa	78	1.1%	21	0.3%
Yuba	486	2.0%	112	0.5%
Shasta	1,454	2.1%	301	0.4%
Imperial	746	1.6%	223	0.5%
Madera	411	1.0%	129	0.3%
Merced	1,426	1.9%	312	0.4%
Butte	1,567	1.8%	489	0.6%
Yolo	1,696	2.4%	470	0.7%
Kings	611	1.5%	127	0.3%
Stanislaus	2,984	1.8%	746	0.4%
El Dorado	1,988	2.9%	315	0.5%
Tulare	1,922	1.5%	449	0.3%
San Joaquin	5,396	2.5%	1,195	0.6%
Placer	3,387	2.6%	528	0.4%
Sacramento	13,143	2.6%	2,448	0.5%
Kern	4,623	1.8%	1,039	0.4%
Fresno	5,811	2.0%	1,413	0.5%
San Bernardino	15,096	2.8%	3,260	0.6%
Riverside	16,630	2.5%	3,868	0.6%
Totals, Inland and Northern Counties	**82,414**	**2.5%**	**18,184**	**0.5%**