

**HOUSING COSTS AND LAND USE TOP LIST OF CRE WOES**

**COX CASTLE NICHOLSON PARTNERS ANDREW FOGG, KENNETH WILLIAMS, DAVID WAITE AND GREGORY CALIGARI RECENTLY PROVIDED PERSPECTIVE ON THE CURRENT REAL ESTATE LANDSCAPE AND PENDING LEGISLATION IN THIS EXCLUSIVE.**

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Fogg says California's housing production has not kept pace with demand for decades.

SAN FRANCISCO—[Cox Castle Nicholson](#) recently was recognized on the 2017 **Legal 500** list in the real estate, construction and land use/zoning categories. The Legal 500 is a referral guide with more than 4 million unique annual visitors.

Nine of the firm's attorneys received the recommended attorney designation including partners **Andrew Fogg, Kenneth Williams, David Waite** and **Gregory Caligari**. These attorneys recently provided perspective on the current real estate landscape in this **exclusive**.

**GlobeSt.com: Which pending legislation stands to impact the real estate industry the most?**

**Fogg:** One of the most challenging issues facing California's real estate industry is the availability and cost of housing. At its core, California's housing costs are largely the result of a long-term supply problem as housing production has not kept pace with demand for decades. Various burdens ranging from restrictive local planning laws to state laws such as the California Environmental Quality Act/CEQA inhibit housing development at a pace to meet current population growth, not to mention the past deficits that have built up over years of underproduction. California's high housing costs have ripple effects throughout various sectors, including commercial real estate as it becomes increasingly challenging for businesses to find and retain great talent and avoid the siren call from other states.

While not a perfect solution to this long-term problem, two bills now pending in the state legislature— SB 35, authored by Senator Wiener, and AB 73, authored by assembly member Chiu (both from San Francisco)—would provide streamlined processes to expedite housing approvals.

SB 35 would require measurable standards to be established in housing elements of local general plans, and, to the extent that housing production falls below objective thresholds, SB 35 would create a program for ministerial approval of developments that meet certain conditions.

AB 73 would provide a framework for cities and counties to establish housing sustainability districts that would allow permits for the development of certain housing developments within such districts to be issued ministerially if they meet certain criteria.

The details in the final bills, including what burdens are placed on the developments to utilize these tools, will determine whether those would be viable options to encourage the development of badly needed additional housing. While it is unclear that these bills as structured will achieve these ends, they are a good starting point for discussion of what can be done to make sure that housing is produced at a rate sufficient to keep up with demand and, ultimately, to help address the affordability crisis in California.

### **GlobeSt.com: How is the shifting CRE landscape affecting each party involved in the commercial construction contract process?**

**Williams:** As part of a risk allocation strategy, the trend is for a contractor to request an indemnification from the owner covering the contractor for any claims and liabilities arising from the project, except to the extent caused by the negligence of the contractor. Further, a contractor may insist on capping its liabilities relating to the project, where the cap is tied to some percentage of the contractor's profit on the project. These clauses must be carefully drafted, be limited to any uninsured losses, and must state that the limitation of liability is inapplicable if the contractor fails to maintain the insurance, or commits fraud, gross negligence or willful misconduct.

Further, a contractor may favor a liquidated damages remedy, which obligates the contractor to pay a daily amount to the owner as an owner's sole and exclusive remedy for late performance. Such provisions usually have a grace period and a sliding scale as to the amount of damages.

Of course, liquidated damages never fully compensate an owner for its damages due to late performance.

**GlobeSt.com: What are the major challenges in land use approvals?**

**Waite:** Landowners that are located in the so-called path of development extending from the urban core and beyond first ring suburban communities are evaluating whether properties they own or control have the ability to allow for the development of more intense or alternative land uses that can accommodate growth and development. Invariably, the conversion of land uses to allow for more intense development outside the urban core, first ring cities and suburbs can contribute to urban sprawl, resulting in increased traffic and congestion.

The CEQA 2015 decision ushered in critical rulings affecting land use and environmental law. The rulings in the case have made the CEQA process and the analysis of greenhouse gas emissions in CEQA documents substantially more complicated.

The challenge going forward is how best to quantify and analyze project level greenhouse gas emissions and to correlate those emissions to statewide greenhouse gas reduction mandates and standards. In a concurring and dissenting opinion, Justice Corrigan correctly observes that this could result in CEQA compliance becoming a “moving target, impossible to satisfy.”

Responding to this concern, many cities and counties are beginning to develop comprehensive land use plans, including updates to general plans, to encourage a healthy balance of jobs and housing. The goal is to reduce vehicle miles traveled, the emerging regulatory metric for evaluating traffic patterns for new development projects. In addition, cities and counties are looking closely at how to reduce greenhouse gas emissions for new development projects and to manage California’s precious water resources. In many cases, transitioning from agricultural uses to non-agricultural uses can result in a reduction in greenhouse gas emissions and reduce water consumption. New energy-efficient homes and emerging technologies such as the promise of autonomous electric vehicles can reduce these emissions. Overall, comprehensive proactive land use planning by cities and counties that anticipates shifting land uses and emerging technologies can offset regulatory impacts over time.

**GlobeSt.com: What are the latest trends in transit-oriented mixed-use developments in the Bay Area?**

**Caligari:** These developments continue to be a very robust market segment in the Bay Area. Many jurisdictions are having difficulty keeping up with demand for the high-density residential housing and related services provided by such projects due to strong employment in the region. For example, a number of jurisdictions in the South Bay are scrambling to meet the needs of large technology companies such as Google and LinkedIn.

Permitting trends in such mixed-use projects include addressing green-house gas emissions based upon vehicle miles traveled instead of traditional level of service standards. In addition, such projects are now integrating complete street concepts into the development plans to provide access for all users, including pedestrians, bicyclists, motorists and transit riders of all types.

There is also an increased emphasis on providing affordable housing as a component of such projects, and leveraging existing and recently promulgated housing subsidies, including California state cap and trade funds for sustainable communities, enhanced infrastructure financing districts, 80/20 tax-exempt bond and tax credit transactions, and local affordable housing bond measures. Lastly, we are seeing increased activity in the area of revitalizing older shopping malls to include improved transit connections and to add high-density housing, lifestyle tenants such as restaurants and entertainment venues, and even hotel and office uses.