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Measuring Local Policy to Advance Fair Housing and Climate Goals Through a Comprehensive Assessment of Land Use Entitlements

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Measuring Local Policy to Advance Fair Housing and Climate Goals Through a Comprehensive Assessment of Land Use Entitlements

Moira O’Neill, Eric Biber, Nicholas J. Marantz*

Abstract

California’s legislature has passed several laws that intervene in local land-use regulation in order to increase desperately needed housing production—particularly affordable housing production. Some of these new laws expand local reporting requirements

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concerning zoning and planning laws, and the application of those laws apply to proposed housing development. This emphasis on measurement requires the state to develop a housing data strategy to support both enforcement of existing law and effective policymaking in the future. Our Comprehensive Assessment of Land Use Entitlements Study (CALES) predates, but aligns with and supports, this state-led effort to improve local reporting. For the cities that it covers, CALES provides verified and cleaned data indicating how cities apply local and state law. In this symposium contribution, we use the CALES data to illustrate the importance of collecting a range of precise objective data on how cities apply law, and then offer a simple but sufficiently comprehensive measurement of regulation that can help identify when a local land use regime may be operating to exclude affordable housing.

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I. INTRODUCTION

Inadequate housing supply within California's high-cost cities derails climate and fair housing policy and disproportionately burdens poor and middle-income households.¹ Most scholars agree that restrictive zoning constrains necessary housing production.² Zoning reform as a remedy, however, is controversial.³ Still, local and state level policymakers nationwide have advanced zoning reform.⁴ California is no exception. The state legislature has passed

1. See, e.g., SHANE PHILLIPS ET AL., HOUSING AND COMMUNITY DEVELOPMENT IN CALIFORNIA: AN IN-DEPTH ANALYSIS OF THE FACTS, ORIGINS AND TRENDS OF HOUSING AND COMMUNITY DEVELOPMENT IN CALIFORNIA 10 (2022).

2. See Moira O'Neill et al., *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates*, 25 HASTINGS ENV'T L. J. 1, 17–35 (2019) (summarizing important research that explores the relationship between restrictive zoning and housing production, housing costs, and income segregation). Most research that explores the relationship between land use regulation and housing costs have also found that high housing costs correlate with stringent regulation. See Vicki Been et al., *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL'Y DEBATE 25, 26–27 (2019) (summarizing economics and urban planning research that explores the relationship between regulation, supply, housing costs, and affordability).

3. See Andrés Rodríguez-Pose & Michael Storper, *Housing, Urban Growth, and Inequalities: The Limits to Deregulation and Upzoning in Reducing Economic and Spatial Inequality*, 57 URB. STUD. 223, 223 (2020) (criticizing studies that link affordability to stringent regulation and arguing against reducing stringency in land use regulation, or deregulation, in high-cost cities). Some scholars characterize zoning reform as deregulation, and object. See, e.g., *id.* Other scholars object to both deregulation and to shifting authority from the local government to the state. See, e.g., Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125, 150 (2021). In addition to scholarly debates, there is active opposition to zoning reform within California. See, e.g., Marisa Kendall, *Inside Livable California's Fight for Single-Family Neighborhoods*, MERCURY NEWS (Sept. 20, 2020, 3:50 PM), <https://www.mercurynews.com/2020/01/26/inside-livable-californias-fight-for-single-family-neighborhoods/>; *In 2019 We Opposed SB 50, SB 330, SB 592, AB 68 & AB 1487*, LIVABLE CAL., <https://www.livablecalifornia.org/portfolio-items/in-2019-we-opposed-sb-50-sb-330-sb-592-ab-68-ab-1487/?portfolioCats=60> (last visited July 26, 2021) (“We oppose . . . top-down Sacramento bills . . . [that] seek to cripple local planning and land-use authority and hand this power to private developers.”).

4. See, e.g., Erick Trickey, *How Minneapolis Freed Itself from the Stranglehold of Single-Family Homes*, POLITICO (July 11, 2019), <https://www.politico.com/magazine/story/2019/07/11/housing-crisis-single-family-homes-policy-227265/>; Laurel Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NPR (July 1, 2019, 7:03 PM), <https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning>; Jerusalem Demas, *California Is Ending a Rule That Helped Cause Its Housing Crisis*, VOX (Sept. 17, 2021, 3:41 PM), <https://www.vox.com/2021/9/17/22679358/california-newsom-duplex-single-family-zoning>; David Brand, *Hochul, Lawmakers Look to Override NY's Exclusionary Zoning Amid Housing Crunch*, CITYLIMITS (Feb. 4, 2022), <https://citylimits.org/2022/02/04/hochul-lawmakers-look-to-override-nys-exclusionary-zoning-amid-housing-crunch/>; Kevin Zimmerman, *Lamont Signs Controversial Zoning Reform Bill Aimed at Creating More Fair and Equitable Housing*, WESTCHESTER & FAIRFIELD CNTY. BUS. J. (June 11, 2021), <https://westfaironline.com/real-estate/lamont-signs->

numerous laws changing the scope of local power over land use in recent years.⁵ Some new laws limit local power over land use controls, while others reduce state requirements on local governments seeking to change local land use controls.⁶ Senate Bill 9, for example, alters the impact of single-family zoning—not because it forces cities to rezone parcels, but because it allows property owners to build duplexes and fourplexes on parcels zoned for single-family-only housing.⁷ Journalists referred to Senate Bill 9 as effectively the “end of single-family zoning.”⁸ Senate Bill 10 allows local governments to increase density in some urban parcels to ten units per acre without environmental review.⁹ It does not limit local power—it eases state law procedural burdens on local governments interested in reforming local law to allow for more density.¹⁰

In the past decade, the legislature strengthened fair share housing law—embodied in state requirements that demand cities plan for their fair share of housing production—by increasing the importance of state administrative oversight over planning.¹¹ Local non-compliance with the state’s planning requirements can trigger state intervention in how cities approve housing and regulate density.¹² The legislature also amended the state’s Housing

controversial-zoning-reform-bill-aimed-at-creating-more-fair-and-equitable-housing/; Megan Kimble, *Desperate for Housing, Austin Seeks Relief in Rezoning*, BLOOMBERG (Apr. 29, 2022, 8:38 AM), <https://www.bloomberg.com/news/features/2022-04-29/as-gentrification-sweeps-austin-zoning-reform-remain-elusive>.

5. See CAL. GOV’T CODE §§ 65400, 65582.1, 65913.4 (West 2017) (streamlining the approval process for affordable housing projects that meet certain criteria).

6. See *infra* notes 8–11 and accompanying text.

7. S.B. 9, 2021 Leg., Reg. Sess. (Cal. 2021).

8. See Manuela Tobias, *With More Enforcement Power than Ever, State Relies on Activists to Enforce Duplex Law*, CALMATTERS (Apr. 22, 2022), <https://calmatters.org/housing/2022/04/california-duplex-housing/>.

9. S.B. 10, 2021 Leg., Reg. Sess. (Cal. 2021).

10. *Id.* (“This bill would, notwithstanding any local restrictions on adopting zoning ordinances, authorize a local government to adopt an ordinance to zone any parcel for up to 10 units of residential density per parcel, at a height specified in the ordinance, if the parcel located in a transit-rich area or an urban infill site, as those terms are defined.”).

11. Assemb. B. 72, 2017 Gen. Assemb., Reg. Sess. (Cal. 2017) (empowering the Department of Housing and Community Development (HCD) to review city and county actions for compliance with their respective adopted Housing Elements, to make non-compliance findings, to revoke compliance status, and to notify the Attorney General); see also Assemb. B. 879, 2017 Gen. Assemb., Reg. Sess. (Cal. 2017) (requiring more local level analysis of constraints on housing production in the Housing Element planning process); Christopher S. Elmendorf et al., *Making It Work: Legal Foundations for Administrative Reform of California’s Housing Framework*, 47 *ECOLOGY L.Q.* 973, 977 (2020).

12. See CAL. GOV’T CODE §§ 65754–55, 65757 (West 1984, 2014, 1982); see also CHRISTOPHER

Accountability Act to curtail cities' power to deny housing development proposals that comply with applicable zoning and planning standards.¹³ And Senate Bill 35 restricted local governments' ability to impose process and environmental review on classes of mixed income or affordable housing development in jurisdictions that previously failed to meet housing production targets.¹⁴

For this symposium, “Measuring Success and Enforcing the Ideal,” we do not define the “ideal” or whether any of these laws embody the ideal.¹⁵ Rather, we address the challenge of measurement—evaluating how past law and this new law operate within cities across the state.¹⁶ Determining the efficacy of any law requires measurement—but what does “measurement” mean when we are discussing land use law?¹⁷ Scholars agree that measuring law and its impact is generally difficult.¹⁸

S. ELMENDORF ET AL., “I WOULD, IF ONLY I COULD”: HOW CITIES CAN USE CALIFORNIA’S HOUSING ELEMENT TO OVERCOME NEIGHBORHOOD RESISTANCE TO NEW HOUSING 4 (2020).

13. See Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo, 283 Cal. Rptr. 3d 877, 887 (Ct. App. 2021) (noting that amendments to the Housing Affordability Act (HAA) “increased the burden of proof required for a finding of adverse effect on public health or safety.” Subdivision (f)(4) of the Act provides the following:

“For purposes of this section, a housing development project . . . shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project . . . is consistent, compliant, and in conformity.”

Id. (quoting CAL. GOV’T CODE § 65589.5(f)(4) (West 2023)); see also, e.g., S.B. 167, 2017 Leg., Reg. Sess. (Cal. 2017); Assemb. B. 679, 2017 Gen. Assemb., Reg. Sess. (Cal. 2017); Assemb. B. 1515, 2017 Gen. Assemb., Reg. Sess. (Cal. 2017).

14. S.B. 35, 2017 Leg., Reg. Sess. (Cal. 2017).

15. We have addressed such questions elsewhere. See Moira O’Neill et al., *Sustainable Communities or the Next Urban Renewal?*, 47 *ECOLOGY L.Q.* 1061, 1114 (2020) (discussing types of reform without analyzing their merits). We argue that increasing equitable and sustainable housing development requires state intervention into some local authority over land use (though not deregulation) in other writing. See *id.* at 1113 (“The need to balance equity considerations and to address local context should not . . . be a pretext to abandon efforts towards state intervention in local control over land, or progress towards achieving climate goals, particularly as fires and other extreme weather events wreak havoc across the state.”); see also Eric Biber et al., *Small Suburbs, Large Lots: How the Scale of Land-Use Regulation Affects Housing Affordability, Equity, and the Climate*, 1 *UTAH L. REV.* 1, 54–55 (2022).

16. See *infra* Section II.A.

17. See *infra* note 19.

18. See, e.g., Albert Saiz, *The Geographic Determinants of Housing Supply*, 125 *Q.J. ECON.* 1253, 1253 (2010) (agreeing that “land-use policies are multidimensional, [and] difficult to measure” because of their complexity and heterogeneity); Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One’s Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 *URB. LAW.* 519, 535

We argue that, in the California context, measurement requires reliable, detailed data and analysis to investigate how local jurisdictions apply their own law and, more importantly, state law to facilitate climate and fair housing policy goals.¹⁹ Why? Because crafting bold land use policy without impact is an old problem for California.²⁰ Consider that the state's fifty-year-old planning law was supposed to support fair distribution of housing production at all income levels; few would credibly argue that the law delivered on this promise.²¹

Because communities statewide have openly opposed state zoning reform and state intervention into local power over land, we think it is reasonable to expect continued local resistance to state-led zoning reform.²² Some local efforts to circumvent state law will be obvious. When Woodside, California—a small city in San Mateo County with approximately 6,000 people and very expensive housing—tried to circumvent Senate Bill 9, it declared itself a habitat for mountain lions.²³ National papers picked up the story, Housing Twitter

(2013) (noting that municipal zoning is complex and collecting permit data is difficult); Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, in 5B HANDBOOK OF REG'L AND URB. ECON. 1289, 1298 (J. Scott Bentley ed., 2015) ("Heterogeneity in land use restrictions across localities is so extensive that it is almost impossible to describe the full complexity of the local regulatory environment."); see also, Kristoffer Jackson, *Do Land Use Regulations Stifle Residential Development? Evidence from California Cities*, 91 J. URB. ECON. 45, 46 (2016) (noting the importance of identifying how specific land-use regulations interact with supply because some might increase supply while others might reduce it).

19. See, e.g., WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 220–21 (1995) (noting that researchers must look at how local governments apply land use regulation as well as the text of land use regulation to determine stringency); C.J. Gabbe, *How Do Developers Respond to Land Use Regulations? An Analysis of New Housing in Los Angeles*, 28 HOUS. POL'Y DEBATE 411, 427 (2017) ("We cannot understand the full puzzle of land use regulations without studying both the written and implementation components."); see also, ROBERT W. BURCHELL ET AL., A NATIONAL SURVEY OF LOCAL LAND-USE REGULATIONS: STEPS TOWARD A BEGINNING 78–79 (2008) (noting the limitations of studies that do not examine actual implementation).

20. See William C. Baer, *California's Fair-Share Housing 1967–2004: The Planning Approach*, 7 J. PLAN. HIST. 48, 50 (2008) (illustrating the history of California's fair-share mandates with a helpful timeline of the law's evolution).

21. *Id.* The state legislature's work to curb the exclusion of low-income households within cities and counties through codified planning mandates is bold considering the legislature began passing laws in this area in the 1960s. See *id.* We will also discuss some of the familiar critiques of California's fair share production law. See *infra* Section II.A.

22. See discussion *infra* text accompanying notes 24–27.

23. See Timothy Bella, *Wealthy California Town Says It Can't Build Mandated Affordable Housing. The Reason: Mountain Lions*, WASH. POST (Feb. 3, 2022, 11:04 AM), <https://www.washingtonpost.com/nation/2022/02/03/woodside-mountain-lions-housing-california/>.

provided comedic taglines, and the state attorney general threatened to sue.²⁴ Woodside made a quick about-face.²⁵ But not all local government efforts to circumvent state law will be so easy to detect. There is a real risk that local governments will obscure how they are avoiding their obligations under state law or applying new state law through inaccessible, complex, and messy local law and planning processes.²⁶

Measurement can help. Therefore, the state's local reporting and data management requirements are important. Reliable data on how cities and counties apply both local and state law to land development proposals can help policymakers and the public measure the relative impact of local planning and zoning as well as the impact of state mandates.²⁷ Measurement might help identify local practices that intentionally or unintentionally contravene state law. Measurement might also signal where local practices comply with state law but obstruct important regional or statewide public policy goals. Measurement can help local governments and the state legislature create a roadmap on how to cure deficiencies in the relevant law.²⁸

In 2016, O'Neill, Biber, and colleagues launched this study to measure local land use policy to understand the relationship between law and housing production outcomes. Marantz joined this study when O'Neill and Biber expanded the scope of our research for the California Air Resources Board and the California Environmental Protection Agency (CARB). In this discussion, we draw heavily on our CARB report²⁹ with other more recent, not yet

24. *See id.*

25. *See* Angela Swartz, *In Aftermath of Mountain Lion Exemption, Woodside Residents Question Council and Staff's Judgment*, ALMANAC (Feb. 15, 2022, 9:01 AM), <https://www.almanacnews.com/news/2022/02/15/in-aftermath-of-mountain-lion-exemption-woodside-residents-question-council-and-staffs-judgment> (discussing the town's reversal of its initial decision).

26. *See* Gabbe, *supra* note 20.

27. *See* Jenny Schuetz, *Is Zoning a Useful Tool or a Regulatory Barrier?*, BROOKINGS (Oct. 31, 2019), <https://www.brookings.edu/research/is-zoning-a-useful-tool-or-a-regulatory-barrier/> (explaining the difficulty of measuring the impacts of zoning regulations).

28. *See id.* (discussing how governments decide what zoning laws to implement and on what basis).

29. *See* MOIRA O'NEILL-HUTSON ET AL., EXAMINING ENTITLEMENT IN CALIFORNIA TO INFORM POLICY AND PROCESS: ADVANCING SOCIAL EQUITY IN HOUSING DEVELOPMENT PATTERNS 1 (2022), [hereinafter CARB Report] <https://www.landuseinsights.org/publications-reports/> (prepared for the California Air Resources Board and the California Environmental Protection Agency). The Silicon Valley Community Foundation and the Chan Zuckerberg Initiative provided the initial sponsorship for data collection and analysis in our first sixteen study cities in California. *Id.* at 3. Before the California Air Resources Board (CARB) and California Environmental Protection Agency (California EPA) provided additional funding to add jurisdictions and observations in the first sixteen cities to this

published findings to discuss what we have learned about local communities throughout the state, and importantly, the data and analysis relevant to “measuring success.”

Like others before and after us, we analyzed how cities wrote their own law by reviewing and classifying ordinances and zoning maps in a manner that facilitates broad comparative analysis.³⁰ But our work emphasized collecting housing approval data to explore how California cities apply local and state law.³¹ We have argued that crafting effective regulation that advances housing affordability and tackles the impacts of climate change demands granular objective data about how land use regulation operates within local contexts.³²

Since we began our work, the state legislature has passed laws requiring cities and counties to augment their reporting requirements to capture more data on how they apply local and state law.³³ In 2017, Senate Bill 35 not only

ongoing study, we submitted our data collection, data cleaning, quality control, and analysis methods to the California Air Resources Board Research Screening Committee for review and approval. *Id.* at 39–41. The internal research scientists and practicing lawyers that work within CARB and the California EPA first reviewed the report. The Research Screening Committee for CARB and the California EPA then reviewed and approved the report. *Id.* at 34; *see also Research Screening Committee*, CAL. AIR RES. BD., <https://ww2.arb.ca.gov/our-work/programs/research-planning/research-screening-committee> (last visited Oct. 29, 2022) (providing more information about CARB and the California EPA’s research screening and review processes). Here, we present findings using the same data collection, quality control, and analysis work approved by CARB and the California EPA in cities we did not discuss in the final report to CARB and the California EPA. *See generally* O’NEILL-HUTSON ET AL., *supra*.

30. *See, e.g.*, Barbara Sherman Rolleston, *Determinants of Restrictive Suburban Zoning: An Empirical Analysis*, 21 J. URB. ECON. 1, 6–8 (1987) (exemplifying an earlier work that relied on the percentage of land zoned for residential use); Laurie J. Bates & Rexford E. Santerre, *The Determinants of Restrictive Residential Zoning: Some Empirical Findings*, 34 J. REG’L SCI. 253, 254 (1994) (discussing the authors’ reliance on the percentage of land zoned for residential use in their study); Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RESV. L. REV. 81, 86 (2011) (exploring density and use controls, rather than procedural hurdles, in zoning). Since beginning our study and releasing working papers, there have been noteworthy studies that also classify and analyze diverse local land use regulations and produce visualizations through mapping. *See* Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 PEPP. L. REV. (forthcoming 2023) (visualizing diverse land use regulation across entire states); *Report: Single-Family Zoning Dominates Bay Area Housing, Presenting Barrier to Integration*, OTHERING & BELONGING INST. (Aug. 11, 2020), <https://belonging.berkeley.edu/report-single-family-zoning-dominates-bay-area-housing-presenting-barrier-integration> (compiling and releasing regional mapping that classifies local land use regulation to calculate the amount of land area limited to single-family only housing development).

31. *See infra* Section II.E.

32. *See, e.g.*, O’Neill et al., *supra* note 2, at 80–83.

33. *See, e.g.*, CAL. GOV’T CODE §§ 65915–18 (West 2023).

created a special time-constrained approval process for qualifying development, but it also expanded annual reporting requirements regarding housing approval processes, so that—for all projects—local governments must report key characteristics (such as affordability, rental/for sale) and identifiers. Local governments must submit these annual progress reports (APRs) to the Department of Housing and Community Development (HCD).³⁴ Assembly Bill 879 augmented the APR data requirements to mandate that local governments report the number of housing development applications (and housing units) they received, approved, and denied, as well as the sites the jurisdictions rezoned to meet fair share housing requirements.³⁵ In 2019, the legislature passed AB 1483, requiring that jurisdictions electronically publish all information on fees, exactions, affordability requirements, zoning and development standards, and other zoning and planning information.³⁶ Importantly, AB 1483 requires that HCD develop a ten-year housing data strategy to identify the data needed to enforce existing housing law and inform state housing policymaking.³⁷

Though the statewide data strategy is still evolving, HCD has since published an important data dashboard that shares new insights about how cities and counties approve proposed housing development.³⁸ Still, HCD's data dashboard explicitly states it has several important limitations: HCD relies on self-reported housing, planning, and zoning data that HCD does not independently verify or clean before uploading it to the data dashboard.³⁹ We expect this will improve because the state's data strategy is still evolving—HCD openly recognizes that accurate data reporting is critical to measuring local and state policy outcomes.⁴⁰

34. See S.B. 35, 2017 Leg., Reg. Sess. (Cal. 2017); see also *infra* notes 107–114 and accompanying text (discussing the legal distinctions between different types of development approvals and other land use control terms).

35. See Assemb. B. 879, 2017 Gen. Assemb., Reg. Sess. (Cal. 2017) (amending CAL. GOV'T CODE § 65400(a)(2)(C)–(G) (West 2023)).

36. See Assemb. B. 1483, 2019 Gen. Assemb., Reg. Sess. (Cal. 2019) (adding CAL. GOV'T CODE § 65940.1 (West 2022)).

37. See Assemb. B. 1483, 2019 Gen. Assemb., Reg. Sess. (Cal. 2019).

38. See *Annual Progress Reports – Data Dashboard and Downloads*, CAL. DEP'T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/planning-and-community-development/housing-open-data-tools/housing-element-implementation-and-apr-dashboard> (last visited September 14, 2022).

39. *Id.*

40. See CAL. DEP'T OF HOUS. & CMTY. DEV., DATA STRATEGY: AN APPENDIX TO THE STATEWIDE HOUSING PLAN 2, 12, 17, 29 (2022).

Our research predates this state-led effort around local housing, planning, and zoning data and informs HCD's ten-year data strategy.⁴¹ Though we limited our research to selected cities across the state, we do have the benefit of independently verified⁴² and cleaned data⁴³ spanning several years in our study cities. Our coding structure examines more than entitlement timeframes, size, and affordability characteristics.⁴⁴ We illustrate the kind of measurement possible with access to base zoning geographic information shapefiles⁴⁵ and verified, clean data regarding how local governments apply their own law over time. We use this work to offer a relatively simple, but sufficiently comprehensive, measurement of exclusion that we think is relevant to "measuring success."⁴⁶

II. MEASURING CALIFORNIA LAW APPLICABLE TO PLANNING AND APPROVING RESIDENTIAL DEVELOPMENT

To explain how we measure the law—or how cities apply the law—we describe the basics of how California's cities plan and regulate housing development as well as state mandated procedural and substantive requirements on local government land use regulation.⁴⁷ In our work, we focus our attention on the substantive dimensions of land use law that tell the public how local governments directly regulate the location, size, and form of housing development, and the procedural steps that project proponents must complete before they are eligible to apply for a construction permit.⁴⁸ We discuss how we

41. *See generally* Assemb. B. 1483, 2019 Gen. Assemb., Reg. Sess. (Cal. 2019) (implementing the ten-year data strategy). We initiated our work in the City of San Francisco in 2016 and expanded the work to an additional four jurisdictions with sponsorship from the Silicon Valley Community Foundation in the fall of 2017. We expanded to more jurisdictions as funding allowed over the years.

42. CARB Report, *supra* note 30, at 44. Verified data refers to our process of confirming a local government's reporting of its approval of a proposed housing development by cross-referencing documents that typically accompany those approval actions (such as notices, staff reports, and public hearing minutes). *Id.* We discuss our methods in detail in the CARB Report. *Id.* Cleaning data references the steps we take to make sure our coding of legal data is accurate—or the quality control work that we do to avoid errors in our own dataset. *See id.* at 40–41 (providing detail on our quality control methods).

43. *Id.* at 36–44 (elaborating on our data collection methods, quality control procedures, and coding process).

44. *Id.* at 37–41, 45–47 (noting the multi-faceted coding structure).

45. *Id.* (discussing spatial analysis methods in depth).

46. *See id.*

47. *See infra* Sections II.A–E.

48. *See generally infra* Sections II.A–B. We examine the various dimensions of local land use

approached measuring both the substantive and procedural aspects of law.⁴⁹

A. *Understanding Density and Use Controls Within the Context of California’s Fair Share Requirements and Housing Element Law*

California is a planning mandate state.⁵⁰ That means that state law requires each city and county to develop a General Plan⁵¹ likened to a local “constitution” for the long-term physical development of the city or county.⁵² The General Plan must include comprehensive language describing the city’s long-range vision, policies, and objectives for development.⁵³ The General Plan codifies the city’s local land use law, but it does so with varying degrees of specificity.⁵⁴ With one exception, California law does not require that jurisdictions update their General Plan according to a set schedule; the law only suggests “periodic” updates.⁵⁵ The one element within the General Plan that

regulation because it is multi-dimensional. *See, e.g.*, William A. Fischel, *Introduction: Four Maxims for Research on Land-Use Controls*, 66 LAND ECON. 229, 230 (1990) (“[No] jurisdiction [is] limited to a fixed configuration of regulatory devices.”); Rolleston, *supra* note 31, at 18 (noting that zoning restrictiveness has many dimensions); Saiz, *supra* note 19 (“[Z]oning and other land-use policies are multidimensional.”). We integrate analysis of California Environmental Quality Act (CEQA) environmental review pathways into our analysis of procedural requirements because many scholars and lawyers argue CEQA holds a prominent role in the housing approval process. *See infra* Sections II.A–B. Some scholars argue that CEQA review impacts production and development costs. *See, e.g.*, FISCHEL, *supra* note 20, at 246–48 (noting that applying CEQA to large private developments “became a powerful tool to block development of all kinds” and contributed to rising housing costs); Sean Stuart Varner, *The California Environmental Quality Act (CEQA) After Two Decades: Relevant Problems and Ideas for Necessary Reform*, 19 PEPP. L. REV. 1447, 1480, 1483 (1992) (explaining that uncertainty with CEQA compliance leads to delay and increased costs). Others argue it may increase community benefits. *See, e.g.*, Benjamin S. Beach, *Strategies and Lessons from the Los Angeles Community Benefits Experience*, 17 J. AFFORDABLE HOUS. & CMTY. DEV. L. 77, 92 (2008) (noting that CEQA may provide leverage for Community Benefits Agreement proponents). Still, others note it does not easily fit into the land use approval process. *See, e.g.*, Daniel P. Selmi, *Themes in the Evolution of State Environmental Policy Acts*, 38 URB. LAW. 949, 990 (2006) (explaining that environmental review may not fit easily with other approval procedures).

49. *See infra* Section II.B.

50. CAL. GOV’T CODE §§ 65300, 65302(g)(7) (West 2023)

51. *Id.*; *see also* 5 MILLER & STARR CAL. REAL EST. DIG. 3D ZONING & PLANNING § 10, WESTLAW (database updated July 2022); *DeVita v. County of Napa*, 889 P.2d 1019, 1023–25 (Cal. 1995).

52. *DeVita*, 889 P.2d at 1023–25 (citing *Leshar Commc’ns, Inc. v. City of Walnut Creek*, 802 P.2d 317, 321–22 (Cal. 1990)).

53. CAL. GOV’T CODE § 65302 (West 2023).

54. *See id.*; *see also id.* § 65301(c) (West 2007).

55. *See id.* § 65302 (noting that the General Plan is comprised of seven elements: land use, open space, noise, circulation, housing, conservation, and safety). The Housing Element, which details how

cities and counties must update according to a specific schedule is the Housing Element.⁵⁶

California's signature fair share housing legislation is built into the state's requirements for the Housing Element of the General Plan and the Regional Housing Needs Allocation (RHNA).⁵⁷ Scholars, planners, and lawyers refer to this area of California's government code as Housing Element law. Housing Element law demands that jurisdictions plan and/or zone for sufficient density within their boundaries to accommodate their "fair share" of regional housing production targets.⁵⁸ California's Department of Housing and Community Development (HCD) issues regional housing needs determinations to the state's council of governments (COGs).⁵⁹ In turn, these COGs create a Regional Housing Needs Allocation Plan (RHNA), and this RHNA assigns local jurisdictions within the COG's plan area production targets for categories of housing (from above-market rate housing to very-low-income housing).⁶⁰

Housing Element law then requires each city and county to: (1) engage in a multi-year planning process to accommodate housing needs determined by the state through this RHNA process; (2) demonstrate that it has zoned enough parcels to accommodate low-income housing; and (3) identify and correct for regulatory constraints on housing production.⁶¹ Inadequate Housing Elements put jurisdictions at risk of losing funding and authority over planning and zoning, though historically these enforcement provisions proved ineffectual.⁶²

the jurisdiction will satisfy its allocation of the regional housing need, is the only element that must be updated according to a planning schedule. *See id.* §§ 65302, 65588 (West 2022).

56. *See id.* § 65588.

57. *See id.* § 65583 (West 2023) (outlining the required contents of the Housing Element); *id.* § 65584 (West 2019) (describing California's approach to regional housing needs); *see also Housing Elements*, CAL. DEP'T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/planning-and-community-development/housing-elements> (last visited Oct. 29, 2022); *Regional Housing Needs Allocation*, CAL. DEP'T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/planning-and-community-development/regional-housing-needs-allocation> (last visited Oct. 29, 2022).

58. *See* CAL. GOV'T CODE § 65583 (West 2023).

59. *See id.* § 65584. The Government Code refers to Councils of Government. *See California's 18 Metropolitan Planning Organizations*, INST. FOR LOC. GOV'T, <https://www.ca-ilg.org/post/californias-18-metropolitan-planning-organizations> (last visited Oct. 29, 2022). In California, Metropolitan Planning Organizations are also referred to as Councils of Governments (COGs) and associations of Government. *Id.* But agencies also frequently reference these same COGs as MPOs. *See, e.g., Housing Elements*, *supra* note 58.

60. GOV'T §§ 65584, 65584.04 (West 2023), 65584.05 (West 2020).

61. *See id.* §§ 65580–65589.11 (West 2018).

62. *See* ELMENDORF ET AL., *supra* note 13; Christopher S. Elmendorf et al., *State Administrative*

It is also important to highlight what Housing Element law does *not* do. Housing Element law creates an affirmative rezoning obligation only if a jurisdiction fails to meet certain obligations.⁶³ That rezoning obligation may apply, for example, when a city has failed to zone for sufficient sites to meet its share of the Regional Housing Needs Allocation (RHNA) for the prior planning period.⁶⁴

Despite the requirements of the RHNA process, California's localities have underproduced housing—especially affordable housing—for decades, perpetuating California's housing shortage.⁶⁵ In 1988, only one of nine counties in the Bay Area came close to meeting half of its production goals for low- and moderate-income units.⁶⁶ Related research demonstrates that between 1994 and 2000, a municipality's compliance with the RHNA planning requirements did not result in more housing production.⁶⁷ Between 1990 and 2007, compliance with Housing Element law across urban, suburban, and rural municipalities was actually associated with lower low-income housing production.⁶⁸ Most recently, in the 2016 reporting period, ninety-seven percent of localities fell short of reaching RHNA's allocation.⁶⁹

Myriad factors may contribute to this failure. Some may be built into the law itself—like the fact that Housing Element law does not require any jurisdiction to actually produce additional housing to be considered in compliance with the RHNA process.⁷⁰ Or, as some scholars argue, Housing Element law

Review of Local Constraints on Housing Development: Improving the California Model, 63 ARIZ. L. REV. 609, 611 (2021).

63. See CAL. GOV'T CODE § 65583.

64. See *id.* §§ 65583–84.

65. See Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35, 46 (1993) (arguing that California Housing Element law has failed at producing affordable housing); see also Baer, *supra* note 22, at 48 (arguing that New Jersey has produced more housing than California); Elmendorf et al., *supra* note 12, at 190–91 n.40 (detailing media reports and other commentaries on California's housing production shortfall).

66. See PAUL G. LEWIS, CALIFORNIA'S HOUSING ELEMENT LAW: THE ISSUE OF LOCAL NONCOMPLIANCE 24 (2003).

67. See Paul G. Lewis, *Can State Review of Local Planning Increase Housing Production?*, 16 HOUS. POL'Y DEBATE 173, 190–92 (2005).

68. See Darrel Ramsey-Musolf, *Evaluating California's Housing Element Law, Housing Equity, and Housing Production (1990–2007)*, 26 HOUS. POL'Y DEBATE 488, 489 (2016).

69. Irvin Dawid, *Most California Cities Now Subject to State-Mandated Development Streamlining*, PLANETIZEN (Feb. 6, 2018, 9:00 AM), <https://www.planetizen.com/news/2018/02/97088-most-california-cities-now-subject-state-mandated-development-streamlining>.

70. See, e.g., Lewis, *supra* note 68, at 190, 193–94 (noting that there is no connection between Housing Element compliance and housing production, and that the fair share system focuses too much

has no teeth.⁷¹ Others argue the RHNA planning process may also be to blame—basing a locality’s housing-need determination on its past population growth perpetuates exclusivity and unaffordability.⁷² Relatedly, scholars suggest the allocation process provides too much deference to localities and allows affluent cities to lobby to keep their RHNA shares low, leaving less affluent places to carry the burden of housing production.⁷³

But how can anyone effectively determine whether the law is contributing to low housing production outcomes? As a starting point, measuring local law greatly benefits from comparative analysis of a city’s law, policy, and planning along with production outcomes in relation to neighboring cities, or demographically or geographically similar cities within the same region.⁷⁴ Comparative analysis, particularly within metros or regions, can help policy-makers determine when a local regulatory environment operates in an exclusionary manner and limits production outcomes—even when the law “on the

on distribution and not enough on production); Field, *supra* note 66 (noting that the Housing Element law has failed to produce affordable housing). *But see* SHANNON DODGE ET AL., SAN FRANCISCO BAY AREA HOUSING CRISIS REPORT CARD 1–2 (2002) (finding that Housing Element compliant Bay Area cities built more affordable housing).

71. *See* Christopher F. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 112 (2019); NOAH KAZIS, ENDING EXCLUSIONARY ZONING IN NEW YORK CITY’S SUBURBS 26 (2020); LEWIS, *supra* note 67; PAAVO MONKKONEN ET AL., A FLAWED LAW: REFORMING CALIFORNIA’S HOUSING ELEMENT 2 (2019); *see also* Field, *supra* note 66, at 51–61 (arguing that too few plaintiffs sue largely because low-income residents cannot afford to sue and developers are afraid of alienating cities and litigation delays, leading to little judicial enforcement).

72. Elmendorf, *supra* note 72, at 107. Specifically, if RHNAs are higher for cities with significant past and present growth, and lower for cities without that growth, then cities that use their land-use regulatory system to prevent development, thus have lower or no growth and will have smaller RHNAs. *Id.*

73. MONKKONEN ET AL., *supra* note 72, at 3; *see also* HEATHER BROMFIELD & ELI MOORE, UNFAIR SHARES: RACIAL DISPARITIES AND THE REGIONAL HOUSING NEEDS ALLOCATION PROCESS IN THE BAY AREA 11 (2017).

74. *See* discussion *infra* Section II.B.2 (comparing cities for the purposes of our analysis); O’Neill et al., *supra* note 2 (summarizing how prominent urban planning and urban economics research correlates stringency in regulation to high housing costs in comparing metropolitan statistical areas and regions). Several national studies rank MSAs, and some state studies may rank or compare cities in terms of stringency. *See* O’Neill et al., *supra* note 2, at 6. Other national studies only group and compare cities regionally, allowing for creating and comparing typologies at a regional level. *Id.* at 24–28. But we also note here that one problem with comparisons within single regions, a relatively “good performer” may not be a good performer in an absolute sense. For example, Redwood City may look less exclusionary—and possibly like a “good actor” within the Bay Area region—but may in fact still be exclusionary.

books” may appear to comply with fair share housing mandates.⁷⁵ Housing demand crosses jurisdictional boundaries—as do other economic factors that influence demand.⁷⁶ Comparing cities within the same region, for example, can allow researchers to explore the law’s impact on other factors that influence housing production.⁷⁷

We are particularly interested in laws and regulations that limit the capacity for affordable housing production (or what scholars refer to as “exclusionary zoning”).⁷⁸ Because land use regulation has increased in complexity and variability,⁷⁹ exclusionary land use regulation has multiple dimensions.⁸⁰ Any effective measurement of exclusionary land use regulation must explore multiple dimensions of land use regulation as well as how local governments

75. See discussion *infra* Section II.E.7 (discussing environmental review pathways in Bay Area cities).

76. See Off. of Pol’y Dev. & Rsch., *U.S. Housing Market Conditions Regional: Region 9—Pacific*, U.S. DEP’T OF HOUS. & URB. DEV., <https://www.huduser.gov/portal/ushmc/regional.html?regionid=9> (last visited Oct. 16, 2022); see also Biber et al., *supra* note 16, at 4.

77. See, e.g., Gyourko & Molloy, *supra* note 19, at 1298 (describing the benefits of comparing regulation within a single metropolitan area); EDWARD L. GLAESER ET AL., *REGULATION AND THE RISE OF HOUSING PRICES IN GREATER BOSTON* 3 (2006) (explaining a study of the Boston metro area that gathered substantial data on regulation in 187 communities). The detailed analysis allowed the authors to tease out the comparative impact of regulation—as opposed to inadequate land—as a contributing factor to downward trend in housing permits. GLAESER ET AL., *supra*.

78. See, e.g., Rolf Pendall, *Local Land Use Regulation and the Chain of Exclusion*, 66 APA J. 125, 126 (2000) (finding that low-density residential zoning and permit caps reduce rental and multifamily housing and contribute to racial segregation, while other growth control tools have no statistically significant impacts); Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 624–25 (2002) (book review) (noting the importance of exclusionary zoning as tool to ensure that local government can maximize revenues and minimize costs); Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFFS. REV. 779, 782–83 (2009) (using WRLUI survey and census data and finding that low-density zoning is correlated with racial segregation).

79. See Fischel, *supra* note 49, at 229–36; RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 11 (1966) (“[T]his metamorphosis in zoning from the simple, open-faced text to highly complex documents has resulted in total confusion”); GLAESER ET AL., *supra* note 78, at 2–4 (noting the complexity in different zoning rules in cities in Greater Boston); Bring & Garnett, *supra* note 19 (noting the complexity of municipal zoning rules and the difficulty of collecting data on permitting).

80. See also Gyourko & Molloy, *supra* note 19, at 1290; Saiz, *supra* note 19; Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning In Its Place: Affordable Housing and Geographical Scale*, 40 FORDHAM URB. L.J. 1667, 1689 (2013) (discussing how exclusionary regulation within urban dense cities can take different forms, and noting that “[h]eight limits, or limits on the floor-area-ratio, can still significantly constrain supply relative to the given demand, even in neighborhoods with truly urban density”); see also John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL’Y REV. 91, 95 (2014) (arguing that exclusion is rampant in gentrifying urban neighborhoods).

apply their laws.⁸¹ To enable comparative analysis across the jurisdictions we studied, we first examined each jurisdiction’s planning designations and zoning ordinances that regulate density and use (e.g., residential, mixed, commercial, industrial).⁸² This is just one dimension of regulation—what we will refer to as “base zoning.”⁸³ Base zoning here refers to the rules that regulate the height, density, and spacing of buildings, as well as control the use of the property—even if there is no relevant zoning ordinance.⁸⁴

Despite the flaws with Housing Element law described above, it provides information on measuring a city’s base zoning to answer important questions about whether local law supports or obstructs affordable housing development. Housing Element law uses density as a proxy for affordability of housing for low-income residents.⁸⁵ In urban jurisdictions, the default standard for density to allow for all income levels is thirty dwelling units per acre (or thirty du per acre).⁸⁶ It is important to note that thirty du per acre might not necessarily yield affordable multi-family housing—it could yield low-rise apartment buildings, condominiums, townhomes, or dense single-family homes.⁸⁷

This default standard provides a meaningful opportunity to understand and compare individual regulatory environments in urban areas because it offers a ready definition of “permissive density” or “zoned for all income levels.”⁸⁸ Though density and use controls are an incomplete measure of the potential constraints on how developers build housing, they offer a proxy for

81. See *supra* note 20 (containing citations to the scholarship establishing that researching land-use controls requires studying how law is applied).

82. See *infra* Section II.B (discussing the planning designations and zoning ordinances of twenty-one California cities).

83. See O’Neill et al., *supra* note 16, at 1087.

84. See *id.* (defining base zoning as “the underlying use and density restrictions of a zoned area”).

85. CAL. DEP’T OF HOUS. & CMTY. DEV., HOUSING ELEMENT SITE INVENTORY GUIDEBOOK 3 (2020), https://www.hcd.ca.gov/community-development/housing-element/docs/sites_inventory_memo_final06102020.pdf. Specifically, this area of law requires that cities report the density and use controls on potentially developable parcels. *Id.*

86. See CAL. GOV. CODE § 65583.2 (West 2022).

87. See Bob Bengford, *Visualizing Compatible Density*, THE URBANIST (May 4, 2017), <https://www.theurbanist.org/2017/05/04/visualizing-compatible-density/> (giving a helpful visualization of what approximately thirty dwelling units might look like).

88. See ROBERT W. BURCHELL ET AL., A NATIONAL SURVEY OF LOCAL LAND-USE REGULATIONS: STEPS TOWARDS A BEGINNING 174 (2008) (exploring density and use controls for national comparison through surveys and providing the thirty dwelling units per acre as the threshold dense zoning). Though Housing Element law codifies this density threshold as a proxy for affordability in California urban communities, it may still be a useful metric for understanding and comparing zoning outside of California. *Id.* at 3–4.

zoning that would allow affordable housing.⁸⁹ To be clear, this individual proxy for affordability does not offer a complete picture of the feasibility of developing affordable housing anywhere in California. Affordable development also depends on the availability of land, financial subsidies, and approval processes.⁹⁰ But this permissive density is still a *necessary condition* for affordable housing, and the law that demands urban cities to zone at least some land at thirty du per acre does not set a minimum threshold of just how much land must be zoned at thirty du per acre.⁹¹ Indeed, the amount of land zoned for all income levels is a key indicator of whether a jurisdiction is creating or eliminating a fundamental regulatory barrier to multi-family affordable housing.⁹²

Determining how much land area would allow development of thirty du per acre in each city we studied requires exploring how California communities write their density and use controls. Some jurisdictions might incorporate provisions within the General Plan for specific or community plans to address anticipated growth.⁹³ These various tools may restrict some development while also incentivizing other development proposed in the policy statements of the General Plan.⁹⁴

Though specific plans are optional for cities to adopt, they are relevant for examining the amount of land area available for dense development in any community. Specific plans may direct dense development to precise locations.⁹⁵ Specific plans may also be extremely detailed and govern nearly every aspect of development by codifying acceptable land uses⁹⁶ and requiring review of proposed development for compliance with the specific plan.⁹⁷ Cities

89. See Serkin & Wellington, *supra* note 81 (cautioning that height limits and floor-area-ratio can also limit density).

90. See ELIZABETH KNEEBONE & CAROLINA K. REID, THE COMPLEXITY OF FINANCING LOW-INCOME HOUSING TAX CREDIT HOUSING IN THE UNITED STATES 2 (2021). For a summary discussion of the complex tools available to help build affordable housing in California, see also *Affordable Housing 101: How is it Built?*, CAL. HOUS. CONSORTIUM, <https://calhsng.org/resources/affordable-housing-101/how-is-it-built/> (last visited Oct. 13, 2022).

91. See CAL. GOV'T CODE § 65583.2 (West 2022).

92. See CARB Report, *supra* note 30, at 25.

93. See *id.* at 15.

94. See CAL. GOV'T CODE §§ 65450-65452 (West 2022).

95. See *id.* § 65451(a); see also O'Neill et al., *supra* note 16, at 1099–1100.

96. See CAL. GOV'T CODE § 65451(a) (West 2022); see also *Hafen v. County of Orange*, 26 Cal. Rptr. 3d 584, 591 (Ct. App. 2005).

97. GOV'T § 65451(a)(3)–(4) (noting that a specific plan requires “[s]tandards and criteria by which development will proceed” and “[a] program of implementation measures including

may also use community plans, which are distinct from specific plans.⁹⁸ Community plans may offer policy goals and programs for a particular geographic area within the General Plan, but unlike specific plans, community plans usually do not include density and use provisions through development standards.⁹⁹

California cities may use zoning ordinances to regulate land use and density.¹⁰⁰ A zoning ordinance is generally found within the local municipal code and can include maps and text that, when combined, provide specificity as to the type of development permissible within specific neighborhoods.¹⁰¹ Requirements on use (residential, commercial, or industrial) often exist in the text of the ordinance and zoning map.¹⁰² Sometimes, however, a California city may provide most or nearly all these detailed requirements in its planning documents rather than in a zoning ordinance.¹⁰³

Thus, there is no obvious regulatory pathway any California community might take to regulate density and use. State law allows local jurisdictions considerable flexibility to regulate land use within this broad planning framework.¹⁰⁴ Sometimes a California city's General Plan provides specific language that not only guides development policy but also closely regulates the form of development and land use through planning designations.¹⁰⁵ Similarly, a California specific plan may be very general—or it may closely

regulations”).

98. See GOVERNOR'S OFF. OF PLAN. & RSCH., THE PLANNER'S GUIDE TO SPECIFIC PLANS 6 (2001) (providing a helpful explanation of the legal distinction between a specific plan and a community plan, while recognizing that communities may use terms interchangeably and create confusion).

99. *Id.* (distinguishing between the requirements of community and specific plans to include density and development standards). They may, however, add a discretionary review step to development that conforms to density and use controls. See *infra* Section II.C (discussing the discretionary review process).

100. See CAL. GOV'T CODE § 65850 (codifying local governments' power to regulate land use and intensity of land uses, among other things); see also *id.* § 65851 (allowing a local government to divide a county, city, or portions thereof into zones).

101. See CARB Report, *supra* note 30, at 16 (defining zoning ordinances, which “include maps and text that when combined provide specificity as to the type of development (type and intensity of use and form) that is permissible within specific neighborhoods”).

102. *Id.* (discussing where to find zoning ordinances and use restrictions).

103. See GOVERNOR'S OFF. OF PLAN. & RSCH., *supra* note 99, at 5.

104. See CAL. GOV'T CODE § 65800 (West 2022) (explaining the state legislature's “intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters”).

105. See, e.g., CITY OF SAN JOSÉ, ENVISION SAN JOSÉ 2040: GENERAL PLAN 9 (2022) (prescribing use districts, density and Floor Area Ratio (FAR) ranges, and height limits).

regulate development.¹⁰⁶

Another key issue in measuring a California city's local policy, or how a city applies its local housing policy, is the distinction between charter and general law cities under California law.¹⁰⁷ California has historically treated these two kinds of cities differently when determining whether zoning ordinances must be consistent with the city's General Plan.¹⁰⁸ General law cities must maintain consistency between the zoning ordinance and the General Plan.¹⁰⁹ But, a charter city might have outdated zoning ordinances that do not reflect changes to city policy on specific types of development.¹¹⁰ The practical impact of this is that in a charter city, the General Plan—and specifically the Housing Element—may be more current than the zoning ordinance(s).¹¹¹ Though newer state law diminishes this inconsistency's impact on proposed development, it matters for base zoning measurement because a charter city may not have updated zoning ordinances.¹¹² If a researcher discovers a

106. See GOVERNOR'S OFF. OF PLAN. & RSCH., *supra* note 99, at 4.

107. See CAL. CONST. art. XI, § 5 (giving charter cities broader autonomy than general law cities). Charter cities within California enjoy freedom to legislate at the local level over “municipal affairs” even if a conflict with state law exists. *Id.* This directly impacts zoning in California charter cities. *See id.* Although the California Constitution does not expressly define “municipal affair,” land use and zoning are consistently classified as exempt from the planning and zoning provisions of the California Government Code, unless the city's charter indicates otherwise. *See, e.g.,* City of Irvine v. Irvine Citizens Against Overdevelopment, 30 Cal. Rptr. 2d 797, 799–800 (Ct. App. 1994).

108. See CAL. GOV'T. CODE § 65803 (West 2022). *But see id.* § 65860(d) (West 2019) (requiring zoning ordinances within general law and charter cities to be consistent with the General Plan). Certain requirements do not apply to charter cities unless the city's charter so requires. *Id.* § 65803 (West 2022). However, the provisions of a General Plan within every city must be internally consistent. *See id.* §§ 65302, 65300.5 (West 2023).

109. *See id.* § 65860(a) (West 2019).

110. *See, e.g.,* O'Neill et al., *supra* note 2, at 10 n.33.

111. *Id.*

112. *See* Moira O'Neill et al., Getting it Right: Examining the Local Land Use Entitlement Process in California to Inform Policy and Process 2 (Feb. 2018) <https://escholarship.org/uc/item/50m0h67f> (observing a pattern of development approvals for projects that were consistent with the planning but inconsistent with the zoning where the zoning was inconsistent with the General Plan). The state legislature, through Assembly Bill 3194, amended the Housing Accountability Act to extend its protection over proposed development consistent with the General Plan but not the zoning ordinance—where the zoning is inconsistent with the Plan. *See* Assemb. B. 3194, 2017 Gen. Assemb., Reg. Sess. (Cal. 2018). We are not certain, however, that this change in law triggered (or will trigger) cities to update outdated zoning ordinances. *See generally* Letter from Rural Cnty. Reps. of Cal. et al., to Tom Daly, Cal. State Assemb. (June 13, 2018), https://www.apacalifornia.org/wp-content/uploads/2018/07/AB_3194_Joint_ROO-Ltr_to_Auth_06132018.pdf (stating that the new law does not require jurisdictions to bring their zoning ordinances into conformity with the general plan). As noted above, this matters for base zoning analysis. *See generally* O'Neill et al., *supra*.

discrepancy between a zoning ordinance and development standards in the General Plan for a charter city when analyzing base zoning, the General Plan should govern.¹¹³

Though local governments have considerable flexibility in how they regulate land use, recent legislation highlights that state law can limit, alter, or change the effect of base zoning.¹¹⁴ Two of the most important state law provisions that property owners can use to increase density are Density Bonus laws and laws related to accessory dwelling units (ADUs).¹¹⁵ Density bonuses seek to incentivize and increase affordable housing production by allowing for denser development than base zoning would otherwise allow in exchange for affordable or senior housing units.¹¹⁶ An ADU is an additional dwelling unit constructed on a residential parcel that is generally smaller than the primary residential unit on the parcel.¹¹⁷ State law now requires local governments to approve ADUs on most parcels zoned for detached single-family development.¹¹⁸ Understanding how state law might augment local base zoning is important to measuring the impact of local law on proposed development in California.¹¹⁹

113. See CAL. GOV'T CODE § 65589.5(g), (j)(4) (West 2023).

114. See STEPHEN L. KOSTKA & MICHAEL H. ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CAL. CEB) § 4.28 (2nd ed. 2022) (providing a list of state laws limiting local authority in zoning).

115. See CAL. GOV'T CODE §§ 65915–18 (West 2023, 2002), 65852.150–2 (West 2019, 2023).

116. See *id.* §§ 65915–18. Specifically, the incentive operates by allowing the developer a “density increase over the otherwise maximum allowable gross residential density” when the proposed new development provides for senior or affordable housing. See *id.* § 65915(f). It also provides waivers from specific development standards (detailed within the local or state law—often referred to as “on menu”) in exchange for the developer providing specific types (and percentages) of senior or affordable housing. See *id.* § 65915(b)(1).

117. See *id.* § 65852.2. State law defines ADUs as “an attached or a detached residential dwelling unit that provides complete independent living facilities for one or more persons” that is an accessory to an existing residential use on the parcel. *Id.* § 65852.2(j)(1).

118. *Id.* § 65852.2. State law grants local governments authority to enact local laws to permit ADUs that comply with a set of criteria addressing form, even within zoning districts that are limited to single-family dwellings. *Id.* More significantly, it imposes a requirement on local governments to provide a streamlined development process for proposed ADUs that meet specified criteria. See *id.* § 65852.2(a)(3).

119. See *supra* notes 113–117 and accompanying text. For example, when we code developments that move through a ministerial process in Los Angeles, we account for the application of a density bonus. See *supra* notes 113–117 and accompanying text. In other words, there are developments of more than forty-nine units that the City approves through a ministerial process, even though the law creates a forty-nine unit threshold for ministerial approvals. See Moira O’Neill et al., *Examining the Local Land Use Entitlement Process in California to Inform Policy and Process* 4 (Univ. of Cal.

B. Analyzing Density and Use Controls, We Discover that Most of Our Urban Study Cities Make Little Land Available for All Income Levels.

Once we located and analyzed density and use controls within our study cities, we then determined how much zoned land our study jurisdictions made available for all income levels. We analyzed the components of the ordinances and plans that regulated use and density and then grouped each jurisdiction’s residential and mixed-use zones into simplified categories of base zoning: all income levels (thirty du per acre); multi-family less than thirty du per acre; single-family only; and other.¹²⁰ We created a measure called “permissive base zoning” to capture zoning/planning that meets or exceeds the state law default density standard of thirty du per acre, demonstrating a jurisdiction can accommodate its regional need for housing at all income levels.¹²¹ Requiring cities to make some land available to develop at thirty du per acre does not mean that there will be sufficient vacant land available for thirty du per acre.¹²² All study cities are urban cities under state law, so they each needed to zone some land at thirty du per acre.¹²³ We used spatial analysis to calculate the amount of permissive base zoning relative to all zoned land area.¹²⁴ Figure 1 illustrates how parcels are grouped into two simplified zoning classifications.¹²⁵ This mapping allows for the calculations in Figure 2.¹²⁶

Berkley L., Working Paper No. 2, 2019). This is not relevant to the analysis we share in this paper, but it would be relevant to any analysis of ministerially approved developments in Los Angeles. *See id.*

120. Sometimes zones in the “other” category allow for building a single residential building. *See Zoning Ordinance Summary—Agricultural Zones*, L.A. CNTY. DEP’T OF REG’L PLAN. (Feb. 28, 2019), https://planning.lacounty.gov/luz/summary/category/agricultural_zones (showing agricultural zones may permit the building of a single home on parcels that are zoned for agricultural production). In past analysis, we have grouped those zones with single-family only zones to calculate the total amount of land area a jurisdiction allows for single family only.

121. *See* CAL. GOV’T CODE § 65583.2 (West 2022).

122. *See* PAAVO MONKKONEN & SPIKE FRIEDMAN, NOT NEARLY ENOUGH: CALIFORNIA LACKS CAPACITY TO MEET LOFTING HOUSING GOALS 2 (Feb. 1, 2019), www.lewis.ucla.edu/research/california-lacks-capacity-to-meet-lofty-housing-goals/ (discussing how cities are required to identify sites to accommodate RHNA production targets, as well as the flaws of past sites analysis).

123. *See* GOV’T § 65583.2.

124. *See* CARB Report, *supra* note 30, at 9 (providing more details of our methods).

125. *See infra* Figure 1.

126. *See infra* Figure 2.

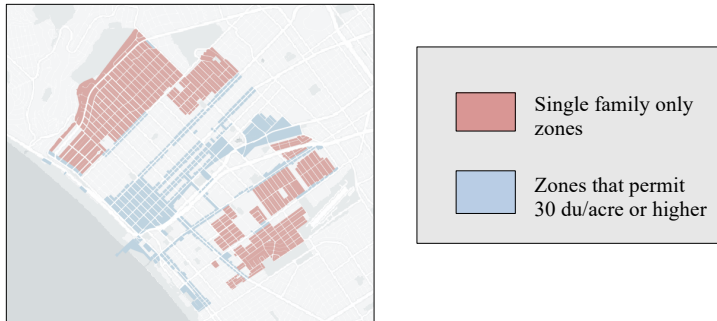


Figure 1: Base Zoning Map of Santa Monica

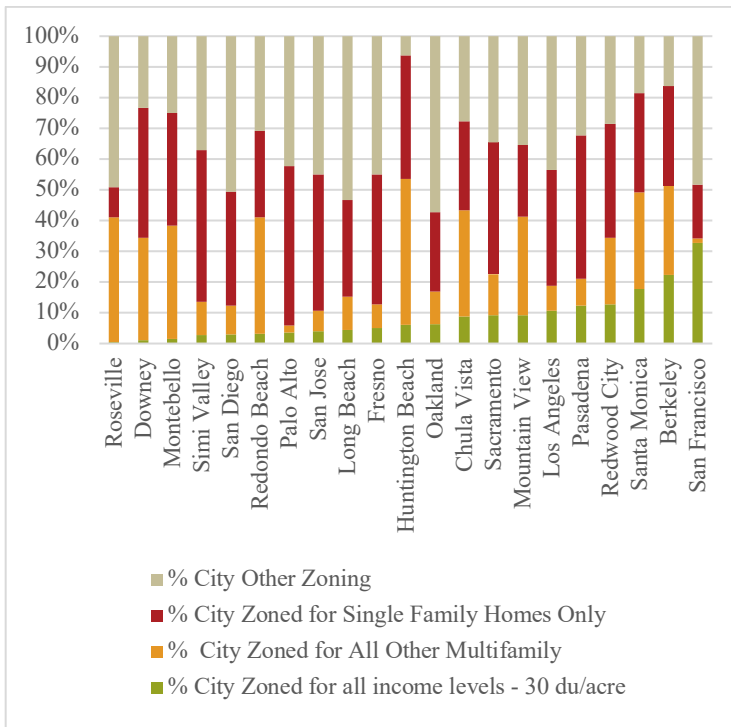


Figure 2: Chart Comparing Base Zoning Across Cities

There are twenty-one cities in Figure 2. Each city complies with Housing Element law by making at least *some* land available for thirty du per acre. But measuring the percentage of land zoned for thirty du immediately, and then generating a chart, highlights that some cities may comply with Housing Element law while also obstructing its policy aims. Only six of the twenty-one cities above zoned at least ten percent of their total zoned land area for multi-family housing sufficient to accommodate all income levels. Roseville, for example, has less than one percent of its zoned land area for all income levels. But more importantly, nine cities in that group of twenty-one zoned less than five percent of all zoned land for all income levels. As we noted above, permissive base zoning is a necessary but insufficient condition for affordable development.¹²⁷ Without permissive base zoning, an affordable developer must take on the risk and uncertainty associated with rezoning a parcel.¹²⁸ When we conducted interviews, affordable developers confirmed rezoning was often not an option. Among the largest of California's cities that we studied, San Diego stood out as having very restrictive base zoning. San Jose is not much better. Less than three percent of its total zoned land area is zoned for all income levels. San Francisco, located in a metro area that other scholars have previously identified as the most stringently metropolitan statistical area nationally,¹²⁹ is notably among the group of large cities with the most permissive base zoning. San Francisco has approximately thirty-three percent of its zoned land area zoned for all income levels.

The above data analysis illustrates that base zoning analysis offers some insight into how cities comply with state law that aims to increase affordable housing production. The thirty du per acre default standard applicable to urban jurisdictions is comparatively easy to identify and measure by reading ordinances and plans, and then using zoning shapefiles for calculations. State

127. See *supra* Section II.B (discussing both the importance and shortcomings of the term “permissive base zoning”).

128. See *infra* Section II.C (discussing rezoning as an example of discretionary review by cities).

129. See, e.g., Joseph Gyourko et al., *The Local Residential Land Use Regulatory Environment Across U.S. Housing Markets: Evidence from a New Wharton Index* 61, (Nat'l Bureau of Econ. Rsch., Working Paper No. 26573, 2019) (identifying the San Francisco Consolidated Statistical Area as the most stringently regulated nationwide); Kristoffer Jackson, *Regulation, Land Constraints, and California's Boom and Bust*, 68 REG'L SCI. & URB. ECON. 130, 131, 133 (2018) (noting that jurisdictions in the San Francisco Bay Area score the highest on the CALURI, indicating they are the most stringently regulated); John M. Quigley et al., *Measuring Land-Use Regulations and Their Effects in the Housing Market* 288 (Univ. of Cal. Berkeley, Working Paper No. W08-004, 2008) (identifying the County and City of San Francisco as among the jurisdictions with the highest weighted factor score on the BLURI stringency index).

law—like Assembly Bill 1483—requires cities to provide the zoning and planning information necessary for this analysis.¹³⁰ Relatively permissive base zoning may be a necessary but insufficient condition to increase supply and affordability.

C. *Grappling with Measuring the Diverse Pathways to Planning and Zoning Approvals*¹³¹

Measuring how land use law impacts housing outcomes also requires examining how cities apply that law and the procedural steps they impose on housing development.¹³² An inventory of regulation—even a complete inventory—without capturing credible objective data on how cities apply their law, is insufficient to understand the law’s impact on housing outcomes.¹³³

Identifying procedural constraints to housing development requires understanding the range of tools California law allows local governments to use to review and approve housing development within its planning mandate framework. Central to local government land use decisions in California is the distinction between discretionary and ministerial review.¹³⁴ Discretionary

130. See Assemb. B. 1483, 2019 Gen. Assemb., Reg. Sess. (Cal. 2019).

131. See O’Neill et al., *supra* note 2, at 80–83. We have updated this where appropriate. Although we do not include ADU analysis in our study (unless the ADUs would yield 5 or more units of housing), we think it important to track ADU developments in California.

132. See Gyourko & Molloy, *supra* note 19, at 1292–93 (“The degree of local land use restrictiveness is challenging to define because constraints can come in so many different forms.”).

133. See, e.g., FISCHER, *supra* note 20, at 249 (“[I]t is hard to determine the effects of protean police-power laws just by examining their text. Ira Lowry and Bruce Ferguson (1992) compared regulatory practices in three metropolitan areas (including one in California) and also concluded that looking at the regulations alone is often misleading.”); Edward L. Glaeser et al., *Urban Growth and Housing Supply*, 6 J. ECON. GEOGRAPHY 71, 81–82 (2006) (“[I]t is not obvious that the rules on the books necessarily reflect the full extent of the zoning environment.”); Gabbe, *supra* note 20, at 423 (“[I]t is not possible to understand the full puzzle of land use regulations without studying both the written and implementation components.”); BURCHELL ET AL., *supra* note 89, at 78–79 (describing the limitations and weaknesses of studies that only look at regulations on the books). Notably, scholars are not the only ones who recognize the importance of studying the implementation of zoning laws. See *Zoning and Land Use Planning*, WORLD BANK, <https://urban-regeneration.worldbank.org/node/39> (last visited Jan. 2, 2023). Relatedly, California demands cities study how they apply procedural requirements on housing development as part of their constraints analysis in the Housing Element drafting process. See CAL. DEP’T OF HOUS. & CMTY. DEV., *supra* note 86, at 30.

134. See, e.g., *Protecting Our Water & Env’t Res. v. County of Stanislaus*, 472 P.3d 459, 464 (Cal. 2020) (addressing the circumstances under which a public agency may characterize the issuance of well construction permits as “ministerial,” and hence not subject to CEQA, versus “discretionary,” in which case CEQA applies); *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal. Rptr. 788,

review refers to a local government's authority to impose subjective standards when deciding whether to approve proposed development.¹³⁵ Ministerial review, in contrast, employs an objective standard that requires a local government to approve a proposed development, so long as the development conforms to the relevant objective standards.¹³⁶ Ministerial review involves approvals in which a government agency applies law to fact without using subjective judgment.¹³⁷ It necessarily involves a proposed development that conforms to underlying base zoning (density and use controls), though it can also include development that conforms to base zoning modified by Density Bonus law.¹³⁸ In other words, discretionary review grants the local government the power to reject proposed development for subjective reasons, and ministerial review does not.¹³⁹

Just as California cities have flexibility in how they write their density and use controls, they also have substantial latitude in the type of processes they use to approve residential development—including whether they use discretionary or ministerial review.¹⁴⁰ If we connect how processes operate in relation to the base zoning, we can effectively distill the range of review processes into four general categories.

First, cities can allow for a ministerial process when proposed development conforms to the underlying base zoning district's use and density requirements and state law does not demand a discretionary process. When cities apply a ministerial process to review proposed housing, the proposal is not subject to environmental review under the California Environmental Quality

791–98 (Ct. App. 1987) (distinguishing between discretionary and ministerial review for the purposes of reviewing a California housing project).

135. See *Friends of Westwood*, 235 Cal. Rptr. at 794–98 (discussing characteristics of a discretionary action and explaining that when city employees can set standards and conditions for many aspects of a proposed building, the approval process is discretionary).

136. See, e.g., *Slagle Constr. Co. v. County of Contra Costa*, 136 Cal. Rptr. 748, 750 (Ct. App. 1977) (finding that a building permit was not ministerial because the county code said a building inspector “may” withhold issuance of a building permit).

137. See *Prentiss v. City of South Pasadena*, 18 Cal. Rptr. 2d 641, 644 (Ct. App. 1993) (discussing a ministerial duty to issue a building permit and asserting that CEQA does not apply to ministerial projects).

138. See CAL. GOV'T CODE § 65915(c)(3)(A), (d) (West 2023). State Density Bonus law provides that when a developer agrees to build the required amount of affordable housing units, the local government must grant the density bonus—or other incentives/concessions—with very few exceptions. See *id.* § 65915(d).

139. See *infra* notes 141–150 and accompanying text.

140. See O'Neill et al., *supra* note 2, at 10. This is also the first article in which we group the different procedural pathways to approval into four general categories. *Id.* at 10–11.

Act (CEQA)—a potentially important component of the procedural process for housing projects in California.¹⁴¹

Second, cities can require subjective discretionary review for categories of projects that are still built within the framework of the zoning ordinance—meaning the zoning ordinance itself contemplates this kind of development, but the development must meet certain conditions to be approved. Examples include conditional use permits, where accessing the density provided in base zoning might require more detailed, and discretionary, review to permit certain kinds of uses or projects.¹⁴²

Third, cities also impose discretionary review when the proposed project would not comply with the base zoning in the applicable zoning ordinance and plan. For example, when the developer seeks an exemption from the zoning ordinance or plan (variance¹⁴³), asks the city to zone the project site differently (rezoning¹⁴⁴), or asks the city to change or update the General Plan to allow for the proposed project (general plan amendment¹⁴⁵).

Fourth, and critical to measuring procedural aspects of local law, California cities can impose discretionary review even when a proposed project is consistent with the underlying base zoning district's use and development controls. Typical examples of this kind of discretionary review include design review, architectural review, site development review, and historical preservation review/certificate of appropriateness.¹⁴⁶ In other words, the city imposes aesthetic controls that may impose discretionary review, which is

141. See CAL. PUB. RES. CODE § 21080 (West 2014).

142. See, e.g., S.F., CAL., MUN. CODE § 329 (2021) (describing Large Project Authorizations in the Bay Area's Eastern Neighborhoods Plan Area); see also REDWOOD CITY, CAL., ZONING CODE § 47.1–47.5 (2021) (describing Planned Community permits in areas with a Precise Plan in place).

143. See *Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 68 Cal. Rptr. 3d 882, 889 (Ct. App. 2007) (defining a variance).

144. *Id.* (defining differences between zoning amendments and rezoning).

145. See CAL. GOV'T CODE § 65358 (West 2008) (governing the process of amending the General Plan).

146. See, e.g., REDWOOD CITY, CAL., ZONING CODE § 45.2(A); PALO ALTO, CAL., MUN. CODE § 18.76.020(b)(2)(D) (2002); OAKLAND, CAL., MUN. CODE § 17.136.040(A)(3)–(4) (illustrating the use of discretionary design and architectural review); see also S.F., CAL., MUN. CODE § 1006 (2020) (containing a historic preservation-related provision); SAN JOSE, CAL., MUN. CODE § 20.100.600 (discussing site development review); BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION 13 (14th ed. 2011) (“Architectural design review ordinances provide some of the worst examples of vague statements of purpose and overbroad standards that invite abuse. Such ordinances frequently lack sufficiently clear standards and vest too much subjective decision making in the architectural review board officials.”).

subjective in nature, on development that otherwise conforms to density and use controls.¹⁴⁷ We refer to this type of proposed development in our analysis as “code compliant but requiring discretionary review.” Although the Housing Accountability Act (HAA) limits when and how local governments may deny proposals to build housing that conforms to local law (requiring findings in certain circumstances), discretionary review of code-compliant development can create uncertainty in the approval process even for projects covered by the HAA.¹⁴⁸ Discretionary review can do this by imposing unexpected, expensive challenges to meeting conditions of approval.¹⁴⁹

There are instances in which state law requires the local government to impose a discretionary process. For example, regulating subdivision—the process of dividing land into two or more parcels for the purpose of sale, lease, or financing—demands a discretionary process under state law.¹⁵⁰ Subdivision can be horizontal—dividing a single parcel of land—or vertical—dividing the airspace above the land.¹⁵¹ Although the California Subdivision Map Act sets the framework and minimum requirements for the approval of subdivisions, local governments implement that regulatory process by enacting a local subdivision ordinance.¹⁵² The process begins when a developer files a Tentative Map application.¹⁵³ After the approval of the Tentative Map, the developer must comply with any imposed conditions before filing for Final Map approval.¹⁵⁴ The Tentative Maps always undergo a discretionary review

147. See BLAESSER, *supra* note 147 (noting the flaws of such subjective discretionary review based on overbroad aesthetic controls); see also, e.g., CAL. GOV'T CODE § 65850 (West 2018) (allowing local legislatures to impose aesthetic controls through discretionary review).

148. See, e.g., BABCOCK, *supra* note 80, at 53–54 (noting that discretionary review can cause delay and uncertainty for developers); Jackson, *supra* note 130, at 133 (“[A]dditional costs associated with uncertainty in the approval process may be substantial enough to significantly reduce or displace new construction.”); see also Michael Manville, *Parking Requirements and Housing Development*, 79 J. AM. PLAN. ASS'N 49, 49 (2013) (“Confronted with [the cost of government mandated onsite parking], developers might build less housing, and the units they do build might be more likely to include parking.”).

149. See CAL. GOV'T CODE § 65589.5 (West 2023) (recognizing these challenges by limiting cities' and counties' abilities to reject proposed housing development projects that are consistent with local plans and zoning regulations).

150. See *id.* § 66424 (West 2014).

151. See *id.* § 66427 (West 2014) (showing that vertical subdivision allows for the creation of condominiums).

152. See *id.* § 66411 (West 2014).

153. See *id.* §§ 66426, 66428 (West 2004, 2014).

154. See *id.* § 66457 (West 2022).

process, but Final Maps are not typically discretionary actions.¹⁵⁵ State and local law also govern the consolidation or merger of lots into a single lot, termed a “lot line adjustment,”¹⁵⁶ but certain lot line adjustments do not require tentative maps.¹⁵⁷

Recent state law, like Senate Bill 35, also limits local authority by requiring a time constrained process for qualifying residential developments, even if the local law would impose discretionary review.¹⁵⁸ Senate Bill 35 also no longer applies CEQA to these qualifying projects.¹⁵⁹ Development processes under Senate Bill 35 move through a ministerial process, but any measurement must consider how the locality determines whether SB 35 applies (which likely involves planning review) and the possibility that the local government may allow a public hearing and administrative appeal of the approval.¹⁶⁰

Finally, in California, any measure of land use approval processes needs to account for Development Agreements. California essentially provides for “contract zoning” through Development Agreements.¹⁶¹ This tool allows cities to enter into agreements with developers through a local legislative act that “freezes” the land use regulations (including zoning) that apply to the property to protect the developer from adverse impacts caused by the development standards changing during the development process.¹⁶² Development Agreements are relevant to large, phased development projects and, therefore, are important for understanding how cities regulate dense development.¹⁶³

155. *See id.* § 66474.1 (West 1982). We track Tentative Tract Map Approvals in our work.

156. *See id.* § 66412(d) (West 2023).

157. *See id.*

158. *See* S.B. 35, 2017 Leg., Reg. Sess. (Cal. 2017).

159. *Id.*

160. *See id.*

161. *See* William G. Holliman, Jr., Development Agreements and Vested Rights in California, 13 URB. LAW. 44, 44 (1981) (“Development agreements can provide a useful and effective means of assuring the developer a significantly greater degree of certainty at a much earlier stage in the development process . . .”).

162. *See* CAL. GOV'T. CODE § 65867 (West 2022).

163. *See, e.g.,* Lindell L. Marsh, *Introduction to DEVELOPMENT AGREEMENTS: PRACTICE, POLICY, AND PROSPECTS* 1, 2–3 (Douglas R. Porter & Lindell L. Marsh eds., 1989) (noting that development agreements are primarily used to give assurances to developers about changes in regulatory rules and can create incentives for larger projects); Richard Cowart, *Experience, Motivations, and Issues, in DEVELOPMENT AGREEMENTS: PRACTICE, POLICY, AND PROSPECTS* 9, 9–10 (Douglas R. Porter & Lindell L. Marsh eds., 1989) (noting rapid growth of development agreements in California); Shelby D. Green, *Development Agreements: Bargained-For Zoning that is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 388–94 (2004). We do not dive into exactions in this article, but we note here that the local law may also mandate exactions, which California law defines as a

Phased development under a Development Agreement might span years.¹⁶⁴ If researchers (or the state) are tracking how a project moves through an approval pathway, they must account for whether the project is part of a larger Development Agreement. If so, a project phase might seem to move quickly through planning review and local approvals. It might even look like it is moving through a ministerial process. A complete analysis of the approval pathway, however, would consider the time, expense, and process associated with approving the Development Agreement that governs the project phase.

For the purposes of measuring law, we also note that California procedural requirements can exist in either planning or zoning ordinances. For example, cities might codify aesthetic controls—a common discretionary approval applicable to code compliant development—in plans or zoning ordinances.

D. Capturing How Development Subject to Discretionary Review Moves Through Environmental Review (California Environmental Quality Act,)

As noted above, state law mandates application of CEQA to any private housing development project that requires discretionary approval.¹⁶⁵ Therefore, understanding discretionary housing approval processes requires exploring how cities apply CEQA.¹⁶⁶ Advocates laud CEQA as essential to protecting the environment and the interests of those historically burdened by past, discriminatory land use policies and critique the law for derailing much

monetary fee or dedication of land to the public as a condition of development approval. See CAL. GOV'T. CODE §§ 66000–01 (West 2007); *Williams Commc'ns, LLC v. City of Riverside*, 8 Cal. Rptr. 3d 96, 107–08 (Ct. App. 2003). The value of the exaction cannot exceed “the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed” if it is a condition of development approval. See CAL. GOV'T. CODE § 66005(a) (West 2022); Kenneth B. Bley & Andrew W. Schwartz, *Exactions: Dedications and Development Impact Fees*, in CALIFORNIA LAND USE PRACTICE §§ 18.7, 18.51 (CAL. CEB) (Adam U. Lindgren & Steven T. Mattas eds., 2022 ed.). The definition of “public facilities” is also broad, encompassing “public improvements, public services and community amenities.” See GOV'T. § 66000(d). In short, exactions are a response to the limits on California cities’ ability to generate revenue—they offer a “nontax” way for local governments to get money or land from developers to support necessary infrastructure and services. See Bley & Schwartz, *supra*, § 18.7.

164. See O’Neill et al., *supra* note 2, at 44. We found this in our data. *Id.*

165. See CAL. PUB. RES. CODE § 21002 (West 2022). A “project” under CEQA includes a public agency’s entitlement approval. See *id.* § 21065 (West 1994); see also *Friends of the Mammoth v. Bd. of Supervisors*, 502 P.2d 1049, 1054 (Cal. 1972).

166. See, e.g., FISCHEL, *supra* note 20, at 246–48 (noting that imposing CEQA on government approval of private projects contributes to rising housing costs).

needed climate-friendly development.¹⁶⁷

Modeled after the National Environmental Policy Act (NEPA),¹⁶⁸ CEQA combines mandatory information disclosure with public participation for government projects and approvals that produce significant environmental impacts.¹⁶⁹ CEQA also requires state government agencies to mitigate, to the extent feasible, any significant environmental impacts.¹⁷⁰ We briefly review a few aspects of CEQA relevant to our analysis.¹⁷¹

The lead agency directs the CEQA review.¹⁷² In the context of residential development, the lead public agency is usually the local planning department because planning agencies generally enforce the local zoning ordinances and make land use determinations.¹⁷³

With some exceptions, the lead agency determines whether the required land use approval that triggers CEQA review is discretionary or ministerial.¹⁷⁴ Conditional or special use permits, variances, development agreements, subdivision maps, and zoning changes are typically discretionary approvals

167. See, e.g., Beach, *supra* note 49, at 92 (noting CBA proponents often use CEQA for leverage); Selmi, *supra* note 49, at 987–88 (noting that negotiation and implementation of environmental review processes might result in the provision of other public benefits to local governments or communities in return for the approval of a project); Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENV'T L.J. 21, 21 (2018) (discussing CEQA's role in blocking climate friendly development: "[M]ost CEQA lawsuits filed in California seek to block infill housing and transit-oriented land use plans, as well as public service and infrastructure projects in existing California communities"); Varner, *supra* note 49, at 1480, 1483 (discussing CEQA's role in increasing housing costs and arguing that uncertainty associated with CEQA compliance and associated judicial review leads to delay and increased costs).

168. See National Environmental Policy, 42 U.S.C. §§ 4321–70 (mandating environmental review for projects managed by federal agencies or sited on federal land); Kathleen Faubion & R. Clark Morrison, *Environmental Review and Mitigation*, in CALIFORNIA LAND USE PRACTICE § 13.61.A. (CAL. CEB) (Adam U. Lindgren & Steven T. Mattas eds., 2022 ed.) (discussing NEPA's notice and information requirements which involve documenting potential environmental impacts and joint CEQA/NEPA processes for some projects subject to both state and federal environmental review).

169. See CAL. PUB. RES. CODE § 21000(d) (West 2022).

170. *Id.*

171. See KOSTKA & ZISCHKE, *supra* note 115 (providing a comprehensive discussion of CEQA).

172. See CAL. PUB. RES. CODE § 21067 (West 1974) (defining the lead agency as the public body that gives final discretionary approval for the project).

173. See CAL. GOV'T CODE §§ 65100–01 (West 2022).

174. See CAL. CODE REGS. tit. 14, § 15369 (West 2022). Though building permits are presumptively ministerial, cities can specify otherwise in local laws. See, e.g., S.F., CAL., BUS. & TAX REGUL. CODE § 26(a) (2005) (changing the default rule that building permits are presumptively ministerial).

demanding CEQA review.¹⁷⁵ These approvals involve subjective judgment.¹⁷⁶

State law exempts some development involving discretionary review from CEQA's environmental review requirements.¹⁷⁷ The legislature carved out statutory exemptions in the California Public Resources Code, and the CEQA Guidelines provide for another thirty-three categorical exemptions.¹⁷⁸ When a project is not categorically exempt, the planning agency conducts an initial study to assess whether there is substantial evidence that the project will significantly effect on the environment.¹⁷⁹ A planning agency must prepare an Environmental Impact Report (EIR) when there is such evidence¹⁸⁰ and when it is not clear from the initial study that these impacts can be mitigated below a significance threshold.¹⁸¹ If there is not substantial evidence of a potentially significant effect on the environment, the agency issues a Negative Declaration (ND).¹⁸² If there is substantial evidence that a project will significantly impact the environment but the developer can properly mitigate the effects, then the agency issues a Mitigated Negative Declaration (MND).¹⁸³

California law also allows the planning agency to reuse existing EIRs to facilitate "streamlining" some classes of development through the environmental review process.¹⁸⁴ Legislators and lawyers call this "tiering."¹⁸⁵

175. See CAL. GOV'T CODE § 65583.2 (West 2022).

176. See CAL. CODE REGS. tit. 14, § 15357 (West 2018).

177. See *infra* notes 179–184 and accompanying text.

178. See CAL. CODE REGS. tit. 14, §§ 15300–15333 (West 2005). For example, a planning department can use the Class 32 infill exemption for an urban infill project to bypass CEQA review if the project satisfies certain conditions. See *id.* § 15332. Other common forms of exemptions are the Class 3 exemption for new construction or conversion of small structures and the Class 1 exemption for existing facilities. See *id.* §§ 15303, 15301.

179. See *id.* § 15063.

180. See *id.* § 15063(b)(1); see also *id.* § 15060(d) (allowing a project to bypass the initial study and proceed directly to the EIR).

181. See CAL. PUB. RES. CODE § 21064.5 (West 1994); CAL. CODE REGS. tit. 14, § 15070 (West 2009).

182. See CAL. CODE REGS. tit. 14, § 15070(a) (West 2009). An ND is a CEQA document created to inform stakeholders and the community that the proposed project will not have a significant effect on the environment. See *id.* § 15071 (West 2005).

183. See *id.* § 15070(b)(2). An MND will detail how the proposed project's potential environmental impacts can be mitigated by certain strategies and describes how the developer will implement these strategies. See *id.* § 15071(e).

184. See CAL. PUB. RES. CODE § 21093(a) (West 2022) ("The Legislature finds and declares that tiering of environmental impact reports will promote construction of needed housing and other development projects by (1) streamlining regulatory procedures . . .").

185. See *id.*

Tiering allows the proposed development to satisfy CEQA's requirements by relying on existing EIRs, typically programmatic EIRs associated with a plan, and narrowing the environmental review documents to only those issues that have not been evaluated in a prior EIR that covers the proposed project.¹⁸⁶ Tiering requires a prior environmental review document (generally an EIR), typically connected to a prior large-scale planning approval (usually a General Plan or Specific Plan); however, the source of the document varies.¹⁸⁷ A Community Plan Exemption, for example, is a tiering-based exemption available to projects consistent with a community plan, General Plan, or zoning.¹⁸⁸ Another form of tiering is the Program EIR, which can exempt future development activity from environmental review, provided that underlying conditions have not changed since preparing the Program EIR.¹⁸⁹ When proposed development satisfies environmental review through tiering, it should theoretically reduce project-level costs for the developer because cities generally pay the costs of the relevant plan- or program-level EIR.¹⁹⁰

Critics of CEQA argue that environmental review adds significant expense, time, and uncertainty to project development, leading to less development.¹⁹¹ CEQA lawsuits may challenge or stall affordable housing development.¹⁹² Scholars also posit that CEQA's deference to local agencies has allowed development opponents to use bad faith tactics to circumvent the HAA with CEQA.¹⁹³ Every one of these critiques engages a fundamental question of whether CEQA is facilitating state climate policy, or whether local

186. *See id.* § 21068.5 (West 2022).

187. *See id.* § 21093(a); *see also infra* notes 189–190 and accompanying text.

188. *See* CAL. CODE REGS. tit. 14, § 15183 (West 2010).

189. *See id.* § 15168. There are also EIR addendums, commonly used for projects that will be built out in phases under a master plan, and a master EIR where the underlying conditions of approval have not changed. *See id.* § 15162. Relatedly, if some of the relevant environmental conditions have changed since the prior EIR, then the lead agency can prepare a Supplemental EIR, which only needs to contain information necessary to make the original EIR adequate. *See id.* § 15163.

190. *See* Robert Olshansky, *The California Environmental Quality Act and Local Planning*, 62 J. AM. PLAN. ASS'N 313, 319–20 (1996).

191. *See also*, Hernandez, *supra* note 168, at 21–22; M. Nolan Gray, *How Californians Are Weaponizing Environmental Law and How to Fix It*, THE ATLANTIC (Mar. 12, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/signature-environmental-law-hurts-housing/618264/>.

192. *See* Maureen Sedonaen, *CEQA Abuse Delays, Frustrates Affordable Housing*, DAILY J. (Aug. 1, 2018), https://www.smdailyjournal.com/opinion/guest_perspectives/ceqa-abuse-delays-frustrates-affordable-housing/article_4f04b844-951e-11e8-bfac-4759a0b619fd.html.; Gray, *supra* note 192.

193. *See* Christopher S. Elmendorf & Timothy G. Duncheon, *When Super-Statutes Collide: CEQA, the Housing Accountability Act, and Tectonic Change in Land Use Law*, 49 Ecology L.Q. 1, 25–27 (2022).

governments are using CEQA to avoid approving development that might promote statewide housing and climate policy.¹⁹⁴ Thus, measuring housing approval processes in California requires analyzing how environmental review operates.

E. Diving Into the Process: Data Tells Us That Most Dense Development Moves Through Discretionary Review, Even Where Local Law Offers a Ministerial Process.

To analyze and compare development approval processes, we first determined whether a proposed development of five or more units was subject to a discretionary or ministerial approval process. Each step within discretionary review might impose time lags to development, so we built our coding structure to capture each discretionary approval step along the way to final entitlement.

During the study years, some of the cities did not allow for any residential development—including the development of single-family dwellings—to proceed through a ministerial process.¹⁹⁵ In contrast, four cities had ministerial processes to approve proposed development of five or more units of housing: Fresno, Inglewood, Los Angeles, and San Diego.¹⁹⁶ Ministerial processes differed across these cities. Los Angeles allows proposed development of up to fifty units that conforms to underlying use and density controls to move through a ministerial approval process, so long as it is not located within a Community Design Overlay. Inglewood and San Diego did not provide a specific unit count threshold for ministerial review. Fresno limited its ministerial process to proposed development located within its Downtown area that met specific project characteristics. A few years into our study, Santa Monica crafted a ministerial process exclusively for up to fifty units of one hundred

194. See, e.g., *supra* notes 192–194 and accompanying text.

195. See PASADENA, CAL., MUN. CODE § 17.61.030(B) (2007) (illustrating how the local law might impose discretionary review). On the other hand, San Francisco’s City Charter provides for discretionary review over all permits and allows for a neighbor or interested party to trigger a discretionary approval hearing not otherwise required by the applicable zoning ordinance or plan. See S.F., CAL., CHARTER § 4.106 (2022); S.F., CAL., BUS. & TAX REGUL. CODE § 26(a) (2019).

196. See FRESNO, CAL., MUN. CODE § 15-5102(D) (2019); INGLEWOOD, CAL., MUN. CODE §§ 12-39.50 (2010), 12-101 (2015); L.A., CAL., ZONING CODE § 16.05(I) (1999). Whether San Diego uses ministerial or discretionary review depends on each zone and its permitted use. See *Discretionary Permit*, CITY OF SAN DIEGO, <https://www.sandiego.gov/development-services/permits/discretionary-permit> (last visited Oct. 30, 2022) (providing information on when ministerial versus discretionary review applies).

percent deed-restricted affordable development.¹⁹⁷ Sacramento has also recently amended its local ordinances, and as of 2020 it applies ministerial review to proposed development of up to two hundred units in specific infill locations.¹⁹⁸ As Figures 3 and 4 illustrate, though we studied cities that, on the books, allow for ministerial approvals for housing development of five or more units, we could only obtain data showing actual ministerial approvals for housing development projects in one city and one county: Los Angeles.

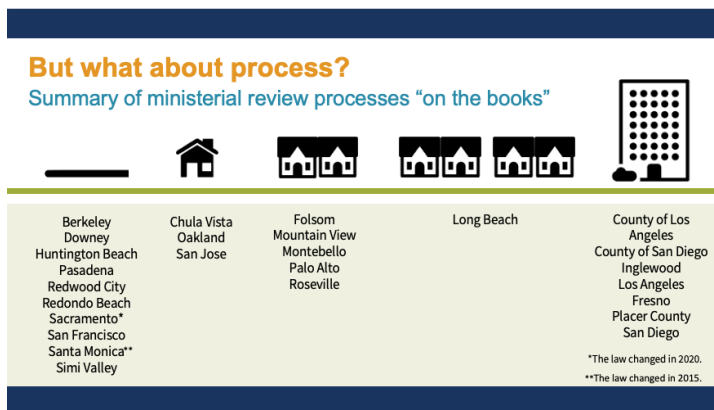


Figure 3: Illustration of Ministerial v. Discretionary Review "On the Books"

197. See *Santa Monica Housing Office – AHPP Owners*, CITY OF SANTA MONICA, <https://www.santamonica.gov/housing-ahpp-owners> (last visited Oct. 30, 2022). Deed-restricted affordable development refers to housing development that, if built, would be available only to qualifying households earning incomes below the Area Median Income (AMI). *Id.* Units are restricted at certain percentages of AMI, and the households must have a qualifying income to occupy those units. See *Income Limits*, CAL. DEP’T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/grants-and-funding/income-limits> (last visited Oct. 15, 2022). The units are deed-restricted because covenants in the deed bind future owners to only rent to eligible tenants. *Id.* Santa Monica changed its local law during the years we studied the city’s entitlement processes of moving some 100% affordable development into a ministerial process. See SANTA MONICA, CAL., MUN. CODE § 9.40.020(B) (2015). We add a caveat: our review of 2018 and 2019 data, not included in this article, indicates the city treated those developments as “ministerial” for the purposes of CEQA review, but applied a discretionary design review process. See also RATHAR DUONG, ARCHITECTURAL REVIEW BOARD REPORT 7 (2018). Each relevant staff report included the following qualifying language: “The Architectural Review Board’s approval, conditions of approval, or denial of this application may be appealed to the Planning Commission if the appeal is filed with the Zoning Administrator within ten consecutive days following the date of the Architectural Review Board’s determination in the manner provided in SMMC9.61.100.” *Id.*

198. See SACRAMENTO, CAL., MUN. CODE §§ 17.808.160, 17.860.020, 17.860.030 (2020).

But what about process?

Number of jurisdictions where we could find application of a ministerial review process to five or more units of housing for an approval issued in 2014-2017



Figure 4: Illustration of Frequency of Cities/Counties with Verified Developments Approved Using a Ministerial Process

When we dig into our housing approval data and compare how cities apply discretionary review to certain kinds of development, we discover that timeframes vary greatly across cities—even for similar types of housing development navigating similar processes. We use the earliest application date and the final approval that confers the ability to apply for a building permit (the entitlement) to calculate timeframes. The earliest application date represents the beginning of the application process and captures the full timeframe to entitlement. We count each discretionary approval required before entitlement, counting the environmental review determination as one approval step.¹⁹⁹

Measurement of timeframes for entitlement are important because they show how the regulatory system operates in practice. Thus, timeframes to entitlement can quickly reveal what base zoning and procedural requirements,

199. Because the discretionary approval confers a right to apply for a building permit—but not a building permit itself—we cannot compare observations of discretionary approval processes against ministerial approval processes in the cities where we have observed use of a ministerial approval process. When measuring the impact of process, in terms of time lags, we only use observations of discretionary approvals with complete timeline information. Some cities failed to share or manage their application date information. The earliest application date is not the determined to be complete date (the date on which the jurisdiction determines the application for development is complete, and the date state law uses to limit approval time frames for development that meets specific criteria). During the data collection process, we did note that completeness determination dates were inconsistently available. We have no timeline data for Inglewood because they did not make application dates available.

together, demand of prospective applicants. And from the perspective of project proponents, even if the law on the books appears to facilitate development, if the application of that law results in extended delays, the law in practice is constraining development. Long delays in entitlement of projects might significantly increase the costs for project proponents. Long delays, in turn, might limit production of more affordable development.

Figure 5 below highlights the timeframes for development for every city for which we have complete timeframe data. Figure 5 reveals that San Francisco has the longest timeframe to entitlement, followed by Berkeley. The median timeframe to approval within San Francisco is nearly twenty-seven months, eclipsing the next longest median approval timeframe in Berkeley—a city that requires a use permit for every proposed development of any kind. On the books, Berkeley’s law would seem more onerous than San Francisco’s. San Francisco’s timeframes represent an outlier not just within the group of cities in that metropolitan region—which had median time frames ranging from approximately five months (Oakland) to approximately twenty-three months (Berkeley)—but also across all our study cities.

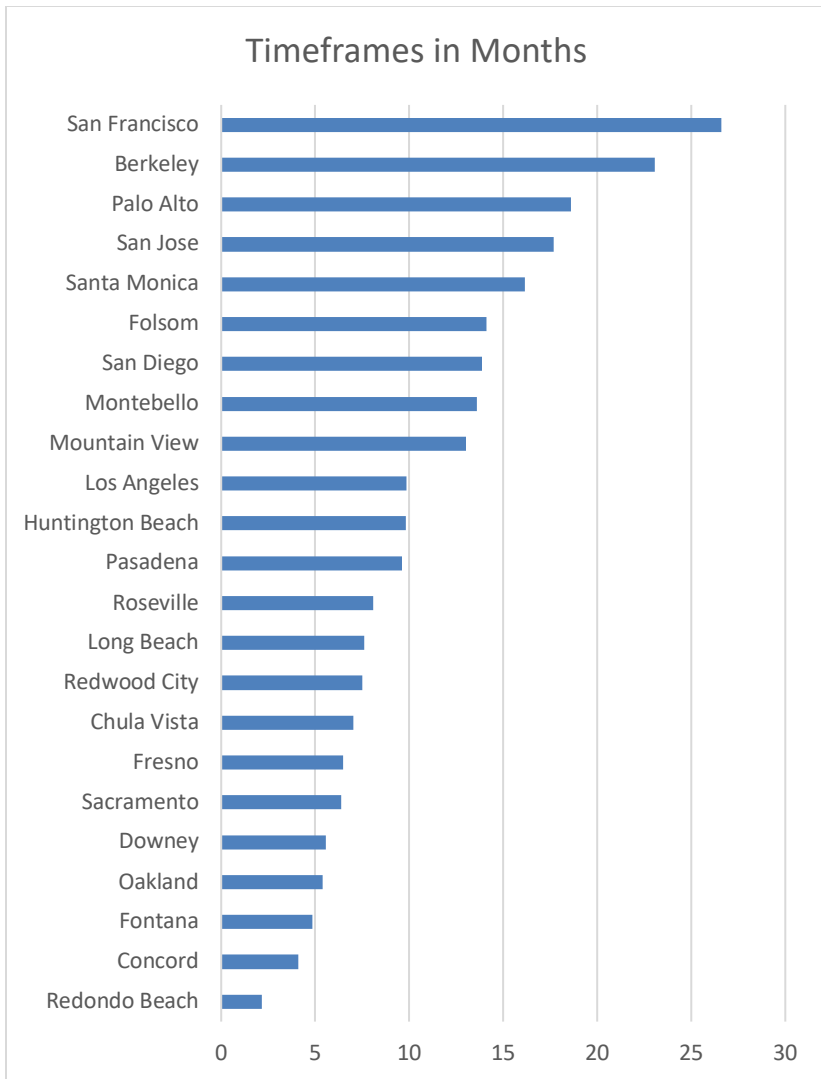


Figure 5: Median Timeframe to Entitlement All Multi-Family

Existing land use research would suggest that one possible explanation for San Francisco's extraordinarily long timeframes might be that San

Francisco requires more steps for approval than its neighbors with shorter median timeframes.²⁰⁰ Yet Figure 6 below highlights that San Francisco required fewer approval steps, on average, than Oakland, Palo Alto, Redwood City, and San Jose. Oakland requires, on average, one more approval step than San Francisco, but San Francisco's median entitlement timeframes are nearly five times longer than Oakland's.

The fact that Oakland has more approval steps on average than its neighbor, San Francisco, but moves much faster through entitlement also highlights how critical it is to measure the application of the law. We did not find an obvious explanation in the written ordinances or planning designations for why entitlement in San Francisco would take five times longer than it does in Oakland.

200. See, e.g., Joseph Gyourko et al., *A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index*, 45 URB. STUD. 693, 708–10 (2008) (noting that the number of approval steps is associated with higher regulatory stringency and that highly regulated communities usually have more approval bodies, or steps, typically making the average approval delay three times longer than a lightly regulated community).

Jurisdiction	2014–2017 Total Discretionary Approval Count	Median Timeframe (Months)	Average Number of Approvals per Project, including CEQA
San Francisco	140	26.6	3.36
Palo Alto	7	18.6	4.14
San Jose	81	17.7	3.8
Santa Monica	21	16.5	3.48
San Diego	99	13.9	3.68
Mountain View	33	13	5.58
Los Angeles	785	9.9	2.89
Pasadena	37	9.6	3.32
Roseville	22	8.1	4.41
Redwood City	18	7.5	4.78
Sacramento	68	6.4	4.21
Oakland	136	5.4	4.38
Redondo Beach	7	2.2	5

Figure 6: Average Number of Steps to Entitlement Selected Cities

Another common explanation for lengthy timeframes within cities is the role of state mandated environmental review—or CEQA compliance.²⁰¹ To explore this explanation—that environmental review drives lengthier local

201. See Varner, *supra* note 49, at 1480–83.

entitlement timeframes—we first explore the frequency of the most intensive environmental review pathway, an EIR. Figure 7 details how selected cities in the Bay Area region apply CEQA. EIRs are uncommon, and exemptions and tiering are frequent. Seventy-two percent of all entitled development in San Francisco benefited from tiering or streamlining.

Jurisdiction	Exempt	Tiering	Addendum	Hybrid	ND	MND	EIR	Multiple	Unknown
Berkeley	68%	5.00%	0.00%	0.00%	0.00%	0.00%	11%	11%	5.00%
Mountain View	45.45%	12.12%	6.06%	0.00%	0.00%	33.33%	3.03%	0.00%	0.00%
Oakland	2.24%	19.40%	0.00%	0.00%	0.00%	0.00%	2.99%	75.37%	0.00%
Palo Alto	28.57%	0.00%	0.00%	0.00%	0.00%	42.86%	14.29%	14.29%	0.00%
Redwood City	22.22%	66.67%	0.00%	0.00%	0.00%	5.56%	0.00%	5.56%	0.00%
San Francisco	8.63%	71.94%	1.44%	0.00%	1.44%	6.47%	8.63%	1.44%	0.72%
San Jose	7.50%	1.25%	35.00%	0.00%	0.00%	32.50%	13.75%	10.00%	1.25%

Figure 7: Environmental Review Pathways Selected Bay Area Cities

Another way we can analyze whether environmental review is a key driver of lengthy timeframes is to examine all entitlements across all cities for apartment buildings that would yield between five and forty-nine units, if built, that benefited from CEQA exemptions. The most useful comparison is between the two cities with the longest median entitlement timeframes: Berkeley and San Francisco. Recall that Figure 5 illustrates that Berkeley's median timeframes are approximately twenty-three months, whereas San Francisco's are approximately twenty-seven months. When we limit the timeframe analysis to the same type of buildings (measured by size) and CEQA pathway (use of an exemption), we find that San Francisco's median entitlements timeframes decrease by less than three months. In stark contrast, Berkeley's median entitlement timeframes decrease by more than thirteen months.

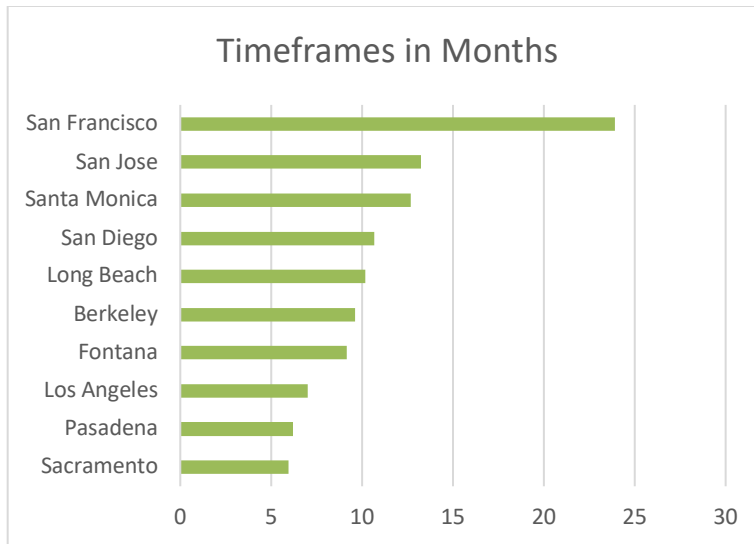


Figure 8: Timeframes for 5-49 Unit Apartment Buildings with CEQA Exemptions

The extreme differences in timeframes to entitlement support the conclusion that local policy—how local governments choose to apply local law and state requirements for environmental review—likely drives lengthier entitlement timeframes.²⁰² Next, we want to glean from this data whether any city’s local policy might be obstructing statewide housing goals.

III. PULLING IT ALL TOGETHER: COMBINING KEY INDICATORS OF STRINGENCY AND EXCLUSION TO MEASURE LOCAL HOUSING POLICY

Base zoning measures and entitlement process measures collectively tell us how each city we study regulates the development of housing. We are also interested in understanding if a particular local land use regime fundamentally supports statewide climate and housing goals. Both policy goals theoretically demand dense housing development within California cities to accommodate

202. Our conclusion here does not foreclose the possibility that cities may use CEQA review to delay approvals or avoid their obligations under other areas of state law by limiting approval timelines and conditions of approval. *See supra* Figure 8. We did not collect data on denied applications to develop housing or those not yet approved.

all income levels. Again, comparing local regulatory environments matters. But what should be the standard for either base zoning analysis or process measurements? How do we know if base zoning is too restrictive or if process requirements are too onerous?

Four decades of work within urban economics and urban planning examining the restrictiveness of local land use regulation across regions, states, and the nation provide some insight. This work has correlated restrictiveness—or stringency—with high costs, low housing supply, and economic residential segregation.²⁰³ Scholars have examined the various dimensions of stringency in land use regulation, including: (1) regulations that outright prohibit some or all residential development in base zoning;²⁰⁴ (2) regulations that impose fees and costs on residential development;²⁰⁵ and (3) regulations that create an onerous process, generating increased uncertainty of approval and potentially time lags to approvals to build, even on parcels that provide for appropriate use and density or allow denial of a right to build.²⁰⁶ Studying all three of these aspects of a local regime would provide the most comprehensive analysis of how regulation might constrain multi-family housing development. Our work focuses on the first and third aspects of local regimes, sometimes referred to as prohibition and process.²⁰⁷

Though measuring restrictiveness of local law is important, we are most interested in whether regulation is so restrictive as to exclude.²⁰⁸ Exclusive

203. See Been et al., *supra* note 2; Gyourko & Molloy, *supra* note 19, at 1316–22 (providing succinct summaries of the literature).

204. See, e.g., Michael C. Lens & Pavvo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6, 6 (2016).

205. See, e.g., Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 478 (1991).

206. See Gabbe, *supra* note 20, at 411; Jackson, *supra* note 19, at 45; Katherine Levine Einstein et al., *The Politics of Delay in Local Politics: How Institutions Empower Individuals 1* (Apr. 3, 2017) (unpublished manuscript), <http://sites.bu.edu/kleinsteinst/files/2017/05/EinsteinGlickPalmerMPSA.pdf>.

207. See Paavo Monkkonen et al., *Built-Out Cities? How California Cities Restrict Housing Production Through Prohibition and Process 4* (Feb. 10, 2020) (UC Berkeley Turner Center Land Use Working Paper Series), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630447.

208. See, e.g., Carol M. Rose, *Planning and Dealing: Piecemeal Land Use Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 849–50 (1983) (highlighting patterns of some local governments zoning land for a less intensive use than expected, and altering regulation on a parcel-by-parcel basis). At least some local governments use restrictive zoning and “holding” zones to invite negotiation and dealmaking for more intensive land uses. *Id.*; see also Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 100 (2015) (discussing the increase in “holding” zones).

local regulation would obstruct California’s fair share housing policy.²⁰⁹ Thus, in the California policy context, any composite measure of restrictiveness should ideally consider what researchers describe as stringent regulation that supports fair housing goals—the provision of housing affordable to lower income households.²¹⁰ The most obvious example is an inclusionary zoning mandate.²¹¹ Researchers might describe inclusionary zoning as an indicator of stringency, but cities might use it to support affordable and mixed income housing development.²¹² A city might combine more permissive base zoning with discretionary approval processes that require developing some below market housing. In this context, the discretionary process—even if it leads to a lengthier entitlement timeframe—might theoretically facilitate bargaining that leads to more affordable development.

We analyze our data to explore whether stringency seems likely to prohibit development by combining two measures: (1) median entitlement timeline data for apartment buildings and (2) percentage of zoned land area that has permissive base zoning.²¹³ Together, these two metrics allow us to sort our cities into four categories to describe relative stringency and exclusion.

209. See *Land-Use Controls*, CAL. DEP’T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/planning-and-community-development/housing-elements/building-blocks/land-use-controls> (last visited Oct. 12, 2022). HCD guidance on complying with California Housing Element law requires cities and counties to undertake a constraints analysis to ascertain whether their land use regulation is “accomplishing [its] intended purpose or constituting a barrier to the . . . development of housing for all income levels.” *Id.*

210. See *id.*

211. See generally Vinit Mukhija et al., *The Tradeoffs of Inclusionary Zoning: What Do We Know and What Do We Need to Know?*, 30 PLAN., PRAC., & RSCH. 222, 223 (2015) (providing context for the expansion of inclusionary zoning).

212. See generally *id.* (“[Inclusionary zoning] . . . is often polarizing. Its proponents argue that it expands the supply of below-market-rate housing and promotes social integration through mixed-income communities. Opponents hold that inclusionary requirements impede housing supply by deterring new development, and hurt the poor the most.”)

213. See discussion *supra* Sections II.B, II.E. We do not use number of steps for approval to compare stringency across jurisdictions. See discussion *supra* Sections II.B, II.E. The average number of steps before approval appears uncorrelated with discretionary approval timeframes when we compare cities. See discussion *supra* Sections II.B, II.E. Presumably, the number of steps would increase the amount of time to approval within a given city. See discussion *supra* Sections II.B, II.E. Notably, our interviews revealed that increasing steps to approval did not automatically create uncertainty or additional complexity for a developer. See discussion *supra* Sections II.B, II.E. This is best illustrated in Redwood City, for example, which had among the highest number of steps to entitlement—study participants described the regulation as detailed but precise, providing more certainty about what each step required to reach approval when moving through discretionary review. See discussion *supra* Sections II.B, II.E.

To create these categories, we look to other scholarship. We calibrate the process axis by referencing the 2018 Wharton Residential Land Use Regulation Index (or WRLURI18) survey responses.²¹⁴ Approximately 2,450 responses to questions about housing development approval processes contributed to what the WRLURI18 authors call the “Approval Delays Index” (ADI).²¹⁵ These responses are not necessarily conclusive of how long any approval process takes in any given jurisdiction.²¹⁶ But they reflect planner perceptions of how long approvals should take in communities that these same planners report as being lightly, moderately, or highly regulated.²¹⁷ Planners are the professionals that usually process applications to develop land, so their perceptions can define the meaning of an “average” delay and are helpful. The WRLURI18 responses indicate that planners perceived approval delays in communities that the WRLURI18 described as lightly regulated communities to be, on average, 3.7 months, 5 months in places with average regulation, and 8.4 months in highly regulated communities. We use 8.4 months as the marker for a more stringent process. We also use 5 months as a marker to identify potentially permissive regulatory environments. We likewise identify cities as having more process requirements where the median time to approval takes more than 15 months but less than 24 months; this range is the upward tail of findings from the WRLURI18.²¹⁸

When the median timeframe to approval for apartment buildings exceeds twenty-four months—the upward tail of planner responses to a national survey about average approval delays—we think that signals prohibitive processes.

Along the base zoning axis, we describe cities with more than 20% of the total zoned land area zoned for all income levels as having less restrictive base zoning. To determine this threshold, we relied on our own base zoning analysis and cross-referenced related work on single-family zoning in California cities.²¹⁹ If one of our study cities zoned more than 20% of its residentially

214. See Gyourko et al., *supra* note 130, at 4–7.

215. *Id.* at 3, 14.

216. See O’Neill et al., *supra* note 2, at 28–36 (elaborating on the limitations of surveys in development); Moira O’Neill, Perspectives or Misperceptions? Why Better Land Use Data is Critical to Housing Policy Debates 14–15 (Apr. 15, 2022) (unpublished manuscript) (on file with author) (explaining how perceptions of planners may not accurately describe how local law operates).

217. See O’Neill, *supra* note 217.

218. CARB Report, *supra* note 30, at 65.

219. See Stephen Menendian et al., *Single-Family Zoning in the San Francisco Bay Area: Characteristics of Exclusionary Communities*, OTHERING & BELONGING INST. (Oct. 7, 2020),

zoned land area for all income levels, this would qualify as having comparatively “less restrictive” base zoning. In contrast, we interpreted a city zoning 5% or less of all zoned land for all income levels as “more restrictive” because it limits the amount of zoned land available for affordable development.

We then generated typologies to describe our study cities.²²⁰ We created four categories.²²¹ The first is permissive jurisdictions, which have less process (medians at or under five months) and less restrictive base zoning (over 20% of zoned land area zoned for all income levels). The second is moderately stringent jurisdictions which can fall into one of two scenarios. Some of these jurisdictions have process timeframes at or under five months but have restrictive base zoning (greater than 5% but under 20% of zoned land zoned for all income levels). Others have less restrictive base zoning (greater than 20% of zoned land zoned for all income levels) but have process medians between five and fifteen months. The third category consists of very stringent jurisdictions, which have greater than 5% but under 20% zoned land area for all income levels and median timeframes to approval between 8.4 months and 15 months. This category also includes jurisdictions with more than 20% zoned land zoned for all income levels and median time frames between fifteen and twenty-five months.

We describe the fourth category of jurisdictions as having prohibitive regulation. This includes cities that zone less than 5% of their zoned land area citywide for all income levels. This category also includes cities with timeframes under five months while also having the most restrictive base zoning. These base zoning limitations signal a severe regulatory constraint on

<https://belonging.berkeley.edu/single-family-zoning-san-francisco-bay-area>. UC Berkeley’s Othering and Belonging Institute found that over 80% of all residentially zoned land in the San Francisco Bay Area was zoned for single family only. *Id.* These researchers categorized jurisdictions within the San Francisco Bay Area that had 0-80% of their land area zoned for single family only as having a “low” percentage of single family only zoning. *Id.* They also found that “[d]enser housing options are only permitted in less than one-fifth of residential areas in this region.” *Id.* This latter finding is consistent with our own base zoning analysis.

220. See generally ROLF PENDALL ET AL., FROM TRADITIONAL TO REFORMED: A REVIEW OF THE LAND USE REGULATIONS IN THE NATION’S 50 LARGEST METROPOLITAN AREAS 9 (2006) (sorting jurisdictions into four regulatory clusters).

221. See CARB Report, *supra* note 30, at 66 (original development and use of classification to describe and compare the stringency of fifteen cities). In the report to CARB and the California EPA, we relied on code compliant timeframes for fifteen cities. Some of our newest study cities require use permits for all development or all multi-family development despite the base zoning. For comparative work here, we use all multi-family median timeframes (which will include application of a conditional use permit in cities that do not apply blanket use permits). Notably, this does not appear to alter the classification of the first fifteen study cities we compared.

land available for dense multi-family development, including deed-restricted affordable development. In interviews with affordable housing developers, participants described the unavailability of land suited to affordable development as being the first obstacle to increasing affordable supply. Prohibitive cities also include those with less restrictive base zoning but with process time lags exceeding twenty-four months. During interviews, affordable housing developers noted that extremely lengthy discretionary processes make forecasting and financing difficult and limit where they choose to propose affordable development.²²²

Categorizing cities based on multi-family entitlement timeframes and base zoning, we find that none of our study cities fall into the permissive category. Only six are moderately stringent: Chula Vista, Fontana, Fresno, Oakland, Redwood City, and Sacramento. Ten—including San Diego, San Francisco, and San Jose—are in the prohibitive group. In fact, all cities in the prohibitive group, apart from San Francisco, have prohibitive base zoning. San Francisco is in this group because of its procedural requirements—which suggests the need for more research to find an explanation for this phenomenon.

222. We have two cities we cannot analyze in this way due to inadequate data (Folsom and Inglewood). Inglewood did not release application dates.

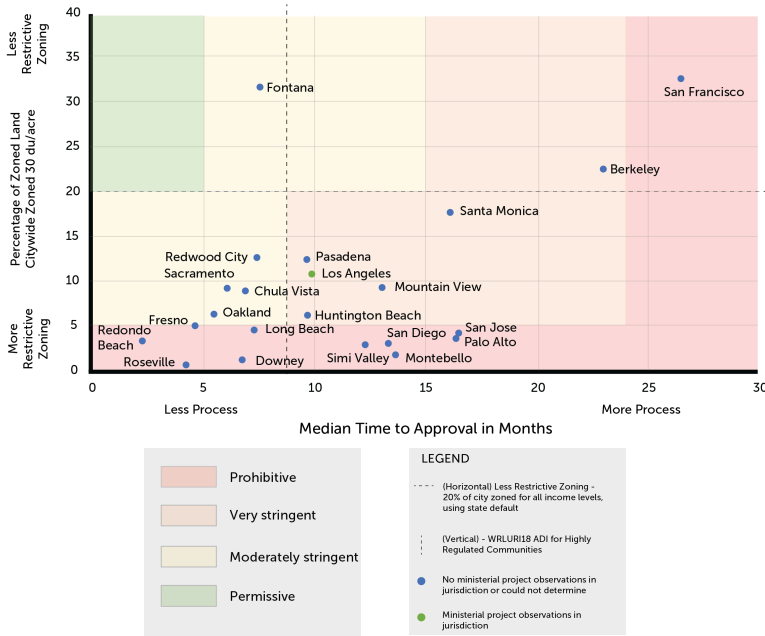


Figure 9: Measuring Relative Stringency Across Cities

Which of the cities in the very stringent and prohibitive groups are potentially exclusionary? Three of the cities in the prohibitive group—San Diego, San Francisco, and San Jose—have local ordinances to promote inclusion and increase affordability through mandates and incentives. San Jose and San Diego are in the prohibitive group because of more restrictive base zoning.²²³ San Francisco’s extreme process time lags—which might derive from the city’s charter making all approvals discretionary—also places it into the prohibitive group. Figure 10 illustrates that if we compare approval of affordable development in relation to city size, measured by population, San Francisco entitles a higher rate of deed-restricted units than any of the other cities that fall into the prohibitive classification. Possibly, then, San Francisco’s prohibitive regulatory environment operates to negotiate for more deed-restricted

223. See O’Neill et al., *supra* note 16, at 1087 (suggesting a partial solution to increasing base zoning density).

affordable development. But if we compare San Francisco to less stringent cities, like Mountain View, we might conclude that San Francisco’s prohibitive regulatory environment is potentially limiting the development of more affordable housing.

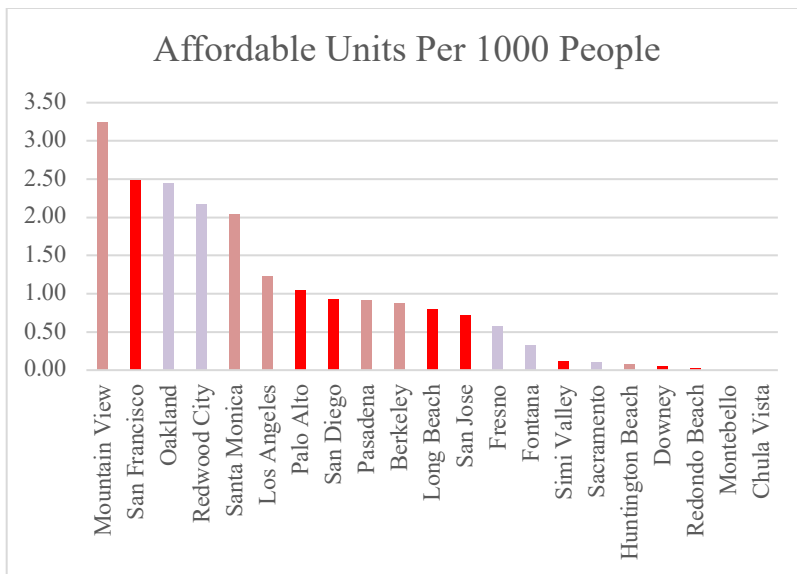


Figure 10: 2014-2017 Entitled Deed Restricted Units per Capita

Still, the sum of our findings above indicates that local land use regulations in at least some of the jurisdictions we studied (including San Francisco, despite its permissive base zoning) do not appear to support California’s climate or fair housing goals. Too few cities had sufficient land area zoned for dense housing, and even fewer had ministerial processes in place to support sustainable and affordable infill development during our study period. Recent changes to state law might address some of these issues.²²⁴ In separate research, one of the authors found that Senate Bill 35 significantly impacted timeframes in some of our study cities, reducing timeframes in San Francisco to approximately four months.²²⁵ Moreover, meaningful state oversight,

224. See *infra* Section I.A.

225. See Moira O’Neill & Ivy Wang, *How Can Procedural Reform Support Fair Share Housing*

through Housing Element law, over existing local land use regulation and planning might encourage cities to address local regulatory constraints.

To determine new local and state laws' impact, we recommend that housing policy research continue to prioritize improving local housing data reporting. Quality measurement of local level housing data is critical to understanding recent legislative changes and to modifying or building on those efforts.

IV. A FINAL WORD ON CALIFORNIA'S HOUSING DATA STRATEGY

Between the Symposium presentation and the release of this Article, HCD updated its data dashboard with entitlement, permitting, and permitting to complete rates and timeframes.²²⁶ This new statewide housing data dashboard is a major step towards transparency around local land use regulation, though it is a work in progress. HCD continues to develop its data strategy, and given our own work, we have a few comments to offer as to how that strategy should evolve.

The current data dashboard provides a range of immediate process and production analyses that can help identify which cities or counties might not be advancing fair share housing policy.²²⁷ For example, the data dashboard makes it clear that San Francisco has the longest submitted-to-entitlement timeframe in the entire state.²²⁸ Notably, the dashboard also states that HCD relies on self-reported data that HCD does not independently verify.²²⁹ What are the implications of self-reported data? Self-reported data risks at least some error.²³⁰ That does not mean that the dashboard is not useful. But it does suggest that there is more work to be done.²³¹

For example, as the writing above shares, after completing our report to CARB, we extended our own research into more jurisdictions and into more years. When completing data collection, we audited the accuracy of ten jurisdictions by verifying whether the APR reported entitlements correctly

Production? Assessing the Effects of California's Senate Bill 35, NYU FURMAN CTR. (forthcoming Mar. 2023) (on file with author).

226. *See Annual Progress Reports – Data Dashboard and Downloads*, *supra* note 39 (displaying the Dashboard with several statistics about housing development in California).

227. *Id.* (demonstrating different housing needs and Housing Element programs).

228. *See id.* at 3.

229. *See id.* at 1 (“Data is self-reported by cities and counties and is not independently verified by HCD. HCD does not do any cleaning . . .”).

230. *See generally id.* (stressing that HCD does not verify the data, indicating there might be errors).

231. *See id.* (providing a valuable tool to analyze housing in different California counties).

conveyed approval dates. We verified APR reported entitlement dates by cross-referencing the meeting minutes, agendas, and staff reports related to the reported approvals. Six jurisdictions overreported entitlement approvals, and four underreported. Aside from duplicate entries (which HCD is likely able to identify), some errors related to reporting proposals that had not received their final entitlement. There were also omissions—failure to account for all entitlements—in four jurisdictions. Other common errors included reporting revisions or extensions of entitled parcels as new entitlements. The definitions within the APR guidelines could help here.

These errors have more implications for HCD's monitoring of housing production than for academic housing research. Accurate assessments of actual entitlements and permits are powerful tools for quickly assessing the quality of local government constraints analysis—a component of their Housing Element process—and scrutinizing programs to correct for regulatory constraints on affordable housing production.²³² Given the importance of good data in helping with enforcement, the legislature should allocate funding to support the Assembly Bill 1483 data strategy mandate.²³³ HCD should have resources to both independently verify APR data and to improve the APR guidelines. As a starting point, HCD must understand the regulatory variability better so it can offer guidance to local governments on reporting requirements. The state should create an incentive structure for local governments to improve their APR data.

Our final comment speaks to what the APR data does not yet offer. Presently, the dashboard separates out the timeframe from submission to entitlement, then entitlement to building permit, and building permit to completion.²³⁴ Associating the timeframe with key milestones is important. At present, what is lacking are CEQA-related milestones within the entitlement timeframe.²³⁵ This should be added. We suggest that capturing how development navigates environmental review when moving through entitlement processes is paramount. CEQA remains one of the most debated state laws—

232. See generally Elmendorf et al., *supra* note 63, at 613 (suggesting that states “rebuttably presume that local governments in expensive areas have substantial regulatory constraints if their rank by housing price (rent) exceeds their rank by rate of housing production” and that housing agencies need more access to information).

233. See *supra* notes 37–41 and accompanying text.

234. See *Annual Progress Reports – Data Dashboard and Downloads*, *supra* note 39, at 3.

235. See generally Varner, *supra* note 49, at 1483 (explaining how uncertainties with CEQA compliance can lead to increased housing costs).

and it is often offered as the reason entitlement takes so long in some communities.²³⁶ Our analysis above highlights the importance of capturing how cities apply CEQA and how long CEQA processes take.

236. See Gray, *supra* note 192 (explaining the unintended negative consequences CEQA has created, particularly in relation to affordable housing).