

Borrowing Innovation, Achieving Affordability: What We Can Learn From Massachusetts Chapter 40B

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Introduction

California is facing a housing affordability crisis, particularly in its coastal cities. Median rents across the state have increased 24 percent since 2000, at the same time that household renter incomes have declined seven percent.¹ While there are multiple contributing factors to the rising cost of housing, 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 approximately half the number of units it would have needed to keep housing costs in line with the rest of the U.S.² Meanwhile, production of units affordable to low- and moderate-income households has been even more dismal, with most cities across California failing to meet their state-mandated Regional Housing Needs Allocation (RHNA) targets. In the Bay Area for example, cities permitted less than 30 percent of their very low, low, and moderate income housing need allocations between 2007 and 2014, falling short of RHNA goals by over 90,000 units.³

This sustained mismatch 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.⁴ 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.⁵ Jason Furman, President Obama's Chairman of the Council of Economic Advisors, has argued that restrictive zoning impedes residential mobility, which in turn leads to increased levels of inequality and declining productivity.⁶ 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." Failing to expand the supply of housing also undermines California's climate change goals, as families are forced to move further and further from jobs to find housing they can afford, resulting in increases to vehicle miles traveled.⁷

The complexity and length of the development entitlement process in California is a key factor influencing constrained supply and higher housing costs. Depending on the nature of the project, this process can involve 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). As a result, it takes about two and a half months longer, on average, to issue a building permit in coastal communities in California than the typical U.S. metro (seven months compared to four and a half months).

In addition, CEQA's complicated procedural requirements give development opponents significant opportunities to challenge housing projects even after local governments have approved them.⁸ A recent study found that nearly 80 percent of CEQA litigation is targeted at infill sites, meaning that the law not only thwarts efforts to expand much needed supply, but also favors growth in undeveloped, suburban and exurban land, ultimately undermining the environmental goals CEQA is intended to promote.⁹

This impasse, between the need to expand supply and the barriers 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 framework of laws regulating local land use decisions, but by the time resolutions pass they often lack teeth or have so many eligibility restrictions that they apply only to a "mythical" project.¹⁰ In addition, while some local jurisdictions have responded to the housing crisis by adopting ordinances that encourage housing production, over two-thirds of cities and counties in California's coastal metros have done the opposite: adopting policies explicitly aimed at limiting housing growth and leading to disparate levels of housing production across communities.¹¹

Streamlining California's land entitlement process at the state level would significantly increase the production of housing supply—both market rate and affordable—and increase access to housing in cities that are not currently meeting growing demand. Governor Jerry Brown's *Streamlining Affordable Housing Approvals* (SAHA) proposal, which was included in his May 2016 budget proposal, represents an important effort to balance local land use

controls with the broader goal of expanding the supply of housing.¹² The proposal recognizes that funding for affordable housing will go farther if complemented by a more predictable and cost efficient land use system. In effect, SAHA fast-tracks eligible housing projects by making local design review of eligible projects “ministerial” rather than discretionary. Eligible projects would be approved “by right,” which would also mean that they wouldn’t be subject to CEQA review. The proposal therefore addresses what is often cited as the primary roadblock to affordable housing developments in California—the use of the CEQA process to delay, create uneconomic approval conditions, or entirely reject multifamily infill developments.¹³

In this paper, we examine the feasibility of a similar, but expanded approach: enacting statewide legislation that would create an expedited permitting process for eligible affordable housing developments, akin to Massachusetts’ Comprehensive Permit Law (Chapter 40B).¹⁴ Chapter 40B, adopted in 1969, was intended to streamline and simplify local approvals processes for affordable housing. By all accounts it has been successful in increasing the number of units affordable to low- and moderate-income housing built across Massachusetts, including in affluent suburbs that have traditionally resisted multifamily and affordable housing developments.¹⁵ For California, Chapter 40B offers a compelling framework that could make a significant impact on expanding the housing supply across the state with minimal costs to either developers or the state.

It is important to note that the SAHA “by-right” proposal and Chapter 40B are not either/or solutions to increasing the supply of housing in the state—they share common goals and are complementary in many ways. Both use state authority to ensure that local governments don’t shirk their duty to provide housing for their workforce, both apply solely to projects that expand the supply of housing for lower-income households, and both reduce permitting timelines to lower the costs of development. However, these goals are achieved through different administrative mechanisms, and they address different development roadblocks. One major difference is that “by-right” facilitates development in jurisdictions that have already zoned and planned for multi-family housing. 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 already served as model legislation for many other states—including Connecticut, Rhode Island, and Illinois—this paper begins by providing a description of how Chapter 40B works and reviews the research on its impacts in Massachusetts. We then outline the policy options for a “California 40B,” examining the precedent for this type of legislation and assessing how it would work with California’s existing housing and land use regulation framework. The article concludes with a discussion of the benefits of a Chapter 40B for California.

An Introduction to Massachusetts Chapter 40B

The Massachusetts Comprehensive Permit Act, or Chapter 40B of the Massachusetts General Laws, was passed in 1969.¹⁶ Chapter 40B was intended to provide relief from exclusionary zoning practices that prevented the construction of low- and moderate-income housing, particularly in suburban municipalities. It provides “an impartial forum to resolve conflicts arising from the siting of affordable housing,” and balances the need for affordable housing with “planning, environmental, open space, design, health, safety, and other [legitimate] local concerns.”¹⁷ 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 area median income (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, it authorizes “qualified developers” (non-profit organizations, local housing authorities, or limited-dividend corporations¹⁸) 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). In its review of the project, the subsidizing agency certifies compliance with household income limits, assesses fair housing considerations (e.g. the marketing of units), and establishes long-term affordability for the new units. In developments intended for homeownership, 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 must 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.¹⁹

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 local ZBA. The ZBA notifies stakeholders and seeks recommendations from other local boards, including the Planning Board, Survey Board, Board of Health, Conservation and Historical Commission, Building Inspector, and Fire, Police or Traffic departments, depending on the project's scope. 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.²⁰ 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. The result is a more streamlined review process.

Chapter 40B also sets the process timeframe; the public hearing process must start within 30 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 40 days. On average, the time between the filing of the application and a ZBA decision is 10 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 timeline difficulty, and costs of development. Once the hearings are completed, the ZBA may take one of three actions: (1) it may approve the application as submitted; (2) it can approve the project with conditions or changes, such as restrictions on height and density; or (3) it can deny the application. Most comprehensive permit applications (over 90 percent between 1999 and 2005 according to one study) are approved by the ZBA.²¹

The second provision of Chapter 40B provides developers with the right to appeal to a state-level administrative, quasi-judicial body if the local ZBA denies the application or approves it with conditions that make the project "uneconomic."²² This body, known as the Housing Appeals Committee (HAC), is convened at the state level and is comprised of five members who adjudicate disputes. Three members are appointed by the Director of the state's Department of Housing and Community Development, one of whom must be an employee of that agency. These representatives typically have substantive expertise in affordable housing and/or finance. Two members, appointed by the governor, represent the state's cities and towns, meaning that one needs to be a councilman and one a selectman.²³ Members are appointed for one year, though in practice 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, defined as cities where less than 10 percent of the housing stock is allocated for low- and moderate-income households.^{24,25} In these cities, the HAC has the authority to overturn the local ruling *unless* the development in question 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 ... [which] outweighs the regional housing need."²⁶ 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.²⁷ Once a city or 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" and has the right to deny applications for Chapter 40B comprehensive permits.²⁸ However, even if a municipality has met the 10 percent standard (or one of the alternatives, noted below), developers can still apply for a comprehensive permit for qualifying developments, but they cannot appeal a negative ruling to the HAC.²⁹

Chapter 40B developments must abide by state laws, such as state environmental review. For example, Chapter 40B developments are subject to state wetland protections, which require that developments be at least 50 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 100 feet from wetlands. A Chapter 40B development would be exempt from this stricter standard, while a 100 percent (or non-qualifying) market-rate development, which must follow all local zoning regulations, would not. That being said, Chapter 40B projects must fully comply with the requirements of the Massachusetts Environmental Protection Act (MEPA).

Since it was originally passed, Chapter 40B has undergone several revisions, including both legislative changes and statutory guidelines that have increased the ability of local jurisdictions to qualify for “safe harbor” from the state appeals process.³⁰ 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 dollars, meaning that they were 100 percent affordable rental units with a direct source of public funding. However, it is now more common to see deals with multiple source of funding, 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 the AMI. To respond to this changing environment, Massachusetts created the Local Initiative Program (LIP) in 1990, which allows developers to work with municipalities to build affordable housing with state technical assistance serving as the requisite source of subsidy.³¹ Decisions regarding the financing, design and construction of LIP units are made by the municipality and reviewed and approved by 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 subsidy, and some argue that LIP developments are higher quality due to their mixed-income nature, increasing public acceptance of the projects and lessening the stigma associated with affordable housing.³²

In addition to the Local Initiative Program, other revisions have broadened the scope of potential exemptions from an appeal to the HAC. These include: limiting the size of Chapter 40B developments to a maximum of 300 units in cities with 7,500 or more total housing units, down to a maximum of 150 units in towns with less than 2,500 housing units.³³ In addition, cities and towns with an approved Housing Production Plan (HPP)³⁴ can be certified by Department of Housing and Community Development as being in compliance with affordability goals, allowing them to deny applications and be immune to an appeal to the HAC for 1-2 years.³⁵ If a jurisdiction shows that they increased the supply of affordable housing units by at least one percent over the previous 24 months, or if they have an approved HPP and demonstrate a half percent increase in units over the previous 12 months, they are eligible for a safe harbor from the appeals process. However, only one-third of municipalities that had not yet met the 10 percent goal submitted a HPP as of 2012, and some allowed them to expire.

The Chapter 40B process has changed in other ways over time. Developers are now more likely to work collaboratively with jurisdictions rather than appealing to the HAC. In the early years of the law’s existence, most of the ZBA denials were overridden by the HAC, but developments were sometimes stalled by local lawsuits.³⁶ In the 1990s, the HAC increased efforts to encourage developers and city officials to resolve land use disputes through negotiations 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 signed off on by the HAC.³⁷

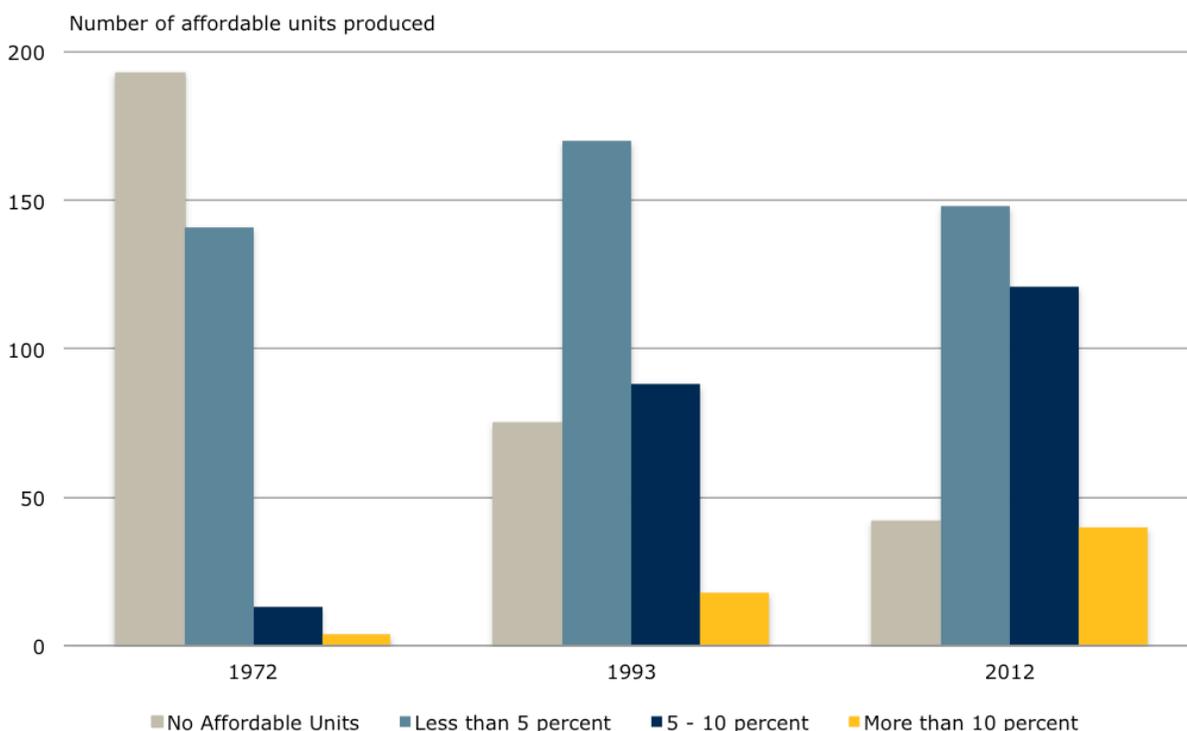
THE IMPACT OF CHAPTER 40B

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 *any* affordable housing units, boosting overall housing production, reducing the costs of development, and improving efficiencies in local planning processes. In addition, though some were concerned Chapter 40B would negatively impact surrounding property values or put undue pressure on local services or infrastructure, research has shown these impacts have not been realized. In 2010, voters had the opportunity to repeal Chapter 40B through a statewide referendum, but nearly two-thirds of voters came out in strong support of the law and its contributions to the production of housing in the state.³⁸

The impact of Chapter 40B on the landscape of affordable housing in Massachusetts has been substantial. Many municipalities in the state do not have any land zoned for multi-family developments, focusing instead on zoning for low-density, single family homes.³⁹ 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 absent the statute.⁴⁰ In 1972, shortly after Chapter 40B was enacted, only four of Massachusetts’ 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 increased tenfold. Among the municipalities that have attained the 10 percent goal are three Boston suburbs—Concord, Lincoln, and Lexington—all of which rank among the 15 most affluent municipalities in the state.⁴¹ While still far short of solving affordability challenges writ large, the data show that municipalities have made steady progress in expanding the stock of affordable housing. As of 2012, nearly half of all Massachusetts cities and towns (161 of 351) had over five percent of their housing stock affordable, including many in affluent suburbs with highly rated public schools.⁴² (Figure 1) Only 42 jurisdictions have no affordable units, but these are mostly smaller, rural towns with overall lower housing costs.⁴³

Figure 1: The impact of chapter 40b on the provision of affordable housing



Source: Bratt, Rachel G., and Abigail Vladeck. "Addressing Restrictive Zoning for Affordable Housing: Experiences in Four States." *Housing Policy Debate* 24, no. 3 (July 3, 2014): 602.

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.⁴⁴ 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 had generated more than \$9.25 billion in construction and related spending since 2000 and created nearly 48,000 jobs.⁴⁵ The policy has also led municipalities to become "more proactive in planning for and developing [affordable] housing."⁴⁶ More generally, Chapter 40B has ensured that cities can't enforce their planning and environmental concerns unequally against the creation of subsidized and market rate housing.⁴⁷ 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.⁴⁸

As mentioned, there is also very little evidence of negative impacts generated by Chapter 40B developments. A review of contested projects built as a result of Chapter 40B found that many concerns were resolved or did not materialize once the project had been built.⁴⁹ 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, the negotiations that took part as a result of Chapter 40B resulted in improved developments as both municipalities and developers agreed to concessions such as efforts to mitigate potential environmental, drainage and traffic impacts.⁵⁰ 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.

A study of Chapter 40B conducted by MIT researchers concluded that even large-scale, rental multifamily developments in single-family neighborhoods do not affect the value of adjacent homes. Using hedonic modeling, they found that the sale price index for neighborhoods with these developments was unaffected by the introduction of a Chapter 40B development.⁵¹ This is consistent with other 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.⁵²

CHAPTER 40B BEYOND MASSACHUSETTS

The success of Chapter 40B has led other states to institute similar legal mechanisms. In Rhode Island, Connecticut, and Illinois, legislation sets a statewide affordable housing goal, with a process for overriding local zoning board denials. However, each state's statute is slightly different, reflecting their unique policy and housing contexts. Connecticut's Affordable Housing Land Use Appeals Act (also known as Section 8-30G), enacted in 1990, does not streamline local approvals with a comprehensive permit process, but it does allow developers to appeal to a local zoning board decision if their development includes an affordable component.^{53,54} 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.⁵⁵ As in Massachusetts, municipalities that have at least 10 percent of their units classified as "affordable" by the state are exempt from the statute.

Like Massachusetts, Rhode Island's Low and Moderate Income Housing Act includes both a comprehensive permit component and an appeals process.⁵⁶ One important difference between Rhode Island and Massachusetts, however, is that as of 2004, Rhode Island requires that jurisdictions produce 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 element.⁵⁷ 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.⁵⁸

Illinois similarly requires that jurisdictions must plan for affordable housing and provides for an appeals process when jurisdictions don't meet their goals under the plan. The Illinois Affordable Housing Planning and Appeal Act requires municipalities that don't 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 methods for increasing the stock of affordable housing in a community: a minimum of 15 percent of all new development or redevelopment must be affordable; that the community will increase its overall percentage of affordable housing by three percentage points, or; that the community will increase its overall percentage of affordable housing to 10 percent of its total housing stock. In 2009, a State Housing Appeals board was authorized to overturn denials in municipalities that have not met the goals outlined in their plan.

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. 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 its own version of Chapter 40B legislation.

Adopting California 40B

We believe that California would be well served by a process akin to Chapter 40B. Currently, California's land entitlement process is the most multifaceted and complex in the nation. While this process has produced some benefits—including protecting environmentally sensitive land from development—it has also been a contributing factor in California's exceptionally high housing costs.⁵⁹ In addition, the emphasis on local control over land use regulations in California has resulted in development review processes that are different in every jurisdiction, leading to disparate levels of housing production across communities and creating significant jobs/housing imbalance, 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 California 40B would work alongside California's existing land use and housing regulations.

THE RESIDENTIAL REGULATORY APPROVALS PROCESS IN CALIFORNIA

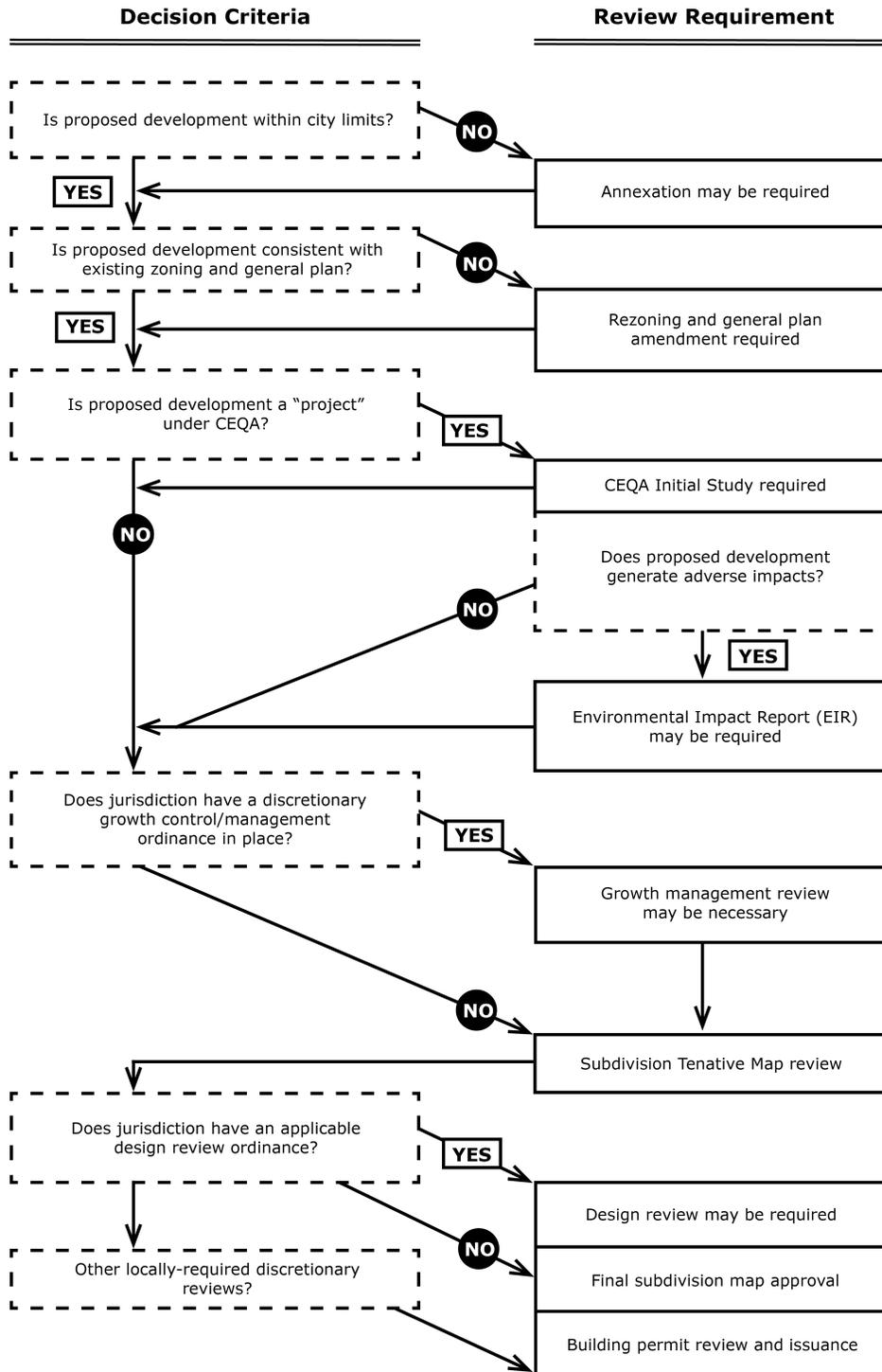
State planning law requires that every city and county in California have a valid general plan; that local zoning ordinances be consistent with the general plan; and that any zoning changes be approved as general plan amendments. California state law allows planning commissions to approve zoning changes 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 can directly restrict the quantity and pace of new development and/or limit the density, quality, and/or location of new development. These growth measures often impose additional project review requirements.⁶⁰

Figure 2 presents a general overview of the entitlement process in California. The multiple layers of review, coupled with CEQA requirements 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, and results in a more than four percent increase in housing prices.⁶¹ Between 2004 and 2013, land use entitlement processing and CEQA approvals for housing projects in California's ten largest cities took, on average, two and one half years to complete.⁶²

CEQA has been particularly singled out as an important driver of California's high housing costs due to litigation abuse. Anyone can file a CEQA lawsuit, and can do so anonymously, allowing a broad range of interests to stall development for reasons unrelated to environmental concerns.⁶³

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.⁶⁴ 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, and 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 20 CEQA lawsuits filed against it.⁶⁵

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/>.

Local planning bodies – sometimes 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. Others deny permits to specific projects even when the local General Plan and zoning laws permit higher density development, citing concerns over “neighborhood character”. 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—like traffic or the preservation of views – create opposition to a multi-family project. Having a state appeals commission, as is the case with Chapter 40B, can help to overcome these local dynamics, and can even provide political cover for local council members and planners who would like to see more housing built, but where a small group of constituents might be vocally opposed.

LEGAL PRECEDENTS FOR CALIFORNIA 40B

This is not the first time there has been a 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. As in Massachusetts and in most other states, California has long favored local rather than state control over land use regulations, stating that “counties and cities may exercise the maximum degree of control over local zoning matters.”^{66,67,68}

Yet the California constitutional provision that grants zoning authority to localities—known as the “home rule provision”—also limits that authority in the same breath; a city can only legislate its land use to the extent that those “regulations [are] not in conflict⁶⁹ with general laws.”⁷⁰ 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, the Housing Accountability Act, the Density Bonus Law, and the California Coastal Act of 1976. In addition, Senate Bill No. 375, passed in 2008, includes provisions that require local governments to align their Housing Element with regional Sustainable Communities Strategies. Each of these serves as a legal precedent for a California 40B:

Housing Element Law: The Legislature made its first foray into asserting preemptive control over local land use with the passage of the Housing Element Law in 1969, 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. Courts have held that cities must identify the actions they will take to make sufficient sites available with the appropriate zoning and development standards to meet their regional fair share of housing needs (RHNA).⁷¹ The courts have also held that the state’s RHNA requirement preempts local no-growth ordinances; in *Urban Habitat v. the City of Pleasanton*, the Judge stated that “The 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.”⁷² The court’s decision in that case sets a precedent that disallowing the construction of new housing units—and in particular, affordable units—when RHNA targets have not been met will not be tolerated by the State.⁷³

Housing Accountability Act: The Housing Accountability Act (HAA) was originally passed in 1982 but was elevated in importance in 2011 when the California Court of Appeals in *Honchariw v. County of Stanislaus* ruled that the Act applies to all housing projects, not just affordable projects. The HAA puts limits on 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 existing general plan and zoning laws. Just as with the Housing Element Law, HAA provides for a judicial remedy that allows a court to issue an order to compel a city to take action of the development project.⁷⁴

Density Bonus Law: The Density Bonus Law (DBL) was first enacted in 1979 to address California’s shortage of affordable housing. The application of the statute is complicated, but its broad 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. In effect, this encourages developers to build low-income housing while maintaining the economic feasibility of the project.⁷⁵ 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 by the applicable local regulations."⁷⁶ In 2014, Governor Brown signed Assembly Bill No. 2222 into law, which amends the DBL to prohibit a developer receiving a density bonus and related incentives *unless* the proposed development maintains the same number and proportion of pre-existing affordable housing units.⁷⁷ However, the DBL remains a precedent for 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.⁷⁸

California Coastal Act: The California Coastal Act of 1976 represents perhaps the strongest application of state rule over local land use decisions.⁷⁹ 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.⁸⁰ 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. The Coastal Act provides a strong analogous basis for California 40B legislation, as it incorporates statutory features highly aligned with those proposed in 40B, including a statewide policy initiative, a local land use permitting system prescribed by state law, and a state-level appellate review system. Under the Coastal Act, the Commission does not impose direct land use controls onto local governments. Rather, the Commission empowers the local government to submit a local coastal program to the Commission for review for compliance with the intent of the Coastal Act.⁸¹ Within that review process, the Commission's role is limited to an administrative determination of whether the local coastal program, including the land use plan,⁸² 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,"⁸³ or to force a local government to select a land use that conforms to the policies of the Coastal Act over another similarly conforming use.⁸⁴ This structure permits the Commission to regulate the policies enacted at the local level, but avoids confrontation with home rule challenges.

Senate Bill 375: The Sustainable Communities and Climate Protection Act of 2008: SB 375 is designed to help reduce greenhouse gas (GHG) emissions by aligning regional land use and transportation planning. 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 18 months of the adoption of the Regional Transportation Plan (RTP) and Sustainable Communities Strategy (SCS). In addition, local governments must rezone land to accommodate the amount of housing assigned under RHNA, and that the RHNA be consistent with the SCS. Cities that fail to rezone to accommodate low-income housing are subject to both a builder's remedy and/or a citywide remedy.⁸⁵ In addition, SB 375 states that projects may only receive transportation funding if they are consistent with the SCS, incentivizing local governments to align their land use regulations with regional planning documents.

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

Policy Considerations for a California 40B

Given California’s existing housing and land use regulations, there are several policy considerations for implementing a California 40B. There are four key questions that need to be addressed to integrate this legislation with the state’s existing legal structure and housing and land use regulations. These include:

- **Which municipalities would be exempt from the California 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 towards this benchmark are ineligible for the state appeals process. What should the state adopt as the threshold under which California 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, and/or should California 40B be limited to certain sites such as urban infill?
- **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 California 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 California 40B projects is a critical policy question for state lawmakers to consider.

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

WHICH MUNICIPALITIES WOULD BE EXEMPT FROM A CALIFORNIA 40B APPEALS PROCESS?

Massachusetts Chapter 40B stipulates that a municipality is subject to the HAC appeals if low- and moderate-income housing comprise less than 10 percent of its housing stock. Once a municipality establishes (and then 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.⁸⁶ One of the important provisions in Chapter 40B (which is often not highlighted in summaries of the law) is that in determining how to count affordable units, *all* rental units built via the comprehensive 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 25 affordable units and 75 market-rate units, the jurisdiction may count all 100 units towards 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 towards 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 AMI in order to achieve “safe harbor.”

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 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 universal 10 percent threshold will adequately reflect the affordable housing needs for all jurisdictions. In municipalities where the housing market is weaker and there is 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 reviewers of Chapter 40B in Massachusetts have argued that the

real affordable housing *need* of a municipality should be computed in determining the threshold.⁸⁷ Second, California does not have clear records of restricted affordable housing units, meaning that implementing this threshold 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 California 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,⁸⁸ it is already part of Housing Element law and jurisdictions are expected to produce a fair share of regional housing needs based on local projections of population and employment growth. 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 precedent set by 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 had zoned for at least two-thirds 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 California 40B may provide teeth to a process that is already familiar to local governments.

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 AMI.^{89,90} 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 readily 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 California 40B, and reduce its appeal to developers.⁹¹ Indeed, the LIP in Massachusetts acknowledges this and provides more flexibility for the sources of funding for Chapter 40B projects.

Given the changes in the funding and financing of affordable housing, California 40B should not be tied to a public source of funding, and the eligibility criteria governing whether a developer can apply for a comprehensive permit should be more flexible rather than less. This would allow the law to be sensitive to the diversity of housing markets in California. In addition, setting the eligibility threshold 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 40B Comprehensive Permit with those that are already eligible under the Density Bonus Law (DBL).⁹² This includes projects that have at least one of the following characteristics: (1) 10 percent of the total units within the project for lower income households; (2) Five 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 40B's eligible project criteria to the standards set forth in the DBL creates administrative efficiencies and increases predictability in the implementation of the new law. As the DBL 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 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 restrictions that no developments succeed in meeting all the eligibility requirements for streamlined review. In addition, if a version of the Governor's SAHA proposal passes—either in this legislative session or in future years—affordable infill would already be designated as by-right, meaning that a California 40B comprehensive permit and appeals process would have greater impact if it applied to projects that fell outside of the by-right development designation.

A third option, and one that would most positively impact 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 workforce housing in the state, California 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 who are proposing rental developments where at least 20 percent of the units are designated for low-income households or below, which would expand the supply of housing for those earning between 80 or less of AMI. In ownership developments, at least 20 percent of the units would have to be affordable to those earning less than 120 percent of AMI. While these lower eligibility thresholds will not reach those in greatest need, evidence shows that about half of households "in the middle" (making between \$35,000 and \$75,000) are over-burdened by housing costs and need to be factored in as part of the overall affordability strategy.⁹³ Further, these thresholds 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.⁹⁴

Two other policy considerations for a California 40B are property type and the length of affordability restrictions. Chapter 40B in Massachusetts doesn't address the mix of affordable housing unit types in a jurisdiction. For example, there isn't a mechanism to drive the development of properties that are targeted towards seniors versus those that are accessible to 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. 3- or 4-bedroom units). California could take this opportunity to be more explicit about the types of housing that meet the jurisdiction's housing needs and would therefore count toward safe harbor, so that jurisdictions can't meet their affordable housing obligations under RHNA solely by building senior properties (which tend to confront less community 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,⁹⁵ but for units that are built under inclusionary ordinances or as part of a mixed-income development, there is a risk that they will convert to market-rate units after the initial affordability period expires. California 40B should spell out the affordability term as part of the 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 55 years for rentals, and 30 years for ownership, even if there is no public subsidy on the project. This will require that California's Department of Housing and Community Development (HCD) develop and implement 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 built under California 40B.

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 comprised of five members, three of whom are appointed by the director of the state's Housing and Community Development department and two who are appointed by the governor, one of whom must be a city councilor, and one of whom must be a selectman.⁹⁶ With the exception of the HCD representative, who is a paid employee, the rest of the members are volunteers and are only compensated for travel and/or parking. Historically, the HCD employee has served as the committee chair, allowing them to dedicate part of their job to managing the

HAC workload. Committee members are appointed for a year, though in practice they generally serve multiple terms. For example, the current committee includes members who have served for just a couple of years, as well as one member 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’s HCD, vested with the authority to review and override local zoning decisions denying comprehensive permit to eligible projects.⁹⁷ Senate Bill No. 744, which was introduced in 2003 but never passed, proposed a structure similar to the Massachusetts HAC, with five members. The Director of HCD 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), and the three remaining members would be appointed by the Governor with the advice and consent of the Senate. One member would be a member of a city council or board of supervisors, and one other member would have extensive experience in the development of affordable housing. Appointed members would serve for terms of two years each, and the Director of HCD 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 10 individuals who are picked by HCD staff but represent housing, planning, and land use professionals from across the state.

Second, California 40B could build on the precedent of the Coastal Act’s creation of the Coastal Commission. When the Coastal Commission was first established, the statute held that four members were appointed by the State 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.”⁹⁸ The Marine Forests Society asserted that this structure—which enabled each appointing authority to remove its appointees at will—rendered the Coastal Commission a “legislative body” 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 a development permit.⁹⁹ In response to the Court of Appeals decision favoring the plaintiff, the Governor signed an urgency measure amending the structure of the commission, which was upheld by the California Supreme Court.¹⁰⁰ 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 by the appointing authority. However, *Marine Forests Society v. California Coastal Commission* is a cautionary tale to the drafters of California 40B to consider the separation of powers issue. Given the precedent of Massachusetts Chapter 40B’s reliance on HCD staff and expertise, policy-makers would be wise to have representatives who are staff as well as others who have expertise in land use.

Third, given California’s size, it could make sense to establish HACs at the regional level, housed within 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.¹⁰¹ 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.

SHOULD CEQA APPLY TO CALIFORNIA 40B PROJECTS?

In California, environmental review mandated under the California Environmental Quality Act (CEQA) is often a significant roadblock in the entitlement process and contributes significantly to the cost and time required to build affordable housing.¹⁰² CEQA was enacted in 1970 to protect the quality of the natural environment by requiring public agencies to consider the environmental impacts of their actions.¹⁰³ Although CEQA has been called "the state's most powerful environmental protection,"¹⁰⁴ in its current application, the statute poses a serious barrier to the development of much needed housing in California. CEQA regularly hinders development by adding significant costs to projects through its complex procedural requirements,¹⁰⁵ as well as "vexatious" litigation in which project opponents who have no interest in protecting the environment sue under CEQA to raise project costs or to extract payments from project developers.^{106,107}

While the Massachusetts Environmental Policy Act (MEPA) also requires state actors to consider the environmental consequences of their actions, there is wide consensus that CEQA's requirements are more onerous and a greater development impediment than those of MEPA.¹⁰⁸ Broadly, 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.¹⁰⁹ However, not every housing project requires compliance with CEQA. CEQA applies only to non-exempt "discretionary *projects* proposed to be carried out or *approved* by public agencies."¹¹⁰ 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.¹¹¹ Second, courts consider whether the subject matter of the proposed action is a "project" under CEQA.¹¹² 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."¹¹³ It is this ministerial provision, which underlies Governor Jerry Brown's SAHA proposal.¹¹⁴

For California 40B, developments are likely to fall into one of three CEQA categories—(1) exempt as a "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 RHNA allocation would be allowable "by-right." This is because 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.

The second category includes proposed developments that align with existing legislative statutes that exempt certain projects, wholly or partially, from CEQA's requirements.¹¹⁵ Over the years, efforts have been made to streamline CEQA for projects that meet specific environmental goals, particularly infill development. For example, in 2002, the Legislature chaptered SB 1925, with the intent of providing "greater regulatory certainty" to developers of affordable housing by exempting infill from CEQA.¹¹⁶ In 2011, 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.^{117,118} And in 2013, the Secretary of the Natural Resources Agency adopted Public Resource Code Section 15183.3, 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 and exemptions as being "too complex" and "so restrictive" that applicable projects have been described as "a herd of unicorns," mythical creatures that are "much discussed, but never seen."¹¹⁹ Nevertheless, developments under California 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 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 makes the case for CEQA reform above and beyond what could be accomplished as part of 40B legislation. One promising model is a legislative amendment like Assembly Bill No. 2522, which was proposed in the 2015 legislative session but was never passed. AB 2522 would have removed qualifying projects from CEQA's process altogether at the "threshold determination" stage by amending the law so that qualifying affordable housing developments are not considered "projects" under CEQA.¹²⁰ To do so, AB 2522 designated "qualified housing development" as a "use by right," so that public agencies would not have authority for discretionary review, but instead would mandate only ministerial approvals such as building permits for the project.¹²¹ Since CEQA only applies to "discretionary projects,"¹²² where a public agency has no discretion over whether to approve or deny a project, then the agency's decision is "ministerial," and CEQA would not apply.¹²³

Conclusion

Given the severity of the housing crisis in California, and the evidence of positive results in Massachusetts, serious consideration should be given to the benefits of adopting California 40B.

- **California 40B would reduce the costs of building affordable housing.** The complexity of California's regulatory environment, coupled with the unpredictable 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, reducing building costs and increasing the efficiency of public subsidies for affordable housing.
- **California 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), California 40B would reduce costs and fast-tracks financially viable developments that include affordable housing on-site.
- **California 40B would not remove local zoning rights, and would provide municipal governments that are making progress towards their housing production goals with complete control over local land use decisions.** The Massachusetts statute allows municipalities to adopt regulations governing permissible land uses and to 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.
- **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 was the only example of a state's departure from the norm of local control of land use.¹²⁴ However, in the face of growing housing pressures and increasingly cumbersome entitlement processes, a number of other states have adopted similar legislation.¹²⁵ Chapter 40B's ability to withstand challenges in the courts and the legislature, combined with the precedential nature of law as it spread across other states, gives it solid foundation for adaptation and adoption in California.

Finally, Chapter 40B could complement the Governor's proposed "by-right" approach, since its reach is not limited to parcels already zoned for multi-family units. It also enables the locality to "earn back" its discretionary land use authority if it is progressing towards expanded supply of housing for lower-income households, and would set up a system that could more effectively track where affordable housing is being built and preserved across the state.

Adopting California 40B 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 the most vulnerable populations. However, given limited resources, it is vital that we use existing subsidies more effectively. Addressing the crisis with strong state action, and adopting legislation similar to Chapter 40B in Massachusetts, offers a promising path forward.

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

³ 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.

⁴ 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).

⁵ Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLANN. ASSOC. 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).

⁶ Jason Furman, U.S. Chairman of Council of Economic Advisers, *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).

⁷ Robert Cervero, *Jobs-Housing Balance Revisited: Trends and Impacts in the San Francisco Bay Area*, 62 J. AM. PLANN. ASSOC. 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.

⁸ 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).

⁹ *Id.*

¹⁰ *Id.*

¹¹ CAL. LEGIS. ANYST'S OFF., *supra* note 2.

¹² See CAL. GOV'T. CODE § 65913 (proposed 2016); see also http://www.dof.ca.gov/budget/Trailer_Bill_Language/documents/707StreamliningAffordableHousingApprovals6-10-16.pdf.

¹³ Hernandez *et al.*, *supra* note 11.

¹⁴ 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 20-25% of the units have long-term affordability restrictions. *Id.*

¹⁵ 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).

¹⁶ The law has become known as Chapter 40B, referencing its location in the Massachusetts General Laws (MASS. GEN. LAWS ch. 40B § 20-23).

¹⁷ MASS. EXEC. OFF. OF HOUS. AND ECON. DEV., HOUSING APPEALS COMMITTEE (2016), <http://www.mass.gov/hed/community/40b-plan/hac.html>.

¹⁸ Most applications are brought by for-profit developers organized as limited dividend companies in order to engage in the 40B process.

¹⁹ The developer must also have site control before applying for the Comprehensive Permit.

²⁰ Massachusetts state regulations, such as the Wetlands Protection Act remain fully in effect under the comprehensive permit.

²¹ LYNN FISHER, *CHAPTER 40B PERMITTING AND LITIGATION: A REPORT BY THE HOUSING AFFORDABILITY INITIATIVE* (2007).

²² 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." *Id.* § 20.

²³ See MASS. GEN. LAWS ch. 23B, § 5.

²⁴ Krefetz & Furman, *supra* note 17.

²⁵ 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% goal. See RACHEL G. BRATT, *OVERCOMING RESTRICTIVE HOUSING IN FIVE STATES: OBSERVATIONS FOR MASSACHUSETTS* (2012).

²⁶ FISHER, *supra* note 23; LYNN FISHER, *REVIEWING CHAPTER 40B: WHAT GETS PROPOSED, WHAT GETS APPROVED AND WHAT GETS BUILT?* (2008).

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- ²⁷ 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).
- ²⁸ See MASS. GEN. LAWS ch. 40B § 20 (2016).
- ²⁹ Rachel G. Bratt & Abigail Vladeck, *Addressing Restrictive Zoning for Affordable Housing: Experiences in Four States*, 24 HOUS. POLICY DEBATE 594–636 (2014).
- ³⁰ Bratt & Vladeck, *supra* note 31.
- ³¹ Paul K. Stockman, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535–580 (1992).
- ³² Bratt & Vladeck, *supra* note 31.
- ³³ See Mass. 760 CMR 56 (6).
- ³⁴ 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.
- ³⁵ Krefetz & Furman, *supra* note 17.
- ³⁶ 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 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.
- ³⁷ Krefetz and Furman, *supra* note 17.
- ³⁸ Almost 80 percent of the 351 cities and towns in Massachusetts, the majority of the electorate voted against the repeal, and 58% of voters voted to retain the affordable housing act. See RACHEL BRATT, *OVERCOMING RESTRICTIVE ZONING FOR AFFORDABLE HOUSING IN FIVE STATES: OBSERVATIONS FOR MASSACHUSETTS* (2012); see also Krefetz and Furman, *supra* note 17.
- ³⁹ Fisher, *supra* note 23.
- ⁴⁰ Spencer M. Cowan, *Anti-Snob Land Use Laws, Suburban Exclusion, and Housing Opportunity*, 28 J. URBAN AFF. 295–313 (2006).
- ⁴¹ Bratt & Vladeck, *supra* note 31.
- ⁴² *Id.*
- ⁴³ *Id.*
- ⁴⁴ *Id.*
- ⁴⁵ Lindsay Koshgarian et al., *ECONOMIC CONTRIBUTIONS OF HOUSING PERMITTED THROUGH CHAPTER 40B: ECONOMIC AND EMPLOYMENT LINKAGES IN THE MASSACHUSETTS ECONOMY FROM 2000-2010* (2010).
- ⁴⁶ 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.
- ⁴⁷ Kenneth Forton, *Expanding the Effectiveness of the Massachusetts Comprehensive Permit Law by Eliminating Its Subsidy Requirement.*, 28 BC ENVTL AFF REV 651–682 (2000).
- ⁴⁸ Jennifer Devitt, *Illinois’ Affordable Housing Planning and Appeal Act: An Indirect Step in the Right Direction—A Survey of Housing Appeals Statutes*, 18 WASH. UNIV. J. L. POLICY 267–290 (2005).
- ⁴⁹ DEGENOVA ET AL., *supra* note 50.
- ⁵⁰ *Id.*
- ⁵¹ David J. Ritchay & Zoe R. Weinrobe, *Fear and Loathing in Massachusetts: Chapter 40B, Community Opposition, and Residential Property Value* (Jun. 12, 2004) (unpublished Master’s thesis, Mass. Inst. of Tech.) (on file with MIT Libraries, Mass. Inst. of Tech.).
- ⁵² 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. PLAN. LIT. 15–26 (2005).

⁵³ 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%, 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 40 rather than 30 years.

⁵⁴ Robert D. Carroll, *Connecticut Retrenches: A Proposal To Save the Affordable Housing Appeals Procedure*, 110 YALE L. J. 1247–1285 (2001).

⁵⁵ *Id.*

⁵⁶ R.I. GEN. LAWS § 45-53-4.

⁵⁷ Bratt & Vladeck, *supra* note 31.

⁵⁸ R.I. GEN. LAWS § 45-53-4.

⁵⁹ CAL. LEGIS. ANYST'S OFF., *supra* note 2.

⁶⁰ 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/>.

⁶¹ CAL. LEGIS. ANYST'S OFF., *supra* note 2.

⁶² *Id.*

⁶³ Hernandez *et al.*, *supra* note 11.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ CAL. GOV'T CODE § 65800.

⁶⁷ 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, it establishes that any powers not specifically granted to the federal government in the Constitution are reserved for the states. U.S. CONST. art. X.

⁶⁸ Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

⁶⁹ According to the California Supreme Court, "[c]onflicts exist if the ordinance duplicates [citations], contradicts [citation], or enters an area fully occupied by general law, either expressly or by legislative implication [citations]." Morehart v. County of Santa Barbara, 7 Cal. 4th 725, 747, 872 P.2d 143 (1994).

⁷⁰ See CAL. CONST. art XI § 7.

⁷¹ CAL. GOV'T CODE § 65583(c)(1).

⁷² Urban Habitat Program v City of Pleasanton, Case No. RG06-293831 (March 12, 2010).

⁷³ *Senate Bill 375: Overview*, TRANSBAY BLOG, <https://transbayblog.com/sb375/> (last visited Jul 15, 2016).

⁷⁴ *Id.* § 65589.5(k).

⁷⁵ CAL. GOV'T CODE § 65915 (West 2016).

⁷⁶ Friends of Lagoon Valley v. City of Vacaville, 154 Cal. App. 4th 807, 824 (2007).

⁷⁷ 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 Jul 15, 2016).

⁷⁸ CAL. GOV'T CODE § 65915(a). (However, a locality's failure to adopt an ordinance does not relieve it from complying with the DBL.).

⁷⁹ CAL. PUB. RES. CODE § 30000 et seq. (West 2016).

⁸⁰ CAL. PUB RES. CODE § 30600 (West 2016); see CECILY TALBERT BARCLAY & MATTHEW S. GRAY, CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW 271 (32nd ed. 2012).

⁸¹ *Id.* § 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, when taken together, meet the requirements of, and implement the provisions and policies of, this division at the local level. *Id.* § 30108.6.

⁸² “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. *Id.* § 30108.5.

⁸³ *Id.* § 30512.2.

⁸⁴ *Douda v. Cal. Coastal Comm’n*, 159 Cal. App. 4th 1181, 1199 (2008), *as modified on denial of reh’g* (Mar. 4, 2008).

⁸⁵ 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.

⁸⁶ FISHER, *supra* note 23; FISHER, *supra* note 28.

⁸⁷ Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509, 513 (2003). The 10% target was an arbitrary number intended to stimulate a “reasonable supply” of affordable housing.

⁸⁸ 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).

⁸⁹ For rental developments, the project can provide 20 percent of the units to households earning below 50 percent of the AMI.

⁹⁰ 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.

⁹¹ Sam Stonefield, *Affordable Housing in Suburbia: The Importance but Limited Power and Effectiveness of the State Override Tool*, 22 WEST. N. ENGL. L. REV. 323–354 (2001).

⁹² CAL. GOV’T CODE § 65915(b)(1) (West 2016).

⁹³ Christopher Thornberg, *California’s Housing Policies Need Real Reform*, available at http://www.car.org/ccre/pdf/Journal_of_Case_Study_Research-CCRE-Housing_Affordability.pdf.

⁹⁴ The majority of housing subsidies are limited to units that serve households earning below 80 percent of AMI.

⁹⁵ Erika Barber, *Affordable Housing in Massachusetts: How to Preserve the Promise “40B” with Lessons from Rhode Island*, 46 N. ENGL. L. REV. 125–153 (2011).

⁹⁶ See MASS. GEN. LAWS ch. 23B, § 5.

⁹⁷ See MASS. GEN. LAWS ch. 40B, § 22.

⁹⁸ See CAL. CONST. art III § 3.

⁹⁹ *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).

¹⁰⁰ *Marine Forests Soc’y v. Cal. Coastal Comm’n*, 36 Cal. 4th 1, 15 (2005).

¹⁰¹ “Public agency” does not include the courts of the state. CAL. PUB. RES. CODE § 21083, *see also* CAL. PUB. RES. CODE § 21063.

¹⁰² Hernandez *et al.*, *supra* note 11.

¹⁰³ Cal. Env’t Qlty. Act, 1970, ch. 1433, § 1, 1970 Cal. Stat. 2780 (codified as amended at CAL. PUB. RES. CODE § 21000).

¹⁰⁴ Ian Lovett, *Critics Say California Law Hurts Effort to Add Jobs*, N.Y. TIMES (September 4, 2012), <http://www.nytimes.com/2012/09/05/us/to-add-jobs-many-in-california-look-to-alter-green-law.html>.

¹⁰⁵ Hernandez *et al.*, *supra* note 11.

¹⁰⁶ Katherine V. Mackey, *Reforming “The Blob”: Why California’s Latest Approach to Amending CEQA Is a Bad Idea*, Note, 39 COLUM. J. ENVIRON. L. 357–388 (2014).

¹⁰⁷ Lisabeth D. Rothman, *CEQA Turns 40: The More Things Change, The More They Stay the Same*, 20 ENVIRON. L. NEWS (2010), <https://law.ucdavis.edu/centers/environmental/files/Rothman-article-Hernandez.pdf>.

¹⁰⁸ 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).

¹⁰⁹ CAL. PUB. RES. CODE § 21100.

¹¹⁰ PUB. RES. § 21080(a) (*emphasis added*).

¹¹¹ *Lexington Hills Assn. v. State of California*, 246 Cal. Rptr. 97, 105-06 (Ct. App. 1988).

¹¹² 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 PUB. RES. § 21065(c).

¹¹³ CODE REGS. tit. 14, § 15369; see also *Adams Point Preservation Society v. City of Oakland*, 237 Cal. Rptr. 273, 275 (1st Dist. 1987).

¹¹⁴ "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. GOV'T CODE § 65583.2.

¹¹⁵ CAL. CODE REGS. tit. 14, § 15260.

¹¹⁶ 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.)

¹¹⁷ See Norman F. Carlin & David R. Farabee, *CEQA Streamlining Legislation: Some Small Steps Forward, but No Giant Leap*, PILLSBURY WINTHROP SHAW PITTMANN LLP (Oct. 5, 2011), <http://www.pillsburylaw.com/publications/ceqa-streamlining-legislation-some-small-steps-forward-but-no-giant-leap>.

¹¹⁸ PUB. RES. § 21094.5(b).

¹¹⁹ Hernandez *et al.*, *supra* note 11, at 82.

¹²⁰ A.B. 2522 (Bloom), 2016 Assemb., Reg. Sess. (Cal. 2016).

¹²¹ A.B. 2522 (Bloom), 2016 Assemb., Reg. Sess. (Cal. 2016). (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.)

¹²² CAL. PUB. RES. § 21080(a),(b)(1).

¹²³ *Id.*

¹²⁴ Krefetz, *supra* note 29.

¹²⁵ 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).