



Addressing California's Housing Shortage: Lessons from Massachusetts Chapter 40B

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I. Introduction

California, particularly in its coastal cities, is facing a housing affordability crisis. Median rents across the state have increased 24 percent since 2000, while at the same time median renter household incomes have declined 7 percent.¹ While multiple factors contribute to these rising rents, it is clear that supply matters, and there is an urgent need to expand supply in equitable and environmentally sustainable ways. Over the past three decades, California has added only about half the number of units it needs to keep housing costs in line with the rest of the United States.² Between 1980 and 2010, the number of housing units in the typical U.S. metro grew by 54 percent, compared with 32 percent for California's coastal metros.³ Production of units affordable to low- and moderate-income households has been even more dismal, with most cities across the state failing to meet their Regional Housing Needs Allocation (RHNA) targets. For example, in the Bay Area, cities permitted less than 30 percent of their very low, low, and moderate-income housing

1. CAL. HOUS. P'SHIP CORP., *CONFRONTING CALIFORNIA'S RENT AND POVERTY CRISIS: A CALL FOR STATE REINVESTMENT IN AFFORDABLE HOMES* (2016), available at <http://chpc.net/wp-content/uploads/2016/04/State-Housing-Need-2016.pdf>.

2. CAL. LEGIS. ANALYST'S OFF., *CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES* (2015), available at www.lao.ca.gov.

3. *Id.*

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need allocations between 2007 and 2014, falling short of their goals by over 90,000 units.⁴

This gap between supply and demand has significant negative repercussions for the economy, equity, and the environment. According to a recent study by economists Chang-Tai Hsieh and Enrico Moretti, the lack of affordable housing in cities like San Francisco and San Jose costs the U.S. economy about \$1.6 trillion a year in lost wages and productivity.⁵ In addition, research is increasingly showing that local growth controls and local discretion in the permitting process are significantly associated with rising residential segregation and inequality.⁶ Jason Furman, President Obama's Chairman of the Council of Economic Advisors, has argued that restrictive zoning impedes residential mobility, in turn leading to increased levels of inequality and declining productivity growth.⁷ He writes,

While land use regulations sometimes serve reasonable and legitimate purposes, they can also give extranormal returns to entrenched interests at the expense of everyone else. . . . [reducing these barriers] could make the economy more competitive by removing artificial barriers, thus improving both the distribution of income and the productive capacity of the economy.

In addition, failing to expand the supply of housing may also undermine California's ambitious climate change goals because families need to commute increasingly long distances due to jobs/housing imbalances.⁸

One of the key factors leading to higher housing costs in the state are the development costs associated with lengthy entitlement processes. Depending on the nature of the project, the entitlement process can include amendments to a general plan, zoning adjustments, subdivision approvals, site specific permits, conditional use permits, variances, design review, and environmental review under the California Environmental Quality Act (CEQA). The entitlement process greatly increases the costs of development: in the Bay Area, each additional layer of independent review was

4. ASS'N OF BAY AREA GOV'TS, REGIONAL HOUSING NEEDS ALLOCATION REPORT (2015), available at http://www.abag.ca.gov/files/RHNAPProgress2007_2014_082815.pdf.

5. Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* (Nat'l Bureau of Econ. Research, Working Paper No. 21154 2015).

6. Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLANNING ASS'N 6–21 (2016); P. Ganong & D. Shoag, *Why Has Regional Income Convergence in the U.S. Declined?* (Harvard Kennedy Sch. Working Paper No. RWP12-028 2015).

7. Jason Furman, Chairman, U.S. Council of Economic Advisors, *Barriers to Shared Growth: The Case of Land Use Regulation and Economic Rents*, Remarks at The Urban Institute (Nov. 20, 2015) (transcript available at www.whitehouse.gov).

8. Robert Cervero, *Jobs-Housing Balance Revisited: Trends and Impacts in the San Francisco Bay Area*, 62 J. AM. PLANNING ASS'N 492–511 (1996); PLAN BAY AREA, *JOB GROWTH, HOUSING AFFORDABILITY, AND COMMUTING IN THE BAY AREA* (2015), available at http://planbayarea.org/pdf/prosperity/research/Jobs-Housing_Report.pdf.

associated with a 4 percent increase in a city's house prices.⁹ California's entitlement process is unusually complicated and cumbersome: the permitting process for new development in coastal communities in California takes about two-and-a-half months longer to issue a building permit than the typical U.S. metro (seven months compared to four-and-a-half months).¹⁰ In addition, CEQA's complicated procedural requirements give development opponents significant opportunities to challenge housing projects after local governments have approved them.¹¹ A recent study found that nearly 80 percent of CEQA litigation is targeted at infill sites, meaning that the law not only thwarts expanded supply, but also pushes growth to undeveloped, suburban, and exurban land, undermining environmental and greenhouse gas emission reduction goals.¹²

This impasse between the need to expand supply and the resistance to new development at the local level should be resolved through state action. While zoning and land use regulations have long fallen under local control, the California Legislature has repeatedly stipulated—and the courts have confirmed—that housing is an issue of statewide policy concern and that there are reasons to limit that local authority to meet public needs. There have been numerous attempts over the years to “nip and tuck” at California's complex state framework of laws regulating local land use decisions, but by the time resolutions pass they often lack teeth or have so many eligibility restrictions they apply only to a “mythical” project.¹³ In addition, while some local jurisdictions have responded to the housing crisis through the adoption of local ordinances that encourage housing production, over two-thirds of cities and counties in California's coastal metros have done the opposite by adopting policies explicitly aimed at limiting housing growth and leading to disparate levels of housing production across communities.¹⁴

Reforming California's existing land use regulations would significantly increase the production of housing supply—both market rate and affordable—and increase access to housing in cities that have not adequately addressed the growing demand. Reforms need to address two inter-related issues: streamlining entitlement processes and ensuring that local governments meet their fair share of housing production. An example of the first is Governor Jerry Brown's *Streamlining Affordable Housing Approvals* (SAHA) proposal, which was included in the May 2016

9. CAL. LEGIS. ANALYST'S OFF., *supra* note 2.

10. *Id.*

11. JENNIFER HERNANDEZ ET AL., IN THE NAME OF THE ENVIRONMENT: HOW LITIGATION ABUSE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT UNDERMINES CALIFORNIA'S ENVIRONMENTAL, SOCIAL EQUITY AND ECONOMIC PRIORITIES—AND PROPOSED REFORMS TO PROTECT THE ENVIRONMENT FROM CEQA LITIGATION AND ABUSE (Holland & Knight 2015).

12. *Id.*

13. *Id.*

14. CAL. LEGIS. ANALYST'S OFF., *supra* note 2.

budget.¹⁵ Although the proposal failed to pass due to opposition from the labor movement,¹⁶ SAHA would have fast-tracked eligible housing projects by making local design review of eligible projects “ministerial” rather than discretionary. Eligible projects would have been approved “by right,” which would also mean that CEQA would not have applied. The proposal sought to address what is often cited as one of the primary roadblocks to affordable housing development in California—use of the CEQA process to delay, create uneconomic approval conditions, or reject multifamily infill developments.

However, streamlining is not enough to ensure that jurisdictions resistant to multi-family or affordable housing development are meeting their fair share of housing needs, particularly in higher cost markets or regions that are experiencing significant job growth. In this article, we examine the feasibility of another approach: enacting statewide legislation that would create an expedited permitting process for eligible affordable housing developments, akin to Massachusetts’ Comprehensive Permit Law (Chapter 40B).¹⁷ Chapter 40B streamlines and simplifies local approval processes for affordable housing and also requires that all municipalities expand their supply of housing affordable to low- and moderate-income families, regardless of existing local zoning laws. By all accounts, Chapter 40B has been successful in increasing the amount of housing built across Massachusetts, including in affluent suburbs that have traditionally resisted multi-family and affordable housing developments.¹⁸ For California, Chapter 40B offers a compelling framework that could make a significant impact on expanding the housing supply across the state at minimal cost to either developers or the state.

By-right¹⁹ legislation and Chapter 40B are not either/or solutions to increasing the supply of housing in the state—they share common goals and

15. See CAL. GOV’T. CODE § 65913 (proposed 2016); see also http://www.dof.ca.gov/budget/Trailer_Bill_Language/documents/707StreamliningAffordableHousingApprovals6-10-16.pdf.

16. See Liam Dillon, *Why construction unions are fighting Gov. Jerry Brown’s plan for more housing*, L.A. TIMES, July 20, 2016, <http://www.latimes.com/politics/la-pol-sac-jerry-brown-affordable-housing-union-fight-20160720-snap-story.html>.

17. See MASS. GEN. LAWS ch. 40B (2016). Ch. 40B is a state statute passed in 1969, which enables local zoning boards of appeals to approve affordable housing developments under flexible rules if at least 20 percent to 25 percent of the units have long-term affordability restrictions. *Id.*

18. Sharon Krefetz & Matthew Furman, *Overcoming Suburban Opposition to Affordable Housing: How the Landmark Massachusetts Affordable Housing and Land Use Appeals Act Survived the Most Recent Effort to Repeal It*, Paper Presented Before the Northeast Political Science Association Annual Meeting (Nov. 2011).

19. “By-right” or “as of right” approvals refer to housing projects that can be approved by city or county planning officials rather than having to get additional approvals from the city council or elected officials. By-right projects require only an

are complementary in many ways. They both use state authority to ensure that local governments do not shirk their duty to provide housing for their workforce, they apply solely to projects that expand the supply of housing for lower-income households, and they reduce permitting timelines to lower the costs of development. However, these goals are achieved through different administrative mechanisms, and they emphasize different aspects of development roadblocks. One major difference is that “by-right” facilitates development in jurisdictions that have already zoned and planned for multi-family developments. In contrast, Chapter 40B is designed to increase housing supply in jurisdictions that fail to zone for or make progress on planning for affordable housing.

Because Chapter 40B has served as model legislation for many other states—including Connecticut, Rhode Island, and Illinois—this article begins by providing a description of how Chapter 40B works and reviews the research on its impact in Massachusetts. It then outlines the policy options for a “California 40B,” examining the precedent for a California 40B and assessing how the legislation would work within California’s existing housing and land use regulation framework. This is not the first discussion of passing a California 40B: in 2003, Senator Dunn introduced Senate Bill No. 744 that would have created a state level appeals process, but the bill failed to advance through the legislative committee process.²⁰ However, the current severity of the housing crisis in California, coupled with increased recognition that housing supply is failing to keep up with job growth in the state, makes this an opportune time to revisit the idea of a California 40B and outline the various policy options that state policymakers could pursue in drafting the legislation. The article concludes with a discussion of the potential benefits of a Chapter 40B for California.

II. An Introduction to Massachusetts Chapter 40B

The Massachusetts Comprehensive Permit Act, or Chapter 40B of the Massachusetts General Laws, was passed in 1969.²¹ Chapter 40B was intended to provide relief from exclusionary zoning practices that prevented the construction of low- and moderate-income housing, particularly in suburbs. It provides “an impartial forum to resolve conflicts arising from the siting of affordable housing” and balances the need for affordable housing with “legitimate local concerns—planning, environmental, open space,

administrative review to ensure they are consistent with existing general plan and zoning rules and that they meet quality and safety standards. See Mac Taylor, *The 2016-17 Budget: Considering Changes to Streamline Local Housing Approvals* (Legis. Analyst’s Off., May 18, 2016).

20. S.B. 744 (Dunn), 2003–2004 Leg., Reg. Sess. (Cal. 2003).

21. The law has become known as Chapter 40B, referencing its location in the Massachusetts General Laws (MASS. GEN. LAWS ch. 40B, § 20–23).

design, health, safety, and other local concerns.”²² Specifically, Chapter 40B entitles developers to an expedited approval process for projects that contain housing units affordable to households earning below 80 percent of the AMI as well as a state appeals process in the event that a local zoning board denies the application.

Chapter 40B includes three important provisions that guide the approval process. First, Chapter 40B authorizes “qualified developers” (non-profit organizations, local housing authorities, or limited-dividend organizations²³) to apply to a local Zoning Board of Appeals (ZBA) for a comprehensive permit to build low- and moderate-income housing. In order to be eligible for the comprehensive permit, the proposed development must receive funding under a state or federal housing program, such as the Low Income Housing Tax Credit, although as funding for affordable housing has shifted in recent years, what counts as funding has been expanded to include technical assistance (see discussion of the Local Initiative Program below). The subsidizing agency reviews the project, including certifying compliance with household income limits; assessing fair housing considerations (e.g., the marketing of units); and establishing long-term affordability for the units that are built. In ownership developments, at least 25 percent of the units must be affordable to low-income households earning less than 80 percent of the AMI. For rental developments, the project can provide 20 percent of the units to households earning below 50 percent of the AMI. In addition, the developer must agree to restrict their profits to a maximum of 20 percent in for-sale developments and 10 percent per year for rental developments.²⁴

Chapter 40B works as follows. A proposal to build affordable housing first receives preliminary approval from the state or federal housing program that is providing the subsidy in the form of a determination of project eligibility or site approval letter. The approval letter and preliminary development plans are then filed with the ZBA. The ZBA notifies stakeholders

22. MASS. EXEC. OFF. OF HOUS. & ECON. DEV., HOUSING APPEALS COMMITTEE (2016), <http://www.mass.gov/hed/community/40b-plan/hac.html>.

23. Most applications that are brought by for-profit developers are organized as limited dividend companies in order to engage in the 40B process. See 760 MASS. CODE REGS. § 56.02 (Definitions) Although the statute does not provide a meaningful definition of a “limited dividend” organization or corporation (see Robert M. Ruzzo, *Unlimited Thoughts About the “Limited Dividend” Requirement in Massachusetts*, Feb. 9, 2015, <https://www.hklaw.com/Publications/Unlimited-Thoughts-About-the-Limited-Dividend-Requirement-in-Massachusetts-02-09-2015/>), it generally refers to an entity that executes a regulatory agreement under Chapter 40B and that “agrees to limit the dividend on the invested equity to no more than that allowed by the applicable statute or regulations governing the pertinent housing program.” 760 MASS. CODE REGS. § 30.02.

24. The developer must also have site control before applying for the Comprehensive Permit.

and seeks recommendations from other local boards, including the planning board; survey board; board of health; conservation and historical commissions; building inspector; and fire, police, or traffic departments. In rendering its decision, the ZBA acts on behalf of all other local boards and officials and is empowered to grant all local approvals necessary for the project.²⁵ The ZBA is also authorized to apply more flexible zoning criteria; for example, the ZBA can approve a project with greater density than local zoning codes may allow. This results in a more streamlined review process.

Chapter 40B also sets the process timeframe; the public hearing process must start within thirty days of the application submission, and public hearings need to be completed within six months. After ending the public hearing process, the ZBA must issue a decision within forty days. On average, the time between the filing of the application until a ZBA decision is ten months. Failure to comply with either of the statutory deadlines results in the permit being granted by default. The comprehensive permit prevents local government from requiring multiple permits that must be secured sequentially, a process that adds to the developer's costs and makes development of affordable housing much more difficult. Once the hearings are completed, the ZBA may take one of three actions: (1) approve the application as submitted; (2) approve the project with conditions or changes, such as restrictions on height and density; or (3) deny the application. Most comprehensive permit applications (nearly 90 percent between 1999 and 2005, according to one study) are approved by the ZBA.²⁶

The second provision in Chapter 40B provides developers with the right to appeal to a state-level administrative, quasi-judicial body if the ZBA denies the application or approves it with conditions that make the project "uneconomic."²⁷ The Housing Appeals Committee (HAC) is convened at the state level and comprises five members who adjudicate disputes as they arise under the state's comprehensive permit law. Three members, one of whom must be an employee of the Department of Housing and Community Development, are appointed by the department's director. These representatives often have substantive expertise in affordable housing, finance, or both. Two members represent the state's cities and towns and are appointed by the governor. This means that one

25. Massachusetts state regulations, such as the Wetlands Protection Act remain fully in effect under the comprehensive permit.

26. LYNN FISHER, CHAPTER 40B PERMITTING AND LITIGATION: A REPORT BY THE HOUSING AFFORDABILITY INITIATIVE (2007).

27. See MASS. GEN. LAWS ch. 40B, § 22 (2016). MASS. GEN. LAWS ch. 40B, § 21.T "Uneconomic" is defined as "any condition . . . that . . . makes it impossible for [the applicant] . . . to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return." MASS. GEN. LAWS ch. 40B, § 20.

needs to be a councilman and one a selectman.²⁸ Members are appointed for one year, although they often serve multiple terms.

The HAC appeals process is limited to projects located in cities that have failed to meet their fair housing goals, which is defined as cities where less than 10 percent of the housing stock consists of low-and moderate-income housing.^{29,30} In these cities, the HAC has the authority to overturn the local ruling unless their action poses a risk to the health or safety of the community. Importantly, the burden of proof is on the local zoning board to demonstrate that there is “a valid health, safety, environmental, design, open space, or other local concern . . . [that] outweighs the regional housing need.”³¹ This represents a significant departure from legal statutes in other states, where the courts have given “presumptive validity” to the decisions of local authorities in zoning cases.³² Once a town establishes (and maintains) affordable housing within its borders equal to 10 percent or more of its total housing stock, it is deemed to have met “local needs” for affordable housing and has the right to deny applications for Chapter 40B comprehensive permits.³³ Even if a municipality has met the 10 percent standard (or one of the alternatives, noted below), developers can continue to use comprehensive permit process, but in those municipalities, a negative local decision cannot be appealed to the HAC.³⁴

Chapter 40B developments must abide by state laws, such as state environmental review requirements. For example, Chapter 40B developments are subject to state wetland protections, which require that developments be at least fifty feet from designated wetlands. However, because wetlands are a primary source of groundwater, storm water damage prevention, and flood control, many coastal towns have passed local regulations that development must be a hundred feet back from wetlands. A Chapter 40B development would be exempt from this stricter standard, while a 100 percent (or non-qualifying) market-rate development, which

28. See MASS. GEN. LAWS ch. 23B, § 5.

29. Krefetz & Furman, *supra* note 18.

30. The state’s Subsidized Housing Inventory (SHI), which is maintained by the state Department of Housing and Community Development (DHCD), is the official count of each municipality’s affordable housing inventory for the purpose of calculating whether it has reached the 10 percent goal. See RACHEL G. BRATT, *OVERCOMING RESTRICTIVE HOUSING IN FIVE STATES: OBSERVATIONS FOR MASSACHUSETTS* (2012).

31. FISHER, *supra* note 26; LYNN FISHER, *REVIEWING CHAPTER 40B: WHAT GETS PROPOSED, WHAT GETS APPROVED AND WHAT GETS BUILT?* (2008).

32. Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW. ENG. REV. 381, 384 (2001).

33. See MASS. GEN. LAWS ch. 40B, § 20 (2016).

34. Rachel G. Bratt & Abigail Vladeck, *Addressing Restrictive Zoning for Affordable Housing: Experiences in Four States*, 24 HOUS. POL’Y DEBATE 594–636 (2014).

must follow all local zoning regulations, would not. Chapter 40B projects must also fully comply with the Massachusetts Environmental Protection Act's (MEPA) requirements.

Since it was originally passed, Chapter 40B has undergone several revisions that have increased the ability of local jurisdictions to qualify for a "safe harbor" from the state appeals process.³⁵ One important revision has been to expand the definition of what counts as "subsidy" for an affordable housing development. When Chapter 40B was first implemented, the vast majority of properties were funded through public housing or Section 8, meaning that they were 100 percent affordable rental units with a direct source of public funding. However, as the affordable housing industry has evolved, deals with multiple sources of funding are more common, and in some markets, developers are willing to build low-income units without subsidy as part of a higher density, market-rate project. In addition, policy goals have evolved to create more "mixed-income" developments as well as to subsidize homeownership units for households earning below 80 percent of AMI. To respond to this changing environment, in 1990, Massachusetts created the Local Initiative Program (LIP),³⁶ which allows developers to work with municipalities to build affordable housing with state technical assistance serving as the requisite source of subsidy.³⁷ Decisions regarding the financing, design, and construction of LIP units are made by the municipality and reviewed and approved the Massachusetts Department of Housing and Community Development. The majority of Chapter 40B housing now built is through the LIP process, meaning that in most developments, only the minimum percentage of affordable units required under Chapter 40B are being built. However, the program does continue to add to the affordable housing stock, even in an era of limited public subsidies, and some argue that quality of LIP developments are higher due to their mixed-income nature, increasing public acceptance of the projects, and lessening the stigma associated with affordable housing.³⁸

In addition to the Local Initiative Program, other revisions have broadened the reasons why municipalities may be exempted from an appeal to the HAC. These include limiting the size of Chapter 40B developments to a maximum of 300 units in larger cities—those with 7,500 or more housing units—down to a maximum of 150 units in towns with less than 2,500 housing units.³⁹ In addition, cities and towns with an approved Housing

35. *Id.* These changes have been made by DHCD through the use of regulations and guidelines, keeping the statute intact.

36. See 760 MASS. CODE REGS. § 56.00.

37. Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 V.A. L. REV. 535–80 (1992).

38. Bratt & Vladeck, *supra* note 34.

39. See 760 MASS. CODE REGS. § 56 (6).

Production Plan (HPP)⁴⁰ can be certified by DHCD as being in compliance with affordability goals, even if they have not met the 10 percent standard.⁴¹ If a jurisdiction has an approved HPP and shows that it increased the supply of affordable housing units by at least 1 percent over the previous 24 months, or at least a 0.5 percent increase in units over the previous twelve months, it is eligible for a safe harbor from the appeals process for the one-to-two year timeframe. However, only one-third of municipalities that had not yet met the 10 percent goal submitted a HPP as of 2015; some have allowed them to expire, meaning that they no longer have safe harbor from state appeals.⁴²

The Chapter 40B process has also changed over time and developers are more likely to work collaboratively with jurisdictions as opposed to appealing to the HAC. In the early years of the law's existence, the HAC overrode most of the ZBA denials, but developments were sometimes stalled by local lawsuits.⁴³ In the 1990s, the HAC increased efforts to encourage developers and city officials to resolve land use disputes through negotiation rather than a HAC ruling. These "stipulated decisions," which constituted nearly 40 percent of all the appeals cases brought to the HAC in the 1990s, are then approved by the HAC.⁴⁴

A. Impact of Massachusetts Chapter 40B

Since its inception, Chapter 40B has had a significant impact on the production of both affordable and market-rate housing in the state of Massachusetts. The benefits of Chapter 40B can be grouped into four major areas: increasing the share of municipalities that have affordable housing units, boosting overall housing production, reducing the costs of development, and improving local planning processes. In addition, research has shown that local concerns about the negative impacts of Chapter 40B

40. The Housing Production Plan (HPP) has three required parts: a comprehensive local housing needs assessment conducted by the locality; an annual affordable housing production goal of no less than half a percent of their total housing stock; and an implementation strategy, including any adjustments required to existing zoning, public services and utilities, or infrastructure.

41. Krefetz & Furman, *supra* note 18.

42. As of 2015, approximately 110 jurisdictions have filed an approved HPP with the state. For more information on the Housing Production Plan, see <http://www.mass.gov/hed/community/40b-plan/housing-production-plan.html>.

43. Chapter 40B does not limit the ability of city residents or other stakeholders to initiate a lawsuit against the development. While there is little research on the extent of this type of litigation, including who brings the suits and the impact on the timing and success of moderate-income housing projects, interviews with Massachusetts Housing and Community Development staff, housing advocates, and scholars who have studied Chapter 40B suggest that these types of lawsuits are less frequent than in the past and that the expense and time associated with legal proceedings serves as a barrier to "frivolous" lawsuits.

44. Krefetz & Furman, *supra* note 18.

have not been realized: Chapter 40B developments have not had a negative impact on surrounding property values, nor have they led to undue pressure on local services or infrastructure. In 2010, voters had the opportunity to repeal Chapter 40B through a statewide referendum. Nearly two-thirds of voters came out in strong support of the law and its contributions to the production of housing in the state.⁴⁵

The impact of Chapter 40B on the landscape of affordable housing in Massachusetts has been substantial. Many municipalities in Massachusetts do not have land zoned for multi-family developments, focusing instead on zoning for low-density, single family homes.⁴⁶ Research has shown that Chapter 40B has resulted in significantly more low- and moderate-income housing being built in the suburbs than would have been created if the statute had not been enacted.⁴⁷ In 1972, shortly after Chapter 40B was enacted, only four of the state's 351 cities and towns had more than 10 percent of their housing affordable to low- and moderate-income households; as of 2012, that number had risen to forty. Among the municipalities that have attained the 10 percent goal are three Boston suburbs that are among the fifteen most affluent municipalities in the state (Concord, Lincoln, and Lexington).⁴⁸ While still far short of the intent of Chapter 40B, the data show that municipalities have made steady progress in expanding access to affordable housing. As of 2012, nearly half of all Massachusetts cities and towns (161 of the 351) had over 5 percent of their housing stock affordable, including many in affluent suburbs with highly rated public schools.⁴⁹ (See Figure 1 on page 252). Only forty-two jurisdictions have no affordable units, but these are mostly smaller, rural towns with overall lower housing costs.⁵⁰

Chapter 40B has also had a significant impact on the total supply of housing in Massachusetts. As of 2010, Chapter 40B had been used to produce approximately 58,000 housing units, including nearly 31,000 units of housing for low- and moderate-income households and 27,000 market rate units.⁵¹ The majority of units—70 percent—produced under Chapter 40B were rentals, the rest were for homeownership. In addition, there is some evidence that Chapter 40B has generated positive economic spillover effects through the additional construction spurred by the law. A study released by the Donahue Institute in 2010 found that Chapter 40B

45. In almost 80 percent of the 351 cities and towns in Massachusetts, the majority of the electorate voted against the repeal. See RACHEL BRATT, *OVERCOMING RESTRICTIVE ZONING FOR AFFORDABLE HOUSING IN FIVE STATES: OBSERVATIONS FOR MASSACHUSETTS* (2012); see also Krefetz & Furman, *supra* note 18.

46. FISHER, *supra* note 26.

47. Spencer M. Cowan, *Anti-Snob Land Use Laws, Suburban Exclusion, and Housing Opportunity*, 28 J. URBAN AFF. 295–313 (2006).

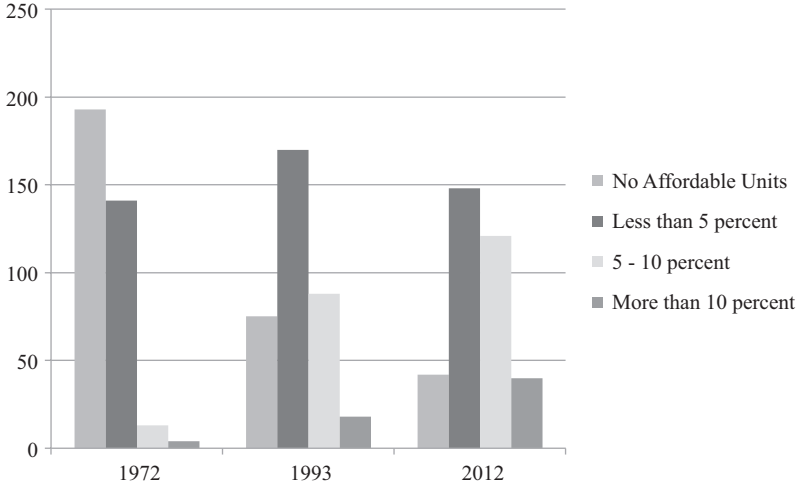
48. Bratt & Vladeck, *supra* note 34.

49. *Id.*

50. *Id.*

51. *Id.*

Figure 1
The Impact of Chapter 40B on the Provision of Affordable Housing



Source: Rachel G. Bratt & Abigail Vladeck, Addressing Restrictive Zoning for Affordable Housing: Experiences in Four States, 24:3 HOUSING POL'Y DEBATE 602 (2014).

had generated more than \$9.25 billion in construction and related spending since 2000 and created nearly 48,000 jobs. The policy has also led municipalities to become "more proactive in planning for and developing [affordable] housing." More generally, Chapter 40B has ensured that cities cannot enforce their planning and environmental concerns unequally against subsidized and market rate housing. Many affordable housing developers claim that their projects never would have been approved without Chapter 40B and that the law has helped municipalities to be more aware of, and to take greater responsibility for, the creation of affordable housing.

52. LINDSAY KOSHGARIAN ET AL., ECONOMIC CONTRIBUTIONS OF HOUSING PERMITTED THROUGH CHAPTER 40B: ECONOMIC AND EMPLOYMENT LINKAGES IN THE MASSACHUSETTS ECONOMY FROM 2000-2010 (2010).

53. ALEXANDRA DEGENOVA ET AL., ON THE GROUND: 40B DEVELOPMENTS BEFORE AND AFTER (2009), available at http://community-wealth.org/sites/clone.community-wealth.org/files/downloads/report-de_genova-et-al.pdf.

54. Kenneth Forton, Expanding the Effectiveness of the Massachusetts Comprehensive Permit Law by Eliminating Its Subsidy Requirement., 28 B.C. ENVTL. AFF. L. REV. 651-682 (2000).

55. Bratt & Vladeck, supra note 34. Krefetz & Furman, supra note 18. See also Jennifer Devitt, Illinois' Affordable Housing Planning and Appeal Act: An Indirect Step in

There is also very little evidence of negative impacts generated by Chapter 40B developments. Despite opposition to local Chapter 40B projects, a review of contested projects found that many local concerns were resolved or did not materialize once the project had been built.⁵⁶ For example, resident concerns about costs—including potential impacts on surrounding property values or undue burdens on municipal services—were overstated, with the projects having little to no impact on the surrounding community. In addition, negotiations as the result of Chapter 40B led to concessions between the municipalities and the developers that resulted in improved developments, for example, efforts to mitigate potential environmental, drainage, and traffic impacts.⁵⁷ Developers have found Chapter 40B to be an attractive tool with which to build apartment complexes in those localities where, without the policy, such building would be impossible; this has, in effect, opened an entire market and created opportunities for business that otherwise would not exist for developers.

A study conducted by MIT researchers concluded that even large-scale, multi-family Chapter 40B developments in single-family neighborhoods do not affect the value of adjacent homes. Using hedonic modeling, they found that neighborhood house prices were unaffected by the introduction of a Chapter 40B development.⁵⁸ This is consistent with other research studies that have found that the spillover effects of affordable housing are context dependent and that affordable housing is least likely to generate negative property value impacts when it is embedded within higher-value, low-poverty, stable neighborhoods and when the affordable housing development is well managed.⁵⁹

Finally, the success of Chapter 40B has led other states to institute similar processes, including Rhode Island, Connecticut, and Illinois. Each of these states has adopted legislation that sets a statewide affordable housing goal with a process for over-riding local zoning board denials. However, each state's statute is slightly different, reflecting its unique policy and housing contexts. Connecticut's Affordable Housing Land Use Appeals

the Right Direction—A Survey of Housing Appeals Statutes, 18 WASH. UNIV. J. L. POLICY 267–90 (2005).

56. DEGENOVA ET AL., *supra* note 50.

57. *Id.*

58. David J. Ritchay & Zoe R. Weinrobe, *Fear and Loathing in Massachusetts: Chapter 40B, Community Opposition, and Residential Property Value* (June 12, 2004) (unpublished Master's thesis, Mass. Inst. of Tech.) (on file with MIT Libraries, Mass. Inst. of Tech.).

59. George C. Galster, *The Effects of Affordable and Multifamily Housing on Market Values of Nearby Homes*, in *GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT?* 176–200 (Anthony Downs, eds. 2004); Mai Thi Nguyen, *Does Affordable Housing Detrimentally Affect Property Values? A Review of the Literature*, 20 J. PLANNING LITERATURE 15–26 (2005).

Act (also known as Section 8-30G), which became effective in 1990, does not streamline local approvals with a comprehensive permit process, but it does allow developers to appeal a local zoning board decision if their development includes an affordable component.^{60,61} The biggest impact of the Connecticut law is that it shifts the burden of proof to the local zoning commission to defend the denial of an application and defers the final judgment to the court.⁶² As in Massachusetts, municipalities that have at least 10 percent of their units classified as “affordable” by the state are exempt from the statute. Although the exact number of units build in Connecticut under Section 8-30G has not been quantified, estimates suggest that the statewide stock of assisted housing has increased by about 25,000 since 1992.⁶³

Like Massachusetts, Rhode Island’s Low and Moderate Income Housing Act includes both a comprehensive permit component and an appeals process.⁶⁴ One important difference between Rhode Island and Massachusetts, however, is that as of 2004, Rhode Island requires that jurisdictions create a housing element as part of their comprehensive planning process. This housing element details how the state-mandated low- and moderate-income housing goals will be attained, and all zoning decisions must be consistent with the plan.⁶⁵ Rhode Island also sets a higher minimum threshold for affordable housing units in urban cities. While small cities and suburban communities must have 10 percent of their units affordable to have “safe harbor” from the appeals process, urban areas must demonstrate that at least 15 percent of their units are affordable to low- and moderate-income families.⁶⁶ As of 2010, ten of Rhode Island’s thirty-nine cities and towns were exempt as the result of meeting the 10 percent affordable housing

60. Section 8-30G originally required that 20 percent of the units be affordable to those earning below 80 percent of AMI (including 10 percent of units priced at or below rates affordable to households making 60 percent or less of AMI), or that the project was funding through a subsidy program. In 2000, the law was amended to raise the affordability threshold for eligible projects. Now, the minimum percent of deed restricted units is 30 percent, 15 percent of units must be affordable to those earning 60 percent of below of AMI, and deed restrictions need to be put in place for forty rather than thirty years.

61. Robert D. Carroll, *Connecticut Retrenches: A Proposal To Save the Affordable Housing Appeals Procedure*, 110 YALE L. J. 1247–85 (2001).

62. *Id.*

63. Statement before the Connecticut General Assembly Housing Committee, Mar. 14, 2014, Opposition to Raised Bill No. 5511, *Benefits and Track Record of General Statutes § 8-30g, The Affordable Housing Land Use Appeals Act; Relationship to Incentive Housing Zones*.

64. R.I. GEN. LAWS § 45-53-4.

65. Bratt & Vladeck, *supra* note 34.

66. R.I. GEN. LAWS § 45-53-4.

threshold, and an additional eleven had made significant progress toward their affordable housing plan goals.⁶⁷

Illinois similarly emphasizes that jurisdictions must plan for affordable housing and provides for an appeals process when jurisdictions fail to meet their goals under the plan. The Illinois Affordable Housing Planning and Appeal Act requires municipalities that do not already have 10 percent of their stock affordable to families earning less than 80 percent of AMI to approve local affordable housing plans. These plans must contain at least one of three very specific goals for increasing the stock of affordable housing: the community must commit that a minimum of 15 percent of all new development or redevelopment will be affordable, that it will increase its overall percentage of affordable housing by three percentage points, or that it will increase its overall percentage of affordable housing to 10 percent of its total housing stock. Starting in 2009, a State Housing Appeals board is empowered to overturn denials in municipalities that have not met the goals outlined in their plan. However, many jurisdictions continue to skirt the law,⁶⁸ and advocates have called for revisions to the law to allow a streamlined local permitting process as well as creating penalties for municipalities that fail to submit an affordable housing plan.⁶⁹

The experiences of these other states in adopting legislation similar to Chapter 40B—especially in states that emphasize the duty of localities to plan for the production of affordable housing—provide important precedent for California. But they also suggest the importance of tailoring the law to local conditions and the need for effective mechanisms to ensure compliance. In the following section, we review existing laws related to land use and housing in California and lay out the policy options that California should consider if it were to adopt Chapter 40B legislation.

III. Adopting Statewide Chapter 40B Legislation in California

We believe that California would be well served by a Chapter 40B like process. Currently, California's land entitlement process is the most detailed and complicated in the nation. While this process has produced

67. State of Rhode Island Division of Planning, *Report on the Progress of Affordable Housing Plan*, <http://www.planning.ri.gov/community/policyplanning/affordablehousingreport.php>. Last accessed on October 2, 2016.

68. Natalie Moore, *Despite mandate, affluent suburbs fail to build affordable housing*, WBEZ 91.5 Chicago, Oct. 12, 2015, <https://www.wbez.org/shows/wbez-news/despite-mandate-affluent-suburbs-fail-to-build-affordable-housing/6977652e-6737-4e88-8d1e-394ed0c96cfe> (last accessed Oct. 2, 2016).

69. Hallock Svensk and Jeff Leslie, Illinois Affordable Housing Planning and Appeal Act, Housing Initiative Clinic Brief, The Edwin F. Mandel Legal Aid Clinic of the University of Chicago Law School, <http://www.law.uchicago.edu/files/file/Housing%20Initiative%20Clinic%20Briefs%20-%20Illinois%20Affordable%20Housing%20Planning%20and%20Appeal%20Act.pdf>. (last accessed Oct. 2, 2016).

some benefits—including protecting environmentally sensitive land from development—it has also contributed to California's exceptionally high housing costs.⁷⁰ In addition, the emphasis on local control over land use regulations has resulted in development review processes that are different in every jurisdiction, leading to disparate levels of housing production across communities and creating a significant imbalance between jobs and housing, especially in the state's coastal areas. As research increasingly shows the negative impacts of discretionary land use policies and approval processes on the economy and equity, it is worth considering how a Chapter 40B like process would work alongside California's existing land use and housing regulations.

A. Residential Regulatory Approvals Process in California

State planning law requires that every city and county in California have a valid general plan, that local zoning ordinances be consistent with the general plan, and that any zoning changes be approved as general plan amendments. California state law allows planning commissions to approve zoning changes but requires that general plan amendments be approved by a city council or county boards of supervisors. This has the effect of subjecting most major land use changes to a two-tiered review. State law further requires that each review include an opportunity for public comment. Local governments may also impose growth control and/or growth management regulations, which either directly restrict the quantity and pace of new development or limit the density, quality, and/or location of new development. These growth measures often impose additional project review requirements.⁷¹

Figure 2 (see page 257) presents a general overview of the entitlement process in California. The multiple layers of review, coupled with CEQA and the potential for lawsuits, greatly increases the risk to developers and increases the cost of development. Residential development in coastal communities in California takes a third longer than in the average American city, which raises housing prices by more than 4 percent.⁷² Between 2004 and 2013, land use entitlement processing and CEQA approvals for housing projects in California's ten largest cities, on average, took two-and-one-half years to complete.⁷³

In particular, CEQA has been singled out as an important driver of California's high housing costs due to litigation abuse. Anyone can file a CEQA lawsuit and do so anonymously, allowing a broad range of

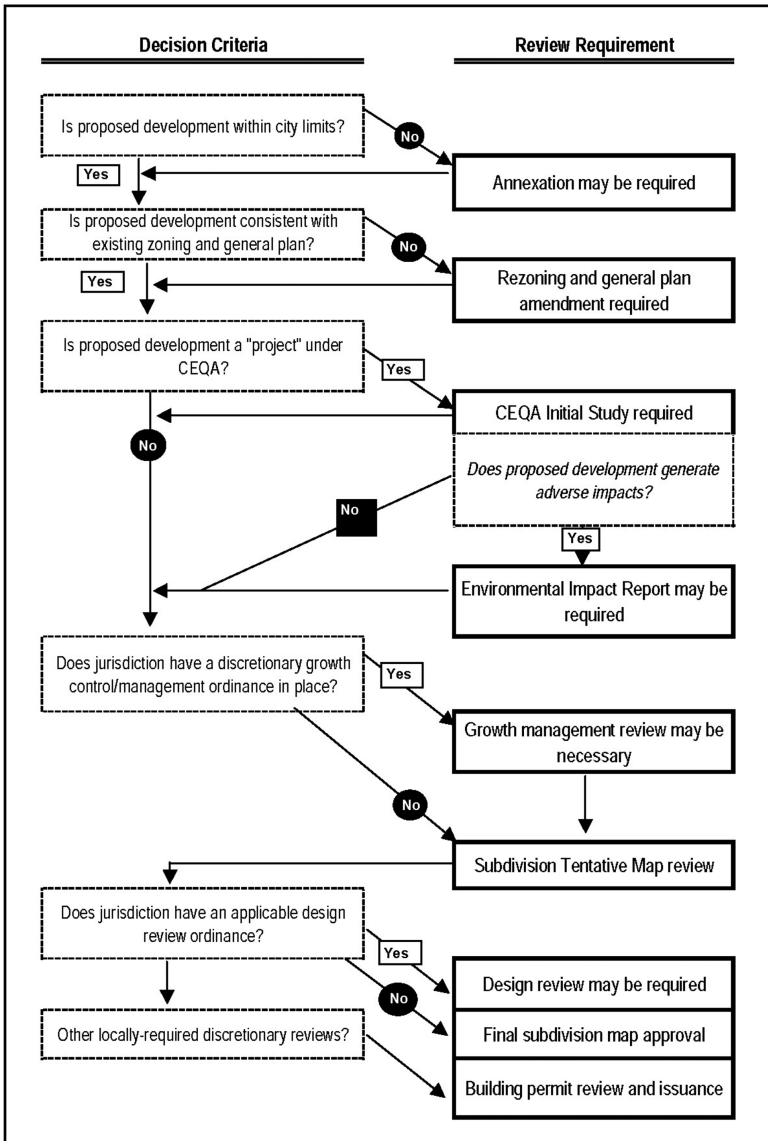
70. CAL. LEGIS. ANYST'S OFF., *supra* note 2.

71. Cal. Dep't of Hous. & Cmty Dev., *Raising the Roof—California Housing Development Projections and Constraints 1997–2020*, <http://www.hcd.ca.gov/housing-policy-development/housing-resource-center/rtr/>.

72. CAL. LEGIS. ANALYST'S OFF., *supra* note 2.

73. *Id.*

Figure 2
California's Local Development Approvals Process



Source: California Department of Housing & Community Development, *Raising the Roof—California Housing Development Projections and Constraints 1997-2020*, <http://www.hcd.ca.gov/housing-policy-development/housing-resource-center/rtr/>.

interests to stall development for reasons unrelated to environmental concerns.⁷⁴

A recent study found that nearly 80 percent of CEQA litigation targeted infill sites, especially residential projects that included higher-density, transit-oriented units, undermining both affordability and environmental goals.⁷⁵ In addition, some projects can get trapped in never-ending cycles of litigation. Under CEQA, there is no limit to the number of times a project can be sued: each discretionary approval by each agency can be the subject of a separate CEQA lawsuit. One infill redevelopment project in Los Angeles has had more than twenty CEQA lawsuits filed against it.⁷⁶

Local planning bodies—often in response to constituent concerns and/or in an effort to balance competing environmental and quality of life goals—can also work against the development of multi-family housing. In some wealthier and suburban cities, local councils fail to approve zoning plans that accommodate multi-family or affordable housing, despite their obligations under California state law. Citing concerns over “neighborhood character,” others deny permits to specific projects even when the local general plan and zoning laws permit higher density development. Even cities that are actively trying to achieve their RHNA targets and expand local housing supply can be subject to these dynamics when local concerns, such as traffic or the preservation of views, create opposition to a multi-family project. For example, in March 2011, a developer proposed a 315-unit building—including both moderate-income and market-rate units—in Lafayette, California. Although the project complied with density standards laid out in the general plan, concerns over traffic and the impact that the project would have on air quality, noise, and sightlines led the city to negotiate with the developer to revise the proposal and eventually approve forty-four units of market-rate housing instead.⁷⁷ A state appeals commission, as is the case with Chapter 40B, could help to overcome these local dynamics and could even provide political cover for local council members and planners who would like to see more housing built but cannot ignore constituents vehemently opposed to such projects.

B. Legal Precedents for California 40B

As in Massachusetts and in most other states, California, stating that “counties and cities may exercise the maximum degree of control over local zoning matters,” has long favored local control over zoning and land use regulations.⁷⁸ The power to enact and enforce zoning regulations

74. HERNANDEZ ET AL., *supra* note 11.

75. *Id.*

76. *Id.*

77. CAL. RENTERS LEGAL ADVOCACY & EDUC. FUND, <http://www.carlaef.org/lafayette/> (last visited July 14, 2016).

78. CAL. GOV'T CODE § 65800.

at the state level is rooted in the state's police power to promote the general welfare of the community.^{79,80} California's Constitution confers this power to cities through its home-rule provision to "make and enforce within [their] limits all local police, sanitary and other regulations and regulations not in conflict with general laws."⁸¹

Yet the California constitutional provision that grants home-rule authority to localities also limits that authority in the same breath; a city can legislate its land use only to the extent that those "regulations [are] not in conflict⁸² with general laws."⁸³ The California Legislature has repeatedly stipulated—and the courts have confirmed—that housing is an issue of statewide policy concern and that localities have an obligation to plan for regional housing needs. Several existing laws in California limit local control over land use planning, including the Housing Element Law,⁸⁴ the Housing Accountability Act,⁸⁵ the Density Bonus Law,⁸⁶ and the California Coastal Act of 1976.⁸⁷ In addition, Senate Bill 375, which was passed in 2008, includes provisions that require local governments to align their Housing Elements with the regional Sustainable Communities Strategies.⁸⁸ Each of these serves as a legal precedent for a California Chapter 40B.

1. Housing Element Law

In 1969, the Legislature made its first foray into asserting preemptive control local land use with the passage of the Housing Element Law, which requires each local government to conduct an extensive housing needs assessment of its current and projected housing needs, including a land inventory that identifies adequate site capacity to equal or exceed the projected housing needs at all income levels.⁸⁹ Courts have held that cities must identify the actions they will take to make sufficient sites

79. Broadly, the source of all land use regulation, both state and local, is derived from the police power reserved to the states by the Tenth Amendment of United States Constitution. Specifically, the Amendment establishes that any powers not specifically granted to the federal government in the Constitution are reserved for the states. U.S. CONST. art. X.

80. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

81. See CAL. CONST. art. XI, § 7.

82. According to the California Supreme Court, "[c]onflicts exist if the ordinance duplicates [citation], contradicts [citation], or enters an area fully occupied by general law, either expressly or by legislative implication [citation]." *Morehart v. Cty. of Santa Barbara*, 872 P.2d 143, 156 (Cal. 1994).

83. See CAL. CONST. art. XI, § 7.

84. CAL. GOV'T CODE §§ 65580–65589.8 (West 2016).

85. CAL. GOV'T CODE §§ 65589.5–65589.6 (West 2016).

86. CAL. GOV'T CODE §§ 65915–65918 (West 2016).

87. CAL. PUB. RES. CODE §§ 30000–30900 (West 2016).

88. S.B. 375, 2008 Cal. Stat. 728 (2008).

89. CAL. GOV'T CODE §§ 65580 (West 2016).

available with the appropriate zoning and development standards to meet their RHNA obligations.⁹⁰ Courts have also held that the state's RNHA requirement preempts local no-growth ordinances; in *Urban Habitat v. City of Pleasanton*, the court held that "[T]he Legislature has specified certain minimum standards for local zoning regulations," even though it "has carefully expressed its intent to retain the maximum degree of local control. . . . Local legislation in conflict with general law is void."⁹¹ The court's decision set a precedent that disallowing the construction of new housing units, in particular, affordable units, will not be tolerated by the state.⁹²

2. Housing Accountability Act

The Housing Accountability Act (HAA), was originally passed in 1982 but elevated in importance in 2011 when the California Court of Appeal in *Honchariw v. County of Stanislaus* ruled that the Act applies to all housing projects, not just affordable projects.^{93,94} The HAA limits a local government's ability to: (1) reject proposed housing development projects, (2) condition approval in a manner that renders the project infeasible for affordable development, or (3) reduce the density of any project that comports with the zoning and general plan. Just as with the State Housing Element Law, HAA provides for a judicial remedy that allows a court to issue an order to compel a city to take action on the development project.⁹⁵

3. Density Bonus Law

The Density Bonus Law (DBL) was first enacted in 1979 to address the state's shortfall of affordable housing.⁹⁶ Although the application of the statute is complicated, its goal is to encourage cities and counties to offer density bonuses, incentives, and development standards waivers to housing developments that include a threshold percentage of affordable units as a means of encouraging developers to build low-income housing while maintaining the economic feasibility of the project.⁹⁷ As recognized by California courts, the DBL rewards a "developer who agrees to build a certain percentage of low-income housing with the opportunity to build more residences than would otherwise be permitted

90. CAL. GOV'T CODE § 65583(c)(1).

91. *Urb. Habitat Program v City of Pleasanton*, Case No. RG06-293831 (Mar. 12, 2010).

92. *Senate Bill 375: Overview*, TRANSBAY BLOG, <https://transbayblog.com/sb375/> (last visited Jul 15, 2016).

93. CAL. GOV'T CODE § 65589.5 (West 2016).

94. 132 Cal. Rptr. 3d 874 (Cal. Ct. App. 2011).

95. CAL. GOV'T CODE. § 65589.5(k) (West 2016).

96. CAL. GOV'T CODE. § 65915.

97. CAL. GOV'T CODE. § 65915.

by the applicable local regulations.”⁹⁸ In 2014, Governor Brown signed Assembly Bill 2222 into law,⁹⁹ which amended the DBL to prohibit a developer from receiving a density bonus and related incentives unless the proposed development maintains the same number and proportion of pre-existing affordable housing units.¹⁰⁰ However, the DBL sets a precedent for Chapter 40B by implementing a state law that is mandatory for cities and counties, including charter cities, and that requires local governments to adopt ordinances to implement DBL at the local level.¹⁰¹

4. California Coastal Act

In 1976, the state adopted its most direct control of land use to date by passing the California Coastal Act.¹⁰² Under the Coastal Act, development within the protected coastal zone cannot occur without a coastal development permit issued by either the Coastal Commission or by a local government with a Commission-certified local coastal program.¹⁰³ Accordingly, the statewide Commission is given broad regulatory authority over land use regulation on the coast, including hearing applications for coastal permits, promulgating regulations, issuing coastal development permits, and issuing cease and desist orders halting illegal development.¹⁰⁴ The Coastal Act provides a strong analogous basis for California 40B legislation because it incorporates statutory features highly aligned to those proposed for California 40B, including a statewide policy initiative, a local land use permitting system prescribed by state law, and a state-level appellate review system.¹⁰⁵ Under the Coastal Act, the Commission does not impose direct land use controls onto local governments. Rather, it empowers local governments to submit a local coastal program to the Commission for review for compliance with the intent of the Coastal Act.¹⁰⁶ Within that review process, the Commission's role is

98. *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 824 (2007).

99. A.B. 2222 (2014), amending CAL. GOV'T CODE § 65915.

100. Matthew Hinks, *Residential Development in California: New Density Bonus Law Makes New Affordable Housing Difficult to Build*, CAL. LAND USE BLOG, <http://landuselaw.jmbm.com/2015/01/residential-development-in-california-new-density-bonus-law-makes-new-affordable-housing-difficult-t.html> (last visited July 15, 2016).

101. CAL. GOV'T CODE § 65915(a). However, a locality's failure to adopt an ordinance does not relieve it from complying with the DBL.

102. CAL. PUB. RES. CODE § 30000 *et seq.* (West 2016).

103. CAL. PUB. RES. CODE § 30600 (West 2016); see CECILY TALBERT BARCLAY & MATTHEW S. GRAY, CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW 271 (32d ed. 2012).

104. CAL. PUB. RES. CODE § 30500.

105. CAL. PUB. RES. CODE § 30500.

106. CAL. PUB. RES. CODE § 30500. "Local coastal program" means a local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, other implementing actions, which,

limited to an administrative determination of whether the local coastal program, including the land use plan,¹⁰⁷ comports with the requirements of the Coastal Act. The Commission does not have the power to “diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan”¹⁰⁸ or to force a local government to select one land use that conforms to the policies of the Coastal Act over another similarly conforming use.¹⁰⁹ This structure permits the Commission to regulate the policies enacted at the local level, but avoids potential home rule challenges.

5. Senate Bill 375: The Sustainable Communities and Climate Protection Act of 2008

SB 375 is designed to help reduce greenhouse gas emissions by aligning regional land use and transportation planning.¹¹⁰ While the bill’s language indicates that it does not regulate land use, the legislation nevertheless mandates that local governments must revise their housing elements within eighteen months of the adoption of the regional transportation plan and sustainable communities strategy (SCS). In addition, local governments must rezone land to accommodate their RHNA allocation and ensure that its RHNA is consistent with the SCS. Cities that fail to accommodate low-income housing by not completing the required rezoning are subject to both a builder’s remedy and/or a citywide remedy.¹¹¹ In addition, SB 375 states that projects may receive transportation funding only if they are consistent with the SCS, giving local governments the incentive to align their land use regulations in a manner consistent with regional planning documents.

All of these laws demonstrate that the California state government has enacted preemptive legislation on several occasions to address statewide concerns around housing shortage; California 40B could build upon that legislative precedent.

when taken together, meet the requirements of, and implement the provisions and policies of, this division at the local level. CAL. PUB. RES. CODE § 30108.6.

107. “Land use plan” means the relevant portions of a local government’s general plan, or local coastal element which are sufficiently detailed to indicate the kinds, location, and intensity of land uses, the applicable resource protection and development policies and, where necessary, a listing of implementing actions. CAL. PUB. RES. CODE § 30108.5.

108. CAL. PUB. RES. CODE § 30512.2.

109. *Douda v. Cal. Coastal Comm’n*, 159 Cal. App. 4th 1181, 1199 (2008), *as modified on denial of reh’g* (Mar. 4, 2008).

110. S.B. 375, 2008 Cal. Stat. 728, § 1(a).

111. Under the builder’s remedy, a developer of a project in which at least 49 percent of the units are affordable to low-income households is entitled to develop on any site proposed for rezoning in the housing element as if the site has already been rezoned (even if it has not). Under the citywide remedy, any interested person can sue to compel the local government to complete rezoning.

C. Policy Considerations for a California Chapter 40B

Given California's existing housing and land use regulations, there are several policy considerations for implementing a California Chapter 40B. Four key areas need to be addressed to integrate Chapter 40B within the state's existing legal structure and housing and land use regulations. These include:

- *Which municipalities would be exempt from the Chapter 40B appeals process?* In Massachusetts, developments in municipalities that have at least 10 percent of their housing stock affordable or that are making substantial progress are exempt from the Chapter 40B state appeals process. What should California adopt as the threshold under which Chapter 40B appeals apply?
- *What housing projects should be eligible for streamlined review and state appeals?* In Massachusetts, developments must meet specific affordability and funding criteria to qualify for the streamlined review and appeals process. Which projects should be eligible in California? What are the right levels of affordability restrictions, should Chapter 40B be limited to certain sites (such as urban infill), or both?
- *How should the Housing Appeals Committee be structured?* In Massachusetts, the HAC is convened at the state level, but given California's size, a regional HAC may be more effective. There are also questions about who should serve on the Committee and for how long.
- *Should CEQA apply to Chapter 40B Projects?* While Massachusetts has its own version of CEQA, it has significantly less power and reach. Given CEQA's role in prolonging (or stopping) the project entitlement process, specifying whether CEQA applies on Chapter 40B projects is a critical policy question for state lawmakers to consider.

In the following section, we discuss each of these policy considerations in more detail and provide the tradeoffs of pursuing different options.

1. Which Municipalities Would Be Exempt from the Chapter 40B Appeals Process?

Massachusetts Chapter 40B stipulates that municipalities are subject to HAC appeals if less than 10 percent of its housing stock consists of low- and moderate-income housing. Once a town establishes (and maintains) affordable housing within its borders equal to 10 percent or more of its total housing stock, it is deemed to have met "local needs" for affordable housing and has the right to deny applications for Chapter 40B comprehensive permits.¹¹² One of the important provisions in Chapter 40B that is often not highlighted in summaries of the law is that in determining how to count affordable units, *all* rental units built through the comprehensive

112. FISHER, *supra* note 26; FISHER, *supra* note 31.

permitting process count toward the 10 percent goal. In other words, if a developer builds a mixed-income rental property using the Chapter 40B comprehensive permit process with twenty-five affordable units and seventy-five market-rate units, the jurisdiction may count all 100 units toward its 10 percent goal. However, in mixed-income homeownership developments, only the income-restricted homeownership units count toward the 10 percent goal. By counting all rental units under Chapter 40B toward the “safe harbor” threshold, Massachusetts encourages cities that may be resistant to affordable projects to approve developments that include at least some units for households earning below 80 percent of the area median.

There are two potential alternatives for establishing a “safe harbor” for California jurisdictions, each with its own strengths and weaknesses. The first is to adopt the Massachusetts definition, requiring that a municipality demonstrate that at least 10 percent of its housing stock is affordable to households making 80 percent of the AMI. While the strength of this measure lies in its simplicity, it may not be the best option for California. First, the diversity of California’s housing markets means that it is unlikely that a single 10 percent threshold will adequately reflect the affordable housing needs for all jurisdictions. In municipalities with a weaker housing market and little new job growth, there may already be sufficient supply of units at rents affordable to those earning 80 percent of AMI. In contrast, in higher cost markets with high rates of job growth, particularly in lower wage sectors, 10 percent of the housing stock may not be enough to meet local housing needs. In effect, the 10 percent exemption is an arbitrary number, and opponents of Chapter 40B in Massachusetts have argued that a municipality’s actual affordable housing need should be used to determine the threshold.¹¹³ Second, California does not have a database of restricted affordable housing units, meaning that implementing this definition would require the creation of a new database and system to track each jurisdiction’s supply of rent restricted units. While this would be a valuable database, it may unnecessarily delay the implementation of Chapter 40B.

A second option would be to work within the existing RHNA framework. While RHNA has been criticized for being a “paper tiger” with no significant enforcement mechanism,¹¹⁴ it is already part of Housing Element law and jurisdictions are allocated a fair share of regional housing needs based on local projections of population and employment growth.

113. Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509, 513 (2003). The 10 percent target was an arbitrary number intended to stimulate a “reasonable supply” of affordable housing.

114. Peter Cohen, Executive Director for the San Francisco Council of Community Housing Organizations, *The Bay Area Affordability Crisis*, Lecture at the University of California, Berkeley (Feb. 6, 2014).

As such, the RHNA process accounts for variations in housing needs across California's diverse housing markets and provides for an established data and reporting system. In working within the RHNA system, California would follow precedents in Rhode Island and Illinois by connecting the appeals process more explicitly to local land use and zoning plans. Another benefit to working within the RHNA framework is that it might actually increase the impact of RHNA itself if municipalities could achieve a "safe harbor" from state appeals by complying or making progress toward their RHNA targets. For example, cities that are zoned for at least 66 percent of their allocated units at all income levels, including at least 50 percent for low-and very low-income households, could be exempted from a state appeals process. Utilizing the RHNA process to inform the trigger for state appeals under a California Chapter 40B may provide teeth to a process that is already familiar to local governments.

2. What housing projects should be eligible for streamlined review and state appeals?

In order to be eligible for a comprehensive permit in Massachusetts, the proposed development must receive funding under a state or federal housing program, such as the Low Income Housing Tax Credit, and at least 25 percent of the units must be affordable to low-income households earning less than 80 percent of the AMI.^{115,116} However, it is important to set the funding subsidy requirement in context. Chapter 40B in Massachusetts was passed when federal and state financing for affordable housing was more easily available. Today, federal and state funding is more limited, and inclusionary zoning and other local dollars are an important source of funds for housing. Restricting eligibility to projects with state or federal funding would greatly limit the impact of Chapter 40B in California and reduce its appeal to developers.¹¹⁷ Indeed, the LIP in Massachusetts acknowledges this and provides more flexibility in the sources of funding that qualify for Chapter 40B projects.

Given the change in the funding and financing of affordable housing, California Chapter 40B should not be tied to a public source of funding, and eligibility criteria governing whether a developer can apply for a comprehensive permit should be more rather than less flexible. This

115. For rental developments, the project can provide 20 percent of the units to households earning below 50 percent of the AMI.

116. To maintain long-term affordability of rental units, the agency that provided the required subsidy performs annual monitoring, including a physical inspection and an audit of a sample of files to ensure that all tenants are income eligible. For homeowner units, a rider is attached to the property as each unit is sold, guaranteeing affordability at 80 percent of AMI.

117. Sam Stonefield, *Affordable Housing in Suburbia: The Importance but Limited Power and Effectiveness of the State Override Tool*, 22 WEST. N. ENGL. L. REV. 323-54 (2001).

would allow the law to respond to the diversity of housing markets in California. In addition, setting the affordability requirements too high would mean projects would need significant added subsidy, making it hard for developers to add affordable units to projects that would pencil out without public funding.

One option would be to align projects eligible for a California Chapter 40B comprehensive permit with those that are already eligible under the Density Bonus Law (DBL).¹¹⁸ This includes projects that have at least one of the following characteristics: (1) 10 percent of the total units for lower-income households; (2) 5 percent of total units for very low-income households; (3) a senior citizen housing development or mobile home park restricted to older persons; or (4) 10 percent of units in a common interest development for moderate-income families or persons. Linking California Chapter 40B's eligible project criteria to the standards set forth in the DBL creates administrative efficiencies and increases the predictability of implementation of the new law. Because the DBL, which has been on the books since 1979, requires each local government to enact an enabling ordinance that specifies how it will comply with the law, local governments, in theory, already have administrative procedures in place to process density bonus project applications.

A second option would be to restrict comprehensive permits to developments that align with the state's goal to concentrate development near transit to reduce reliance on cars and attendant greenhouse gas emissions. For example, SB 375 attempts to reduce the costs and barriers associated with building compact transit-oriented development by streamlining CEQA requirements, and the Affordable Housing and Sustainable Communities program provides funding for affordable housing (as well as other investments) that support more compact, infill development patterns and that encourage the use of transit. However, efforts to streamline CEQA for infill developments and transit priority projects (TPPs) have been criticized for layering on so many project level restrictions that no developments succeed in meeting all the eligibility requirements for streamlined review.

A third option—and one that would likely have the greatest positive impact on increasing housing supply—is to make a broad range of projects eligible for a streamlined comprehensive permit as long as they include an affordability component. Particularly given the dearth of housing for those of moderate incomes in the state, California Chapter 40B has the potential to increase the number of housing units affordable for households earning between 80 and 120 percent of AMI with little subsidy if developers could be assured a streamlined entitlement process. For example, the option to apply for a comprehensive permit could be extended to developers that are proposing rental developments where at least 25 percent

118. CAL. GOV'T CODE § 65915(b)(1) (West 2016).

of the units are designated for moderate-income households or below, thereby expanding the supply of housing for those earning between 80 and 120 percent of AMI. In ownership developments, at least 25 percent of the units would have to be affordable to those earning less than 120 percent of AMI. While these lower eligibility thresholds may not please affordable housing advocates, they would remove some of the barriers to development and help to close the gap between overall housing supply and demand in the state, particularly for housing that is generally not supported by public subsidy dollars.¹¹⁹

Two other policy considerations for a California Chapter 40B are property type and the length of affordability restrictions. Chapter 40B in Massachusetts does not address the mix of affordable housing units, for example, the balance between properties that are targeted toward seniors versus families. While projects with housing subsidies are reviewed under fair housing guidelines, jurisdictions are not currently required to provide for family units or properties with units suitable to larger families (e.g., three- or four-bedroom units). One consideration for California is to be more explicit in the RHNA process about the types of housing that meet housing needs and would therefore count toward safe harbor. Otherwise, jurisdictions may meet their affordable housing obligations solely by building properties for seniors, which tend to generate less opposition than family-oriented affordable housing.

The second consideration is affordable housing preservation. In Massachusetts, affordability restrictions are determined by the rules of the subsidizing agency,¹²⁰ but there is a risk that units built under inclusionary ordinances or as part of a mixed-income development will convert to market-rate units after the initial affordability period expires. California should spell out the affordability term as part of the Chapter 40B statute. We recommend that in order to be eligible for a comprehensive permit, the developer must commit to ensuring the continued use of the housing units for lower-income households for a period of at least fifty-five years for rentals, and thirty years for ownership, even if there is no public subsidy on the project. This will require that HCD develop a robust monitoring system to ensure compliance with affordability restrictions as well as help build the capacity of local planning agencies to track affordable units.

D. How Should the Housing Appeals Committee Be Structured?

In Massachusetts, the Housing Appeals Committee (HAC) is convened at the state level. As mentioned earlier, the HAC is composed of five members, three of whom are appointed by the director of the state's Housing

119. The majority of housing subsidies are limited to units that serve households earning below 80 percent of AMI.

120. Erika Barber, *Affordable Housing in Massachusetts: How to Preserve the Promise "40B" with Lessons from Rhode Island*, 46 N. ENGL. L. REV. 125–53 (2011).

and Community Development Department (MA-HCD); the governor appoints two members, one of whom must be a city councilor and one of whom must be a selectman.¹²¹ With the exception of the MA-HCD representative who is a paid employee, the rest of the members are volunteers and compensated for travel and parking. Historically, MA-HCD employees have served as the chair of the committee, allowing them to dedicate part of their job to managing the HAC workload. Committee members are appointed for a year, although in practice they generally serve multiple terms. For example, the current committee includes members who have served for several years as well as one who has served on the HAC for more than two decades. HAC decisions are considered to be “adjudicatory,” meaning that they are court decisions based on the facts of the case rather than discretionary decisions.

California has several options for establishing its HAC. First, the HAC could be structured as an administrative body within the California Department of Housing and Community Development (HCD), vested with the authority to review and override local zoning decisions denying comprehensive permit to eligible projects.¹²² This would be most similar to the Massachusetts statute and would align with Senate Bill 744, which was introduced in 2003 but never passed.¹²³ The HCD director and the director of the Governor’s Office of Planning and Research would serve as ex officio members (with authority to designate an employee to serve on the committee); the three remaining members would be appointed by the governor with the advice and consent of the Senate. One member would serve on a city council or board of supervisors, and one other member would have extensive experience in the development of affordable housing. The appointed members would serve for terms of two years each, and the director would designate the chairperson. Alternatively, the HAC could be structured in a way that is similar to the existing Local Assistance Loan and Grant Committee, a body of ten individuals, selected by HCD staff, who are housing, planning, and land use professionals from across the state.

Second, Chapter 40B could build on the precedent of the Coastal Commission. When the Coastal Commission was first established, the statute held that four members were appointed by the governor, four by the Speaker of the Assembly, and the remaining four by the Senate Committee on Rules. Each served two-year terms “at the pleasure of their appointing authority.” However, this structure came under fire. In *Marine Forests Society v. California Coastal Commission*, the Marine Forests Society asserted that this structure, which allowed each appointing authority to remove its appointees at will, rendered the Coastal Commission a “legislative body”

121. See MASS. GEN. LAWS ch. 23B, § 5.

122. See MASS. GEN. LAWS ch. 40B, § 22.

123. S.B. 744 (Dunn), 2003-2004 Leg., Reg. Sess. (Cal. 2003).

for purposes of the separation of powers clause of the California Constitution and argued that such a body was precluded from engaging in executive or judicial functions, such as granting, denying, or conditioning development permits.¹²⁴ In response to the Court of Appeals decision favoring the plaintiff, the governor signed an emergency measure amending the structure of the commission, which was upheld by the California Supreme Court.¹²⁵ Under the new structure, one-third of the voting members are still appointed by the governor, one-third by the Senate Rules Committee, and one-third by the Speaker of the Assembly, but commissioners appointed by the Senate Rules Committee or by the Speaker of the Assembly serve four-year terms and are not removable at will. However, this is a cautionary tale to the drafters of California Chapter 40B to consider the separation of powers issue. In addition, given the success of Massachusetts Chapter 40B, which draws on the land use regulation and affordable housing experience of HCD staff, argues for representatives who are not just political appointees.

Third, given California's size, it makes sense to establish HACs at the regional level, housed within the regional Council of Governments or Metropolitan Planning Organizations. This would allow for more localized knowledge to inform HAC decisions, but it may also increase the political nature of the appeals process, particularly if local COGs or MPOs are comprised of elected officials who are beholden to anti-growth constituents. In order for this approach to work, the regional HACs could be set up as in Massachusetts, where at least the majority of the members are appointed at the state level on the basis of their substantive knowledge of land use regulations.

Perhaps the most important consideration in establishing the HAC is to ensure that HAC decisions are considered adjudicatory in the statutory language, meaning that rulings are treated as a decision of the court. This would ensure that HAC rulings would not be subject to CEQA since courts are not considered public agencies under CEQA.¹²⁶ This would align California 40B with both the precedent in Massachusetts, as well as the practice in Connecticut, where appeals are made to the court system.

E. Should CEQA Apply to Chapter 40B Projects?

In California, environmental review mandated under CEQA contributes significantly to the cost and time required to build affordable housing

124. *Marine Forests Soc'y v. Cal. Coastal Comm'n*, 104 Cal. App. 4th 1232 (2002) (where the court found that the appointment structure of the Commission unconstitutionally failed to separate the legislative and executive functions of government where committee positions were electable and terminable at the whim of the Legislature).

125. *Marine Forests Soc'y v. Cal. Coastal Comm'n*, 36 Cal. 4th 1, 15 (2005).

126. "Public agency" does not include the courts of the state. CAL. PUB. RES. CODE § 21083, *see also* CAL. PUB. RES. CODE § 21063.

and is often a significant roadblock in the entitlement process.¹²⁷ CEQA was enacted in 1970 to protect the quality of the natural environment by requiring public agencies to consider the environmental impacts of “projects,” as defined under the statute.¹²⁸ Although CEQA has been called “the state’s most powerful environmental protection,”¹²⁹ the statute poses a serious barrier to the development of much needed housing. CEQA hinders development by adding significant costs to projects through its complex procedural requirements,¹³⁰ as well as encouraging “vexatious” litigation in which project opponents who have no interest in protecting the environment sue under CEQA to raise project costs or extract payments from project developers.^{131,132}

Although the Massachusetts Environmental Policy Act (MEPA) requires state actors to consider the environmental consequences of their actions, CEQA’s requirements are widely accepted as being more onerous than MEPA’s.¹³³ Briefly, CEQA requires every public agency to prepare a detailed statement regarding the environmental effects for any project that would be approved or carried out by a public agency that may have a significant, adverse effect on the environment.¹³⁴ Not every project requires compliance with CEQA. CEQA applies only to non-exempt “discretionary projects proposed to be carried out or approved by public agencies.”¹³⁵ Courts have interpreted this statutory provision to require two threshold determinations. First, courts look to whether the agency is considering “approval” of a proposed action.¹³⁶ Second, courts consider whether the subject matter of the proposed action is a “project” under

127. HERNANDEZ ET AL., *supra* note 11.

128. California Environmental Quality Act, 1970, ch. 1433, § 1, 1970 Cal. Stat. 2780 (codified as amended at CAL. PUB. RES. CODE § 21000).

129. Ian Lovett, *Critics Say California Law Hurts Effort to Add Jobs*, N.Y. TIMES (Sept. 4, 2012), <http://www.nytimes.com/2012/09/05/us/to-add-jobs-many-in-california-look-to-alter-green-law.html>.

130. HERNANDEZ ET AL., *supra* note 11.

131. Katherine V. Mackey, *Reforming “The Blob”: Why California’s Latest Approach to Amending CEQA Is a Bad Idea*, Note, 39 COLUM. J. ENVTL. L. 357–88 (2014).

132. Lisabeth D. Rothman, *CEQA Turns 40: The More Things Change, The More They Stay The Same*, 20 ENVTL. L. NEWS (2010), <https://law.ucdavis.edu/centers/environmental/files/Rothman-article-Hernandez.pdf>.

133. Both CEQA and MEPA are known as little NEPAs: state environmental reporting statutes passed after the enactment of the federal National Environmental Policy Act (NEPA). See also Daniel P. Selmi, *Themes in the Evolution of State Environmental Policy Acts*, 38 URB. LAW. 949, 951 (2006).

134. CAL. PUB. RES. CODE § 21100.

135. CAL. PUB. RES. CODE § 21080(a) (*emphasis added*).

136. *Lexington Hills Ass’n v. State of California*, 246 Cal. Rptr. 97, 105–06 (Ct. App. 1988).

CEQA.¹³⁷ If a public agency action does not consist of *approval* of a project, then CEQA does not apply. Importantly, CEQA applies only to discretionary, not ministerial, projects. CEQA's guidelines define ministerial as "a governmental decision involving little or no personal judgment . . . [t]he public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision."¹³⁸ This ministerial provision provided the foundation for the governor's by-right proposal.¹³⁹

For California Chapter 40B, developments are likely to fall into one of three CEQA categories—(1) as an exempt "by-right" development, (2) as a development that qualifies for streamlined CEQA review under existing legislation, or (3) as a project that is subject to the regular CEQA review process.

In the first category, requests for comprehensive permits on parcels that are already zoned and identified in a jurisdiction's housing element as designated for affordable housing under their RNHA allocation would be allowable "by-right." Municipal adoption of a general plan, housing element, and adoption or amendment of zoning ordinances are all subject to CEQA review at the planning stage. When drafting these plan updates, a city must engage in environmental review to analyze proposed modifications to its existing land use inventory and related changes associated with its RHNA requirement. Proposals for new developments that are consistent with the housing element, general plan, and underlying zoning are ministerial and therefore should not require additional project-level CEQA review.

In the second category are proposed developments that align with existing legislative statutes that exempt certain projects, wholly or partially, from CEQA's requirements.¹⁴⁰ Over the years, efforts have been made to streamline CEQA for projects that meet specific goals, particularly infill development. For example, in 2002, the Legislature enacted SB 1925, with the intent of providing "greater regulatory certainty" to developers of affordable housing by exempting infill from CEQA.¹⁴¹ In 2011,

137. CEQA includes in the definition of "project" any "activity that involves the issuance to a person of a lease, permit, license, certificate or other entitlement for use by one or more public agencies." *See also* CAL. PUB. RES. CODE § 21065(c).

138. CAL. CODE REGS. tit. 14, § 15369; *see also* Adams Point Preservation Soc'y v. City of Oakland, 237 Cal. Rptr. 273, 275 (Ct. App. 1987).

139. "By-right" means, a "local government's review of the owner-occupied or multifamily residential use may not require a conditional use permit, planned unit development permit, or other discretionary local government review or approval that would constitute a "project" for purposes of [CEQA]." *See* CAL. PUB. RES. CODE § 65583.2.

140. CAL. CODE REGS. tit. 14, § 15260.

141. S.B. 1925 (Sher), Stats. 2002, Ch. 1039 (Cal. 2002) (SB 1925 created statutory exceptions for three categories of housing: agricultural employee housing, affordable low-income housing, and residential projects on infill sites.).

California's legislature passed Senate Bill 226, which contained a number of directives for expediting infill development to promote specified land use, transportation, and environmental goals.^{142,143} In 2013, the Secretary of the Natural Resources Agency adopted Public Resource Code Section 15183.3,¹⁴⁴ which expedites projects in urban infill areas that are focused on transit-oriented development and align with local sustainable communities strategies, as required by SB 375. While it is too early to assess the impact of some of the more recent streamlining provisions, experts have criticized existing provisions as "too complex" and "so restrictive" that projects have been described as "a herd of unicorns," mystical creatures that are "much discussed, but never seen."¹⁴⁵ Nevertheless, developments under Chapter 40B that meet these criteria, or that would fall under other legislative action to exempt affordable housing from CEQA, would be covered by those provisions.

California Chapter 40B comprehensive permit applications for developments on parcels not already appropriately zoned or identified in a jurisdiction's housing element would fall into a third category, where CEQA would apply. If there has not been any environmental review at the planning or zoning scale, project-level CEQA review would be necessary. This would lengthen the entitlement process and argues for the continued need to reform CEQA above and beyond what could be accomplished as part of Chapter 40B legislation. One promising model is a legislative amendment such as AB 2522, which was proposed in the 2015 legislative session but never passed.¹⁴⁶ AB 2522 would have removed qualifying projects from CEQA's processes at the "threshold determination" stage by amending the law so that qualifying affordable housing developments would not be considered "projects" under CEQA.¹⁴⁷ To do so, AB 2522 designated "qualified housing developments" a "use by right" so that public agencies would not have authority for discretionary review, but instead would make only ministerial approvals, such as building permits.¹⁴⁸ Since CEQA applies only to "discretionary projects,"¹⁴⁹ where a public agency has no discretion whether to approve or deny a project,

142. See Norman F. Carlin & David R. Farabee, *CEQA Streamlining Legislation: Some Small Steps Forward, but No Giant Leap*, Pillsbury Winthrop Shaw Pittman LLP (Oct. 5, 2011), <http://www.pillsburylaw.com/publications/ceqa-streamlining-legislation-some-small-steps-forward-but-no-giant-leap>.

143. C. AL. PUB. RES. CODE § 21094.5(b).

144. 14 CAL. CODE RECS. § 15183.3.

145. HERNANDEZ ET AL., *supra* note 11, at 82.

146. A.B. 2522 (Bloom), 2016 Assemb., Reg. Sess. (Cal. 2016).

147. *Id.*

148. *Id.* (CEQA only applies to "discretionary projects." Where a public agency has no discretion whether to approve or deny a project, then the agency's decision is "ministerial," and CEQA does not apply.)

149. CAL. PUB. RES. CODE § 21080(a),(b)(1).

the agency's decision would be "ministerial" and CEQA would not apply.¹⁵⁰ While a more in-depth discussion of CEQA reforms is beyond the scope of this article, it is clear that amending CEQA would be an important corollary to a California 40B and would help to increase the likelihood that proposed housing developments that meet affordability and sustainability goals are approved in a timely manner.

IV. Conclusion

California's affordable housing crisis requires strong state action, and adopting legislation similar to Chapter 40B in Massachusetts, as well as similar legislation in Connecticut, Rhode Island, and Illinois, offers a promising model. Chapter 40B legislation will not solve all of California's housing needs. Addressing the lack of affordable housing across the state will require significant public funding to provide for its most vulnerable populations. However, given limited resources, it is vital that we use existing subsidies more effectively, and Chapter 40B would facilitate this through a streamlined approval process.

A California 40B offers a number of potential benefits. First, it would reduce the costs of building affordable housing. The complexity of California's regulatory environment, coupled with the roller-coaster nature of the land entitlement process, greatly increases the capital risk for developers. Most incentives currently in place reward fast tracking of building, rather than entitlement, permits. Streamlining the approvals process would reduce this capital risk, lower building costs, and increase the efficiency of public subsidies for affordable housing. In addition, Chapter 40B works by making housing development more efficient rather than by imposing new costs on developers. Rather than requiring additional fees that can make a project financially more complex (or untenable), Chapter 40B reduces costs and fast tracks financially viable developments that include affordable housing.

A Chapter 40B in California certainly would be controversial, and many jurisdictions would argue that it violates local control over zoning and land use. However, Chapter 40B does not remove local zoning rights and would provide municipal governments that are making progress toward their housing production goals with complete control over local land use decisions. The Massachusetts statute still allows municipalities to adopt regulations governing permissible land uses and review projects based on local design and suitability criteria. In addition, the right for a developer to appeal a denial to the state appeals board only "kicks in" when municipalities fail to meet their fair share housing obligations. Because California's RHNA process already requires that municipalities zone and plan for their affordable housing needs, a Chapter 40B would

150. CAL. PUB. RES. CODE § 21080(a),(b)(1).

merely provide the additional “stick” to ensure that what is planned for actually gets built.

Finally, Chapter 40B has had demonstrated positive impacts on the production of both market-rate and affordable housing in Massachusetts and has withstood both court and popular challenges. For many years Massachusetts Chapter 40B existed as the only example of a state’s departure from the norm of local control of land use.¹⁵¹ However, a number of other states have adopted legislation modeled after Chapter 40B.¹⁵² Chapter 40B’s ability to withstand challenges in the courts and the legislature, combined with the precedential nature of law as it spreads across other states, gives it solid grounding to be adopted in California.

151. Krefetz, *supra* note 32.

152. See CONN. GEN. STAT. § 8-30g to 8-30h (adopted 1999); see also R.I. GEN. LAWS § 45-53-1 to § 45-53-8 (adopted 1999).