Via PropertyProf blog, here’s an article on the real estate blog LA Curbed in which they disclose a previously secret settlement agreement between an LA neighborhood group and a local developer. The agreement resolved potential CEQA litigation by the neighborhood group against a possible condo development proposed by the developer. In particular, Curbed is outraged that (a) the agreement is secret; (b) the agreement gives the neighborhood group $250,000 for “monitoring” costs without actually restricting how the funds are used; and (c) the settlement provides payment of about $90,000 for attorney’s fees for the neighborhood group. Curbed (and the lawyer it relies on a major source) argue that this agreement is an example of a broader pattern of “greenmail” in which opportunistic individuals, neighborhood associations, unions, and even competing businesses use the threat of CEQA litigation to extract money from developers.

The first question is whether Curbed is right that we should be outraged about the secrecy of the agreement. There are lots of secret settlement agreements in law all the time – it’s unclear to me why we should be particularly troubled about them in the CEQA-context as opposed to other contexts. (That makes the comment by the lawyer that Curbed quotes that secret settlement agreements are a “loophole” in CEQA puzzling, since it’s the general rule in private litigation that settlement agreements can be secret.) Perhaps the argument is that if these agreements were public, there would be more public pressure on neighborhood associations not to threaten potentially frivolous CEQA litigation against developers.

But that just leads to the next question: Are these agreements really problematic? If developers are rational business actors, then they should only be paying off potential litigants where the settlement costs are equal or less than the potential costs that the developers would face if a lawsuit was filed. Those costs would include: the costs from any delays that a lost lawsuit would impose on the project (multiplied by the risk that the developer might actually lose) plus the attorney’s fees to contest the litigation, and the costs from any delays that resolving the lawsuit would impose on the project.

The problem is that these costs are present for all CEQA litigation – not just the kinds that Curbed or anyone else dislikes or thinks are frivolous or whatever. We could look to reduce those costs – for instance, we could try to accelerate some kinds of CEQA litigation so as to reduce delays (as the legislature did last session when it created special fast-track procedures for certain kinds of projects). But it’s hard to imagine that reducing those costs wouldn’t involve trade-offs themselves. The fast-track procedures mean that other important kinds of litigation in California courts might get further delayed; they might result in courts rushing to make decisions and therefore reaching more erroneous decisions; and creating fast-track procedures for only some kinds of projects can undermine the long-term stability and effectiveness of the statute as a whole, as other interest groups seek

exemptions for their favorite kinds of projects.

Now perhaps the folks at Curbed would respond: Yes, yes, we are all in favor of CEQA litigation, but only the right kind. The kind that involves fighting big, bad corporations doing evil things. But let's get rid of the frivolous claims. Of course, no one believes they are the big, bad corporation doing evil things (well, not many people believe that anyway). Nor do many plaintiffs believe that they have frivolous claims. Perhaps you could try to impose more sanctions for losing claims – for instance, make losing plaintiffs in CEQA litigation pay for the costs of the defendant. But because many plaintiffs with truly meritorious claims will not know (before they file suit) that their claims will actually win (courts make mistakes, after all!), that kind of reform will necessarily reduce the number of lawsuits that Curbed probably thinks should be filed in the end. You know, the ones against big, bad corporations. To reduce that problem, you could set the bar for frivolous claims higher, such that only really, really bad claims mean you have to pay the defendant's attorney's fees. But that means the deterrent effect of the sanction is much reduced – just as the sanctions for frivolous claims in general in the federal judicial system (pursuant to Federal Rule of Civil Procedure 11) are generally seen as being relatively ineffective in deterring frivolous litigation.

Now maybe you think the reduction in some meritorious claims that would otherwise be brought is a price worth paying in order to eliminate a whole bunch of "greenmail" frivolous claims. (Again, setting aside the problem that one person's greenmail is another person's meritorious claim.) But if that's the case, let's be up front about the argument. We think there's too much environmental protection under CEQA and not enough development, and the lack of development means housing prices are too high, not enough construction jobs, etc., etc. That's a reasonable position, in general – but it doesn't seem to be the one that Curbed is taking. At least, they're not explicit about the first part ("too much environmental protection")

Is there a way of squaring this circle, of selectively reducing the problem of frivolous litigation while still protecting meritorious claims? Curbed, and the lawyer it quotes, seem to believe that there are three main solutions: (a) make it harder for parties not claiming environmental interests relevant to a dispute to file a CEQA lawsuit (in technical terms, restrict standing to sue to those with environmental interests, not solely business interests); (b) require public disclosure of all the interested parties in the lawsuit, such that business interests or others can't hide behind unincorporated neighborhood associations as the lead plaintiff; and (c) require public disclosure of settlement agreements for CEQA litigation. I've suggested (a) before. Now, I'm skeptical that this solution would actually make a huge dent in the amount of CEQA litigation, but it might solve the political problem of people

being concerned about people suing under CEQA for the wrong reasons (i.e., greenmail). As for (b) and (c), I don't see any major problems with them. Again, I actually don't think this will deter a whole lot of CEQA litigation, but if it makes people feel better about the process, and reduces the risk of reforms that would gut CEQA, that's great.

What's interesting to me is that Curbed's blog post, and the solutions it develops, seem to show a deep concern about *why* people are suing under CEQA, what their motives are. Curbed cites some data collected by the lawyer that it quotes that only a fraction of CEQA litigation is filed by "traditional" environmental groups and most of the rest is filed by fly-by-night unincorporated neighborhood associations. The implication is that this is problematic, because those groups are likely motivated by "good" green motives, while the unincorporated associations might have "bad" motives, i.e., get money.

But if the law is set up well, and if it produces good results (and of course, we can question whether that is the case with CEQA's environmental review and litigation procedures), why do we care about motive? I noted this point in an earlier post about litigation over decisions whether to list species for protection under the Endangered Species Act. Environmental groups do appear at times to be motivated to list species under the ESA in order to stop development projects – but that seems to inspire those groups to take the effort to find species that are truly in trouble and warrant protection under the Act. Likewise, if various parties think they can make money of potentially successful CEQA litigation, then you'll get more efforts by private parties to scrutinize environmental review documents for potential flaws, and litigation over those flaws, which should encourage those conducting the environmental reviews to do a better job preparing them – which should be a good thing, if we think the aims of CEQA are good ones. Motive should be irrelevant; it's results that count. (PLF doesn't seem to get this, but that's okay.) Of course, you could say that the cost we're paying to get higher quality CEQA environmental review isn't worth it, because of diminishing marginal returns and all that. But again, that's an argument about tradeoffs, not motives.

But for some reason, arguments over motives appear to have a fair amount of political traction – and that's what seems to have gotten the folks at Curbed so upset. And if some tinkering with CEQA to reduce concerns about motives makes everyone happier without really undermining how the law works, I'm fine with going along with that.