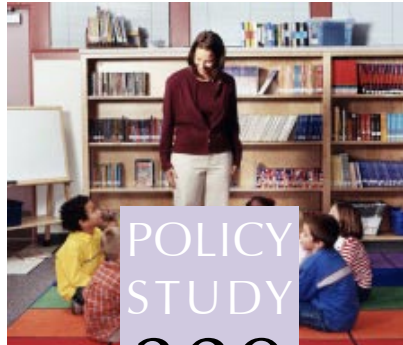




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# ADDITION AND SUBTRACTION: STATE AND LOCAL REGULATORY OBSTACLES TO OPENING A NEW PRIVATE SCHOOL

By Bahaa Seireg  
Project Director: Lisa Snell



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# Addition and Subtraction: State and Local Regulatory Obstacles to Opening a New Private School

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## Executive Summary

In California's 2000 election, when the school voucher proposition failed miserably at the polls, voucher supporters lost a major battle. Their campaign sought reform on the demand side of the schooling market. Today private schools in California are often quite expensive. If given the purchasing power of \$4,000 in the form of a voucher (or tax credit), most parents could send their kid to a private school, if prices remained constant and the preferred seat in the existing set of private schools were available.

Yet, parents who want higher-quality education for their children are routinely being turned away or put on waiting lists as private schools fill to capacity and high demand and low supply force prices upward. The battle for better schooling needs to fight a supply-side campaign as well and create more high-quality school capacity. Many stringent regulations prevent entry and impose large costs on those attempting to open new schools. These obstacles "shift back" the supply curve, keeping potential entrepreneurs out of the market, reducing the amount of new school capacity, and raising its price.

Ultimately, for schools to be competitive and performance-based, and for parents and students to have real choices in their education, the supply of private schooling must be dynamic and competitive as well. The battle for better schooling must be fought on both fronts. That means that the challengers of the status quo shift some of their resources to combating the regulatory obstacles to private schooling.

This paper mostly discusses private schools, but it is important to note that all the regulations imposed on private schools are also imposed on charter schools. Charter schools create choice for parents and students within the public school system. The charter school movement has its roots in a number of other reform ideas, from alternative schools, to site-based management, magnet schools, public school choice,

privatization, and community-parental empowerment. When reading this paper it is essential to realize that charter schools depend on nontraditional buildings and new facilities in order to proliferate within the public school system.

Opening a private school is onerous at best. In addition to meeting education department requirements, one must satisfy four main types of regulation, each of which imposes many hurdles to the private sector and limits the creation of new school capacity:

1. The State Environmental Quality Act, which imposes several obstacles to acquiring a piece of land or modifying a structure on that land;
2. City zoning requirements, which impose restrictions on the location of the private school;
3. City parking requirements; and
4. State and Local Building Codes, which deal with the school building itself.

The causes behind the excessive restrictions discussed in this paper are many. The education bureaucracy can often get bogged down in issues of control. Administrators might really think that they are enhancing children's educational experience and that they are making schools safer and more conducive to learning. But the road to hell is paved with good intentions. In reality, they are doing the exact opposite. Adam Smith described the liberal principle best when he wrote:

*[E]very individual, it is evident, can, in his local situation, judge much better than any statesman or lawgiver can do for him. The statesman who should attempt to direct private people in what manner they ought to employ their capitals would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.*

Parents have strong reason to decide for themselves whether a school is appropriate for their child. More than anyone else, parents have both the motivation and the local knowledge to make choices for their children about the school's bundle of characteristics. Parents and the proprietors themselves will naturally seek assurances against conflagration and building collapse, and nongovernmental forces can attend to this demand in a responsive, intelligent way. Very often, solutions among local parties are self-creating and self-enforcing. They don't need or want legal authorities to resolve their problems.

Government restrictions make it very hard and very expensive for people to open a private school. These costs are largely passed on to the customer. The high price of private schooling in California today can be traced to a lack of competition, which itself can be traced to government restrictions. Basic economic theory says that, with less supply, the price will go up. The opponents of government schooling are right to focus on making private schooling viable, but almost all the attention has been on demand-side reforms like vouchers and tax credits. Even if demand-side reforms were to succeed, the situation on the supply side would prevent those reforms from succeeding. Ultimately, for schools to be competitive and performance-based and for parents and students to have real choices in their education, the supply of private schooling must be dynamic and competitive as well.

Fostering a competitive market for education where a private school market can flourish and expand the options for many children who desperately need them requires legislators to act. At the local level, zoning, parking and building codes and environmental reviews must be reassessed for merit and streamlined. A

performance planning approach focusing on end results rather than prescriptive policies would ensure that the goals for which the regulations were created get addressed without bogging the system down with arcane requirements. It determines appropriate uses, parking needs and environmental impact flexibly, built on the fact that the impact of any given use of land upon another has more to do with the intensity of the use than the type of use. It holds landowners accountable for any negative effects of their actions but lets them use their land as they see fit.

This resilient system designs rules and procedures that allow maximum flexibility but cope well with real problems as they arise. It replaces our current system based on anticipation—assuming we know all the potential problems and solutions for present and future land uses and prescribing what we will and will not allow. An approach designed to deal with real and measurable impact would require fewer regulations and less paperwork with a faster and simpler approval process. Some restrictions would still exist, but far fewer than under current approaches and allowing a broader range and mix of uses. Such streamlining would allow parents greater choice in schools and students a greater chance to succeed.

## Part 1

# Introduction

In California's 2000 election, when the school voucher proposition failed miserably at the polls, voucher supporters lost a major battle. Their campaign sought reform on the demand side of the schooling market. Today private schools in California are often quite expensive. If given the purchasing power of \$4,000 in the form of a voucher (or tax credit), most parents could send their kid to a private school, if prices remained constant and the preferred seat in the existing set of private schools were available.

There is at least anecdotal evidence, however, that many established private schools are filled up and routinely turn people away. Charter schools, magnet schools, and private schools, which create alternatives to the traditional public schools, often have long waiting lists. Despite the failure of a universal voucher initiative, parents seem to want more high-quality choices for their children. Yet, the causes of high price and excess demand of private schools have received little attention. The battle for better schooling needs to fight a supply-side campaign as well and create more high-quality school capacity. Many stringent regulations prevent entry and impose large costs on those attempting to open new schools. These obstacles "shift back" the supply curve, keeping potential entrepreneurs out of the market, reducing the amount of new school capacity, and raising its price.

Even if vouchers were widely implemented, they would only be a temporary solution. What would stop state and local governments from imposing more regulations? Going back to the California example, it is entirely possible that if vouchers became common, the California School Employees Association, a top ten contributor to the California legislature in the 2000 election cycle,<sup>1</sup> would lobby policy makers to further regulate new school construction. Restrictions would make it too costly for potential private school providers to build more schools, and the incumbent private schools could simply raise prices. The voucher program would not convey much of an increase in purchasing power. The battle for better schooling must be fought on both fronts. That means that the challengers of the status quo must shift some of their resources to combating the regulatory obstacles to private schooling.

Even if vouchers never become a reality, the restrictions imposed upon the potential supply of new competitors are still an important matter that must be addressed. This paper mostly discusses private schools, but it is important to note that all the regulations imposed on private schools are also imposed on charter schools. Charter schools create choice for parents and students within the public school system. The charter school movement has its roots in a number of other reform ideas, from alternative schools, to site-based management, magnet schools, public school choice, privatization, and community-parental empowerment<sup>2</sup>. When reading this paper it is essential to realize that charter schools depend on nontraditional buildings and new facilities in order to proliferate within the public school system.

## Part 2

# Four Goliaths

If David wants to start a private school, he must slay four Goliaths.

- *The State Environmental Quality Act*, which imposes several obstacles to acquiring a piece of land or modifying a structure on that land;
- *City zoning requirements*, which impose restrictions on the location of the private school;
- *City parking requirements*; and
- *State and Local Building Codes*, which deal with the school building itself.

To see how these barriers work against new private schools, we'll look at how they apply in detail in California.

### A. The State Environmental Quality Act

The California Environmental Quality Act (CEQA) was enacted in 1970 to give local agencies guidelines for assessing the environmental impact of both public and private projects. At first, CEQA appeared to apply only to government projects. In his book *Regulatory Takings*, William Fischel writes, “the legislative history of CEQA indicated that the legislature did not include under the term ‘project’ actions by private developers that merely required regulatory review.”<sup>3</sup> In 1972, the California Supreme Court decided in the *Friend of Mammoth* case that the CEQA standards applied to all private projects that needed a government permit, license, or subsidy, which would include all school facilities.<sup>4</sup> After the ruling, CEQA became a common basis to oppose new building, including schools.

Projects are defined in CEQA as “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment”. Private projects are defined by CEQA as “any project that will be carried out by a person other than a governmental agency, but the project will need discretionary approval from one or more government agencies for: a) a contract of financial assistance or b) a lease, permit, license, certificate or other entitlement for use.”<sup>5</sup> Any plan requiring a permit must conform to CEQA. The local planning agency (which is referred to in CEQA as the “lead agency”) has to test and approve the land, even if the owner wants to make improvements to existing structures on the land, since doing so requires a permit. The lead agency may require a permit in a time period that is very short relative to time that it can review the project under CEQA. The law addresses this timing issue by stating that the lead agency has to approve “non-permit” projects first (public projects do not need permits) and when they have time then they will get to



projects that need a permit (private projects).<sup>6</sup> This introduces delay and uncertainty, but even if there were no lag time between receiving permits and getting approval under CEQA, it would still take a long time.

First an application has to be filed. Making sure that the elaborate and extensive application is complete takes time, effort, and money. Thirty days later, the city's planning agency notifies the applicant as to whether the application for a permit is complete. After another thirty days, the planning agency will have completed an initial study consisting of data detailing project information, project description, environmental factors potentially affected, determination, and evaluation of environmental impact.<sup>7</sup> The planning agency (referred to in CEQA as the lead agency) submits the study to other agencies; in thirty days the lead agency convenes a meeting with the other agencies in order to discuss the possible environmental repercussions of the project. After the meeting, the planning agency will determine what information is needed in the Environmental Impact Report (EIR). The costs of the report has to be paid for by the land owner; the landowner has to pay various types of consultants and engineering firms to provide local governments with the information pertaining to possible soil samples, geological surveys, as well as architecture and archeological analysis. Following the completion of the EIR (which takes as long as the local agencies deem necessary), the EIR has to be circulated to the public and sent in to and approved by the State Clearing House, so that state agencies can review it. All individuals and organizations wishing to receive a copy of the EIR must be sent one; furthermore, the public agency must publish a notice of the EIR at least once in a local newspaper. The public is given between 30 and 60 days to evaluate the EIR and voice their concerns to the lead agency. After hearing the comments from the public, the local agencies prepare a final EIR and the lead agency subsequently decides whether or not to approve the project.

Given the requirements set forth by CEQA, the purchase of land for a private school is very risky. Often entrepreneurs try to navigate and negotiate the requirements before buying or leasing the land, but this slows things down and precludes sales of land, which might move quickly for other uses. In a report published March 20<sup>th</sup> of 1997, the California Legislative Analyst's Office expressed concerns that CEQA:

*... has a detrimental effect to economic development. In particular, the business community is concerned about the complexity and unpredictability of the CEQA process, the costs of compliance, and the ease for legal challenges to be made to impede development. We find that these problems do exist, although their extent is unclear.*<sup>8</sup>

## B. City Zoning Requirements

Once David has convinced the planning agency that his school will not have an adverse effect on the environment, he has to prove that his private school will not have an adverse effect on the aesthetic quality of the city. The requirements vary some from city to city, but share a lot of common elements, so for an illustrating example, we discuss the requirements in the city of Santa Clara, California. Santa Clara is known among Bay Area developers to have less restrictive laws than many other cities in the region. In the nearby cities of Saratoga and Cupertino, there are no private high schools, even though there have been many attempts to build one.

If one wants to start a private school in Santa Clara, he has to purchase land in the B-Zoning areas of the city, which are classified as "Public, Quasi-public, and Public Parks or Recreational Zoning Districts." To use the land for a private school the owner has to obtain a conditional use permit, and the city imposes

several requirements. Just because all the requirements are met, it is not assured that the city-planning agency will give David his conditional use permit.<sup>9</sup>

The zoning requirements are replete with specific instructions regarding the land. The lot area must contain a minimum of 10,000 square feet and the width must not be less than 80 feet,<sup>10</sup> so if David can't buy 10,000 feet, he is automatically cut out of the option of providing a private school in Santa Clara. The zoning ordinance specifies the minimum measurements of the front yard (15 feet), the side yard (10 feet), and the rear yard (15 feet). The following yards have to be maintained permanently as open landscaped areas: "the front yard, street side yards of corner lots (with opening of access ways in accordance with city standards), and a landscaped area equal to ten percent of the required parking area [are] to be evenly distributed throughout the parking area and adjacent to buildings."

A fence at least six feet high must surround the perimeter of the property. Also,

*[A] planter landscaped in screening shrubs and trees shall be installed and permanently maintained adjacent to any residentially zoned property. Each planter area shall be surrounded with a six-inch raised concrete curbing, or Planning-Division-approved equivalent. Minimum width of planter shall be five feet. An irrigation system shall be installed and maintained functional in each separate planter area.<sup>11</sup>*

The city of Santa Clara also specifies building height and coverage; article 26 (section 7) states that the "building height and coverage must be such that maximum height and coverage shall not exceed that allowed in the most 'restrictive' abutting zone district." This means that the height and size of David's building cannot exceed the height and size of the tallest or biggest building in the most restrictive adjacent district.

If David wants to start a private school, he will have to pay the extra cost of construction, landscaping, fencing, and irrigation consistent with the city's requirements. These zoning requirements greatly reduce the possibility that David will be able to comply with the city's requirements.

If David is lucky enough to find a piece of property in the designated zoning area, and wealthy enough to meet the requirements imposed by the city, he still has to wait for the approval of the Santa Clara Planning Commission. After the planning commission deems the zoning application complete, a public hearing must be held within 45 days.<sup>12</sup> The city code states that in order for a use permit to be approved, completion of the project has to be "desirable to the public convenience or welfare" and must not be "detrimental to the health, safety, peace, morals, comfort, and general welfare of persons residing or working in the neighborhood of such proposed use property or improvements in the neighborhood of such proposed use; or to the general welfare of the city."

All the criteria mentioned are very subjective. Going through the process, David would probably contact all potential complainers, such as residents and property owners of a neighborhood, so that he can assess the project's chances. It is possible for one complaining resident to be the reason behind the planning commission's disapproval of a project. And the process allows not only neighbors to oppose the project, but also other groups with ideological goals that oppose growth or oppose new private schools. Thirty-five days after the public hearing, the planning commission decides whether to approve the project and grant a conditional use permit.

City zoning requirements also limit “off-site advertising”—external signs on one’s own property. Santa Clara prohibits the usage of new, permanent, off-site signs and a relocation or reassignment of existing billboards. The city will discourage the proliferation of billboards and encourage the removal of existing billboards.<sup>13</sup> These advertising restrictions would make it more difficult for David to get the word out about his new school. The city’s reasoning behind the policy is that “sign clutter subjects the citizens of the city to excessive competition for their visual attention and reduces the effectiveness of all signs.”<sup>14</sup> These laws potentially limit the consumer awareness of new schools.

### C. Parking Requirements

Parking requirements, listed usually in the city’s zoning ordinance, are yet another obstacle. Parking requirements, like the zoning requirements discussed above, are predicated on the city planner’s beliefs that there is one best answer to all decisions about building. No allowance is made for the reality of different situations and special cases or of holding property owners responsible if problems are created instead of using blunt instruments to try to head off theoretical problems.

There are several specifications dealing with the many aspects of building a parking area, for example a surfacing requirement states that “all open required off-street parking areas shall be improved with two inches plant mix asphalt on six inches base rock with a prime coat and a seal coat, or five inches concrete with 10 x 10 x 10 wire mesh and expansion joints.”<sup>15</sup> If David wants to put directional signs in his parking area he has to obtain a sign permit; the area of the sign has to follow a formula based on lettering, symbols, and wording, there are height and location requirements, and the sign must follow the guidelines found in the Uniform Building Code.<sup>16</sup>

Perhaps the most restrictive element of the parking regulation is the screening and landscaping requirement, which states:

*[A]ll open automobile parking areas which abut upon a public street right-of-way shall provide landscaping to a depth of at least ten feet of said street right-of-way and of any plan line, with openings for walkway or drive purposes in accordance with City standards. An additional five percent of the gross lot area shall be devoted to landscaping. Major canopy trees shall be provided throughout the parking area and adjacent to buildings. Trees shall be spaced at either a minimum distance of thirty-six (36) feet on center or in an alternative design to accomplish an equivalent density of screening and degree of shading, as approved by the Architectural Committee.<sup>17</sup>*

Something as subjective as degree of shading has to be evaluated by a government inspector. Converting the parking area so that it meets the landscaping and shading requirements may force David to buy and plant adult trees, which requires the services of a landscaper.

Suppose David slays the foregoing Goliaths and his school is flourishing and he wants to expand. The parking requirements state “When the intensity of use by any building, structure or premises shall be increased through addition of dwelling units, gross floor area, seating capacity or other units or measurement specified herein for required parking or loading facilities, parking and loading facilities as required herein shall be provided for such increase in intensity of use.”<sup>18</sup>

For a high school, one parking space has to be provided for an additional classroom or office plus one space for each ten students attending class. For an elementary or intermediate school, one parking space has to be built for an additional classroom or office. In order for David to expand, he has to take into consideration the added expense of providing more parking spaces. And he is not allowed the option of surveying his own customers and determining what his real parking needs are, but must provide what the city directs. These requirements might make him think twice about expanding capacity.

## D. The California Building Code

The California Building Code refers to both public and private schools as Group E Occupancies, which is classified into two divisions. Division one is “any building used for educational purposes through the 12<sup>th</sup> grade by 50 or more persons for more than 12 hours per week or four hours in any one day.” Division two pertains to schools that have less than 50 students for more than 12 hours per week or four hours in any one day.<sup>19</sup> The building code is perhaps the most complicated set of rules governing private schools; everything from handrail configuration, to corridor width, to sidewalks is covered in the building code.

The general building specifications are covered in sections 504, 505, and 506, these sections give a wide range of restrictions regarding allowable floor areas, increases in allowable floor area, and the maximum height of buildings. For example, section 504.6.3, treating extensions beyond exterior walls, states that “area separation walls shall extend horizontally to the outer edges of horizontal projecting elements such as balconies, roof overhangs, canopies, marquees or architectural projections extending beyond floor area as defined in section 207 [which gives another set of definitions and restrictions].” Section 505.1.3, treating floor size increases, states that “where public ways or yards more than 20 feet (6096 mm) in width extend on all sides of a building and adjoin the entire perimeter, floor areas may be increased at a rate of 5 percent for each foot (305 mm) by which the minimum width exceeds 20 feet (6096 mm).” If David wants to expand his floor space due to an increase in demand, this section of the building code limits him.

Section 1007.3 deals with the atmospheric requirements of a school, atmosphere is divided into two headings. Common atmosphere, which exists between rooms and spaces not separated by a barrier, and separate atmosphere, which exists between rooms and spaces separated by an approved smoke barrier. Section 1007.3.3.1 deals with travel distance and says, “the travel distance from any point in a room shall not exceed 75 feet (22860 mm) to a corridor or an exit. Section 1007.3.5 has to do with hallways and corridor requirements; the sections states, “the width of hallways and corridors in a group E, Division 1 Occupancy shall be determined by section 1003.23, plus 2 feet (610 mm), but shall not be less than 6 feet (1829 mm). This requirement makes it very difficult for David to buy a building and not have to pay the extra cost of converting that building to meet the specified requirement; if the hallway is expanded to six feet, the bathrooms become too small or classes become unusable in small buildings. Section 1007.3, also states that the width of stairways serving an occupancy load of more than 100 people cannot be less than five feet. Section 1133B.4.2.2 says, “handrails shall extend a minimum of 12 in (305 mm), plus the tread width, beyond the bottom nosing.”

Any building in which chairs and tables are installed is required to have an aisle of at least 36 inches wide (or 44 inches if serving both sides).<sup>20</sup> Section 1133B.7 addresses sidewalks and states “walks and sidewalks subject to these regulations shall have a continuous common service, not interrupted by steps of abrupt changes in level exceeding ½ inch (12.7 mm) and shall be a minimum of 48 inches (1219 mm) in width.” The building code elaborates on slopes of sidewalks: “surface cross slopes shall not exceed ¼ inch (6 mm)

per foot except when enforcing agency finds that due to local conditions it creates an unreasonable hardship, the cross slope shall be increased to a maximum of  $\frac{1}{2}$  inch (12.7 mm) per foot for distances to exceed 20 feet (6096 mm) (2.5% gradient).”<sup>21</sup>

The California Building Code imposes bathroom requirements. In Group E Occupancies, the ratio of bathrooms to male students is 1:100 and for female students it is 1:45 (in elementary schools it is 1:35).<sup>22</sup> This law would make it very costly for David; what if demand for his service increases and there are 103 male students? A building inspector would demand that he build another bathroom. Bathrooms have their own requirements and specifications in the California Building Code as well as the California Plumbing Code, which makes the process expensive and time consuming. What if David bought a building that couldn't accommodate another bathroom? He has to restrict the number of students in his school, even if the school has the capacity (and toilets) to teach more students. When buying a building David has to predict the number of students that will demand his service and restrict his capacity to the predicted number, or build one more bathroom and pass the expense on to the students (and some students might not want to attend David's school with the extra cost).

## Part 3

## Case Studies Based on Interviews

The best way to understand the difficulty of building a new school in California is to listen to the stories of entrepreneurs who have grappled with the extensive regulation.

### A. Michael Leahy of Fremont, California<sup>23</sup>

Leahy bought a piece of land in Fremont, California to build a private school. The land was bought in the historic Mission San Jose district of the city. Using a piece of land in this district is excessively difficult:

*[I]f you turn over a shovel full of earth to build something, you've got to call in a certified archeologist to more or less monitor the digging. If you turn up something of cultural or historical significance, the city shuts down the project, they call in a team of archeologists, who essentially come in and unearth what you've dug up.*

As it happens, Leahy's building site was on top of a building used to house the Indians living in a mission. At first he was told that the archeologists would cost an extra \$5,000-\$15,000, however, the total extra turned out to be \$85,000. Even though Leahy and his wife owned the property, the city hired a team of archeologists who had a blank check to do as they please. Leahy stated that "every chicken bone, every piece of debris, everything was catalogued, . . . pottery experts came in from the University of Santa Clara; archeologists had a field day, but at our expense." Also, the Leahys had to plant a pepper tree that was indigenous to the area at the time the mission existed; the cost was \$6,000.

When the city school district wants to expand, it is allowed to use a portable building on the back of a truck, but when Leahy was building his school in the same area, he had to comply with all of the architectural restrictions of the district; he had to use red tile roof, and portico (which resembles stucco), which cost him \$20,000-\$25,000. The concrete work specified by the city came to another \$50,000-\$60,000. Since private schools are considered commercial, Leahy was required to install a \$30,000 fire-prevention sprinkler system that was not required for public schools. He also had to pay a development fee of \$1700-\$1800 to the local school district to build within the district. Leahy estimated that the natural cost of putting up the building was \$400,000, but because of all the requirements, the total cost came to about \$1.2 million (not including the cost of interest), and a lot of anxiety and aggravation.

When it comes to getting loans, the bank assesses by the square foot of the school and looks at what the return would be for an equivalent piece of property. Since most schools require a playground and other businesses do not, a private school owner is less likely to get a loan than another type of business owner. The

difficulty of receiving financial assistance, as well as the high costs of fulfilling all the obligation set forth by local government, means that it is less likely that there can be a competitive private school market in California.

Although the local public schools in the area are allowed to have signs that flash, Leahy's school is restricted to a wooden sign. The public schools don't have to comply with city zoning laws but private schools do. Leahy says, "the city requires us to do all the special things that [public] schools do, but because we are commercial, we don't enjoy the exemptions under the code that the school district has, . . . it's sort of a double standard."

## B. Ray Youmans of Sacramento, California<sup>24</sup>

Ray Youmans is president of Innovative Component Groups Inc., a company in Sacramento that specializes in modularly built schools. Before starting his own company, he worked in the construction department of the Navy. Youmans runs into government obstacles constantly:

*[P]olicies appear to be very benign and beneficial under the surface, but when you start peeling off the layers of the onion, they are all intertwined, reinforcing each other to confiscate private property, and turn everything over to the government. . . . In education, most government actions are directed at taking away the private education, . . . The goal of many in public education is to keep private education in check or kill it.*

Youmans cites the environmental laws as deadly to entrepreneurs who wish to start a private school. He says that the government officials hire environmental experts to come to a site with a blank check to spend the landowner's money. Sometimes it takes as long as three years to overcome the environmental requirements. Youmans also cites the political structure in California as being another obstacle to private schooling. Laws are written by attorneys and enacted by legislators who are financed by special interest groups. The attorneys have a very powerful association called the Trial Attorney Association, which gives a tremendous amount of money to the Democratic National Committee (DNC); which largely controls the California legislature. Attorneys want more laws, so that the process of starting a school becomes complicated, and more lawyers need to be hired.

Youman says that the laws are set up to:

*[D]rive up the cost, drive up the time, make it almost impossible to borrow money, and if you do borrow money it increases the time so that the cost of holding that money is prohibitive. The people who own the property can't even sell it unless the [government] gives it a clean bill of health, so it takes productive property off of the market, while the owner has to pay taxes and can't even generate revenue from it.*

In my interviews of Youmans, he spoke of the time he wanted to build a 10,000 square foot roof on a school property, simply a structure without walls, to protect the area from the rain and sun; his company was required to put in a \$40,000 fire-prevention sprinkler system even though the structure was made from steel and it had no chance of catching fire. He says government inspectors don't have the inclination or knowledge to make reasonable decisions.

### C. David Delgado of Newark, California<sup>25</sup>

David Delgado, who is a director of Challenger Schools, thinks that the worst obstacles to starting a private school come from the local government. Challenger Schools has the financial resources to meet all the building code and property requirements, but getting past the city council is the difficult part.

In the city of Newark, California, Challenger Schools wanted to build an elementary school on a property adjacent to its existing preschool. The preschool was in a retail district and all retail businesses have to pay both property and retail tax. Since schools are not retail businesses they only needed to pay property tax. If the city allowed an elementary school to be put on the property (instead of a car dealership), the city would lose tax revenue. Delgado says:

*The local government impeded the conditional use permit process. Without any legal grounds on which to deny the project, they kept the process moving slowly enough that we wouldn't make our target deadline, hoping that it would be useless to us and we would sell it or swap it with someone else who would buy it and put a car dealership on it. Once we did trade properties, the city gave their full support, expedited the process, and we opened on time.*

In the city of Los Gatos, California, Challenger Schools owned a piece of property and wanted to build a school on it, but to do so they had to apply for a conditional use permit. Challenger Schools had the resources to meet all the building requirements and offered to help with road improvements, beautification of the surrounding area (planting lots of trees), bringing in utilities that would benefit the surrounding residential area, and everything necessary to answer the concerns of the planning commission. There was a presentation made on the economic benefits of a tax-paying school to the city, and the planning commission was in favor of the new school, but the city council still turned Challenger School down and refused to approve the conditional use permit. The Los Gatos City Council did not want to approve commercial encroachment into an undeveloped area. What made that hard to understand was that it was a property adjoining an existing private school and church. Delgado's examples show that local governments can create great obstacles that hobble even entrepreneurs with the financial resources to abide by the codes and regulations. Such arbitrariness is the opposite of the rule of law, and makes it almost impossible to hope for a successful undertaking. Even if the probability of an extremely adverse outcome is small, the extremity of the loss in that case may make the undertaking uninviting. Politicized processes are in this matter highly arbitrary and capricious, making for great uncertainty (and aggravation). Such uncertainty is an integral part of the barriers to the nongovernmental provision of schooling.



## Part 4

# The Liberal Principle

The education bureaucracy can often get bogged down in issues of control. Administrators might really think that they are enhancing children's educational experience and that they are making schools safer and more conducive to learning. But the road to hell is paved with good intentions. In reality, they are doing the exact opposite. Adam Smith described the liberal principle best when he wrote:

*[E]very individual, it is evident, can, in his local situation, judge much better than any statesman or lawgiver can do for him. The statesman who should attempt to direct private people in what manner they ought to employ their capitals would not only load himself with a most unnecessary attention, but assume an authority which could safely be trusted, not only to no single person, but to no council or senate whatever, and which would nowhere be so dangerous as in the hands of a man who had folly and presumption enough to fancy himself fit to exercise it.<sup>26</sup>*

Parents have strong reason to decide for themselves whether a school is appropriate for their child. More than anyone else, parents have both the motivation and the local knowledge to make choices for their children about the school's bundle of characteristics, including the landscaping, fencing, bathrooms, and hallways. Parents and the proprietors themselves will naturally seek assurances against conflagration and building collapse, and nongovernmental forces are able to attend to this demand in a responsive, intelligent way. Factors that arguably present mild neighborhood effects, such as parking and external signage, should be handled passively and permissively by legal authorities. As Aaron Wildavsky explained in *Searching for Safety*, it makes more sense to be resilient and respond to problems that arise, rather than try to anticipate all possible problems and issue regulatory commands in advance.<sup>27</sup> Very often, solutions among local parties are self-creating and self-enforcing. They don't need or want legal authorities to resolve their problems.

## Part 5

# What to Do?

Government restrictions make it very hard for people to open a private school. Assuming that David can slay the four Goliaths, the costs are largely passed on to the customer. The high price of private schooling in California today can be traced to a lack of competition, which itself can be traced to government restrictions. Basic economic theory says that, with less supply, the price will go up. The opponents of government schooling are right to focus on making private schooling viable, but almost all the attention has been on demand-side reforms like vouchers and tax credits. Even if demand-side reforms were to succeed, the situation on the supply side would prevent those reforms from succeeding. Ultimately, for schools to be competitive and performance-based and for parents and students to have real choices in their education, the supply of private schooling must be dynamic and competitive as well.

How might local government change things so the private school market can flourish and expand the options for many children who desperately need them?

Zoning, parking, building codes and environmental reviews all arose to address real problems caused by new development. But over time the system became self-reinforcing and self-referential and further removed from the change and flexibility going on everywhere else in our lives.

A performance planning approach focuses on end results rather than prescriptive policies.<sup>28</sup> It approaches determining appropriate uses, parking needs and environmental impact flexibly, built on the fact that the impact of any given use of land upon another has more to do with the intensity of the use than the type of use. Lane Kendig, called the "Father of Performance Zoning," wrote that "Unlike the traditional approach, [performance zoning] does not organize uses into a hierarchy which is then used to protect 'higher' uses from 'lower' ones. Rather, it imposes minimum levels of performance by setting standards that must be met by each land use."<sup>29</sup> So a performance-based system replaces use restrictions with specific performance standards like drainage controls, density, floor area ratios and bufferyards between uses, and so on. It allows all uses on all lands but holds landowners accountable for any negative effects of their actions.<sup>30</sup>

This is a system based on resilience—designing rules and procedures that allow maximum flexibility but cope well with real problems as they arise. It replaces our current system based on anticipation—assuming we know all the potential problems and solutions for present and future land uses and prescribing what we will and will not allow. An approach designed to deal with real and measurable impact would require fewer regulations and less paperwork with a faster and simpler approval process. Some restrictions would still exist, but far fewer than under current approaches and allowing a broader range and mix of uses.<sup>31</sup>

Performance-based planning approaches have been successfully used in many communities in the United States.<sup>32</sup> And it is easy to see how the same approach works with building codes and preventing environmental harm by shifting to performance measures and accountability for harm, rather than bans and prescriptions.<sup>33</sup> This would remove unnecessary barriers to new private schools and many other projects as well.

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Ms. Snell frequently comments on education issues on radio and television media including recent appearances on the Fox News Channel, ABC's "Wall Street Journal Report," and numerous regional news programs. Ms. Snell has published numerous articles and op-eds on school choice in newspapers including the Las Vegas Review Journal, Orange County Register, and the Los Angeles Daily News and frequently speaks about these issues. She is a frequent contributor to Reason magazine and a monthly columnist for Reason Foundation's Privatization Watch.

Before joining Reason, Ms. Snell taught public speaking and argumentation courses at California State University, Fullerton. She was also a recipient of the 1994 Charles G. Koch Fellowship and worked on public policy issues for the Institute for Justice and REASON magazine.

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# Endnotes

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  - <sup>9</sup> Zoning Ordinance of Santa Clara, California, Article 55, Section 6. [http://www.sccplanning.org/planning/content/PropInfoDev/PropInfoDev\\_Zoning\\_Ordinance.jsp](http://www.sccplanning.org/planning/content/PropInfoDev/PropInfoDev_Zoning_Ordinance.jsp).
  - <sup>10</sup> All requirements pertaining to the building and land of private schools are found in the Zoning Ordinance of Santa Clara, California, Article 26.
  - <sup>11</sup> Zoning Ordinance of Santa Clara, California, Article 26, Section 13.
  - <sup>12</sup> All laws pertaining to the approval process of use permits are found in the Zoning Ordinance of Santa Clara, California, Article 55.
  - <sup>13</sup> City of Santa Clara General Plan 1990-2005 pg. 70. [http://www.ci.santa-clara.ca.us/community/au\\_gen\\_plan\\_index.html](http://www.ci.santa-clara.ca.us/community/au_gen_plan_index.html).
  - <sup>14</sup> Ibid.
  - <sup>15</sup> All laws pertaining to parking are found in Zoning Ordinance of Santa Clara, California, Article 37.
  - <sup>16</sup> Zoning Ordinance of Santa Clara, California, Article 40.
  - <sup>17</sup> Santa Clara Parking Regulations, Section 37.4
  - <sup>18</sup> Ibid, Section 37.1

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- <sup>19</sup> California Building Code, Section 305.1
- <sup>20</sup> Ibid, Section 1133B.6.1-B.6.2
- <sup>21</sup> Ibid, Section 1133B.7.1.3
- <sup>22</sup> Ibid, Section 2902.4
- <sup>23</sup> Michael Leahy, interview with author, May 12, 2003.
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