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TOO LATE IN THE GAME: HOW BALLOT MEASURES UNDERCUT CEQA

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I. INTRODUCTION

"Take me out to the ball game" recently became the campaign slogan for two critical development projects in San Francisco. Both of these development projects — a San Francisco Giants ballpark and a San Francisco 49ers football stadium/shopping mall complex — were approved by the voters, in March, 1996, and June, 1997, respectively, and are now moving forward.

Because the regulatory guidelines for the California Environmental Quality Act ("CEQA") contain an exemption for "the submittal of proposals to a vote of the people," both projects avoided environmental analysis after the board of supervisors and the electorate had given a green light for the projects. In this article, we will examine the possibility that

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the ballot measure exemption functions as a loophole that weakens the goal of early meaningful, analysis that is at the heart of CEQA. To put the exemption in a specific environmental and political context, we will look at some of the environmental impacts of the two San Francisco stadium development projects as well as the campaigns for the stadiums. For historical context, we will also describe the origins of the ballot measure exemption and the case law surrounding it. Finally, we will briefly propose suggestions for reform.

II. THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

In the early 1970's, as California experienced sustained economic and population growth, Californians grew concerned about a host of environmental problems — including traffic congestion, toxic contamination, decreasing air quality and water quality, and destruction of open space. Those concerns in turn led to a series of landmark environmental protection laws.[1] The California Environmental Quality Act ("CEQA") — perhaps the most ambitious of those laws — was passed by the State Legislature in 1970 to "ensure that the long-term protection of the environment . . . shall be the guiding criterion in public decision-making."[2]

Modeled on the National Environmental Policy Act ("NEPA"),[3] CEQA requires "local agencies, regional agencies, and state agencies, boards, and commissions" to take environmental impacts into consideration in their actions.[4] CEQA has been interpreted as "requiring public agencies to deny approval of a project with significant adverse effects when feasible alternatives or feasible mitigation measures can

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1. *See* CAL. CODE REGS. tit. 14, § 15378(b)(4) (1996) [hereinafter "CEQA Guidelines"]. The "CEQA Guidelines" begin in section 15000 of Title 14 of the California Code of Regulations.

2. CAL. PUB. RES. CODE § 21001(d) (West 1996).

3. 42 U.S.C. § 4321 *et seq.*

4. CAL. PUB. RES. CODE §§ 21000(g), 21001(f), (g) (West 1996 & Supp. 1997). *See* CEQA Guidelines, §§ 15002(b), 15020, 15367, 15368, 15369, 15383 (1996).

substantially lessen such effects."[5] By requiring environmental concerns to guide development, CEQA revolutionized planning in California. It set up an open process that would give public agencies, project proponents, and the public a chance to fully assess the impact of development projects before approving them. This process utilizes the Environmental Impact Report ("EIR") as the key tool in environmental decision-making.[6] An EIR as envisioned in CEQA would contain three main components: 1) a description of the environmental impacts of a project[7] 2) a determination as to whether there are feasible less environmentally harmful alternatives to the project[8] and 3) and an analysis of ways of mitigating the harmful environmental effects of the project[9].

CEQA Administrative Guidelines[10] and case law[11] emphasize that the "EIRs should be done as early in the planning process as possible to enable environmental considerations to influence project, program or design."[12] Courts describe the preparation of EIRs prior to approval of proposed projects as the "heart of the environmental control process"[13] and as simply the "heart of CEQA."[14] In fact, untimely EIRs have been disapproved of because they can

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5. Sierra Club v. Gilroy City Council, 222 Cal. App. 3d 30, 41(1990).

6. *See* CAL. PUB. RES. CODE § 21061 (West 1996). Details of the EIR process are set forth in sections 15080-15096 of Title 14 of the California Administrative Code.

7. *See id.*

8. *See* CAL. PUB. RES. CODE § 21002.1 (a) (West 1996); CAL. ADMIN. CODE tit. 14 § 15121(a). The content requirements for EIRs generally are set forth at §§ 15120-15132 of the Administrative Code.

9. *See* CAL. PUB. RES. CODE § 21002.1 (a) (West 1996).

10. CEQA Guidelines, § 15004(b).

11. *See, e.g.,* Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ., 654 P.2d 168 (Cal. 1982); Bozung v. Local Agency Formation Com., 529 P.2d 1017 (Cal. 1975); Stand Tall on Principles v. Shasta Union High Sch. Dist, 235 Cal. App. 3d 772, 780 (1991); Mount Sutro Defense Comm. v. Regents of Univ. of Cal., 77 Cal. App. 3d 20, 35 (1978).

12. *Bozung,* 529 P.2d at 1030, n. 7.

13. County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 192 (1977).

14. Stanislaus Natural Heritage Project v. County of Stanislaus, 48 Cal. App. 4th 182, 190 (1996). *See also* CAL. CODE REGS., tit. 14 § 15003; Citizens of Goleta Valley v. Board of Supervisors, 801 P.2d 1161 (Cal. 1990); No Oil, Inc. v. City of Los Angeles, 529 P.2d 66 (Cal. 1974); San Franciscans for Reasonable Growth v. City and County of San Francisco 151 Cal. App. 3d 61, 72 (1984).

become "post hoc rationalizations" to support action already taken."[15]

This requirement of early environmental analysis conflicts with the single provision in the CEQA Guidelines that exempts ballot measures. When an EIR is done for an environmentally sensitive project well after the voters and municipal authorities have embraced the project, can the EIR really be objective and timely? Or does the exemption become, especially when project proponents for financial resources and political clout, a way of ensuring that EIRs are done "too late in the game" to have meaningful impact? In these cases, is CEQA's mandate to "ensure that the long-term protection of the environment . . . shall be the guiding criterion in public decision making" being circumvented?[16]

III. REGULATORY BASIS FOR CEQA'S BALLOT MEASURE EXEMPTION

The original intention of the CEQA exemption for ballot measures is unclear. The exemption is not found in CEQA's statutory language, but in the CEQA Guidelines. The Guidelines are not part of the statute passed by the Legislature, but are promulgated by the state Resources Agency to aid local agencies in implementation of CEQA. The Guidelines in section 15378(b)(4) — originally adopted as section 15037 in 1973 — simply state that the "submittal of proposals to a vote of the people" is not to be considered a "project" as defined by CEQA and therefore is not subject to the CEQA review process. Like all sections of the CEQA Guidelines, the ballot measure exception is not binding on the courts, but the Guidelines are generally given "significant weight."[17] The California Supreme Court, however, has held

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15. Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278 (Cal. 1988). *See also*, *No Oil*, 529 P.2d, at 74.

16. CAL. PUB. RES. CODE § 21001(d) (West 1996).

17. Guardians of Turlock's Integrity v. Turlock City Council, 149 Cal. App. 3d 584, 594-595 (1984); City of Santa Ana v. City of Garden Grove, 100 Cal. App. 3d 521, 530 (1979).

that the Guidelines should not be followed when a provision is erroneous or clearly unauthorized.[18]

The courts have also at times recommended a loose approach to specific provisions of the CEQA Guidelines, one where the Guidelines "are subject to a construction of reasonableness"[19] and are "distinguishable from standards that frequently require a rigid and precise application . . . [and] have only general application to the diversity of projects undertaken or approved by public agencies."[20]

Since the CEQA environmental review process only applies to "projects," this section of the Guidelines suggests the possibility that ballot measures — including those approving what would otherwise be a project under CEQA — would be considered exempt from CEQA and CEQA's environmental review process.[21]

CEQA defines a "project" as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect change in the environment."[22] The "submittal of proposals to a vote of the people of the state or of a particular community"[23] is found in a short list of activities that "are not projects" in section 15378 of the CEQA Guidelines.

This section of the guidelines also excludes from the definition of project "proposals for legislation to be enacted by the State Legislature,"[24] "continuing administrative or maintenance activities, such as purchases of supplies, personnel-related actions, general policy and procedure

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18. *See* Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 282, n. 2 (1988).

19. Rural Landowners Ass'n v. Lodi City Council, 143 Cal. App. 3d 1013, 1021-1022 (1983).

20. Las Virgenes Homeowners Fed'n, Inc. v. County of Los Angeles, 177 Cal. App. 3d 300, 306, fn. 1 (1986).

21. *See* Stein v. City of Santa Monica, 110 Cal. App. 3d 458, 460 (1980).

22. CAL. PUB. RES. CODE § 21065 (West 1996).

23. CEQA Guidelines, § 15378(b)(4).

24. CEQA Guidelines, § 15378(b)(2).

making,"[25] and "the creation of government funding mechanisms or other government fiscal activities which do not involve any commitment to any specific project."[26]

When read in context, the exceptions made for "not-projects" seem to be borne out of an effort to avoid encumbering basic governmental procedures that "do not involve commitment to any specific [development] project" by the CEQA review process. The CEQA Guidelines' practical concern for efficient function of government can devolve, when misapplied, into a blanket exemption for environmentally sensitive projects that happen to appear on the ballot. This loophole in the law allows developers of potentially popular projects to use a ballot measure to avoid or delay environmental review until well after significant political and economic momentum has been built through political sloganeering that tends to be long on emotional appeal and short on objective fact. This "greasing of the skids" turns the EIR — if and when it is finally done — into exactly the type of "post-hoc rationalization" that the courts have repeatedly condemned.

The application of the ballot exemption to specific development projects is largely a product of the somewhat murky interpretations of the guidelines found in the surrounding case law, to which we now turn.

IV. CASELAW INTERPRETING CEQA'S BALLOT MEASURE EXEMPTION

A. *YOUNGER V. LAFCO*: LIMITING THE EXEMPTION'S SCOPE

In *Younger v. LAFCO*, the very first case which discusses the CEQA Guidelines' exemption for ballot measures, the Court of Appeal remarks on the code section's "ambiguous language."[27] A Local Agency Formation Committee of San Diego County ("LAFCO") had approved for a vote a proposal to

25. CEQA Guidelines, § 15378(b)(3).
26.CEQA Guidelines, § 15378(b)(5).
27. *Id.*

deannex twenty-five square miles of territory in the southwestern corner of San Diego County.[28] The Court of Appeal had to determine whether the deannexation proposal was a "project" subject to CEQA and EIR requirements even though that project might qualify for the ballot measure exemption. The *Younger* court found that it was a project, despite the fact that the deannexation proposal would be voted on by the electorate. The court held that when a vote of the people is a stage in the approval process for a project that has a potential impact on the environment, the ballot measure exemption does not apply.

The court explained:

> the "project" here is "more than the submittal of proposals to a vote of the people." Rather, it is but the first step. . . with consequent substantial impact on the physical and human environment. . . If LAFCO disapproves the deannexation proposal, it cannot come to a vote.
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> It is true the deannexation petition. . . is but a step in a series of activities that may or may not occur; but these activities may culminate in a project which will change and affect the environment. . . . [T]he word "project" appears to emphasize activities *culminating* in physical changes to the environment . . . . In environment, directly or *ultimately*.[29] (emphasis in original).

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28. *See id.* In the *Younger* case, the LAFCO had determined that because the proposed deannexation "amounted to a change in governmental jurisdiction" that no EIR was required. *Younger*, 81 Cal. App. 3d at 467. The state of California and the City of San Diego both sought a writ of mandate to compel LAFCO to prepare an EIR. *See id.* at 468. It is an interesting historical note that in this seminal case on the CEQA ballot exemption, the plaintiffs were the state and a major city — San Diego. They sought to compel LAFCO, basically a small agency following the wishes of a citizens' group supporting the deannexation, the Border Area Citizens for Deannexation, to complete an EIR prior to placing a project on the ballot. Subsequent history will show that many, if not most, cities strongly support blanket CEQA exemptions for ballot measures against the wishes of citizen groups concerned about the environmental impacts of projects placed on the ballot.

29. *Younger*, 81 Cal. App. 3d at 479 (citing Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 279 (1975).

The *Younger* court concluded that:

> where there is a reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper. . . . We conclude a petition for deannexation is a project that does not fall within the specified exemptions *although one step in the entire process requires submittal of the deannexation question to the voters* of the County of San Diego.[30]

In *Younger*, the Court of Appeal recognized what should be obvious: In cases where the electorate is called on to "approve" projects with potentially significant environmental impacts, the electorate deserves the benefit of the environmental analysis that the CEQA process affords. The court wrote that an EIR prepared prior to the vote "would be available to assist the public in exercising its vote."[31] This sensible approach balances the guidelines' exemption with the larger statutory and public policy goals of CEQA analysis. This approach protects what a number of courts have described as CEQA's dual purpose of affording both "the fullest possible protection of the environment"[32] and "informed self-government."[33] Given the sensitive nature of the two stadium projects along San Francisco's bayfront, "informed self-government would certainly have benefited if an EIR had been "available to assist the public in exercising its vote."[34]

B. *STEIN V. CITY OF SANTA MONICA*: CITIZENS VERSUS AGENCY SPONSORED INITIATIVES

In *Stein v. City of Santa Monica*, the Court of Appeal sought to determine whether the city's act of placing a rent control ordinance on the ballot in response to a citizen petition was a

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30. *Younger*, 81 Cal. App. 3d at 479-80 (citing Wildlife Alive v. Chickering, 553 P.2d 537 (1976).

31. *Younger*, 81 Cal. App. 3d at 481.

32. Citizens of Goleta Valley v. Board of Supervisors, 801 P.2d 1161, 1167 (Cal. 1990).

33. Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 283 (Cal. 1988).

34. *Younger*, 81 Cal. App. 3d at 481.

"project" contemplated by CEQA, and therefore required environmental review.[35] The court found that the initiative did not become a "project" under CEQA when the city placed it on the ballot.[36]

In its discussion, the court cited CEQA language that defines "projects" subject to CEQA's environmental investigation to include ". . . discretionary projects proposed to be carried out or approved by public agencies . . ." but not ". . . ministerial projects proposed to be carried out or approved by public agencies . . . ."[37] The *Stein* court found that "the acts of placing the issues on the ballot and certifying the result as a charter amendment qualifies as a nondiscretionary ministerial act not contemplated by CEQA,"[38] given that the sponsors filed a legally sound petition and the city had *no choice* but to certify the petition and place it on the ballot.[39]

The *Stein* decision also cites CEQA statutory language which defines a project as "activities directly undertaken by any public agency."[40] It distinguishes between the initiative, which it calls an "an activity undertaken by the electorate,"[41] and activities undertaken by a "public agency" as defined in CEQA.[42]

The Resources Agency highlighted a critical point here when they revised the ballot exemption section of the guidelines to include a direct citation to *Stein*.[43] This citation

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35. *See* Stein v. City of Santa Monica, 110 Cal. App. 3d 458 (1980). In this case, a group of landlords called Santa Monica for Renters' Rights sought writ of prohibition or mandate seeking to block the implementation and enforcement of the rent control charter amendment. The initiative was placed on the ballot by a petition signed by 15% of registered voters and was passed as "Proposition A" by the electorate of Santa Monica on April 10, 1979. *See id.*

36. *See id.* at 460.

37. *Id.*; CAL. PUB. RES. CODE § 21080(a), (b)(1) (West 1996).

38. *Stein*, 110 Cal. App. 3d at 461. *See also* Norwood Homes, Inc. v. Town of Moraga, 216 Cal. App. 3d 1197, 1206 (1989).

39. *See Stein*, 110 Cal. App. 3d at 461.

40. *Stein*, 110 Cal. App. 3d at 460; CAL. PUB. RES. CODE § 21065 (West 1996).

41. *Stein*, 110 Cal. App. 3d at 461.

42. *See* CAL. PUB. RES. Code § 21063 (West 1996).

43. *See* CEQA Guidelines, § 15378 (b)(4).

must be seen as an attempt to resolve the "ambiguous language" of the ballot measure exemption noted in the Younger decision.[44] Why precisely did they cite to *Stein? Stein* hinges on the distinction between a "non-discretionary ministerial act not contemplated by CEQA"[45] of certifying "an activity undertaken by the electorate"[46] on the one hand, and discretionary acts by public agencies on the other. The Stein citation in the guidelines indicates that the most reasonable interpretation of the current guidelines is that they *apply only to non-discretionary citizen-sponsored initiatives* where the city has no choice but to put the measure on the ballot. Certainly, a vote by the Board of Supervisors *choosing* to place on the ballot a measure for a development project on environmentally sensitive land would fall into the discretionary category in this scheme, thus triggering CEQA review.

If the courts and public agencies had applied Stein's narrow interpretation, the potential for abuse of the ballot measure exemption would have been minimal.[47]

C. *FULLERTON JOINT HIGH SCHOOL DISTRICT V. STATE BOARD OF EDUCATION:* CITIZEN'S RIGHT TO ENVIRONMENTAL INFORMATION

In *Fullerton Joint Union High School District v. State Board of Education*,[48] the high school district sought a writ of mandate to prevent an election to approve the creation of a new school district out of part of the existing district. The petition

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44. *See Younger*, 81 Cal. App. 3d at 473.

45. *Stein*, 110 Cal. App. 3d at 461.

46. *Id.*

47. There is case law suggesting that agencies and the courts should feel bound to Stein's limited interpretation of the ballot measure exemption, exempting only the ministerial act of certifying for election a citizen-sponsored initiative. In *Williams v. Garcetti*, the California Supreme Court held that "[w]here changes have been introduced to a statute by amendment it must be assumed that the changes have a purpose . . . [which may likely be] to clarify the true meaning of the statute." Williams v. Garcetti, 853 P.2d 507, 510 (Cal. 1993) (citations omitted). What meaning could the inclusion of Stein have but to equate the ballot measure exemption with a somewhat narrow exemption for citizen-sponsored initiatives?

48. Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ., 654 P.2d 168 (Cal. 1982).

by the Fullerton HSD argued that the state Board of Education illegally failed to follow CEQA procedures *before* placing the matter before the voters. The Superior Court found that CEQA had been violated and barred the election.[49] The State Board of Education then appealed the decision.[50]

In the appeal, the California Supreme Court was asked to decide whether CEQA applied to the Board of Education's decision to place this matter before the voters.[51] The Court issued a ringing endorsement of the voters' right to environmental analysis *before* voting on a proposal.[52] The Court wrote that the Board's decision is "not exempt from CEQA merely because that approval must be ratified by the voters."[53] The decision then goes on to say:

> In the present setting, the State Board and the voters are the decision-makers; they must decide whether to approve the proposed secession, an approval which necessarily entails building a new high school and other actions which may have an environmental effect. In making that decision, the State Board and the voters should have the benefit of relevant environmental data and analysis.[54]

The reasoning is crystal clear. The vote by the people is a "first step. . . with consequent substantial impact on the environment"[55] or is "an essential step leading to environmental impact,"[56] requiring some formal environmental assessment before the vote. This common sense approach acknowledges that when voters "approve" a project, the electorate is serving a planning and decision-making function, and has just as much right to the environmental data

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49. *See id.* at 179-80.
50. *See id.*
51. *See id.*
52. *See id.*
53. *Fullerton*, 654 P.2d at 181.
54. *Id.* at 183.
55. *Id.* at 179-80 (*citing Younger*, 81 Cal. App. 3d at 479).
56. *Id.* at 179-80.

represented by CEQA analysis as any other planning body. This type of review might be especially useful in the case of high profile, well-publicized, contentious election battles — like those for the two San Francisco stadiums.

D. *LEE V. CITY OF LOMPOC*:[57] WIDENING THE EXEMPTION

So far, in the first three cases we have discussed, the courts have taken an approach to the ballot measure exemption that balances the exemption with the broader context of the critical environmental analysis purpose of CEQA. The *Lee* court chose a more literal and categorical interpretation of the ballot measure exemption. This created the possibility that the ballot measure exemption could be used as a political tool to circumvent early CEQA analysis in favor of a pro-forma EIR, after a voter "mandate" and political and economic momentum had built behind the project.

As with *Stein*, the court in *Lee* was asked to determine whether environmental review was required under CEQA when the city council placed a ballot measure before the electorate.[58] Unlike *Stein*, however, the measure put before the electorate was not brought by a citizens' petition,[59] and unlike *Stein*, the court in *Lee* did not find that CEQA's distinction between between a city council's ministerial duties and its discretionary acts applied to the ballot measure exemption.[60]

The *Lee* court reasoned that the city council's discretionary decision to place the measure on the ballot did not qualify as a

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57. Lee v. City of Lompoc, 14 Cal. App. 4th 1515 (1993).

58. *See Lee*, 14 Cal. App. 4th at 1515. The Lompoc City Council had placed on the ballot a project to build a shopping center and to amend its general plan and specific plans and zoning ordinance. After the voters approved the measure, the petitioners filed suit to set aside the election results. The trial court denied the petition and the Court of Appeal (Second District) affirmed the lower court.

59. *See Lee*, 14 Cal. App. 4th at 1523. The *Lee* court claimed that the ballot exemption "does not distinguish between submittal of ballot measures by a public agency from those submitted by voter initiative petitions," missing that the guidelines had been amended to include a citation to *Stein*. In fact, the *Lee* decision mistakenly asserts that the ballot measure exemption in section 15378 "has never been amended." *Id.*

60. *See Lee*, 14 Cal. App. 4th at 1523.

"project" because the decision was not an "approval" within the meaning of CEQA.[61] The court wrote that "the City Council's resolution to place the matter on the ballot did not constitute an "approval" under CEQA because it did not commit the Council to a definite course of action."[62] This line of reasoning directly conflicts with the reasoning in *Younger* and *Fullerton* — that CEQA applies to a ballot measure *if it could eventually culminate in a change to the environment.*

The *Lee* court also took a very different approach to the "informed self-government"[63] aspects of CEQA that *Fullerton* and *Younger* saw as mandating EIR analysis prior to non-citizen-sponsored measures. In fact, the *Lee* court seems to denigrate the importance of the environmental issues surrounding an EIR and the voters' interest in such issues. The *Lee* decision, in fact, ends by quoting with approval the trial court's words that theses issues ". . . are not the kind of informational blockbusters which would be expected to affect the lay voter."[64]

The *Lee* court's rejection of requiring the CEQA process for ballot measures placed before the electorate relies on a somewhat convoluted and legalistic argument. The court reasoned that CEQA:

> requires the "lead agency"[65] to certify that the final EIR has been completed in compliance with CEQA . . . and that the decision-making body reviewed and considered . . . the final EIR prior to approving the project. There is no way a lead agency could certify that the electorate considered the information in the EIR prior to approving the project.[66]

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61. *See id.*

62. *See id.*

63. Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 764 P.2d 278, 283 (Cal. 1988).

64. *Lee*, 14 Cal. App. 4th at 1524.

65. *Lee*, 14 Cal. App. 4th at 1524. "Lead agency" is defined in CEQA Guidelines § 15367; *see also* CAL. PUB. RES. CODE § 21067 (West 1996).

66. *Lee*, 14 Cal. App. 4th at 1524.

Therefore, because the "lead agency" has no way of going out and determining if each voter has read and considered the EIR in full, the *Lee* court would deny the electorate as a whole the opportunity for what *Fullerton* called "the benefit of relevant environmental data and analysis."[67]

Lee misses what *Younger* and *Fullerton* see clearly: the electorate and the public agency are both decision-makers, and the consideration of an EIR is not an either/or process. Environmental analysis benefits the public agency in deciding whether to "approve" the project. And it benefits the formal "lead agency" in fully considering the project's environmental impacts, alternatives to the project,[68] and mitigation of negative environmental impacts.[69]

Arguments by development project proponents and planning agencies that both citizen-sponsored and agency-sponsored ballot measures are exempt from CEQA prior to a vote of the people thus rest squarely on the *Lee* decision. In this context it is ironic to note that the facts of the *Lee* case do not lend themselves to such a broad interpretation of *Lee*. In fact, in *Lee* the city council *had* prepared an EIR on the development project but were deadlocked on whether or not to approve the project. The city council's inability to reach a decision caused them to seek to resolve the impasse by placing the matter before the voters.[70] Thus, a specific case where a public agency placed a development measure before the voters after a certified EIR was prepared has become the main precedent for legal arguments that no EIR process is required prior to a vote of the people for any and all ballot measures.[71]

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67. *Fullerton*, 654 P.2d at 179-180.

68. *See* CAL. PUB. RES. CODE § 21002 (West 1996); CEQA Guidelines, §§ 15002(A)(3), 15021(A)(2), (c), 15041(a), 15063(c)(2), *see also* Sierra Club v. State Bd. of Forestry, 876 P.2d 505, 516-17 (Cal. 1994).

69. *See* CEQA Guidelines § 15370.

70. *See Lee*, 14 Cal. App. 4th at 1518.

71. *See* Citizens for Responsible Government v. City of Albany, 56 Cal. App. 4th 1199 (1997). This recent case, handed down while this article was written, follows *Lee* in precisely this way. In this case, the petitioners sought writ of mandate and declaratory relief against the city and gambling companies after passage of a ballot measure

V. THE STAKES OF THE GAME: ENVIRONMENTAL IMPACTS OF SAN FRANCISCO'S PROPOSED STADIUMS

In San Francisco, the Board of Supervisors placed two measures on the ballot in 1996 and 1997 for large development projects that clearly would have significant environmental impacts.

The first was Proposition B, on the ballot in March of 1996. It contained a proposal for a 42,000-seat baseball stadium for the San Francisco Giants at China Basin along with an ancillary retail and commercial structure. The proposed site could hardly be more environmentally sensitive — downtown and on the waterfront. Along with the complexities of a major development in an urban center, the city would have to take into consideration the sensitive bayside location of the project — including the impact on the bird and aquatic life in the Bay and Channel area.

Proposition B amended the City Planning Code to establish development standards for the proposed Giants ballpark at the China Basin site. The measure also directed the city to adopt conforming amendments to the city's General Plan and all other relevant state, regional, and local codes and plans.[72] In addition, the measure created the Northeast China Basin Special Use District, adopted as Section 249[18] of the City Planning Code.

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permitting cardroom gaming at a horse track located on the waterfront. The Superior Court dismissed the case and the Court of Appeal affirmed in part and reversed in part. Without much discussion, the case adopts *Lee*'s blanket application of the guidelines' ballot measure exemption — even going so far as to cite *Lee*'s mistaken contention that the ballot measure exemption in the guidelines "has never been amended." *Id.* at 109 (*citing Lee*, 14 Cal. App. 4th at 1523). The Court of Appeal, however, in this recent decision did hold that the ballot measure was subject to CEQA review *because it included a detailed development agreement between the city and the cardroom developers with details about the development*. *See id.* at 116. This is an important point because just these types of details about how specific development projects were to be carried out were included in the ballot measures placed before San Francisco voters. Unfortunately, the Court of Appeal failed to see that that this sort of "planning before environmental review" could take place without a legally binding development agreement. In fact, in the case of measure F (Land Use measure for the 49ers' stadium), it was negotiated and placed directly in the initiative rather than in the development agreement. *See id.*

72. San Francisco, California, Proposition B, Section 8 (June 1997 ballot).

The second project was another proposal for a sports arena — this one to build a new 75,000-seat 49ers football stadium at Candlestick Point along with a 1.4 billion square feet "MegaMall"[73] shopping and entertainment complex. This project would again be built right on the waterfront, impacting sensitive wildlife habitat, open space, and the Candlestick Point Recreation Area. The project would also impact the human environment, adding thousands of cars to the adjacent Highway 101.

The 49ers' stadium/mall proposal was contained in two ballot measures in San Francisco's June 1997 election.[74] Proposition D included approval for the city to sell up to $100 million in lease revenue bonds to finance part of the stadium. Proposition F was a land-use measure that created a special district at Candlestick point for the stadium/mall development.[75] It also included language expediting the approval of any "permitted use" of the special district, instructing the Planning Commission to approve all applications that fit the guidelines contained within the ballot language and to take final action on all applications "within 60 days of its first public hearing on the application."[76]

These two projects had a particularly wide range of potential environmental impacts. The size and public nature of the projects, along with their sensitive bayside settings, created a particularly broad range of potential environmental impacts. The new stadiums (and mall) could create an increase in traffic along with potentially significant air quality impacts. Potential impacts on aquatic ecology were implicated by the stadiums' locations adjacent to San Francisco Bay. Industrial

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73. Ironically, although the term "MegaMall" was used frequently by project opponents during the initiative campaign, the term itself was created as a positive marketing term by the Mills Corporation, one of three partners in the $200 million mall project attached to the stadium proposal.

74. Proposition D was placed on the ballot by the San Francisco Board of Supervisors. Proposition F was placed on the ballot by the Mayor without public hearings. A special election was called for the measures, which took place in June, 1997.

75. San Francisco, California, Proposition F Section 5, which added § 249.19 to Part II, Chapter II of the San Francisco Municipal Code (City Planning Code).

76. SAN FRANCISCO MUNI. CODE § 249.19 (5) (1997).

uses in the area of the China Basin ballpark led to serious toxic remediation issues that had to be dealt with. Finally, the fact that the proposed location for each stadium was right on the Bay created potentially significant impacts on open space and recreational use of the land.

A. TRAFFIC AND AIR QUALITY

Perhaps the most obvious impact of the two stadium projects is increased traffic and traffic congestion. For example, a game with a capacity crowd at the proposed Giants ballpark would generate about 18,500 auto trips with an average trip length of 25.2 miles.[77] The greatest impacts would be felt after some or all of the approximately thirteen weekday afternoon games each season. Between 3:30 and 4:30 p.m., the level of service at nineteen or more of the sixty-six intersections would deteriorate to the point of causing "excessive delays."[78] During these periods, parking needs would also escalate, impacting the on-street parking in surrounding neighborhoods and businesses.

Increased traffic means, of course, increased air pollution. The Giants ballpark project would result in increases of the two pollutants that are precursors to "smog" or ozone pollution: reactive organic compounds (ROG) and nitrogen oxides (NO_X).[79] The project would also result in increases in PM_{10} particulate pollution.[80] Both particulates and ozone have serious health effects including increased risk of respiratory ailments as well as an increase in premature deaths.

The Giants ballpark project would also lead to violations of state and federal Carbon Monoxide standards.[81] The incremental increase in Carbon Monoxide emissions caused by

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77. *See* Giants Ballpark Draft Environmental Impact Report [hereinafter "DEIR"], IV at 267.

78. Giants Ballpark DEIR, IV at 144.

79. *See* Giants Ballpark DEIR, Figure IV.G.1 at 268. Proposed Project Vehicular Emissions compared to Existing 3Com Park Vehicular Emissions.

80. *See* Giants Ballpark DEIR, IV at 267 - 270.

81. *See* Giants Ballpark DEIR, Table IV.G.2 at 275. Local Carbon Monoxide Concentrations.

the project is particularly pronounced when compared to local background air quality because game-day traffic increases lead to low travel speeds and therefore significantly more air pollution in the vicinity of the ballpark.[82]

B. LAND USE AND OPEN SPACE

The San Francisco General Plan contains provisions for Recreation and Open Space as a central element in guiding the land use policies for San Francisco.[83] Key portions of it would seem to preclude a development of the size, scope and nature of the Giants' proposed ballpark.

The General Plan calls for a "citywide system of high quality public open space."[84] It also calls for "continuous public open space along the shoreline unless public access clearly conflicts with . . . uses requiring a waterfront location."[85] The Plan further states that "industry or commercial uses that are not dependent upon use of the water should not be permitted."[86]

The General Plan also includes specific provisions for open space development at specific locations. The policy for the creation of a South Beach Small Boat Harbor and Park calls for the development of a "six or seven acre public park and small boat marina east of the Embarcadero Roadway."

How do development projects such as the two proposed stadiums penetrate such an apparent impasse of established development guidelines? In the case of the Giants stadium, language was placed in the ballot measure that directed the Board of Supervisors, Planning Commission and other officials to *amend the city's General Plan and other codes and*

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82. *See* Giants Ballpark DEIR, IV at 274.

83. *See* Giants Ballpark DEIR, III at 3.

84. San Francisco General Plan, Recreation and Open Space Element, Objective 2, as cited in Giants Ballpark DEIR, III at 5.

85. San Francisco General Plan, Recreation and Open Space Element, Objective 3, as cited in Giants Ballpark DEIR, III at 5.

86. San Francisco General Plan, Recreation and Open Space Element, Objectives 2 and 3, as cited in Giants Ballpark DEIR, III at 5.

ordinances in a manner consistent with the intent to build the stadium expressed in Proposition B.[87]

As directed by the passage of Proposition B, the city's Planning Department developed a number of amendments to the general plan that would (1) nullify any requirements for development projects that contradicted the proposals in Proposition B, and (2) introduce specific enabling language and exemptions for the Giants ballpark. This type of piecemeal editing of a general plan to expedite a particular project is in itself troubling. The specific amendments threaten a number of central planning and urban design issues contained in the general plan including: 1) the preservation of sunlight in open spaces, 2) public access to shoreline areas, and 3) keeping structures low along the waterfront to allow views of the Ocean and Bay. Ironically, these amendments, arguably weakening urban environmental guidelines, were considered and approved as part of the "environmental review" process for the ballpark.[88]

1. Sunlight in Parks and Open Space

The Giants ballpark project would clearly violate Objective 2, Policy 3, of the Recreation and Open Space Element of the General Plan adopted pursuant to Proposition B. This provision calls for:

> Objective 2, Policy 3: A number of other open spaces are under jurisdiction of other public agencies, or are privately owned and therefore not protected by the Charter amendments. These spaces should be given other forms of protection to assure they are not shaded during the hours of their most intensive use. Any new shading should be remedied to the extent feasible by expanding

87. The provision is contained in "Objective 2 Policy 3 of the Recreation and Open Space Element of the General Plan." The amendment creating an exemption tailor-made for the ballpark was contained in Proposition B, Section 8, approved by the voters of San Francisco, March, 1996.

88. *Commissions OK EIR at Mayor's Urging*, SAN FRANCISCO EXAMINER, June 27, 1997, at p. A1. The amendments were approved at the same joint meeting of the Redevelopment Agency and Planning Commission certifying the EIR. *See id.*

> opportunities for public assembly and recreation in indoor and outdoor settings.[89]

2. Open Space Along the Waterfront

The Ballpark plan also clearly violates the provisions in the Plan for *public open space along the waterfront.* Furthermore, it conflicts with the proposal for a small boat harbor. Therefore, Proposition B's mandate to amend the General Plan to fit plans for the Ballpark includes the following:

> Objective 3: A 4.8 acre shoreline park is proposed at Rincon Point, and a 6.8 acre South Beach park is being developed at the base of Second Street adjacent to South Beach Harbor as part of the Rincon Point-South Beach Redevelopment project, with appropriate transitions to the ballpark and its overlooks. The ballpark will provide public access along its waterfront edge and connect the Embarcadero promenade (Herb Caen Way) with Lefty O'Doul Bridge along China Basin.[90]

3. Size and Scale of Waterfront Development

Finally, the sheer bulk of the stadium conflicts with a number of features of the Urban Design Element of the General Plan, including an explicit 40-ft. height limit for new buildings,[91] as well as a guideline calling for low buildings along the waterfront. As in the above cases, Proposition B required the Planning Commission to write specific exemptions for the ballpark into the language of the General Plan:

> Objective 3, Section 1.D: Low buildings along the waterfront contribute to the gradual tapering of height from hilltops to water that is characteristic of San Francisco and allows views of the Ocean and Bay. Larger, taller buildings providing places of public assembly and rec-

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89. Giants Ballpark DEIR, IV at 2.

90. Giants Ballpark DEIR, IV at 3.

91. Objective 3 Map 4, Urban Design Guidelines for Height of New Buildings. San Francisco General Plan.

> reation may be appropriate along the waterfront if they provide unique overviews or vistas that include portions that are publicly accessible during daytime and evenings, and provide maximum feasible access to the shoreline.[92]

The language in Proposition B circumventing these principles of urban design and planning through an initiative approving a specific development project sets a worrisome precedent. Instead of the project being tailored to be consistent with the city's general plan, the general plan itself was tailored to allow a well-funded development project to go forward. Will the city continue to allow politically expedient projects to run roughshod over its own development guidelines?

C. TOXIC CONTAMINATION AND AQUATIC LIFE: OF HERRING AND HEAVY METALS

The proposed location for the Giants' Ballpark had been an industrial site for over 100 years. As a result, the land was contaminated with toxics of multiple varieties, from coal-tar and petroleum products to chemicals, paints, and heavy metals.[93] Soil samples at the project site were found to contain chemicals exceeding regulatory hazardous waste standards.[94] The twelve months of construction for the project would uncover large areas of soil.[95] Rain and water used for construction purposes (like dust control) would fall on the soil, washing the toxic-laden dirt into China Basin Channel.[96] The increased turbidity of the water in the Bay could decrease sunlight underwater, hindering photosynthesis, and introduce concentrated toxics, potentially resulting in an increased accumulation of toxics in the biota.[97] And toxics currently buried under the Bay floor would be churned up by the huge

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92. Giants Ballpark DEIR, IV at 5.
93. *See* George Cothran, *Foul Play*, S.F. WEEKLY, Oct 1-7, 1997, at p.12.
94. *See* Giants Ballpark DEIR, IV at 298.
95. *See* Giants Ballpark DEIR, IV at 306.
96. *See* Giants Ballpark DEIR, IV at 306.
97. *See* Giants Ballpark DEIR, IV at 307.

support columns to be driven deep into the underwater soil.[98] Tidal action could move buried pollutants from the site into the China Basin Channel and the Bay.

The EIR also points out the economic importance of the Pacific herring (*Clupea harengus pallasi*), and the possibility that toxic sediment released by construction at the site would interfere with the herring spawning at the mouth of China Basin by suffocating eggs laid there, and causing abnormalities in the surviving fish.[99]

Had this information been made available through an EIR performed prior to the election, the project may have seen opposition from an entirely new sector: the fishing industry. San Francisco's general plan contained a clear vision for the Pier 46B area (the Ballpark site): it was to be used for "a Port maintenance facility and other maritime uses."[100] Not only would the Ballpark project not be a maritime use, it would threaten an important maritime use of the entire area by killing fish. But this posed no problem for the Giants. This troublesome section would simply be crossed out, voided, and replaced by specific language calling for the development of a ballpark written right into the general plan.[101]

D. POST-ELECTION EIRS: A FAST-TRACK CEQA PROCESS?

As the *Guide to the California Environmental Quality Act* points out:

> In the more than 25 years since the enactment of CEQA, the environmental review process has also become a means by which the public interacts with decision-makers in developing policies affecting the environment. Thus, the California Supreme Court has

98. George Cothran, *Foul Play*, S.F. WEEKLY, Oct 1-7, 1997, at p.12.
99. *See* Giants Ballpark DEIR, IV at 307.
100. Giants Ballpark DEIR, IV at 10.
101. *See* Giants Ballpark DEIR, IV at 10.

> stated that the CEQA process `protects not only the environment, but informed self-government.'[102]

Despite all of these potentially significant environmental impacts, no Environmental Impact Report (and for that matter, no formal environmental analysis) would be completed until well after voter approval of the ballpark and stadium projects — long after key decisions would be made about the scope of the projects. This fact in itself undermines the informed self-government function of CEQA.

Because no environmental analysis had been done, both the Supervisors who placed the measures on the ballot and the public who voted on them were denied the very information that would have been required had any other "decision-making body" been faced with the approval or disapproval of the stadium projects were they not on the ballot.

In the case of the 49ers stadium and mall, the only information the public received on the potential adverse affects on air quality, traffic, and pollution was in short statements in the ballot handbook placed by groups opposed to the project, and in one mail piece put out by environmental groups.[103] Since the cost of placing arguments in the ballot is high and based on a per-word charge ($200 + $2 per word in San Francisco), the statements tended to be very short and general. Furthermore, *since no formal environmental review had been commissioned by the city,* those discussing the potentially harmful impacts had very little data with which to work. If an EIR had been available, its findings could have been brought into the debate as concrete, objective data. Instead, the vast majority of information the public received was in the form of

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102. MICHAEL REMY, ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 2 (1996) (*citing* Citizens of Goleta Valley v. Board of Supervisors, ("Goleta II") 52 Cal. 3d 553, 564 (1990)).

103. Campaign mail from the Sierra Club and the San Francisco League of Conservation Voters addressed the environmental problems associated with the stadium-mall project. The piece urged a "No" vote on Propositions D and F because of "increased traffic and air pollution, destruction of open space and state parkland, and habitat destruction." This mailer was sent to 15,000 voters. (Campaign materials on file with the authors).

campaign materials, mostly from the pro-stadium/mall campaign, which spent more than $2 million to inundate the electorate with glossy campaign literature, an amount equivalent to approximately $33 a vote.[104]

But the fact that the voters and the Board of Supervisors were denied the opportunity to examine environmental data before voting is not the only problem. Equally important, the post-election environmental review process would face such political momentum that post-election EIRs risked being turned into exactly the type of "post-hoc rationalization" disapproved of by the courts. We discuss some of the evidence of that political momentum below.

Under CEQA, a project cannot be approved before an EIR is completed and certified. The day after the election that approved the 49ers stadium, even before all the votes were counted, the city agencies responsible for certifying completion of the EIR, the Planning Department and the Redevelopment Agency, seemed to publicly indicate a predisposition towards approval of the project as if the EIR were a formality.[105]

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104. *See* Carla Marinucci & Gregory Lewis, *Foes Say Team Spent $33 a Vote to Carpet Bomb City*, SAN FRANCISCO EXAMINER, June 4, 1997, at A1. This article, published the day after the election, estimated that "the campaign ended up with barely 85,000 out of San Francisco's 411,000 registered voters." *Id.* The article also credited successful appeals to women voters as helping to seal the victory. The campaign literature targeting women emphasized the "50% discount shopping" that would be available at the new mall. One such piece queried "Why should the city support Propositions D and F? New jobs, new stadium, and new hope for the Bayview — And 50% off." (Campaign materials on file with authors). Of course, had an EIR been prepared prior to the vote, project proponents could still have tried to drown out any data on negative environmental impacts with glossy mail pieces. For this reason, we suggest in the final section of this article that some information on environmental impacts be placed in the ballot handbook. The broader issue of campaign finance is, however, beyond the scope of this article.

105. *See* Gerald D. Adams, *But City is Poised to Issue Approvals with Lightning Speed*, SAN FRANCISCO EXAMINER, June 4, 1997, at A15. According to the *San Francisco Examiner*, "San Francisco Redevelopment Agency Director James Morales said that, once assured the ballot measures have been approved, he will immediately redeploy staff members to work on the stadium and mall . . . ." *Id.* "It is a high priority project," said Morales. *Id.* Sue Hestor, attorney and urban environmental advocate criticized the department: "Planning has become a permit-processing department that wants to approve projects without modification." *Id.*

The push for both the stadium projects took place in the context of a very aggressive approach to planning in San Francisco. San Francisco Mayor Willie L. Brown, Jr. — dubbed "The Master Builder" by the local press[106] — pledged to develop "every inch of ground that is not open space."[107] In August, two months after the June election that contained the two 49ers measures, the *San Francisco Chronicle* reported on the mayor's tightening grip on the city's planning commission. The trouble was, critics reported, that "the mayor seems to be the only voice in city government when it comes to planning issues."[108] The article also reported that planning veterans said that "checks and balances have disappeared: If Brown wants something to happen, city agencies that in the past would have scrutinized projects closely now rush to see them approved."[109]

An account of the hearing in which the Ballpark EIR was approved by city agencies illustrates this point. An article by planning writer Gerald Adams in the *San Francisco Examiner* reads in part:

> Sternly instructed to do so by Mayor Brown, the joint Redevelopment Agency and Planning commissions dutifully pushed forward the San Francisco Giants' plan to construct a China Basin ballpark. . . .

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106. *See* Rob Morse, *Multifaced Mayor: A Citizen's Guide*, SAN FRANCISCO EXAMINER, November 9, 1997, at A1. This name stuck and appeared a number of times in local papers. Columnist Rob Morse wrote of the "symptoms" of "Mayor Master Builder," which he described as, "Boulevards, museums, Taj Ma City Hall, and Willigan's Island Theme Park. This is the classic case of the edifice complex, with overtones of Paris envy." *Id.* Ken Garcia at San Francisco's other daily paper quipped, "Guys like Bill Clinton want to deal with vague concepts like building a bridge to the 21st Century. Brown doesn't care where the bridge goes. He just wants to build it." Ken Garcia, *State of City? State of Confusion*, SAN FRANCISCO CHRONICLE, October 16, 1997, at A17. For a list of the many ambitious building plans laid out in the 95 minute State of the City address that sealed the Mayor's reputation as "Master Builder," *see* Matier and Ross, *Brown's Ambitious To-do List for San Francisco Carries Hefty Price Tag*, SAN FRANCISCO CHRONICLE, October 17, 1997, at A19.

107. John King, *Mayor's Grip on Planning Called Worrisome*, SAN FRANCISCO CHRONICLE, August 8, 1997, at A17. "Mayors are known for what they build. . . . I intend to cover every inch of the ground that isn't open space." *Id.*

108. *Id.*

109. *Id.*

> "San Franciscans normally deliberate and deliberate and deliberate and nothing gets done. That's not the way I operate," Brown said. . . .

While commissioners may have been intimidated by the mayor's words, dissidents were not. Among some 50 speakers were critics who raised problems about traffic, parking, encroachment on South Beach Park, sidewalks in states of disrepair, poorly lit streets and threats to residential neighborhood quality.

The fast-track nature of the ballpark review process is further demonstrated by a tailored statutory exemption for the Ballpark pushed through the state Legislature that allowed the Giants to begin preparation of the ballpark site — including relocation proceedings against tenants — before final approval of the EIR.[110] This not only further called into question the validity of the post-election ballpark EIR, but also invited an attempt to amend the bill with a flurry of unrelated CEQA exemptions from Republicans in the Legislature.

For proof positive that the vote had a profound effect on the post-election environmental decision-making process, we need look no further than the Ballpark EIR's rejection of the "No Project" Alternative. CEQA "requires public agencies to deny approval to a project with significant adverse effects when feasible alternatives or feasible mitigation measures can substantially lessen such effects." One alternative — the "No Project" alternative — is required by CEQA to be considered in all EIRs.[111] The possibility that a project might be rejected as too harmful to the environment is critical to the integrity of the CEQA process.

In the terse two paragraph section labeled "Reasons for Rejection" [of the "No Project Alternative"] the EIR reads:

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110. *See* Steven A. Capps, *Giants Ballpark Bill Passes Assembly,* SAN FRANCISCO EXAMINER, April 8, 1997, at A1. The bill passed with a lopsided vote: 71-1 in the Assembly.

111. *See* CEQA Guidelines, § 15126.

> The No Project Alternative would not fulfill the mandate of the voters of San Francisco in Proposition B to construct a ballpark on a China Basin site.[112]

As with the Ballpark, the campaign for a 49ers stadium and mall blurred the lines between private project proponents and the city approving the project. The city's participation before and after voter approval was spearheaded by Mayor Brown himself.[113] It was his idea to add the mall to the stadium complex.[114] He played a defining role in the campaign for Propositions D and F, publicly stumping for it and encouraging city workers to walk precincts for it. Finally, he took an active role in shepherding the project through agencies for review, having his office handle the project directly.[115]

This predisposition towards fast-track approval is written directly into Proposition F, which was placed on the ballot by the Mayor. Proposition F directed the San Francisco Planning Commission to "approve a conditional use permit for the stadium and mall no matter what flaws, if any, they find in the project. It must grant approval within 60 days of its first hearing on the projects."[116] Normally, public hearings for such a large project could take a year. One local paper reported that veteran planners said they "have never known the commission to be so constrained by a time restriction."[117]

VI. CONCLUSIONS AND SUGGESTIONS FOR REFORM

In drafting the guidelines, the Resources Agency made efforts to ensure that, wherever possible, CEQA's procedures

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112. Giants Ballpark DEIR, VIII at 12.

113. *See* John King, *Mayor's Grip on Planning Called Worrisome*, SAN FRANCISCO CHRONICLE, August 8, 1997, at A17. The San Francisco Mayor cultivated his mastery of the development approval process during his years as Speaker of the Assembly when he also worked as a development attorney. *See id.*

114. *See Key Events in San Francisco 49ers' Bid for a New Stadium to Replace Candlestick*, SAN FRANCISCO CHRONICLE, June 4, 1997, at A14.

115. *See* John King, *Mayor's Grip on Planning Called Worrisome*, SAN FRANCISCO CHRONICLE, August 8, 1997, at A17.

116. *Id.*

117. *Id.*

would not obstruct efficiency in government. To this end, it allowed that "the submittal of proposals to a vote of the people" is not to be considered a "project" as defined by CEQA, and therefore no environmental analysis needs to be done studying that submittal. This directive says that the purely ministerial act by a public agency of placing a proposal on the ballot — where it has no other legal option — need not trigger the CEQA review process.

Unfortunately, this narrow advisory in the guidelines has been misused in a way that clearly contradicts CEQA's central requirement that EIRs should be prepared ". . . as early as feasible in the planning process to enable environmental considerations to influence project program and design . . . ."[118] In cases such as the Giants Ballpark and the 49ers Stadium, project sponsors (in reality the city and private parties together) were able to largely avoid CEQA's requirement that "at the earliest feasible time, project sponsors incorporate environmental considerations into project conceptualization, design, and planning."[119]

One remedy would be to remove the ballot measure exemption from the CEQA Guidelines in its entirety. Even when ballot measures are citizen-sponsored, voters should have a right to consider environmental analysis when deciding how to vote on an initiative. Or perhaps the exemption could be narrowed to only exempt more general citizen-sponsored measures,[120] but not citizen-sponsored measures on specific development projects.[121]

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118. CEQA Guidelines, § 15004. *See also* Fullerton Joint Union High Sch. Dist. v. State Bd. Of Educ., 654 P.2d 168, 179-180 (Cal. 1982); Bozung v. Local Agency Formation Comm., 529 P.2d 1017 (Cal. 1975); Mount Shasta Defense Committee v. Regents of Univ. of Cal., 77 Cal. App. 3d 20, 35 (1978); Stand Tall on Principles v. Shasta Union High Sch. Dist., 235 Cal. App. 3d 772, 780 (1991).

119. CEQA Guidelines, § 15004(b)(1).

120. *See* Stein v. City of Santa Monica, 110 Cal. App. 3d 458 (1980).

121. A private project proponent could, of course, avoid early CEQA analysis through an "astroturf" paid signature drive for an initiative. This misuse could be avoided if specific development projects were barred from using the exemption.

At the very least, the Resources Agency should amend the guidelines[122] to further clarify that the ballot measure exemption applies only to citizen-sponsored initiatives. As we discussed earlier, this was probably their intention in amending the section to include a citation to *Stein*. The *Lee* court, however, missed this amendment, underscoring the need for clarification. Alternately, local governments could pass resolutions and/or planning policies interpreting the guidelines' exemption for ballot measures to apply only to citizen-sponsored initiatives, and requiring EIRs in cases where the project sponsors or local governments place the measure on the ballot. Certainly, some initial formal environmental assessment should be done.

The *Lee* court's argument, that it would be hard to confirm that voters had considered the data, does not contradict the usefulness of the data to the whole electorate. For example, in San Francisco, many influential endorsing organizations would be able to make decisions based on that data, and voters would be able to take their recommendations into account.[123] As well, some summary of whatever environmental analysis had occurred could be placed in the ballot handbook, much like the financial analysis that the handbook currently contains.

CEQA's exemption for ballot measures was not meant to allow project proponents to make an end-run around the EIR process. The current misuse of this exemption is undermining the law's intent, namely, "that protection for the environment be the guiding criterion in public decision-making." If corrections are not made, we are sure to see more and more developers taking advantage of the exemption, ironically using

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122. *See* CAL. PUB. RES. CODE 21087(a) (West 1996). The Resources Agency is now required to "certify and adopt guidelines, and any amendments thereto, at least once every two years." *Id.*

123. In addition to environmental groups — San Francisco League of Conservation Voters, Sierra Club, and San Francisco Tomorrow — many of the dozens of Democratic clubs have dedicated activists who would be highly likely to look at formal environmental analysis when making endorsement decisions. For example, the Harvey Milk Lesbian, Gay, Bisexual and Transgender Democratic Club — one of the most influential endorsements — has an environment committee that examines just these types of issues. These organizations then distribute their recommendations via slatecards and grassroots electioneering.

the initiative process — originally intended to empower the citizenry[124] — to undermine public participation in environmental and land use planning.

124. The ballot initiative was a centerpiece of the Progressive Party at the turn of the twentieth century. Envisioned as a way to allow the electorate to legislate directly, the idea was most popular on the West Coast. California adopted the initiative process in 1911, during Hiram Johnson's term as governor. *See* RANDY SHAW, THE ACTIVIST'S HANDBOOK (Univ. of California Press, 1996), for an overview of the history of and recent campaigns around California ballot initiatives.