Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates

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Introduction

Reducing vehicle miles traveled through increasing the use of public transit and improving transit access is critical to reduce greenhouse gas ("GHG") emissions in California. Housing development properly focused in infill areas with transit accessibility (transit-oriented development or "TOD") may significantly reduce greenhouse gas emissions if it increases transit usage and results in reducing vehicle miles traveled. Senate Bill 375[4] recognizes that meeting GHG reduction targets through increased transit use requires the adoption of sustainable, integrated regional transportation and community planning strategies to promote TOD.

But housing costs in the coastal communities of California near major regional economic centers and transit are too high for many families. Low-income families that cannot afford housing near their work commute ten percent further than commuters elsewhere[5] which may directly undermine the goals of recent legislation intended to address climate change. Research also links high housing costs within coastal communities, like the Bay Area, to the resegregation of the region,[6] a crisis with major implications for public welfare and public health outcomes.[7] Infill development in transit accessible neighborhoods within these coastal communities must therefore occur equitably to avoid the risk of displacing low-income populations from these neighborhoods or exacerbating current cost barriers to entry for low-income populations into highly desirable neighborhoods with substantial transit accessibility or transit investment.[8] The goals of reducing GHG emissions and equity are thus linked; emissions reductions cannot occur if commute times are increasing because low- and middle-income communities are pushed to farther rings of the suburbs and forced to drive to access economic centers of opportunity.

Even as California's state legislature responded in 2017 with the passage and signing of housing bills[9] meant to address escalating housing costs, legislators and

4. *See* S.B. 375, 2007–2008 Leg., Reg. Sess. (Cal. 2008).

5. CHAS ALAMO, BRIAN UHLER & MARIANNE O'MALLEY, LEGIS. ANALYST'S OFF., CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES (2015) ("LAO REPORT").

6. *See Rising Housing Costs and Re-segregation*, URB. DISPLACEMENT PROJECT (Oct. 26, 2018), https://perma.cc/8N88-F3CV.

7. For a general discussion of the relationship between racial residential segregation and health outcomes, *see* David R. Williams & Charles O. Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REP. 404, 404–16 (2001). For an analysis on the impact of racial residential segregation on life outcomes in Oakland, California, *see* Matt Beyers et al., *Life and Death from Unnatural Causes: Health and Social Inequity in Alameda County*, ALAMEDA CTY. PUB. HEALTH DEP'T i, i–142 (2008).

8. Throughout this article we use the term "equitable infill development" to describe TOD or infill development that considers equity through affordability components or other mechanisms that would address the risk of displacement of low-income populations or exclusion of low-income populations.

9. *Governor Brown Signs Comprehensive Legislative Package to Increase State's Housing Supply and Affordability*, OFF. OF GOVERNOR EDMUND G. BROWN JR. (Sep. 29, 2017), https://perma.cc/6R5X-VHGD.

others acknowledged that more is needed to address California's housing crisis.[10] One recurring theme in the ongoing coverage and discussion of the housing crisis is an argument that state-mandated environmental review under the California Environmental Quality Act ("CEQA") is a significant contributor to the housing crisis because it adds time and money to the development process, and that given the persistent housing crisis, CEQA merits legal reform.[11] Others advance that local land use regulations significantly constrain housing development[12] and have proposed legislation to narrow local authority over infill development near transit.[13]

Existing urban planning and urban economics research correlates the overall stringency of a jurisdiction's land use regulations with high housing costs and income segregation.[14] But this research, though important, cannot answer the question of which specific elements of local land use regulation or state environmental review contribute disproportionately to either the cost of housing or the exclusion of low-income communities from these metro areas. Despite these limitations, the impact of this research and similar work has been far reaching, surfacing in statewide policy briefs[15] and political debates about proposed legislation.[16]

10. Liam Dillon, *Gov. Brown Just Signed 15 Housing Bills. Here's How They're Supposed to Help the Affordability Crisis*, L.A. TIMES (Sep. 29, 2017), https://perma.cc/9Y9V-C2AX; Angela Hart, *Jerry Brown Signs New California Affordable Housing Laws*, SACRAMENTO BEE (Sep. 29, 2017), https://perma.cc/9XXU-A4Q2; Liam Dillon, *The Housing Package Passed by California Lawmakers is the Biggest Thing They've Done in Years. But it Won't Lower Your Rent*, L.A. TIMES (Sep. 15, 2017), https://perma.cc/4WL9-4L6R.

11. Chang-Tai Hsieh & Enrico Moretti, *How Local Housing Regulations Smother the U.S. Economy*, N.Y. TIMES (Sep. 6, 2017), https://perma.cc/9DBQ-28JF; Liam Dillon, *Which California Megaprojects Get Breaks from Complying with Environmental Law? Sometimes, It Depends on the Project*, L.A. TIMES (Sep. 25, 2017), https://perma.cc/Y4BS-FBZQ; Angela Hart, *Here's Why California's Historic Housing Legislation Won't Bring Down Costs Anytime Soon*, SACRAMENTO BEE (Sep. 27, 2017), https://perma.cc/P8FT-8T2P.

12. *See* Hsieh & Moretti, *supra* note 11; THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 2 (Sep. 2016), https://perma.cc/P4YM-LYPK.

13. *See* S.B. 827, 2017–2018 Leg., Reg. Sess. (Cal. 2018); Scott Wiener, *My Transit Density Bill (SB 827): Answering Common Questions and Debunking Misinformation*, MEDIUM (Jan. 16, 2018), https://perma.cc/GN94-NFAK.

14. Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* 17 (Nat'l Bureau of Econ. Research, Working Paper No. 8835, 2002); John Quigley, Steven Raphael & Larry A. Rosenthal, *Measuring Land Use Regulations and Their Effects in the Housing Market*, *in* HOUSING MARKETS AND THE ECONOMY 282 (Lincoln Inst. of Land and Policy ed., 2009).

15. *See* LAO REPORT, *supra* note 5.

16. *See* Letter from Sheryll D. Cashin et al. to Mike McGuire & Jim Beall (Apr. 5, 2018), https://perma.cc/4DPJ-UCWP (letter from fair housing experts endorsing SB 827 as "a major step towards promoting integration and reducing racial residential segregation"); Letter from Amanda Eaken et al. to Scott Wiener (Mar. 23, 2018), https://perma.cc/S84A-8YTX (endorsing SB-827 as "a key element in achieving California's climate goals" on behalf of the Natural Resources Defense Council, Climate Resolve, and Environment

Recognizing the limits of existing data sets and past research applicable to California, and the importance of the current policy debate, we began a case study of land use development within specific cities in California. We undertook this study to better understand what specific regulations of land use development in California may contribute to the state's housing crisis by increasing development approval timelines.[17] We also examined the specific impact of local and state mandated processes on all housing development, including affordable housing development, supply, and access.

This article proceeds in four parts. Part I of our article will cover the elements of land use law we identify as having the closest relationship to the ongoing policy reform debate, and then will explain the findings and limitations of existing research in relationship to current California policy reform proposals. Part II of this article provides details about our methods and research approach to respond to this gap in the research. Part III of our article presents detailed findings from our research on the first set of cities within our study. Part IV of our article places our findings within the context of other research and offers the policy implications of what we have learned so far, and the research still necessary.

Part I: Background

We first situate our research in a legal and scholarly context by providing a brief overview of the specific provisions of state and local law that are particularly relevant to infill residential development, and then we provide an overview of the academic literature that explores how land use regulation may have impacts on housing production, housing affordability, and on equity in housing outcomes.

A. Navigating the law applicable to entitlement processes in California[18]

State law governs the regulatory landscape for housing construction in California in two important ways. First, state law empowers and mandates local governments to develop their own regulatory processes to control development.

California); *cf.* Letter from Kyle Jones to Scott Wiener (Jan. 18, 2018), https://perma.cc/9HCE-2RS4 (opposing SB-827 on behalf of the Sierra Club California as "a heavy-handed approach . . . that will ultimately lead to less transit being offered and more pollution generated"); Letter from Rich Gross & Jaqueline Waggoner to Scott Wiener (Apr. 9, 2018) (on file with authors) (opposing SB-827 on behalf of Enterprise Community Partners "unless it is amended to explicitly serve the housing needs of low-income Californians"); Letter from Brian August et al. to Scott Wiener (Mar. 20, 2018) (on file with authors) (opposing SB 827 on behalf of California Rural Legal Assistance Foundation, Housing California, and Western Center on Law & Poverty "unless it is amended to address the proposal's impact on gentrification and exclusion").

17. Approval timeframes have generally been connected to higher costs of development. *See* discussion *infra* Section I.B.1.

18. The approval process to obtain a building permit is referred to as the entitlement process.

Second, state law imposes additional procedural and substantive requirements on local government regulatory processes—we discuss one of the most important of those state law components, the California Environmental Quality Act.

1. Local law governing infill development

California law permits cities to employ a range of tools to review and approve housing development based on a hierarchical system of land use law.[19] The General Plan—likened to a "constitution" for long-term physical development of the city or county[20]—sits at the top of "the hierarchy of local government law regulating land use" in California.[21] State law requires that each jurisdiction have a General Plan, and the General Plan must include comprehensive language that describes the city's long-range vision, policies, and objectives for development. The General Plan codifies the city's planning law, but it may do so with varying degrees of specificity. Also, 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.[22]

Although not required by state law, some cities may also incorporate provisions within the General Plan for Specific Plans to address anticipated growth. Particularly relevant for infill development in major cities, Specific Plans may direct development to particular locations. Specific Plans may also be extremely detailed and direct nearly every aspect of development[23] by codifying acceptable land uses[24] and requiring review of proposed development for compliance with the Specific Plan.

Next within this hierarchy are zoning ordinances. Zoning ordinances (defined generally) include maps and text that when combined provide specificity as to the type of development (type and intensity of use and form) permissible

19. We focus exclusively on components of California land use law that are specifically implicated in this research study. We do not attempt to discuss the breadth and applicability of the complex body of law that practitioners and academics describe as "land use law" within California. For relevant treatises, *see* CECILY BARCLAY & MATTHEW GRAY, CURTIN'S CALIFORNIA LAND USE & PLANNING LAW (Solano Press 2014); STEPHEN KOSTKA, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEB 2014). For a guide intended for planning professionals that summarizes California land use law, *see* WILLIAM FULTON & PAUL SHIGLEY, A GUIDE TO CALIFORNIA PLANNING, (Solano Press 5th ed. 2018).

20. CAL. GOV'T CODE §§ 65300, 65302(g)(7) (2010); *see also* MILLER & STARR CALIFORNIA REAL ESTATE DIGEST, *Zoning and Planning* § 10 (3d ed. 2018); *see* DeVita v. Cty. of Napa, 889 P.2d 1019, 1023–25 (Cal. 1995) (citing Lesher Commc'ns, Inc. v. City of Walnut Creek, 802 P.2d 317, 321–22 (Cal. 1990)).

21. DeVita, 889 P.2d at 1023–25 (citing Neighborhood Action Grp. v. Cty. of Calaveras, 203 Cal. Rptr. 401, 406–07 (Ct. App. 1984)).

22. The General Plan is comprised of seven elements: land use, open space, noise, circulation, housing, conservation, and safety. *See* CAL. GOV'T CODE § 65302. The Housing Element, which details how the jurisdiction will satisfy its allocation of the regional housing need, is the only element that must be updated according to a planning schedule.

23. *See* KOSTKA, *supra* note 19, § 4.2.

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

within specific neighborhoods.[25] Zoning in California operates to restrict development while also incentivizing development proposed in the General Plan[26] or mandating exactions.[27]

State law also carves out some local government land-use authority through specific mechanisms that are directly related to housing development.[28] Notable examples include Density Bonuses[29] intended to incentivize and increase affordable housing production and an Accessory Dwelling Unit[30] law intended to increase housing production in otherwise low-density residential neighborhoods.

But how each city employs these tools is varied. In some cities, the General Plan may contain very specific language that not only guides development policy, it may also closely regulate the form of land use designations.[31] Likewise,

25. For a definition of zoning, *see* KOSTKA, *supra* note 19, § 4.1. *See infra* Sections II–IV for a discussion of "base zoning." By "base zoning" we mean the underlying zoning district and use (residential, commercial, or industrial) provided for in the text of the ordinance and zoning map.

26. See *id.* § 4.

27. *See generally* CAL. GOV'T. CODE §§ 66000–66025; Williams Commc'ns, LLC v. City of Riverside, 8 Cal. Rptr. 3d 96, 107–08 (Ct. App. 2003). California law broadly defines exactions as a monetary fee or dedication of land to the public that local governments require of developers as a condition of development approval. 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); KOSTKA, *supra* note 19, §§ 18.7, 18.51. The definition of "public facilities" is also broad, encompassing "public improvements, public services and community amenities." *See* CAL. GOV'T. CODE § 66000(d). In short, exactions are a response to the limits on a California city's ability to generate revenue and offer a "nontax" way for local governments to get money or land from developers to support needed infrastructure and services. *See* KOSTKA, *supra* note 19, § 18.7.

28. For a list of state laws limiting local authority in zoning, *see* KOSTKA, *supra* note 19, § 4.28.

29. *See* CAL. GOV'T CODE §§ 65915–65918. Density bonuses are incentives to encourage developers to propose new development providing for specific types of senior housing or affordable housing; the incentive operates by allowing the developer a "density increase over the maximum allowable gross residential density" where the proposed new development provides for senior or affordable housing. *See id.* § 65915(f). It also operates to provide 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 housing or affordable housing.

30. Accessory Dwelling Units, otherwise known as ADUs, are "an attached or a detached residential dwelling unit which provides complete independent living facilities for one or more persons" that is an accessory to an existing residential use on the parcel. *See* CAL. GOV'T CODE § 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. 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).

31. The General Plan of the City of San Jose is illustrative. *See e.g.*, City of San Jose, *Envision San Jose 2040 General Plan* Chapter 5 at 9, http://www.sanjoseca.gov/DocumentCenter/View/474 (prescribing use districts, density and Floor Area Ratio (FAR) ranges, and height limits).

a Specific Plan may be very general in some cities—and in other instances it may closely regulate development. To complicate things even more, California treats charter cities and general law cities differently on the issue of whether the city's zoning ordinances must be consistent with the city's General Plan.[32] This sometimes results in inconsistency between a charter city's zoning and its General Plan, or more specifically, the continued presence of outdated zoning ordinances even as the city's policy on specific types of development changes.[33]

State law also grants California cities substantial latitude in how they approve residential development within the framework of the relevant plans and zoning ordinances. We group the land use tools into four general categories. First, cities can allow for an objective ministerial process (or "by-right" process) when proposed development conforms to the underlying base zoning district's use and density requirements.[34] Cities can also impose requirements for subjective discretionary review for categories of projects that are still built within the framework of the zoning ordinance—in other words, the zoning ordinance itself contemplates that at least some property owners would propose these projects, but they must meet a certain set of conditions to obtain one of these types of permits. Examples include conditional use permits or specific plan permits.[35] Cities also impose discretionary review when the proposed project would not comply with the

32. Zoning ordinances within general law cities must be consistent with the general plan, but these same consistency requirements do not apply to charter cities unless the city's charter requires consistency with the general plan. *See* CAL. GOV'T. CODE §§ 65803; 65860(d). Charter cities within California enjoy freedom to legislate at the local level over "municipal affairs" even if a conflict with State law may exist under Article XI, section 5 of the California Constitution. This directly impacts zoning in California charter cities. 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* City of Irvine v. Irvine Citizens Against Overdevelopment, 30 Cal. Rptr. 2d 797, 799–800 (Ct. App. 1994). But the provisions of a general plan within every city must be internally consistent. *See* CAL. GOV'T. CODE §§ 65302, 65300.5.

33. The City of San Jose is illustrative. Of the forty-six rezonings in the City of San Jose, fifteen involved wholesale changes in use district—for example from Light Industrial to a residential designation—and many others involved more intensive escalations in residential density. Only one of these fifteen rezonings required a General Plan Amendment; only three of the remaining thirty-one rezonings required a General Plan Amendment. The fact that General Plan Amendments were not necessary shows that the General Plan permitted the desired use and intensity of the development. This suggests that the base zoning in some locations had not been updated after the most recent General Plan enactment.

34. Ministerial approvals are approvals in which a government agency simply applies law to fact without using subjective judgment. In Friends of Westwood Inc. v. City of Los Angeles, 235 Cal. Rptr. 788, 793 (Ct. App. 1987), the Court of Appeal held that "the touchstone" of the discretionary-ministerial distinction "is whether the approval process involved allows the government to shape the project in any way which could respond to any of the concerns which might be identified in an environmental impact report."

35. *See e.g.,* S.F. MUNI. CODE § 329 (describing Large Project Authorizations for Eastern Neighborhoods Plan Area); S.F. MUNI. CODE § 303 (describing Conditional Use Authorization requirements applicable across all zones); REDWOOD CITY MUNI. CODE § 47.1–47.5 (describing Planned Community permits for areas with a Precise Plan in place).

applicable zoning ordinance; this includes when the developer is seeking an exemption from the zoning ordinance (variance) or asking the city to zone the project site differently (rezoning), or to change or update the General Plan to allow for the proposed project.

Finally, cities in California can also impose discretionary review even when a proposed project is consistent with the underlying base zoning district's use and development controls; in other words, cities can provide for development standards (including density and use), while also imposing aesthetic controls that may impose discretionary review that is particularly subjective in nature.[36] Examples of this include design review, architectural review, site development review, and historical preservation review/certificate of appropriateness.[37]

Another important feature within local law relevant to infill development is the regulation of subdivision, or the process of dividing land into two or more parcels for the purpose of sale, lease, or financing.[38] Subdivision can be horizontal—dividing a single parcel of land into two or more units—or vertical—dividing the airspace above the land into two or more units.[39] Also important for infill development within central cities are Development Agreements, which allow for cities to enter into agreements with developers through a local legislative act that "freezes" the applicable land use regulations (including zoning) for the property to protect the developer from any adverse impacts imposed by changes to the development standards during the development process.[40] Development Agreements are relevant to large phased development projects.

36. *See* BRIAN BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION XIX, XX, 11 (6th ed. 2003) (noting that many of the discretionary provisions involve "community character" components that are highly subjective, that design codes increasingly involve subjective standards that "emphasize flexibility over precision" and that "[a]rchitectural 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.").

37. For design review-related provisions, *see* REDWOOD CITY MUNI. CODE § 45.2(A); PALO ALTO MUNI. CODE § 18.76.020(b)(2)(D); OAKLAND MUNI. CODE §§ 17.136.040(3)–(4). For a historic preservation-related provision, *see* S.F. MUNI. CODE § 1006. For site development review, see SAN JOSE MUNI. CODE § 20.100.010.

38. *See* CAL. GOV'T CODE § 66424.

39. The California Subdivision Map Act regulates the design and improvement of subdivision; however, local governments control these design and improvements through the enactment of a local subdivision ordinance. *Id.* § 66411. The process begins when a developer seeking to create five or more units of land files a Tentative Map application. *Id.* § 66428(b). After the approval of the Tentative Map, the developer must comply with any imposed conditions before filing for Final Map approval. *Id.* § 66457. For the purposes of the California Environmental Quality Act (*see* discussion *infra* Section I.A.2), the Tentative Map is the discretionary trigger—Final Maps are not typically discretionary actions. *Id.* § 66474.1. For this reason, we have tracked Tentative Map approvals, not Final Map approvals. State and local law also governs the consolidation or merger of lots into a single lot, termed a lot line adjustment. *Id.* § 66412(d). Certain lot line adjustments do not require tentative maps. *Id.* § 66412(d).

40. *See* CAL. GOV'T. CODE § 65867. For a general description, *see* KARL E. GEIER & SEAN R. MARCINIAK, MILLER AND STARR CALIFORNIA REAL ESTATE § 21:29 (4th ed. 2015).

2. Environmental review under the California Environmental Quality Act

Modeled after the National Environmental Policy Act ("NEPA"), CEQA combines mandatory information disclosure with public participation to "open[] government decision-making to public scrutiny."[41] CEQA is "[o]ne of California's most cherished institutions and one of its most controversial."[42] CEQA's focus is on government projects and approvals that produce significant environmental impacts.[43]

a. Local governments often determine CEQA's applicability

CEQA applies to any residential development project that requires a public agency's discretionary approval.[44] In the context of urban land development, the lead public agency is usually the local Planning Department[45] and with some exceptions, it is the lead agency that determines whether the required approval is discretionary or ministerial.[46] Though building permits are presumptively ministerial (or "by right"), local agencies can specify otherwise in their laws.[47] Conditional or special use permits, variances, Development Agreements, subdivision maps, or zoning changes are typically discretionary approvals[48] because Planning Departments are not legally obligated to grant these types of

41. Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 913 (2002).

42. *See* JOHN LANDIS, ROLF PENDALL, ROBERT OLSHANSKY & WILLIAM HUANG, FIXING CEQA: OPTIONS AND OPPORTUNITIES FOR REFORMING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 1 (Cal. Pol'y Seminar ed., 1995).

43. CAL. PUB. RES. CODE § 21002.

44. CAL. PUB. RES. CODE § 21080.

45. State law requires each city and county to have a planning agency—either an administrative body or a commission—to carry out the state planning laws, which include General Plan laws discussed in this Part. *See* CAL. GOV'T. CODE §§ 65100, 65101. Planning agencies generally enforce the local zoning code and make land use determinations. *See* MILLER & STARR, 7 CAL. REAL EST. § 21:1 (4th ed., 2015).

46. *See* CEQA GUIDELINES § 15369 (2016) (codified at 14 C.C.R. § 15369 (2016)). "CEQA Guidelines" refers to Title 14 of the California Code of Regulations, which implement PUB. RES. CODE § 21080 et seq. *See Friends of Westwood Inc.*, 235 Cal. Rptr. at 793 (finding building permits to be presumptively ministerial).

47. *See* CEQA GUIDELINES § 15268(b). San Francisco is one city that makes building permits discretionary through their charter. *See* discussion *infra* Section IV.

48. *See* CAL. GOV'T CODE § 65583.2 ("the phrase 'use by right' shall mean that the local government's review of the owner-occupied or multifamily residential use may not require a conditional use permit, planned unit development permit, or other discretionary local government review or approval that would constitute a 'project' for purposes of [CEQA]"). Another example is provided through the state law that requires that Development Agreements be adopted by a local legislative act, preventing them from being ministerial approvals. *See supra* note 33.

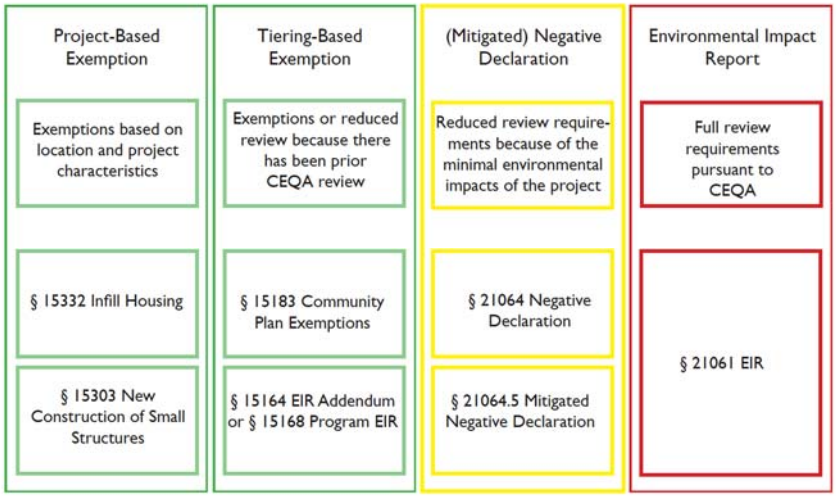
approvals; instead, they use discretionary judgment to evaluate the project based on subjective criteria.[49]

Discretionary projects may still be exempt from CEQA. The legislature has carved out statutory exemptions in the Public Resources Code, and thirty-three categorical exemptions have been developed in the California Code of Regulations, which are more commonly referred to as the CEQA Guidelines.[50] In this article, we focus on the exemptions most relevant to infill development. For example, a lead agency can use the Class 32 infill exemption for infill development; if an urban infill project satisfies five conditions, it can bypass CEQA review.[51] 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.[52]

Tiering is a way to streamline environmental review under CEQA by allowing environmental review of a proposed project to focus on a narrow set of issues that have not already been evaluated in a prior Environmental Impact Report ("EIR"). If all the issues have been evaluated in a previous EIR, then no further study is necessary. Tiering necessarily requires a prior environmental review document (generally an EIR) that is usually connected to a prior and large-scale planning approval; however, the source of the document can vary. A Community Plan Exemption, for example, is a tiering-based exemption available to projects consistent with a community plan, general plan, or zoning.[53] Another form of tiering is the Program EIR, which can exempt future development activity from environmental review, provided that no underlying conditions have changed.[54] An EIR Addendum is commonly used for projects that will be built out in phases under a master plan and master EIR where the underlying conditions of approval have not changed.[55] If some of these conditions have changed, then the lead agency can prepare a Supplemental EIR, which only needs to contain information necessary to make the original EIR adequate.[56]

49. *See* CEQA GUIDELINES §15357.
50. *Id.* §§ 15300–15333.
51. *Id.* § 15332. These factors are: (1) the project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations; (2) the proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses; (3) the project site has no value, as habitat for endangered, rare or threatened species; (4) approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality; and (5) the site can be adequately served by all required utilities and public services.
52. *See id.* §§ 15303, 15301.
53. *See* CEQA GUIDELINES § 15183.
54. *See id.* § 15168.
55. *See id.* § 15162.
56. *See id.* § 15163.

Figure 1: Types of Environmental Review



b. The disclosure requirements under CEQA

For projects that are not categorically exempt or exempt based on prior EIR analysis, the lead agency conducts an Initial Study[57] to assess whether the project will have a significant effect on the environment. If not, the agency issues a Negative Declaration ("ND").[58] If the project will have a significant effect on the environment, but the developer can incorporate mitigations that reduce their significance, then the agency issues a Mitigated Negative Declaration ("MND").[59] A lead agency must prepare an EIR where there is substantial evidence that the project will have a significant effect on the environment[60] and where it is not clear from the Initial Study that these impacts can be mitigated below a significance threshold.[61]

An important debate in the context of CEQA implementation is over the merits of project-specific CEQA review (which focuses on individual projects) and plan- or program-level CEQA review (e.g., review focused on Specific Plans, neighborhoods, or city-wide programs). One issue is the effectiveness of project-specific review. On the one hand, CEQA's information mandate when applied at the project level can force agencies to "identify and confront the environmental consequences of their actions" in that particular project.[62] CEQA's procedural

57. *See* CEQA GUIDELINES § 15063(a).
58. *Id.* § 15070(a).
59. *Id.* § 15070(b)(2).
60. *Id.* § 15063(b)(1), § 15060 (indicating a project may also bypass the Initial Study to proceed directly to the EIR)
61. *See* CAL. PUB. RES. CODE § 21064.5; CEQA GUIDELINES § 15070.
62. Karkkainen, *supra* note 41, at 904.

requirements can enable cost-effective mitigation, because agencies can take into account "the site-specific circumstances" of the project "in a flexible manner" and propose feasible mitigations in a way that applying blanket regulations would not.[63] CEQA also operates to mitigate project-specific environmental problems where there are lapses in regulation because its procedural framework is sufficiently flexible to mitigate environmental problems that other, more general laws are slower to address.[64] A project-specific EIR, however, cannot inform a long-term perspective or mitigate the regional and cumulative effects of development that are better suited to the general plan process.[65]

The other issue relates to cost. As noted above, plan or program-level EIRs can generally reduce the costs of subsequent CEQA review through tiering: prior research has found the differences between a Categorical Exemption, MND, and EIR, in time and cost, can be great.[66] Therefore, tiering that allows project-level review to occur at the MND or Categorical Exemption level can reduce project-level costs substantially. However, cities generally pay the costs of plan- or program-level CEQA review, while developers pay for the costs of project-specific CEQA related documents and studies.[67] For cash-strapped jurisdictions, particularly in the wake of Proposition 13, which reduces the amount of property taxes that stay within local jurisdictions,[68] the project-specific EIR presents a more economically feasible way of considering environmental effects than an update to

63. ELISA BARBOUR & MICHAEL TEITZ, CEQA REFORM: ISSUES AND OPTIONS 4 (Pub. Pol'y Inst. of Cal. ed., 2005) (emphasis omitted).

64. *See id.* for a further discussion of how CEQA fills these regulatory gaps; Giulia Gualco-Nelson, *Reversing Course in California: Moving CEQA Forward*, 44 ECOL. L. Q. 155, 164 (2017).

65. *See* Robert Olshansky, *The California Environmental Quality Act and Local Planning*, 62 J. AM. PLAN. ASS'N. 313, 317 (1996). EIRs are very effective tools to analyze project-specific impacts but many environmental effects are cumulative in that they are not traceable to a single project. Traffic, for example, is a regional issue stemming from historic patterns of land use and disinvestment in public transportation. Unfortunately, instead of promoting long-term planning, CEQA often "burden[s] a single project with all of a region's problems"—a nearly impossible undertaking. *Id.*

66. *See* Kenneth Bley, *Beware of Planners Bearing Gifts*, COX CASTLE NICHOLSON (Jan. 20, 2015), https://perma.cc/HD4K-MDNH (noting that "[p]reparing an MND . . . also requires significant time and money, although, in the short run, less than an EIR). Substantively, EIRs must contain more detail and studies than an MND. EIRs require (1) detailed information about the proposed project's significant effects on the environment; (2) ways in which the significant effects of such a project might be minimized; and (3) alternatives to the project. *See* CAL. PUB. RES. CODE § 21061. However, in long the run, as Bley notes, if there are legal challenges, MNDs might end up costing more because they are potentially less defensible in court. *See* Bley, *supra* note 66 (discussing the standards of review for an MND and EIR).

67. *See* Olshansky, *supra* note 65, at 319-20.

68. Passed as a voter initiative in 1978, Proposition 13 is an amendment to the California Constitution that froze property tax values at 1976 assessed value levels and fixed tax increases at a maximum of two percent per annum. CAL. CONST. art. XIIIA, §§ 1(a), 2(a). This has led to a sharp decline in the revenue local governments receive from property tax revenue. *See* LEGISLATIVE ANALYST'S OFFICE, COMMON CLAIMS ABOUT PROPOSITION 13 at 2 (2016).

the General Plan because it effectively shifts the costs of CEQA compliance to individual developers.[69] The cost of a project-specific EIR, for example, is significantly lower than the cost of a General Plan update (typically financed from the city's general fund), and the project applicant bears most of the cost.[70]

Critics have also attacked the way agencies unpredictably apply CEQA both within the same jurisdiction and across the state, an inconsistency that critics say increases not only the time and money spent on CEQA review, but also the risk of litigation.[71] And some critics question whether or not CEQA actually leads to meaningful mitigation of harm.[72] Because CEQA leaves implementation entirely to local control, agencies can weigh environmental harms and social or economic benefits differently.[73]

c. The public participation requirements of CEQA

Public participation is the democratic cornerstone of CEQA. CEQA has strict notice provisions that enable the public to participate in every major phase of environmental review. The notice requirements are demanding for an EIR. Immediately after determining that an EIR is necessary, the lead agency must issue a Notice of Preparation.[74] After posting this notice, the agency begins work on the Draft EIR. The agency must then notice and post the Draft EIR for public review for at least thirty days.[75] During this period, the public submits comments about the agency's findings. The lead agency must review and prepare a written response to all comments received during this period.[76] The agency incorporates these responses into the Final EIR and then recirculates it to the public.[77] Within five days of certifying the Final EIR, the agency will file a public Notice of Determination ("NOD") with the county clerk.[78]

The Office of Natural Resources promulgates CEQA guidelines for implementation, but no state agency substantively oversees CEQA.[79] Citizen suits are the sole enforcement mechanism to ensure a lead agency's compliance. NODs trigger the statute of limitations to bring suit,[80] and CEQA lawsuits are easy to file. Filing fees are relatively inexpensive, and courts limit proceedings to the administrative record, which obviates the need for a lengthy discovery process.[81]

69. *See* Olshansky, *supra* note 65, at 320.

70. *Id.* at 319–20. In 1996, the average cost of an EIR was $38,214. The average cost of a General Plan was $208,000.

71. *See* BARBOUR & TEITZ, *supra* note 63, at 15.

72. *Id.* at 25.

73. *Id.*

74. CEQA GUIDELINES § 15082.

75. *Id.* § 15105.

76. *Id.* § 15088.

77. *Id.* §§ 15088, 15132.

78. *Id.* § 21152(a).

79. CAL. PUB. RES. CODE § 21083.

80. *Id.* at § 21167.

81. *See* KOSTKA, *supra* note 19, § 23.48 (discussing admissibility of extra-record evidence).

CEQA also allows plaintiffs to easily satisfy standing requirements.[82] The ease of CEQA litigation has been a source of significant criticism of the statute, with critics arguing that it increases uncertainty and costs for developers.[83]

B. What prior research has told us about the impact of California's land use regulations on housing supply and spatial equality

Meeting California's statewide goals to reduce GHG emissions requires equitable infill development. Housing development properly focused in infill TOD areas may significantly reduce emissions in part by increasing transit usage[84] and reducing vehicle miles traveled.[85] The state legislature has recognized that meeting GHG reduction targets through increased transit use requires the adoption of sustainable, integrated regional transportation and community planning strategies.[86] Research suggests, however, that law promoting sustainable urban development without an equity focus may lead to "environmental gentrification"[87] and may directly undermine intended policy goals of reducing GHG emissions.[88]

82. In Save the Plastic Bag Coalition v. City of Manhattan Beach, the California Supreme Court refused to apply the federal "zone of interests" test for CEQA litigation. 254 P.3d 1005, 1012–13 (Cal. 2011). Limiting standing under CEQA has been proposed as a way to reduce the proliferation of CEQA litigation. *See* Eric Biber, *Could Standing Save CEQA*? LEGAL PLANET (Apr. 9, 2012), https://perma.cc/7CHE-HKR3.

83. *See* BARBOUR & TEITZ, *supra* note 63, at iii.

84. NATHANIEL DECKER, CAROL GALANTE, KAREN CHAPPLE & AMY MARTIN, RIGHT TYPE, RIGHT PLACE: ASSESSING THE ENVIRONMENTAL AND ECONOMIC IMPACTS OF INFILL RESIDENTIAL DEVELOPMENT THROUGH 2030 11–12 (Next 10 ed., 2017).

85. Arefeh Nasri & Lei Zhang, *The Analysis of Transit-Oriented Development (TOD) in Washington, DC and Baltimore Metropolitan Areas*, 32 TRANSPORT POL'Y 172, 179 (2014).

86. CAL. GOV'T CODE § 65400.

87. *See, e.g.*, MALO HUTSON, THE URBAN STRUGGLE FOR ECONOMIC, ENVIRONMENTAL AND SOCIAL JUSTICE: DEEPENING THEIR ROOTS 20 (Routledge ed., 2016) (citing Melissa Checker, *Wiped Out by the "Greenwave": Environmental Gentrification and the Paradoxical Politics of Urban Sustainability*, 23 CITY & SOC'Y 210, 210 (2011) ("While it appears as politically-neutral, consensus-based planning that is both ecologically and socially sensitive, in practice, environmental gentrification subordinates equity to profit-minded development")); Hamil Pearsall, *Moving out or Moving in? Resilience to Environmental Gentrification*, 17 LOC. ENV'T 1013, 1013 (2012) ("Sustainability initiatives and environmental improvements that lack adequate attention to the social justice dimension of environmental change produce environmental gentrification").

88. Notably, the characteristics of ridership also suggest that if low-income communities that have historically lived in central city neighborhoods and used transit at the highest rates are displaced from central cities, TOD investment may not achieve its intended policy goals. *See* Robert Cervero, *Transit-Oriented Development's Ridership Bonus: A Product of Self-Selection and Public Policies*, 39 ENV'T & PLAN. 2068, 2083–84 (2007). The decline of transit ridership in Los Angeles, despite new investments in public transportation and upzoning around these stations, is an acute example of this issue. *See* MICHAEL MANVILLE ET AL., FALLING TRANSIT RIDERSHIP: CALIFORNIA AND SOUTHERN CALIFORNIA (S. Cal. Ass'n of Gov'ts ed., 2018). Also, the LAO reported that low-income

Multiple studies examine the relationship between land use regulation and its specific impacts on housing supply and housing costs as well as its impacts on spatial equality. We thus discuss and summarize the findings and methods of two research areas: (1) studies that explore the relationship of land use regulation on housing supply and costs (indirect or direct impact on housing costs), and (2) studies that explore the relationship of land use regulation on spatial equality (indirect or direct impact on segregation/exclusion).[89] Our summary identifies the key conclusions of that literature, and how the current methodological approaches of that literature limit the ability to either generalize from the study findings or identify specific policy solutions.

1. Understanding land use regulation as a constraint on supply

California's home prices and rents are higher than anywhere else in the country; home prices are 2.5 times the national average and rents are fifty percent higher.[90] Using basic supply and demand economics, urban economists posit that a sharp decline in supply beginning in the 1970s has led to the affordability crises in many of the nation's coastal cities, like those in California, where the labor market is strong and demand for housing is high.[91] Building on the work of William Fischel—who coined the term "homevoter hypothesis" to describe a home owner's

families that work within coastal communities, but cannot afford housing near their work, commute ten percent farther than commuters elsewhere and concluded that high housing costs that result in longer commutes risk undermining the goals of recent legislation intended to address climate change. *See* LAO REPORT, *supra* note 5, at 3.

89. We focus here only on research that directly touches on the debates over housing costs and regulation in California. The relevant literature that engages with the impact of land use regulation (defined broadly to encompass both local land use regulations and state law) on both housing costs and spatial equality is large. For a comprehensive literature review that focuses on an econometric analysis of land use regulation *see* generally, Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply* (Nat'l Bureau of Econ. Research Working Paper No. 20536, 2014). For a summary of studies and writing on how stringency within land use regulation impacts supply, *see* Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENVTL. L. 217, 223 n.24 (2018). For a review of the literature that engages public investment (related to land use) and gentrification and displacement, *see* Miriam Zuk et. al, *Gentrification, Displacement and the Role of Public Investment: A Literature Review*, URBAN DISPLACEMENT (Mar. 3, 2015), https://perma.cc/QER4-XC2H.

90. *See* LAO REPORT, *supra* note 5, at 3.

91. *See* LAO REPORT, *supra* note 5, at 7 ("Beginning in about 1970, however, home prices throughout the state began to accelerate. Prices were eighty percent above U.S. levels by 1980, and by 2010, the typical California home was twice as expensive as the typical U.S. home"); *see also* Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J. L. & ECON. 331, 337 (2005) (beginning in the 1970s, the U.S. experienced a sharp decline in the supply of housing nationwide). Other studies have found a sharp decline in building permits beginning in the 1990s. *See* CAL. DEPT. HOUSING & CMTY. DEV., CALIFORNIA'S HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES 6 (2018).

inherent motivation to maximize the value of their property[92]— much urban economics research attributes the change in housing production to the rise of "historical preservationists in New York City [and] conservationists in California. . . ."[93] In this literature, supply constraints are the primary cost of land use regulation. These studies reach this result by measuring the gap between the physical costs of producing the housing unit and the sales price for the housing unit.[94] If the gap between production costs and sales price is narrow, the market is efficient and affordable; where the gap between sale price and production costs is wider, housing is unaffordable. Large disparities between price and production cost are generally understood as indirect evidence of the costs of land use regulation.[95] Because of the difficulty of measuring the impact of particular land use policies, [96] urban economists use proxies such as declining permitting levels, declining heights and densities, and increasing sale prices, which together provide indirect evidence for a "regulatory tax."[97]

In 2002 Glaeser and Gyourko found that generally home sale prices are within forty percent of hard construction costs nationwide, but California's housing prices were substantially higher than construction costs.[98] They concluded the gap between hard costs and sale price is not a function of higher land costs,[99] and found that stringent land use regulation which imposes longer than average[100] lag times between permit application and approval creates an "implicit zoning tax."[101] However, for our purposes a key limitation of this research is that it is unable to isolate which land use regulations might impose the lag time in development.[102]

92. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 5 (Harvard Univ. Press ed., 2001); William A. Fischel, *A Property Rights Approach to Municipal Zoning*, 54 LAND ECON. 64, 68 (1978).

93. Edward L. Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply* 3 (Zell/Lurie, Working Paper No. 802, 2017).

94. *See id.* at 5; Glaeser, Gyourko & Saks, *supra* note 91, at 336.

95. Glaeser, Gyourko & Saks, *supra* note 91, at 336.

96. *Id.* at 333.

97. *Id.* at 335.

98. Glaeser & Gyourko, *supra* note 14, at 21.

99. *Id.* at 17. Because the cost of a house on a 10,000 square foot lot versus an identical house on a 15,000 square foot lot is close in value, if high land values were a real driver of cost, the house on the larger lot would be worth more. But high prices were not associated with higher densities. A classic free market land model would suggest that densities would increase as land becomes more expensive due to an exogenous scarcity, but in California the researchers found that high cost areas were associated with lower not higher densities. One notable caveat to this study is that the authors only use data from single-family home sales and exclude all multifamily, cooperative or condominium sales. Thus, their approximation of "density" will likely skew lower. More expensive, but comparatively less dense, housing presents indirect evidence of stringent land use regulation

100. Defined as six months based on the underlying survey. *Id.* at 19–20.

101. *See* Glaeser & Gyourko, *supra* note 14, at 17. Glaeser & Gyourko derive this data from the 1989 Wharton Land Use Control Survey, a precursor to the Wharton Residential Land Use Regulatory Index ("WRLURI"). *See* discussion *infra* Section I.B.1(a).

102. These studies also employ national averages to describe very local issues. For example, some studies use RS Means Construction data for hard construction costs, which

a. Exploring stringency and constraints on housing supply through national surveys

In an effort to understand how regulations might shape housing costs, in the 2000's two groups of researchers completed two national surveys that both contributed to the analysis of the financial cost of land use regulation and produced

reflects national averages of construction costs per square foot rather than actual costs. To adjust these national averages for certain metro regions, RS Means inflates them by a set percentage. This inflation, however, does not consider higher than average labor cost or equipment costs in a particular location. Building in expensive metro areas is spatially constrained and requires higher costs for staging, storage, and transportation. *See About RSMeans Data*, RSMEANS DATA (Oct. 23, 2018, 4:00 PM), https://perma.cc/A37F-2ANS. Labor markets also tend to be stronger in high cost areas, which increases construction costs. According to the California Legislative Analyst's 2015 report, these factors heavily influence the cost of housing construction in California. *See* LAO REPORT, *supra* note 5, at 14. Also, a recent McKinsey study suggests that low construction productivity is a major driver of construction costs and time delays. FILIPE BARBOSA ET AL., REINVENTING CONSTRUCTION: A ROUTE TO HIGHER PRODUCTIVITY 2–3 (McKinsey Global Inst. ed., 2017). (noting that in its sample "over the past ten years less than one-quarter of construction firms have matched the productivity growth achieved in the overall economies in which they work, and there is a long tail of usually smaller players with very poor productivity. Many construction projects suffer from overruns in cost and time.").

In addition, while the studies assume efficient market conditions, in reality, home sale prices include all the transaction costs that the developer needs to recoup, such as the cost of financing (carrying capital, lender origination fees, issuance fees, insurance), investor ROI (which is typically higher in high cost metro areas), legal fees, taxes, and developer and contractor profit. *See, e.g.*, Memorandum from Keyser Marston Assoc., to Pleasant Hill BART Station Leasing Auth., (Nov. 12, 2014) http://www.co.contra-costa.ca.us/DocumentCenter/View/34410/Condominium-Feasibility-Study (describing a developer's pro forma feasibility analysis for condominiums adjacent to the Pleasant Hill BART station: "The output of the pro forma is the average condo sale price required for project feasibility. The pro forma estimates the costs to build the project including land acquisition, direct construction costs, and indirect and financing costs." These costs must be recouped for the project to be feasible.)

Though land use regulation can certainly increase these costs by prolonging the approvals process, many of these costs exist independent of land use regulation.

In 2005, Glaeser, Gyourko, and Saks made a better case for the regulatory tax formula as applied to the housing market in Manhattan. In Manhattan, where most people live in dense multifamily structures, the cost of adding an additional floor of units is the marginal cost of building up rather than the cost of purchasing additional land. This implies that choosing to add an additional floor would be a function of regulatory approvals rather than the availability of land. The study found that buildings today are on average shorter than they were from the beginning of the century to the 1970s. Moreover, the ratio of sales price to construction costs fluctuated between 1.5 and 1.7 throughout the 1980s and 1990s. This suggests that regulation prevents developers from maximizing density, which would tie the sale price to construction cost. The authors also suggest that the regulatory tax is not solely a product of laws on the books, but rather how these laws are applied and supplemented their data with case studies of wealthy New York constituents that organized to block a 17-story apartment building on the Upper East Side. Though the underlying zoning actually permitted the 17-story height, the wealthy neighborhood constituents used landmark preservation law to reduce the building height to nine stories. *See* Glaeser, Gyourko & Saks, *supra* note 91, at 334.

important datasets that other researchers would rely on.[103] In 2006 Pendall, Puentes, and Martin published the results of their survey of land use in 1,844 jurisdictions from the fifty largest metropolitan areas. The survey asked planning staff about their perceptions of the jurisdiction's use of zoning, comprehensive planning, growth containment measures, impact fees, building permit caps, or affordable housing incentives, and for perceptions of regulation (more or less) from the 1970s to 1990s.[104] The team then coded these results to create "regulatory clusters" (groups of jurisdictions with similar land use typologies) on a spectrum—traditional (typically the most exclusionary), reform, and deregulated jurisdictions.[105] To gauge the level of exclusionary land use regulation, the survey asked whether a jurisdiction would allow construction by right or by special permit of a forty-unit two-story apartment building sitting on five acres.[106]

In terms of permissive zoning, the most exclusionary jurisdictions were in the Northeast, whereas San Francisco, San Diego, Seattle, and other western metro areas were the least exclusionary.[107] At that time, nearly two-thirds of the Western metro regions surveyed had affordable housing incentive programs and nearly half had dedicated affordable housing funds.[108] Although zoning in Western metro regions might have been the most permissive in terms of density and variety of housing stock (in some cases even rivaling New York), these western jurisdictions used other regulatory tools—like urban growth containment measures, impact fees, and permit caps—that made it more expensive and difficult to develop housing.[109]

Pendall's 2006 study does not explain how affordable housing incentives can modify an underlying exclusionary land use system (for example, by exempting affordable housing from certain impact fees), but the study results suggest that some metro regions, though ostensibly committed to constructing affordable housing, are actually employing regulatory tools that decrease supply, or that there could be a mismatch between means and ends. Housing prices were highest in "reform" jurisdictions that have permissive underlying zoning but employ a variety of land use tools that include growth control (e.g., San Francisco and Denver).[110] And housing costs in these areas are higher than in the North East where traditional exclusionary zoning is employed.[111]

103. *See, e.g.*, Rothwell & Massey *infra* FN 196.

104. Rolf Pendall, Robert Puentes & Jonathan Martin, *From Traditional to Reformed: A Review of the Land Use Regulations in the Nation's 50 Largest Metropolitan Areas*, THE BROOKINGS INSTITUTION 7–8 (2006), https://perma.cc/3CKU-PZAK. The survey tool is also available at https://perma.cc/VG98-SWAM.

105. *Id.* at 19.

106. *Id.* at 7.

107. *Id.* at 13.

108. Since the time of the Pendall study, California has dissolved its Redevelopment Agencies—a primary source of affordable housing funding, which has negatively impacted many of these funds. *See* discussion *infra* Section III.

109. *See id.* at 14 (containment), 17 (impact fees), 19 (permit caps).

110. *Id.* at 31.

111. *Id.* at 30. Unsurprisingly Houston and Dallas-San Antonio, which the study considered nearly unregulated with the exception of impact fees, had the lowest housing

The Pendall study does not examine whether the jurisdiction requires environmental review, which in California impacts the type of housing that can be built regardless of the underlying zoning controls. Because of the national scope, the study also did not focus on how land use regulations are applied. For example, Pendall notes that San Francisco has permit caps, but fails to note that they apply only to certain commercial developments and not residential or mixed-use properties.[112] These issues are likely applicable to other jurisdictions as well.

At around the same time as the Pendall survey, Gyourko, Saiz, and Summers conducted another major national survey of land use practices to build the Wharton Residential Land Use Regulatory Index ("WRLURI") with the aim of determining the "average" degree of land use regulation in the nation by focusing on process and outcomes, rather than just the presence of regulatory constraints.[113] The WRULRI distributed a fifteen-question survey to planning officials in 2,649 jurisdictions.[114] Participants ranked their perception of the importance of certain factors that influence local government decisions on how to regulate the rate of residential development on a 1-5 scale.[115] They also ranked the involvement of certain organizations—including local councils, communities, state legislature, and local courts—in the land use regulation process. The survey asked respondents to (a) identify how much the cost of land development has increased in the last ten years as well as the average length of the entitlement process as compared to ten years ago; (b) provide the number of board and commission approvals required to approve projects with zoning changes versus projects without zoning changes; (c) identify whether the community has permit caps, minimum lot size requirements, and open space or affordable housing or infrastructure exactions; and (d) identify the number of applications for zoning changes filed and approved in the last year. To assess each state legislature's involvement in the planning process and the involvement of the state courts, Gyourko, Saiz, and Summers used Foster and Summers's fifty state survey[116] that determined the features typical of judicial

prices. While Pendall 2006 notes that housing prices were once low in Austin, the study notes that the growth of the high-tech sector has increased housing costs above Houston and San Antonio. Housing prices aside, reform jurisdictions and Texas had more in common in terms of social demographics. Both have higher concentration of college graduates in their central city than in their suburbs. Low-income people and people of color were dispersed more evenly throughout the suburbs in reform areas and Texas, whereas they are primarily concentrated in the central city in traditional jurisdictions.

112. *See, e.g.*, S.F. Planning Dep't, *Office Development Annual Limitation Program*, (Oct. 23, 2018, 4:00 PM), https://perma.cc/DN94-CDKW. In 1985, San Francisco enacted the Annual Office Limit Program which caps the annual permitting of office space on a square foot basis; this square footage limitation does not apply to residential housing.

113. Joseph Gyourko, Albert Saiz & Anita Summers, *A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index*, 45 URB. STUD. 693, 694 (2008).

114. *Id.* at 696.

115. *Id.* at 719–21. Some of these factors included supply of land, cost of new infrastructure, density restrictions, impact fees, opposition to growth, and school crowding.

116. *See* DAVID FOSTER & ANITA SUMMERS, CURRENT STATE LEGISLATIVE AND JUDICIAL PROFILES ON LAND-USE REGULATIONS IN THE US 3–8 (2007) (surveying land use laws—such as legal standards for exactions—in all 50 states).

review for exactions, fair share development requirements, building moratoria, and spot zoning.[117] They also used data on ballot box planning measures from a database that tracks initiatives nationwide.[118] The authors then created an index of eleven land use stringency indicators: local political pressure, state political involvement, state court involvement, local zoning approval (includes environmental review), local project approval, local assembly (democracy), supply restrictions, density restrictions, open space, exactions, and approval delay.[119]

The WRLURI's stringency index provided policymakers a general assessment and comparative analysis of whether a jurisdiction's land use system is more or less "stringent" and whether it imposes more lag time to approvals. In the least regulated community nationally, density restrictions were relatively permissive, open space requirements were unlikely to be imposed, and the lag time between application and issuance of a building permit was approximately three months.[120] The average community required two levels of approvals to grant a zoning change and at least one approval for a project without a zoning change, but did not put project approvals to a popular vote by the community, and minimum lot sizes, open space, and exactions were not onerous.[121] The typical lag between application and permit issuance was six months.[122] The most stringently regulated communities required a local popular vote to approve a project and one more level of approval for a project even without a zoning change; density restrictions and high minimum lot sizes were also more prevalent.[123] The average approval timeline in stringently regulated communities was 10.5 months.[124] Stringently regulated communities tended to have high stringency values for all the land use indicators.[125] Stringency was also strongly correlated with community wealth.[126] Interestingly, regulations were highly variable even within the same state, highlighting the ubiquity of local rather than state control.[127]

117. Gyourko, Saiz & Summers, *supra* note 113, at 701. *See also* FOSTER & SUMMERS, *supra* note 116, at 3. The Foster and Summers 50 state survey ranked states on a scale of 1 to 3: states that scored a 1 gave little deference to local municipalities; states that scored a 3 nearly always defer to the municipality. The number of cases consulted per state ranges from one in Alaska to a high of fifteen in California. Foster & Summers also used information on new legislative enactments and governor's actions to rank the state legislative involvement on the same scale.

118. Gyourko, Saiz & Summers, *supra* note 113, at 698 (citing TRUST FOR THE PUBLIC LAND, LANDVOTE DATABASE, https://tpl.quickbase.com/db/bbqna2qct?a =dbpage& pageID=10 (last visited Oct. 24, 2018)).

119. Gyourko, Saiz & Summers, *supra* note 113, at 698–701.

120. Gyourko, Saiz & Summers, *supra* note 113, at 709, 714.

121. *Id.* at 707.

122. *Id.* at 708.

123. *Id.* at 708.

124. *Id.* at 710.

125. Gyourko, Saiz & Summers, *supra* note 113, at 710.

126. *Id.* at 710.

127. *Id.* at 712 ("For example, in Massachusetts which has a state average that is 1.56 standard deviations above the national mean, 10 per cent of the communities (8 out of 79) still have WRLURI values below zero and thus are more lightly regulated than the average place in the country").

In 2018, the WRLURI continues to remain highly influential. The finding that stringency is associated with higher housing costs is particularly important because it drives much of the policy debate around land use in California.[128] The index also has been used in subsequent studies[129] and informs survey design for related research.[130]

For instance, many researchers have used the WRLURI to examine relationships between housing supply and other variables. In 2010, Saiz used the WRLURI and satellite data to establish that the most geographically constrained jurisdictions—meaning the jurisdictions with the least available land to develop[131]—also had the highest stringency values on the WRLURI.[132] Saiz found that regions with the most inelastic supply are also the most geographically constrained in terms of mountainous topography and internal water (e.g., flood plains, wetlands).[133] Areas with the most geographic constraints also had the highest stringency values on the WRLURI.[134] Housing and population growth were also predictive of more stringent regulation.[135] Though this does not establish causality, Saiz's results evoke the homevoter hypothesis, suggesting that people who invest in expensive high growth areas want more regulation to retain value in their investment.[136]

128. In an effort to drive down housing costs, the California legislature has aimed to reduce the number of local regulations for certain types of residential developments. SB 35 requires local jurisdictions not in compliance with RHNA obligations to approve certain residential developments containing ten to fifty percent affordable housing through a ministerial process. S.B. 35, 2017–2018 Reg., Leg. Sess. (Cal. 2017). SB 827—which would have created a by-right process to approve residential developments exceeding underlying height limitations in transit zones—failed last year; however, the bill will likely be resurrected in some form during the next legislative cycle. *See* Alissa Walker, *Sen. Scott Wiener Will Introduce New Version of Transit Density Bill*, CURBED LA (Oct. 9, 2018), https://perma.cc/R5KK-S4HP.

129. *See e.g.*, Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?* 82 J. AM. PLAN. ASS'N 11 (2016) (using the WRLURI to analyze levels of spatial segregation); Albert Saiz, *The Geographic Determinants of Housing Supply*, 125 Q. J. ECON. 1253 (2010) (using the WRLURI to analyze geographic constraints and housing supply restrictions); Matthew A. Turner, Andrew Haughwout & Wilber van der Klaauw, *Land Use Regulation and Welfare*, 82 ECONOMETRICA 1341 (2014) (using the WRLURI to gauge supply constraints).

130. *See e.g.*, QUIGLEY, RAPHAEL & ROSENTHAL, *supra* note 14, at 280; Kristoffer Jackson, *Regulation, Land Constraints, and California's Boom and Bust*, 68 REGIONAL SCI. & URB. ECON. 130 (2018); Terner Center, *Terner Residential Land Use Survey* (on file with the author).

131. To determine what land is unavailable, Saiz used satellite data to calculate areas lost due to water and mountains (any slope above fifteen percent). Saiz, *supra* note 129, at 1254.

132. *Id.* at 1282.

133. *Id.* at 1253.

134. *Id.* at 1261.

135. *Id.* at 1282.

136. Albert Saiz, *The Geographic Determinants of Housing Supply*, 125 Q. J. ECON. 1253 (2010), at 1255.

A few key limitations of the WRLUI study make reliance on that study problematic. First, the authors assign stringency variables to metropolitan statistical areas ("MSAs").[137] This index tells us that San Francisco was more highly regulated than the national average.[138] But the stringency level for San Francisco, for example, is composed of thirteen observations drawn from five counties. The stringency value might not necessarily characterize the regulatory process across those five counties. Second, the WRLURI only focuses on the approval process in theory. This approach is ill-suited to understanding and distinguishing drivers of delays that could be related to local variations in planning practice rather than what the law mandates. Third, the WRLURI identifies stringency at a single point in time in 2005. Using the data (or findings) to describe current conditions risks ignoring changes in the regulatory process that occurred after the point in time of the survey or data collection.[139] Fourth, the sub-index values derive from inherently subjective survey questions submitted to only one planning official per jurisdiction; the bias or perspective of a single person could substantially skew the stringency measurement.[140] Finally, although areas with the most stringent regulation have the highest housing costs, all regulations might not impact that cost in the same way.

b. Exploring stringency and constraints on housing supply through a statewide or regional survey

National surveys provide a big picture of the regulatory environment across the country, but regional and statewide surveys may more effectively identify the regulatory determinants of housing inelasticity,[141] and are necessary to understand how land use affects housing supply given the local and heterogeneous nature of land use regulation.[142] Local metropolitan surveys require more resources than a national survey, and "the enormity of [this] effort prevents it from being easily replicated in many . . . markets."[143] California has benefited from at least five regional and state-specific studies.[144]

137. Gyourko, Saiz & Summers, *supra* note 113, at 713.

138. *Id.* at 714 (finding that the least regulated jurisdictions were located within the Midwest, whereas the most regulated jurisdictions were in the coastal metro areas, with the most stringent land use systems located in the North East).

139. *See* Been, *supra* note 89, at 227 for a similar argument.

140. The potential for these types of biases is further explained in the context of CEQA in LANDIS, PENDALL, OLSHANKSY & HUANG, *supra* note 42, at 116. The authors note that planners' "livelihoods depend in no small part on administering [CEQA]."

141. Glaeser & Ward 2008, for example, used a highly resource-intensive method that enabled them to disaggregate minimum lot sizes, wetlands, and infrastructure regulation as the major determinants of permitting and costs in the Boston metro area. Edward L. Glaeser & Bryce Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. OF URB. ECON. 265 (2008).

142. GYOURKO & MOLLOY, *supra* note 89, at 13.

143. *Id.*

144. We omit discussion of several earlier California focused surveys conducted in 1989 (MADELYN GLICKFELD AND NED LEVINE, REGIONAL GROWTH AND LOCAL REACTION:

Quigley, Raphael & Rosenthal 2009 used a method similar to WRLURI to create a regulatory stringency index for the San Francisco Bay Area. The authors surveyed building officials in eighty-six jurisdictions in 2007, and then supplemented their data with surveys of land use officials conducted between 1992–1999.[145] The 2007 survey addressed a variety of factors that affect housing development, including duration, timing, specific regulations, political influence, project approval procedures, delays, inclusionary zoning, and open space.[146] Building officials provided information on the number of approvals required for certain types of projects and the presence of certain types of regulation connected to restricted growth.[147] They also conducted online surveys of professional builders and environmental consultants, who provided self-reported data on a total of 37 single-family (121 units) and 25 mixed-use developments (331 units) in 33 land use jurisdictions.[148] These questions asked about "perceived level of controversy" associated with certain project types, "regulatory reasonableness," "transparency," and "estimates [of] the 'all-inclusive cost of the entire entitlement process."[149] Indexing the results of both surveys, the authors created the Berkeley Land Use Regulation Index ("BLURI").[150]

The BLURI does not necessarily contradict the findings of the WRLURI, but highlights that local context is important when assessing land use regulation in California. The BLURI indicated that the average approval lag between application and permit was 2 years for a multifamily development and 2.5 years for a single-family home development.[151] Within this time frame, environmental approvals took 2.3 years for single-family homes and 1.9 years for multifamily.[152]

Other findings from the BLURI closely track the WRLURI. The numbers of approvals required to build a unit of housing closely correlated with high housing costs.[153] Regulatory stringency was consistently associated with higher costs for construction, longer delays in completing projects, and greater uncertainty about the elapsed time to completion of residential developments.[154] Political

THE ENACTMENT AND EFFECTS OF LOCAL GROWTH CONTROL AND MANAGEMENT MEASURES IN CALIFORNIA (Cambridge, MA: Lincoln Institute of Land Policy ed., 1992)) and 1992 (Ned Levine, Madelyn Glickfeld & William Fulton, *Home Rule: Local Growth Control. Regional Consequences*, (Report to the Metro. Water Dist. of S. Cal. & the S. Cal. Ass'n of Gov'ts 1996) (unpublished)).

145. John Quigley, Steven Raphael & Larry A. Rosenthal, *Measuring Land Use Regulations and Their Effects in the Housing Market*, HOUSING MARKETS AND THE ECONOMY 272, 280 (Lincoln Institute of Land and Policy ed., 2009). For the 1992–1999 surveys, *see* Glickfield & Levine, *supra* note 13; Ned Levine, *The effects of local growth controls on regional housing production and population redistribution in California*, 36 URB. STUD. 2047 (1999).

146. Quigley, Raphael & Rosenthal, *supra* note 14, at 280.

147. *Id.* at 282–85.

148. Quigley, Raphael & Rosenthal, *supra* note 14, at 287–289.

149. *Id.* at 288–89.

150. *Id.* at 289.

151. *Id.* at 292.

152. *Id.* at 292–93.

153. Quigley, Raphael & Rosenthal, *supra* note 14, at 295.

154. *Id.* at 297.

influence was another important factor, with jurisdictions in Marin County, the City of Richmond, and the consolidated City and County of San Francisco reporting the strongest political influence.[155] Berkeley and mixed-income cities like San Jose and Vallejo ranked in the middle in terms of political influence.[156]

Another more recent California-focused survey includes the California Land Use Regulatory Index ("CaLURI"). The CaLURI provides better insight into the geographic variability of land use stringency across California. Jackson sent surveys to planning staff in 540 cities and counties, and 420 jurisdictions responded.[157] The survey asked questions about the land use process and policies, including specific residential development standards like bulk, height, setback requirements, and floor area ratio restrictions.[158] The survey also asked whether the jurisdiction permitted low-cost housing alternatives, like mobile homes, as well as whether the jurisdiction restricts growth through its General Plan.[159] Other questions asked about affordable housing requirements, average approval times, permit caps, and planners' perceptions of the groups that wield the most political influence, as well as the main drivers of development regulation.[160] Jackson aggregated the sub-indices to create a stringency measure for each responding jurisdiction.[161]

Jackson found that the San Francisco Bay Area is the most stringently regulated region in California.[162] Whereas Southern California is more likely to restrict the form of new development, the Bay Area tends to prohibit development outright.[163] Notably, Jackson also found that the variation in regulatory stringency between coastal and inland communities was not statistically significant.[164] One major variation between coastal and inland communities is affordable housing mandates and low-cost housing alternatives. Coastal jurisdictions, where housing is the most expensive, are more likely to have affordable housing mandates and are more likely to permit mobile home parks than inland communities.[165] Jackson also found that contrary to previous studies, regulatory stringency is not a proxy for supply elasticity.[166] Instead geographic constraints are a more appropriate proxy.[167]

155. Quigley, Raphael & Rosenthal, *supra* note 14, at 297.
156. *Id.*
157. Jackson, *supra* note 130, at 131. The responding jurisdictions comprised more than ninety percent of California's population.
158. *Id.* at 133.
159. *Id*. at 142.
160. *Id*. at 143.
161. *Id*. at 132.
162. Jackson, *supra* note 130, at 133.
163. *Id*.
164. *Id.* at 134.
165. *Id.* at 145.
166. Jackson, *supra* note 130, at 141.
167. *Id*. Note that unlike Saiz who used GIS tools to measure geographic constraints, Jackson relies on planner's identification of "land supply" as a primary driver of land use regulation in the survey instrument.

c. Exploring supply constraints through the case study approach

Surveys focused within metropolitan regions or a single state may more effectively pinpoint the actual regulations that might constrain supply than national surveys. But even localized surveys cannot easily evaluate how laws are implemented at a project level. Mixed method case studies offer more insight. John Landis's 2000 report for the Department of Housing and Community Development ("HCD Landis Report") illustrates the value of case studies to explore land use regulations and residential development in California.

The HCD Landis Report is comprised of a case study of 46 housing developments approved between 1995-1997 in 31 cities and counties.[168] The authors selected the jurisdictions based on shared strong demand for housing, policies that were not anti-growth, and extensive experience processing high volumes of development applications.[169] The authors sent surveys to these pre-selected jurisdictions asking planners to identify a "typical" development in their community.[170] The authors next traveled to the community, reviewed and copied the case file for the typical development, sent the case file to the developer to make any needed corrections, and conducted in-person interviews to supplement any gaps in information.[171]

Landis found that the average approval time for the 24 single-family home case studies was 11 months, with each project subject to an average of 3.3 reviews.[172] For multifamily units, this timeline shrunk to 6.7 months, with only 2.3 separate reviews.[173] One of these reviews was typically non-legislative—meaning the approval did not require a rezoning or a General Plan Amendment—such as design review or approval by a neighborhood group.

Notably, this work explored the role of CEQA on lag times.[174] Some results were unsurprising. For example, the type of CEQA review directly coincided with approval timeline, with average delays of three years and twelve continuances for EIRs.[175] But other results were surprising. Of the twenty-two

168. JOHN D. LANDIS ET AL., RAISING THE ROOF: CALIFORNIA HOUSING DEVELOPMENT PROJECTIONS AND CONSTRAINTS 1997–2020, 95–96 (Cal. Dep't of Housing and Cmty. Dev. ed., 2000).

169. *Id.*

170. LANDIS ET AL., *supra* note 167, at 95. The authors specified a typical project in their survey instrument as: single or multi-family projects larger than 25 units; projects for which the review process had been fully completed; and projects that had experienced a typical approval process.

171. *Id*. at 96.

172. *Id*. at 101. The authors define 'review' as "the number of separate discretionary actions by the local planning commission, city council (or board of supervisors) or any other . . . review body, such as a design review board."

173. *Id.* at 107.

174. Landis had specifically explored the role of CEQA in earlier work. *See* LANDIS, PENDALL, OLSHANSKY & HUANG, *supra* note 42.

175. LANDIS ET AL., *supra* note 168, at 102. For a discussion of CEQA review, *see* Part I.A.2 *supra.*

multi-family case studies, only one project had to conduct an EIR.[176] Eight projects received NDs, six received MNDs, and six projects were processed under a tiered EIR from a prior Specific Plan.[177] In contrast, three single-family home projects conducted an EIR, twelve projects used a tiered EIR, and eight projects were issued NDs and MNDs.[178]

This study's CEQA results have interesting implications for the overall planning process. A third of multifamily projects were processed under a Specific Plan, compared to two-thirds of single-family homes that went through the Planned Unit Development ("PUD") process.[179] The difference in approval times suggests that Specific Plans can significantly cut down on approval delays, although single-family home PUDs were approved much faster than re-zones or General Plan Amendments.[180] The case studies also suggested that certain jurisdictions were not complying with the California Permit Streamlining Act (Cal. Gov. Code § 65950 et seq.), which required all jurisdictions—including charter cities[181]—to approve projects within certain time windows.[182]

Development selection for this case study limits the capacity for generalizations from the findings. First, the authors selected the jurisdictions based on their openness to new development, which likely skews the approval timeline, causing it to appear shorter. Second, the individual project case studies themselves were selected by local planners, who could import certain biases into the projects they recommend for analysis. Third, the study only looked at one project in each jurisdiction, limiting the ability to assess variance around the "typical" project.

Although the data is over twenty years old, and the contemporary development climate has drastically changed in the intervening years, the McKinsey Global Institute recently used the HCD Landis Report to predict the

176. *Id*.

177. *Id*.

178. *Id*.

179. *Id*. Planned Unit Development (PUD) in California refers to a zoning classification and a type of development that is intended to provide cities a degree of flexibility not typical of "conventional" zoning by, for example, permitting development of differing form and uses on a single or associated parcels. The definition and operation of the PUD will vary considerably depending on the city and local ordinance. *See* KOSTKA, *supra* note 19, § 7.40. The cities we studied, discussed in Parts II, III and IV, illustrate its diverse meaning at the local level. A PUD in San Jose, for example, always requires a re-zoning followed by a second permit that solidifies the design requirements. SAN JOSE MUN. CODE § 20.120.110 (2013). PUDs in Palo Alto—called Planned Community Districts—also require a rezoning but not a subsequent permit. *See* PALO ALTO MUN. CODE § 18.38.065 (2014). But a Planned Unit Development in Oakland, San Francisco, and Redwood City operates much more like a conditional use permit. *See* S.F. MUN. CODE § 304; REDWOOD CITY MUN. CODE §§ 46.1–46.7 (2005); OAKLAND MUN. CODE § 17.142.004.

180. LANDIS ET AL., *supra* note 168, at 102.

181. CAL GOV'T CODE § 65921 (1977).

182. LANDIS ET AL., *supra* note 168, at 108–09. For example, Negative Declarations must be adopted within 180 days from when the project application is accepted as complete, with certain extensions acceptable for applicant delays. CAL. PUB. RES. CODE § 21151.5 (1997); CEQA GUIDELINES § 15107 (2010). A Final EIR must be certified within one year of the project application's acceptance as complete. CAL. GOV'T CODE § 6595 (1985).

costs of current land use approval processes and the monetary benefits of reform.[183] Basing these projections on the HCD Landis Report as well as undisclosed expert interviews, McKinsey estimated the current approvals process at six months for simple projects and more than three years for complex projects.[184] The McKinsey study found that shortening the approval process in California could reduce the cost of housing by more than $12 billion through 2025 and accelerate project approvals by an average of four months.[185] The most significant gains of improving land use processes would accrue to projects that require a zoning change or a General Plan Amendment and projects that require an EIR.[186] Savings to projects undergoing streamlining under a Specific Plan are minimal, indirectly suggesting that streamlined approval processes are working efficiently.[187] McKinsey likely drew those last conclusions directly from Landis's study, which found that amongst the case study projects, use of long-term planning like Specific Plans reduces delay.[188] These results suggest that jurisdictions should consider investing in Specific Plans that enable streamlined review for discretionary projects and/or ministerial approvals.[189] These results also suggest that land use regulations may be stringent but still efficient in terms of approval times when there is a comprehensive plan for future growth in place.

Remarkably, although developers frequently refer to CEQA as "the third rail of California politics,"[190] current empirical research into how CEQA constrains supply continues to be fairly limited. The California Legislative Analyst's Office ("LAO") has identified CEQA as a culprit in delaying or reducing residential construction in the state.[191] The LAO conducted an independent review of CEQA documents submitted to the state between 2004-2013 and found that agencies took 2.5 years to approve a project-specific EIR.[192] While this figure includes non-residential projects that could potentially provoke more controversy, it is not inconsistent with the findings of the BLURI survey. But as noted in the Landis

183. *See e.g.*, Jan Mischke et al., *A Tool Kit to Close California's Housing Gap: 3.5 Million Homes by 2025*, MCKINSEY & COMPANY 28–29 (Oct. 2016); CAL. DEPT. HOUSING & CMTY. DEV., CALIFORNIA'S HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES (2017).

184. MISCHKE ET AL., *supra* note 183, at 28. The report does not define a simple or complex project.

185. *Id.* at vi.

186. *Id.* at 28–29 (2016) (finding that improving approvals for zoning or general plan amendment projects would reduce the timeline from 9 to 6 months, or about thirty-three percent. Improving the process for EIRs would reduce the timeline from 21 to 15 months, or about thirty percent). McKinsey also used undisclosed expert interviews in reaching these conclusions. *See id.* at 28.

187. *Id.* at 28–29.

188. LANDIS ET AL., *supra* note 168, at 110 ("[T]wo-thirds of the single-family case studies were processed as part of a pre-approved specific, community, or area plan . . . . [F]or many of the reviewed projects, the most onerous, time-consuming, and controversial part of the development approvals process had already been completed.")

189. MISCHKE ET AL., *supra* note 183, at 29–30.

190. Bill Allen & Maura O'Connor, *CEQA: That 70's Law*, L.A. TIMES (Mar. 30, 2011), https://perma.cc/9GS9-VVWK.

191. *See* LAO REPORT, *supra* note 5, at 15.

192. *Id.* at 18.

study and as discussed below, an EIR is not the only CEQA outcome.[193] In 2016, BAE Economics published a study that concluded that no evidence supported arguments that CEQA was a barrier to development (defined to include more than housing), examining four development projects involving environmental review and finding that direct environmental review costs ranged from .025 to .05% of total project costs.[194]

In summary, the relevant research on the relationship between regulation and housing costs has found a strong connection, but that research has relied on inferences drawn from the gap between construction costs and sales prices or on surveys of planners and other stakeholders about their understanding of the regulatory process. While some research uses mixed method case studies, the methods still limit generalizability. Overall, the research has also found correlations between high-income levels and property values with regulation, significant variation across jurisdictions in terms of regulatory frameworks and stringency, high levels of complexity in the land-use regulatory process, and possible benefits for facilitating approvals through the use of specific or neighborhood-level planning processes.

2. Understanding land use regulation as a tool of exclusion

Another important line of research examines whether stringency in land use regulation is associated with racial and/or economic exclusion, which in turn can contribute to spatial inequality.[195] For example, using income and racial segregation data and the Pendall 2006 land use survey, Rothwell and Massey in 2010 found a strong relationship between density and income segregation.[196] The higher a metropolitan area's density score, the lower the degree of class segregation.[197] These findings support the exclusionary suburb paradigm, in which wealthy suburbs use zoning to maintain low-density development that effectively excludes low-income people and minorities.[198]

193. MISCHKE ET AL., *supra* note 183, at 28–39.

194. Janet Smith-Heimer et al., *CEQA in the 21st Century*, ROSE FOUND. FOR COMMUNITIES & THE ENV'T (2016).

195. We define spatial inequality to refer to scholarly work that finds that where a person lives may limit a person's access to economic, educational, and quality housing opportunities, and may impact health and life outcomes. This incorporates research that explores racial residential segregation, exclusion, and gentrification.

196. Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1123 (2010).

197. *Id.*

198. *See* John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, n.2 (2014). ("Decades of scholarship—legal and sociological—outline how these policies left low-income families stranded in faltering cities whose abandonment by suburban homeowners-to-be at least left behind a large supply of low-cost housing") (citing FISCHEL, *supra* note 92); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L. J. 385, n.3 (1977); *see also* S. Burlington Cty. NAACP v. Twp. of Mount Laurel (Mount Laurel II), 456 A.2d 390 (N.J.

Spatial inequality, however, is not limited to exclusive suburbs within metropolitan areas. Gentrification within central cities, for example, is associated with segregation, exclusion, discrimination,[199] and the displacement of low-income communities.[200] Discussing spatial inequality thus requires consideration of exclusionary strong-market cities[201] and the growing suburbanization of the poor.[202] One theory (built on prior legal and economic studies) about exclusionary zoning within the strong market central city might explain the persistence of spatial inequality as more affluent populations move into formerly low-income neighborhoods: Demand for development controls increases as cities become denser and richer, evidenced by the tightening of development controls as affluent individuals return to cities, reversing decades of urban flight. [203] Gentrification, under this theory, would stem from the gradual tightening of restrictions that reflect the preferences of newly arrived affluent urban workers who prefer wealthier established neighborhoods that disallow new development and who flock to the lower-income neighborhoods adjacent to these wealthy anti-development areas, driving up the rents and disrupting the normal filtering process.[204] This theory of

1983); S. Burlington Cty. NAACP v. Twp. of Mount Laurel (Mount Laurel I), 336 A.2d. 713 (N.J. 1975). *See also* BEEN, *supra* note 89, at 218.

199. *See generally* john powell, *Sprawl, Fragmentation, and the Persistence of Racial Inequality*, *in* URBAN SPRAWL: CAUSES, CONSEQUENCES, AND POLICY RESPONSES, 104–15 (Gregory D. Squires ed., 2002); Elvin K. Wyly & Daniel J. Hammel, *Gentrification, Segregation, and Discrimination in the American Urban System*, 36 ENV'T AND PLAN. A, 1215–39 (2004) (finding evidence of intensified discrimination in lending and exclusion in gentrified neighborhoods).

200. *See* The Urban Displacement Project, *Executive Summary* (2015) (using statistical analysis of demographic and land use datasets to find that "more than half of low-income households, all over the nine-county region, live in neighborhoods at risk of or already experiencing displacement"); *but see* Lance Freeman, *Displacement or Succession*, 40 URB. AFF. REV. 463, 467 (2005) (using longitudinal survey data to find that "there is relatively little in the way of persuasive empirical evidence that suggests [that displacement] is indeed how gentrifying neighborhoods change")

201. *See* HUTSON, *supra* note 87, at 13–14; Been, *supra* note 89, at 219–23 (discussing the scholarly works exploring exclusionary zoning within cities); MANGIN, *supra* note 197.

202. Elizbeth Kneebone & Emily Garr, *The Suburbanization of Poverty: Trends in Metropolitan America, 2000 to 2008*, BROOKINGS INST. (2010) (finding that "while poverty has grown on the whole, the most recent data also make clear that American poverty is becoming an increasingly suburban phenomenon").

203. MANGIN, *supra* note 198, at 92.

204. *Id.* at 95. Filtering is a theory based on supply-side solutions to the inadequate supply of affordable housing stock, in which the construction of middle- to upper-quality housing stock opens up opportunities for lower-quality housing stock as middle to upper-income households occupy better housing. *See* William C. Baer & Christopher B. Williamson, *The Filtering of Households and Housing Units*, 3 J. OF PLAN. LITERATURE 127, 128–29 (1988). However, economists have noted that filtering may be an inefficient tool to support increased housing for low-income households in markets with high development costs. In such contexts, any gains in affordable housing stock might be accompanied by harms associated with downgrading and abandonment of neighborhood environments providing the low-income housing stock. *See* Galster & Rothenberg, *Filtering in Urban*

exclusionary zoning in central cities influences current legal research in this arena.[205]

Based on this theoretical framework, by opposing market-rate development in their neighborhoods and rejecting a supply-side solution to the gentrification problem, some anti-gentrification advocates, community development, and affordable housing practitioners may be working against their own interests.[206] The author did not propose inclusionary housing incentives as a response to the exclusionary zoning within the central city but suggested reducing regulation incrementally—particularly aesthetic and historical preservation.[207] Easing local control over land use and supporting a supply-side solution (even for market-rate development) to gentrification and displacement is a dominant theme in California's public policy debate and public discourse about potential solutions to the housing crisis, but it is not without controversy.[208]

For some, the term "exclusionary zoning" suggests that the remedy would be more permissive density. But a 2015 study suggests a more complex problem.[209] Comparing land use stringency data from the WRLURI survey with a segregation index, Lens and Monkkonen found that the overall WRLURI score—a measurement of local regulatory stringency—did not correlate with income segregation, which suggests that not all land use regulations contribute to class

Housing: A Graphical Analysis of a Quality-Segmented Market, 11 J. OF PLAN., EDUC. & RES. 37, 48–49 (1991).

205. *See e.g.*, Been, *supra* note 89, at 222; Wendall Pritchett & Shitong Qiao, *Exclusionary Megacities*, 91 S. CAL. L. REV. 34 (2018) (forthcoming).

206. *See* MANGIN, *supra* note 198, at 93–94. Others have made similar arguments but acknowledge the methodological challenges of determining whether increasing supply contributes to increased housing costs. *See* Vicki Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism: Housing Supply and Affordability*, NYU FURMAN CTR (Draft Oct. 26, 2017), https://perma.cc/YDU7-PJNX; *see also* Been, *supra* note 89, at 244–45.

207. MANGIN, *supra* note 198, at 119–20.

208. The Yes In My Backyard (YIMBY) movement is an example. *See Let's End California's Housing Crisis: Support SB 827 – Sen. Wiener's Transit Rich Housing Bonus Bill*, CAL. YIMBY (Oct. 27, 2018), https://perma.cc/J5LA-3G6A; *see also* LAO REPORT, *supra* note 5 (using data from The Displacement Project to conclude that increasing supply of market-rate housing would curtail displacement of low-income households); *but see* Miriam Zuk & Karen Chapple, *Housing Production, Filtering and Displacement: Untangling the Relationships*, BERKELEY IGS RES. BRIEF (May 2016), https://perma.cc/SJX5-YP3S (responding to this report and offering a more nuanced analysis: the data showed market-rate and subsidized housing reduce displacement pressures at the regional level, but not at the block level, at least not in San Francisco, and that market-rate production is associated with higher housing costs for low-income households, but lower median rents, in subsequent decades). *See also* Miriam Zuk, Ian Carlton, & Anna Cash, *SB 827 2.0, What are the implications for communities in the Bay Area?* THE URB. DISPLACEMENT PROJECT (Oct. 1, 2018) https://perma.cc/3H9A-AJKT (finding that the SB-827 proposal, to reduce discretionary review of certain types of infill development near transit, would have resulted in a six-fold increase in feasibility of market-rate housing in affluent areas, and a seven-fold increase in inclusionary housing in moderate income areas, but that 60% of the financially feasible development was located in gentrifying or low-income areas, and over 65% of residential demolitions for development would have occurred in these neighborhoods).

209. LENS & MONKKONEN, *supra* note 129, at 12.

segregation.[210] Density restrictions are strongly correlated with income segregation and seclusion of the super elite.[211] But the correlation was equally strong for jurisdictions that mandated high minimum densities as well as those that kept densities low.[212] Understood within the context of the Rothwell & Massey work, this suggests that other restrictive forces are at play even in areas with permissive density—like central cities. Notably, income segregation is higher where local governments are more involved in entitlement approvals and communities put more pressure on the government to control growth[213] and lower in places with a higher degree of state involvement in local planning decisions.[214] Jurisdictions that require multiple levels of government approvals to build are more segregated.[215] Finally, the authors observed higher levels of income segregation in MSAs with central cities that regulate land use more stringently than surrounding suburbs.[216] The authors concluded that inclusionary incentives and reduced local control might be the most effective at reducing segregation.[217]

There is little research that aims to identify *which* land use regulations may be contributing to exclusion within cities generally, and insufficient recent research that focuses specifically on California.[218] There are two recent reports that explore the role of CEQA litigation as a tool to block infill development, although both examine CEQA's impact on more than housing development. In 2015, the law firm Holland & Knight produced a widely circulated report analyzing all CEQA lawsuits filed within a fifteen-year period and found that eighty percent of CEQA litigation in the past fifteen years targeted infill development.[219] While scholars have criticized this report for its overly inclusive definition of infill development,[220] this observation finds some support in earlier studies that found most CEQA litigation to occur in large cities.[221] Although it does not focus

210. *Id.* at 11.
211. *Id.*
212. *Id.* at 11–12.
213. LENS & MONKKONEN, *supra* note 129, at 12.
214. *Id*.
215. *Id.*
216. *Id*.
217. *Id.* at 11–12.
218. Anika Singh Lemar, *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 IND. L. J. 1525, 1563 (2015). Lemar, for example, explored the use of aesthetic regulations within walkable "conservation neighborhoods" with close proximity to the urban center and transit—specifically conservation districts— to constrain supply, but none within California. Lemar posits that urban residents are using conservation districts as a new public law form of private Covenants, Conditions, and Restrictions ("CC&Rs")—a hypothesis she finds support for in factual findings from published state opinions. Unlike CC&Rs, however, which must be adopted unanimously, a vocal minority of the neighborhood can organize to form a conservation district.
219. Jennifer Hernandez, David Friedman & Stephanie DeHerrera, *In the Name of the Environment*, HOLLAND & KNIGHT (2015).
220. *See* Sean Hecht, *Anti-CEQA Lobbyists Turn to Empirical Analysis, but are Their Conclusions Sound?*, LEGAL PLANT (Sept. 28, 2015), https://perma.cc/B7P3-7MB8.
221. *See* LANDIS, PENDALL, OLSHANSKY & HUANG, *supra* note 42, at 110–11 (1995).

exclusively on housing development, it appears consistent with the observations of Mangin 2014 and Lens & Monkkonen 2016 that dense cities are using land use regulation as an exclusionary tactic. The 2016 report from BAE Economics, however, found low rates of litigation and infrequent use of EIRs.[222]

C. How the limits of past research make it challenging to inform proposed legal reform

Past research tells us that stringency in land use regulation is correlated with certain outcomes—be it reduced housing supply and increased housing costs, or increased income segregation and spatial inequality. But it does not establish causation, nor does it identify which land use regulations, specifically, are correlated with these outcomes. It may be that increasing housing supply across multiple income levels or redressing spatial inequality within our urban communities is not as simple as drastically reducing regulation. And yet proposed legal reforms continue to target process, advancing solutions like reducing the number of approvals, more state oversight over local zoning decisions,[223] and CEQA reform.[224] Each of these elements of process serve important goals, like open government, public participation, and disclosure and mitigation of potential environmental harms. If we are uncertain which element of process increases

222. *See* JANET SMITH-HEIMER ET AL., *supra* note 194. A much earlier study used a survey and found that responses indicated CEQA litigation is relatively rare, with fifty-eight percent of the responding communities reporting no CEQA litigation between 1985-1990. *See* LANDIS, PENDALL, OLSHANSKY & HUANG, *supra* note 42, at 90. Eighty percent of jurisdictions reported zero or one lawsuits within that five-year timeframe. The authors estimated that across California, there is one lawsuit per 354 CEQA reviews. Attempts to find demographic variables driving the variation across communities were unsuccessful; the only statistically significant correlation showed that CEQA litigation is more common in larger cities, in white-majority cities, and in Democratic-majority cities. But this data predates recent CEQA streamlining initiatives as well as case law that made business, rather than environmental interests, easier to leverage. *See e.g.*, Save the Plastic Bag Coalition 254 P.3d at 1011-12 where the California Supreme Court refused to apply the federal "zone of interests" test for CEQA litigation.

223. For example, decisions at the state-level—although perhaps less biased towards local political power players—could take much longer than decisions at the local level. *See e.g.*, FISCHEL, *supra* note 5, at 276 (regional governance structures in Oregon and Washington have had mixed results, and New Jersey Mt. Laurel Fair Share requirements have failed to yield integrated demographic mixes). Research shows that Massachusetts Chapter 40B has been effective, although it is difficult to disentangle the coercive threat of state action with local incentives to construct affordable housing. *See* Carolina K. Reid, Carol Gallante & Ashley F. Weinstein-Carnes, *Borrowing Innovation, Achieving Affordability: What We Can Learn from Massachusetts Chapter 40B*, TERNER CTR. FOR HOUSING INNOVATION (2016).

224. *See* Dan Walters, *Brown Talks CEQA Reform, but Hasn't Done It*, CALMATTERS (Aug. 2, 2018) https://perma.cc/EF2X-VD2Y (discussing Governor Brown's call for comprehensive CEQA reform). Moderate reforms have succeeded in the legislature. *See e.g.*, A.B. 2341 2017–2018 Leg., Reg. Sess. (Cal. 2018) (reducing significance of certain aesthetic impacts); A.B. 2782 2017–2018 Leg., Reg. Sess. (Cal. 2018) (allowing an EIR to discuss non-environmental benefits of a proposed project).

housing costs, or exacerbates or contributes to segregation or gentrification, eliminating or curtailing process may sacrifice one set of policy goals without achieving another.

The research showing that permissive density does not equate with spatial equality is particularly troubling for California. California's signature housing legislation, the Housing Element of the General Plan, requires jurisdictions to plan for and zone for density to accommodate their portion of their regional housing need.[225] In addition to well-noted problems, (for example, Housing Element law places no affirmative production requirement on the jurisdiction beyond re-zonings),[226] this model implicitly assumes that density is a proxy for affordability.[227] As the most recent work around exclusionary central cities suggests, zoning for density does not necessarily result in opening up access to cities, as there are likely non-zoning barriers to development within exclusionary central cities.

More inquiry into how the land use approval process plays out within individual cities is therefore necessary to implement effective state-level reform. In essence, we are grappling with a series of local problems that have regional and statewide implications. Unlike surveys that often depend on generalizations across multiple jurisdictions and necessarily depend on perceptions of the regulatory process by the surveyed stakeholders, case studies can effectively unpack the local variation and the potential impacts of specific regulations within these local contexts and ground-truth actual outcomes of land-use regulatory processes. And because land use planning has changed over the past twenty years, current data that reflects these changes is needed to explore these issues.

Part II: Methods

Crafting effective and targeted policy interventions to promote equitable infill development requires understanding what legal barriers to increased housing production exist; what legal tools afford meaningful participation in land use planning; and how current development patterns are affecting affordable housing opportunities within TOD areas or areas receiving substantial transit investment. Our study seeks to address these issues by examining whether local land use law and/or environmental regulations governing infill development individually, or in conjunction, present significant obstacles to equitable infill development. Based on our review of existing research (discussed in Part I) we hypothesized that:

225. *See* CAL. GOV'T. CODE § 65583 et seq. The affirmative rezoning obligation only applies, however, if a jurisdiction has failed to meet certain obligations—for example, by failing to zone for sufficient sites to meet its share of the Regional Housing Needs Assessment (RHNA) for the prior planning period.

226. Paul G. Lewis, *California's Housing Element Law: The Issue of Local Noncompliance* 10, PUB. POL'Y INST. OF CAL. (2003).

227. *Id.* (finding that "cities with significant housing unit goals are left with . . . rezoning existing neighborhoods for higher density housing").

1. There are significant legal, planning, and regulatory barriers to advancing equitable infill development within transit-accessible neighborhoods in high cost coastal cities;
2. The most significant barriers will emerge in local land use regulations that limit or slow infill development in transit-accessible neighborhoods and *not* in state environmental regulation; and,
3. State law aimed at incentivizing infill development in transit-accessible neighborhoods is applied differently (and sometimes ineffectually) within these local contexts.

Based in part on these descriptive hypotheses, we also began with a baseline hypothesis that future policies to advance state-level GHG reduction goals in a way that also promotes equitable infill development will require policy interventions that meet a number of important requirements, including (a) accounting for the heterogeneity of local regulations; (b) accounting for varied application of state streamlining provisions (or varied planning practice) in relationship to the political culture and revenue demands of the specific local context; and (c) either are (i) constructed at the local level to advance equitable infill development in transit-accessible locations; or (ii) are carefully targeted approaches to reducing local discretion over proposed infill development in transit-accessible locations that nonetheless protect the voice of vulnerable communities, minimize or prevent displacement of existing low-income residents, and ensure access to transit for future low-income residents. To test our hypotheses, we employed a case study approach that joins qualitative[228] and legal research methods, employing overlapping phases of data collection and sequenced analysis.[229]

A. Choosing study sites: focusing first on the Bay Area

Our first phase of research involved selecting strong market charter cities[230] of various sizes within California major metropolitan areas (specifically, urban core cities and first ring suburban communities) experiencing robust

228. *See* JOHN W. CRESWELL, RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES, 185-204 (Vicki Knight et al. eds., 4th ed. 2014).

229. *See* ROBERT K. YIN, CASE STUDY RESEARCH: DESIGN AND METHODS (SAGE Publications, Inc. 6th ed. 2014); BRUCE L. BERG & HOWARD LUNE, QUALITATIVE RESEARCH METHODS FOR THE SOCIAL SCIENCES 325 (Pearson ed., 8th ed. 2011).

230. Charter cities within California enjoy some freedom to legislate at the local level over "municipal affairs" even if a conflict with state law may exist under Article XI, section 5 of the California Constitution. 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.* CAL. GOV'T CODE §§ 65803, 65860(d); City of Irvine, 30 Cal. Rptr. 2d at 799–800.

economic growth. The cities also needed to have transit accessibility or have capacity for TOD[231] and be in high demand.[232]

We began our work within the Bay Area, with a focus on San Francisco and San Jose. In 2015, the California Legislative Analyst's Office attributed high housing costs statewide in large part to the lack of housing supply in California's coastal communities.[233] This report identified the San Francisco-Metropolitan Division ("MD") and the San Jose-Sunnyvale-Santa Clara MSA as having the first and second highest housing costs in the state in 2015, respectively. Using American Community Survey data and California Department of Housing and Community Development's State Income Limits for 2017, we selected additional cities within the San Francisco-Oakland-Hayward MSA and San Jose-Sunnyvale-Santa Clara MSA using multiple criteria, including: demographic criteria, (population size, average household income, percentage of the population living in poverty, and area median income), land area, and population density.[234] To be considered for the study, each city needed a minimum population of 50,000 people and a minimum land area of 7 square miles.[235]

We used California's Regional Housing Need Allocation ("RHNA")[236] to steer us towards jurisdictions that have transportation and other infrastructure in place or planned, and can sustainably support increased housing supply[237] including infill development.[238] All of our first five selected cities face acute

231. PETER CALTHORPE, URBANISM IN THE AGE OF CLIMATE CHANGE (Island Press ed., 2d ed. 2010).

232. MALO HUTSON, *supra* note 87, at 20; PAUL KNOX & LINDA MCCARTHY, URBANIZATION: AN INTRODUCTION TO URBAN GEOGRAPHY (Pearson, 3d 2012).

233. LAO REPORT, *supra* note 5, at 3.

234. Area Median Incomes, or AMI, are provided by California's Department of Housing and Community Development State Income Limits, which provides income eligibility criteria for affordable housing programs. *See generally*, Memorandum from Jennifer Seeger, Assistant Deputy Director Division of Housing Policy Development to Interested Parties (June 9, 2017), https://perma.cc/T9EU-AK4E.

235. Cities that are too small (in population or land area) may not provide enough data for any meaningful analysis.

236. RHNA is a goal of housing production that each jurisdiction within the state is mandated to achieve through the local jurisdiction's Housing Element of its General Plan.

237. Senate Bill 375 mandates that each of the state's 18 Metropolitan Planning Organizations develop a Sustainable Communities Strategy that links housing development with transportation investments. The Association of Bay Area Governments' (ABAG) Regional Housing Need Plan: San Francisco Bay Area 2014-2022, states its RHNA allocation methodology complies with SB-375 because it uses factors that "aim to expand housing and transportation options; increase access to jobs, particularly for low-income workers; and promote housing growth in places with high quality services, such as parks and schools. . . . [with] a fair share distribution between large cities and medium cities with high job growth and transit access." *Regional Housing Need Plan for San Francisco Bay Area: 2014-2022*, ASS'N OF BAY AREA GOV'TS at 3, https://perma.cc/B2V6-9UCP.

238. We used the RHNA to identify areas with adequate infrastructure (or planned infrastructure) but are mindful of the potentially disparate racial impact of housing allocation. *See* Press Release, Haas Institute for a Fair and Inclusive Society, New Research Shows Racial Disparities in Bay Area Housing Allocation Methodology (Aug. 23, 2017), https://perma.cc/VRL8-BWED.

affordability issues, and all cities have complex land use approvals processes that typify the type of "stringent" regulation called out by existing research. Our first five cities were San Francisco, San Jose, Oakland, Redwood City, and Palo Alto.[239]

B. Analyzing the law: creating planning and development ordinance summaries

We first researched local ordinances and planning code provisions most relevant to residential/mixed use development approvals, starting with the most macro planning tools (the General Plan) and then drilling down to the micro level (use and development controls). We created a summary of planning and development controls in each jurisdiction, including permitted and restricted uses, height limitations within specific neighborhoods, maximum commercial and residential density and lot coverage, minimum parking requirements, exactions, and other dedication requirements. We also identified and cataloged all characteristics of local processes that would appear to increase affordable housing supply within the city, or preserve existing affordable housing, including inclusionary housing ordinances, local referenda to generate affordable housing supply, rent stabilization ordinances, anti-demolition ordinances, and neighborhood planning that taps into state-level streamlining initiatives. This step also identified the extent of a jurisdiction's "as of right" development—meaning development that does not require a discretionary permit from a local approval body. For the vast majority of developments that require a discretionary approval, these code summaries also helped identify general approaches to density and other building form controls that drive the discretionary approval process, the internal process for obtaining a building entitlement, and the extent to which cities use long term planning to expedite environmental review. These summaries informed development data collection, later analysis, and interview questions.

C. Analyzing the projects: building the entitlement database

After completing the planning code summary for a city, we built a database for each selected jurisdiction that allows us to analyze land use and environmental review requirements for residential developments along with important characteristics, such as time to entitlements completion and size. This process required an emergent design, and went through three iterations to address variation in data access across cities and newly available data.

1. Defining five or more residential units

We chose the five-unit threshold in order to capture projects that most impact California's housing and climate goals. The five-unit threshold does not

239. We limit our findings in this article to these five cities, but are currently completing research within Los Angeles, Long Beach, Pasadena, and Santa Monica.

capture scattered site single-family homes, duplexes, or accessory dwelling units that are not developed as part of a larger development project. These scattered developments move through entitlement differently; they do not consistently present the type of dense infill development that can be the subject of the policy or political debate, and likely warrant their own research study.[240]

We have gathered data on single-family subdivisions or duplexes where they are part of a larger development that produces more than 5 units of housing because on net they are adding substantially more housing and density than what was there before (typically vacant or commercial land in our project years). This in turn, potentially advances housing supply and climate goals. For example, Oakland's mini lot ordinance allows a developer to subdivide a single lot to create "mini" lots that would not otherwise satisfy minimum lot requirements.[241] Developers in our data years used this process frequently to subdivide a lot that would normally only permit one or two single-family homes to create five or more single-family homes. This is an important process that significantly densifies neighborhoods.

We included all projects that contained an addition of five units to the housing stock. We did not net out demolished units from the new addition of units. Frequently, the exact number of units being demolished was not available, so for consistency, we chose to capture that the project would include demolition but disregard demolished units for the purposes of total unit count. For example, a proposal to demolish a duplex and replace it with a ten-unit building would be counted as ten units, not eight units, although we would also capture that the prior use was residential and involved demolition. If the proposal was to add five or more units to an existing residential development, we would not count the existing units in the total unit count. This would apply where there was a proposal to the convert commercial space to residential units in an existing mixed-use building, or build new units on a vacant portion of a residential site. These types of developments occurred infrequently in our database years.

We defined residential units broadly, encompassing live-work spaces, single room occupancy hotels, deed-restricted affordable housing, and student housing. We did not include facilities for the elderly dedicated to providing medical care or hospice care. We also did not include residential facilities constructed by hospitals to house patients' families.

240. The entitlement processes for individual single-family homes and duplexes are quite different than for larger projects. Individual homes and accessory dwelling units go through more streamlined processes than larger developments, frequently because they don't require the land divisions that a larger single-family subdivision would require. *See infra* Figure 4; *see also* S.B. 1069, 2015-2016 Leg., Reg. Sess. (Cal. 2016); A.B. 2299, 2015-2016 Leg., Reg. Sess. (Cal. 2016) (streamlining approval processes for accessory dwelling units).

241. OAKLAND MUNI. CODE § 17.142.010.

2. Defining project years: 2014, 2015, and 2016

We included projects that received all the entitlements necessary to file for a building permit in 2014, 2015, and 2016. Entitlement includes any discretionary planning approval, including subdivision approvals.

We chose our project years in order to minimize impact from the Great Recession years, but many jurisdictions extended pre-Great Recession entitlements during our study years. We did not count entitlements that were extensions of prior approved projects in our database. Post-entitlement developer-initiated modifications present a related issue. Sometimes a developer will receive an entitlement and then seek to modify it months or years later. We do not include the modification in our time frame calculations because it may not be reflective of planning process or law, but instead external factors related to the developer. Some data related to the Great Recession impacts could not be excluded. San Jose frequently uses the PUD Process, which begins with a rezoning later follow by a Planned Development Permit. In some instances, the delay between the rezoning and the permit was many years. This might be related to the Great Recession, but without more data it was impossible to solely attribute the delay to economic circumstances.

For appealed projects, we used the date of the original approval and not the date the project was upheld on appeal. Some jurisdictions have large appeals dockets and appeals are not always heard within a certain statutory timeframe. We wanted to ensure we were measuring the planning process, not how long it takes to schedule and hear an appeal. That being said, we are analyzing timeframes for appeals resolutions that will be forthcoming in future publications.

For jurisdictions that bifurcate more than one project approval—San Jose for example—we use the earliest application date and the latest approval date to bookend the entire process. San Francisco also differs from the other Bay Area jurisdictions in two important respects. The San Francisco Planning Code gives the Planning Commission the power to hear an appeal of a building permit application.[242] This process is known as Discretionary Review, and it was initiated for ten projects during our timeframe. Unlike the appeals process, Discretionary Review is internal to the approvals process in that it remains within the purview of the Planning Commission, as opposed to the Board of Supervisors or the Board of Appeals. The Planning Commission did not resolve Discretionary Review for six of these projects during our timeframe, which means none of them could have filed for a building permit in our project years. Thus, we could not include these projects in our final database. These projects are also small, 38 units on average, and highly unlikely to affect our overall data. Subdivision presents an additional issue. Unlike other jurisdictions that typically approve the Tentative Map (for both horizontal subdivision and condominium/airspace subdivision) concurrently with the underlying land use approvals, in San Francisco, we frequently observed Tentative Map approvals for condominiums that occurred months to years after the approval of the underlying entitlements. Unlike other jurisdictions where the Planning

242. S.F. MUNI. CODE §§ 311(d); 312(e).

Department usually manages subdivision review, in San Francisco the Department of Public Works primarily manages the Tentative Map approval process.[243] While Tentative Maps are an important part of the residential development process, we did not want to inflate planning approval timeframes due to factors outside the Planning Department's control. Thus for San Francisco, we only included subdivision approvals necessary to pull a building permit (for example, lot merger or horizontal subdivision) and not condominium maps that can be approved after obtaining a building permit. While projects that obtained condominium maps figure in our total approval counts, they do not factor into our overall approval timeframes.

San Francisco's response to the dissolution of the Redevelopment Agencies in 2011 also creates a distinct entitlement path that differs from the other selected jurisdictions.[244] San Francisco designated a successor agency—the Office of Community Investment and Infrastructure ("OCII")—after the dissolution of the Redevelopment Agencies in 2011 to fulfill the former Redevelopment Agency's outstanding obligations.[245] These obligations include development in redevelopment areas like Mission Bay, Transbay, and Bayview Hunters Point.[246] This entity is legally distinct from the City of San Francisco.[247] OCII approves the entitlement of new developments within these plan areas pursuant to protocols

243. *See* S.F. Department of Public Works, Subdivision Regulations § IV(D)(2015) (describing that once Planning issues the CEQA determination, "the Director of Public Works shall approve, conditionally approve, or deny the application within 50 days . . . ").

244. The Community Redevelopment Act gave local governments the authority to declare areas as blighted and in need of urban renewal, which enabled the city or county to distribute most of the growth in property tax revenue for the project area to the relevant Redevelopment Agencies as tax-increment revenues. *See* CAL. HEALTH & SAFETY CODE §§ 33020 et seq. In 2011, the California legislature dissolved the Redevelopment Agencies. *See* A.B. X126, 2011-2012 (Cal. 2011). Dissolution has severely constricted local governments' ability to finance affordable housing. *See* Casey Blount et al., *Redevelopment Agencies in California: History, Benefits, Excesses, and Closure* 7 (Working Paper No. EMAD-2014-01, 2014). https://www.huduser.gov/portal/publications/Redevelopment_WhitePaper.pdf (estimating a statewide average annual loss of 4,500 to 6,500 new affordable units).

245. San Francisco, Cal., Ordinance 11-12 (Jan. 26, 2012) (resolution transferring Redevelopment assets to successor agency); San Francisco, Cal., Ordinance 215-12 (September 25, 2012) (resolution designating Office of Community Investment and Infrastructure as successor agency).

246. *See* Office of Community Investment and Infrastructure, *Affordable Housing Production Report Fiscal Year 2016-2017* 2, https://sfocii.org/sites/default/files/2017%20ANNUAL%20REPORT%20-%20FY%2016%20-17%20FINAL.pdf. Outstanding obligations include the major approved developments in Hunters Point Shipyard/Candlestick Point, Mission Bay North and South and Transbay; disposition of former Redevelopment assets; and ensuring the development of affordable housing in the major approved developments.

247. *See* San Francisco, Cal., Ordinance 215-12 §3 (September 25, 2012).

outlined in each plan area document.[248] OCII also utilizes remaining tax increment funds within the plan areas to fund affordable housing development.[249]

The OCII approval process differs from projects approved through the Planning Department. The process varies depending on the Redevelopment Area, but generally OCII in partnership with a horizontal developer—which can be a public or private entity—selects the vertical developer for each parcel within the plan area.[250] Once the developer is selected, the developer submits a Basic Concept Plan that is responsive to the highly prescriptive design standards set forth in the area plan.[251] After approval of Basic Concept Plan, the developer submits for Schematic Review, which the agency must approve within 45 days of its submission.[252] In approving the schematic design, OCII makes CEQA determinations based on the master EIR for each Redevelopment Area.[253]

248. *See generally*, San Francisco Office of Community Investment and Infrastructure, Mission Bay North Design Review and Document Approval Procedure, https://sfocii.org/sites/default/files/FileCenter/Documents/771-DRDAP%20MBN.pdf; San Francisco Office of Community Investment and Infrastructure, Mission Bay South Design Review and Document Approval Procedure, https://sfocii.org/sites/default/files /FileCenter/Documents/772-DRDAP%20MBS.PDF.

249. *See* Office of Community Investment and Infrastructure, *Affordable Housing Production Report Fiscal Year 2016-2017* 2.

250. A horizontal developer builds out all the required infrastructure for a development; the vertical developer constructs the improvements. *See e.g., Transbay Redevelopment Project Implementation Agreement* 3, https://sfocii.org/sites/default/files /FileCenter/Documents/4039-TB%20Implementation%20Agreement_5.2006Fully%20Exe cuted.pdf ("Under the Cooperative Agreement, City and Authority title to the State-Owned Parcels is subject to a deed restriction requiring that any such parcel may be sold for development only when" certain financial conditions are met); First Amendment to Mission Bay South Owner Participation Agreement (Feb. 17, 2004), https://sfocii.org/sites/default /files/FileCenter/Documents/4089-15%20MBS%20OPA%20 Amendments%201%262.pdf (detailing obligations of Redevelopment Agency and Master Developer for Mission Bay South).

251. San Francisco Office of Community Investment and Infrastructure, Mission Bay South Design Review and Document Approval Procedure 7-10; https://sfocii.org/ sites/default/files/FileCenter/Documents/772-DRDAP%20MBS.PDF. These prescriptive design standards are known as the "Design for Development."

252. *See e.g.,* San Francisco Office of Community Investment and Infrastructure, Mission Bay South Design Review and Document Approval Procedure 7-9, https://sfocii. org/sites/default/files/FileCenter/Documents/772-DRDAP%20MBS.PDF.

253. San Francisco Office of Community Investment and Infrastructure, Mission Bay South Design Review and Document Approval Procedure 3, https://sfocii .org/sites/default/files/FileCenter/Documents/772-DRDAP%20MBS.PDF.

OCII is approving a substantial number of units,[254] including the majority of San Francisco's affordable housing units.[255] Our calculations in this paper do not include this process for several reasons. First, within our selected jurisdictions, no other successor agency is approving residential development entirely outside the jurisdiction's Planning Department. Omitting this pipeline of units enables us to provide a comparison of planning and entitlement processes by type and number of approvals; the OCII process would be a standalone process within our analysis. Second, this process is slowly being discontinued. By law, successor agencies cannot continue beyond the current redevelopment plan areas; redevelopment dissolution law requires obligations to sunset once the outstanding obligations are fulfilled.[256] Finally, these projects are not tracked within the Planning Department, and OCII has more limited data tracking than the Planning Department, so the type of data required to attempt analysis (in terms of number of total units entitled, number of approvals and timelines) is unavailable.[257] OCII's unique approval process will, however, be discussed in future publications as we continue to gather the required data, as it may be an example of expeditious approvals of affordable housing development that should be contemplated (even as redevelopment is being discontinued).

Phased projects present an additional complexity for measuring project time frames. Most notably Oakland entitles many projects under a single master EIR and Development Agreement that is phased over many years; in some cases phased projects crossed decades. Prior to filing for a building permit for each phase, the developer must obtain final design review from the City. For these projects, we did not measure the entire process from the date of the application for the master EIR and Development Agreement because the project was intentionally designed to be phased. In other words, the delay is not a product of law or planning process but rather market economics. This is consistent with the way we measure

254. *See* San Francisco Office of Community Investment and Infrastructure, Transbay Neighborhood (Transbay Project Area), https://sfocii.org/sites/default/files/TB%20Project%20Area%20Summary%20Sheet%20010418.pdf (stating that the Transbay redevelopment plan will lead to 4,150 new housing units, 35% of which will be affordable); San Francisco Office of Community Investment and Infrastructure, Bayview Hunters Point Redevelopment Projects and Rezoning FEIR Summary S-3, https://sfocii.org/sites/default/files/ftp/uploadedfiles/Projects/BVHPFEIRSum.pdf (estimating 3,700 net new units in the Bayview plan area); *See* San Francisco Office of Community Investment and Infrastructure, Mission Bay, https://sfocii.org/mission-bay (stating Mission Bay redevelopment area will produce 6,404 new housing units, 1,806 of which are affordable).

255. *See* Office of Community Investment and Infrastructure, *Affordable Housing Production Report Fiscal Year 2016-2017* 4 (noting that 552 funded affordable housing units and 51 inclusionary units were completed in fiscal year 2016-2017).

256. *See* Cal. Health & Safety Code § 34179.7 (specifying final conditions for completion of enforceable obligations and Redevelopment dissolution).

257. The data is unavailable primarily because the current data tracking system in San Francisco tracks planning entitlements not approvals from OCII. Although overall production counts are available for these redevelopment plan areas, additional work is needed to identify timelines and to disaggregate approvals on annual basis. We note that San Francisco has worked to make all relevant data points available to facilitate future comparative analysis of housing production..

time frames for projects entitled under a Specific Plan—the developer's entitlement application kicks off the entitlement process, not the adoption of the Specific Plan.

Finally, some developers will obtain a project approval and later withdraw it, with the intent of filing for a new application. Despite the fact that this approval was later withdrawn, we still count the entitlement in our database because it successfully completed the planning process, regardless of whether it will ever be built.

3. Extracting the project data

To collect this data, we reviewed a jurisdiction's website to see what information could be readily obtained by reviewing public notices for all environmental review documents, lists of approved developments, parcel information maps, among other relevant information. We also searched property addresses within a jurisdiction's database to gather parcel-level information, such as lot size, census tract, and assessor data. To obtain information on property tax assessment and land transaction records, we searched by street address in Lexis/Nexis Public Records. We tracked any obvious holes in the data to confirm with planning department staff, and in some cases, we requested additional data through public records requests.

To analyze how each residential development of five or more units navigated the entitlement process, we gathered approximately twenty-five characteristics per development, relating to current site usage, proposed project characteristics, types of entitlements and environmental review, and approval timeline, including appeals. Where projects received more than one entitlement, we noted all entitlements, which is why the total land use approvals per jurisdiction are far greater than the number of projects. Similarly, many jurisdictions processed projects under more than one CEQA pathway—combining multiple project-based exemptions or a project-based exemption with review that tiered off a prior document. Depending on the accessibility of public data, these characteristics are drawn from project approval documents, zoning geographic information systems ("GIS"), tax assessor records, and city council and planning commission meeting minutes. This data revealed how local governments apply their planning code and other relevant ordinances at a micro level.

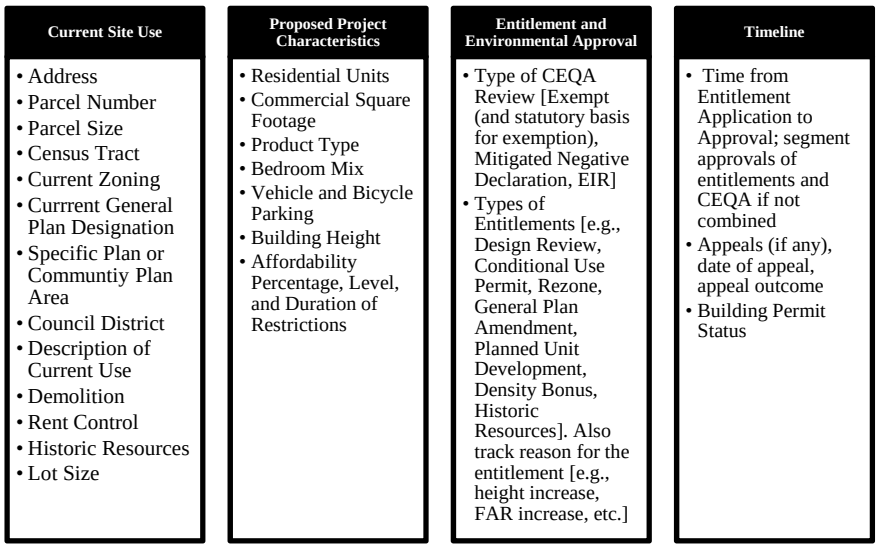
We entered this project specific data into an excel spreadsheet, retaining assigned project identifiers, all original descriptors, dates, and all unit counts. We then assigned a numeric code to specific project characteristics, use of local land use processes, and types of environmental review documents/exemptions to enable analysis of timeframes and frequency of certain approval types. To determine timeframes, we counted days from the application file date through the approval of the last discretionary entitlement, and then converted them into months by dividing by 30.5.

To provide a comprehensive assessment of all litigation against the entitled development projects of five or more units, we searched state and county records to identify all writs filed against each of our selected cities in the timeframe

of 2014 through 2017. We then pulled the records associated with litigated projects of five or more residential units entitled during our study period.

To spatially analyze this data, we mapped all city boundaries using data available from the city (San Francisco, Oakland) or Stanford's Digital Repository (San Jose, Redwood City, Palo Alto). Mapping of San Francisco plan areas uses GIS data from the San Francisco Planning Department. Area plan polygons for Redwood City, Oakland, and San Jose use georeferencing planning documentation maps to street centerline data for each municipality. BatchGeo provided geocoding for project addresses.

Figure 2: Project Characteristics



We then conducted initial analysis of our residential development database to identify possible entitlement patterns and inform the scope of interviews. We identified the land use characteristics that appeared to be associated most frequently with protracted development approval timelines, as well as the development characteristics that appeared to be associated with contentious approvals processes. This analysis yielded potential patterns of either accelerated timelines, protracted timelines, or contentious approval processes for residential development within certain areas.

We supplemented gaps in available online data with requests to planning staff officials. After the publication of our first working paper in February 2018,[258] San Francisco Planning Department provided us with more data, which enabled us to add ten developments that were not previously in our database. While

258. Moira O'Neill, Giulia Gualco-Nelson & Eric Biber, *Getting it Right: Examining the Local Land Use Entitlement Process in California to Inform Policy and Process* (Working Paper Feb. 2018), https://perma.cc/P68H-XY5E.

researching appeals, we discovered another large discrepancy with Oakland, which led us to add twenty-three new developments to our database that were not available to us when performing our initial search. Still, for reasons described in Part III, Oakland data access is limited. Of the ninety total developments in Oakland, we were only able to obtain final approval documents for forty-nine of these developments. San Jose also dropped two projects since the time of our prior paper due to duplicate projects that had separate entitlements filed under different addresses. While these new projects influenced the entitlement rates in these jurisdictions, they did not significantly alter our findings.

D. Diving deeper into local context: in-depth interviews with key informants

To explore how law is applied in ways that project-level data could not, alone, reveal, we conducted in-depth interviews with key informants from each jurisdiction we chose to study. Building on our professional expertise in the field of land use, we used purposive sampling[259] to generate a list of potential participants across four stakeholder groups across all five cities: (1) public agency staff (including local planning staff, housing and community development staff, and city attorneys), (2) developers (market-rate and non-profit affordable), (3) community-based organizations and advocates, and (4) consultants (design, legal, and entitlement).[260] We identified seventy potential interview participants through examination of websites, professional reports, and project-level data. We successfully recruited twenty-nine participants for in depth interviews, with at least one participant within each stakeholder group and within each city. Some participants sat for more than one interview and had more than one role, which is why the totals do not add up to twenty-nine.

259. Although not engaging with a survey tool, we wanted to make sure that the participants were in some way representative of both stakeholders that directly interact with entitlement processes and stakeholders engaged with local-level policy reform that directly influences entitlement processes within these five cities. We therefore considered various forms of "sampling" used in survey methods when constructing our research design. *See Purposive Sampling*, in ENCYCLOPEDIA OF SURVEY RESEARCH METHODS (Paul J. Lavrakas ed., 2008), http://methods.sagepub.com/reference/encyclopedia-of-survey-research-methods/n419.xml.

260. In some cases, a single participant could represent more than one stakeholder group. In some instances, individuals we interviewed worked in, or for, two or more of the cities within our group of five.

Figure 3: Research Interviews by Category

	Public Agency Staff	Developers	Community-Based Organizations /Advocates	Consultants	Total
San Francisco	3	4	2	3	12
San Jose	3	2	3	4	12
Oakland	3	3	2	1	9
Redwood City	3	3	3	2	11
Palo Alto	3	3	3	4	13
Total	15	15	13	14	57

We conducted semi-structured interviews[261] with open-ended questions to collect perceptions of: the jurisdiction's approvals process, land use taxonomies that contribute most to delays and cost, the role of community in the public approvals process, social-economic-political factors that shape development patterns including important context (such as the local political climate and community tensions at play), and technical details not immediately obvious in the development data. We concluded interviews by sharing preliminary findings from our datasets with participants to gather feedback.

We transcribed our interviews verbatim and used open coding[262] to identify themes that emerged from the interviews. We then analyzed the interviews to identify perceptions about both local and state-level obstacles to advancing equitable infill development and whether proposed (and relevant) statewide legislative action might succeed in reducing time lags caused by local regulatory processes and the potential trade-offs (if any) of reducing those time lags. We then triangulated the data from our planning and development code summaries and development database (including identified patterns within the project-level data) with the themes emerging from interviews to test potential explanations of patterns and themes that we extracted from the interviews.

261. *See* BERG & LUNE, *supra* note 229, at 112–14.
262. *See* BERG & LUNE, *supra* note 229, at 364–72.

Part III:Findings

While our research continues, and we will be adding jurisdictions to our data set, we can provide an overview of completed research within our first Bay Area jurisdictions.

A. All residential development of five or more units is discretionary in these cities, and each city imposes discretionary review at multiple points in the entitlement process

All five jurisdictions we examined require discretionary review for residential developments of five or more units. These discretionary review processes apply even if these developments comply with the underlying zoning code.[263] Four of these cities use aesthetic controls as a primary discretionary review mechanism. Oakland uses Design Review,[264] whereas Redwood City and Palo Alto employ Architectural Review.[265] San Jose chooses to use a Site Development Permit.[266] Among these five cities, San Francisco is unique in that it does not impose design or site development review on all projects. But San Francisco, through its city charter, imposes discretionary review on *all* proposed projects.[267] Absent its city charter that renders building permits discretionary, San Francisco would have permitted as of right nine projects — each ranging from eight to sixty-seven units. As Figure 4 shows, no other planning code in our case studies would permit this level of development without a discretionary approval. This is an example of how a charter city can impose discretionary review through a mechanism outside of the formalized planning and zoning process.

263. For a discussion of discretionary review, *see* Part I *supra* note 34.

264. OAKLAND MUNI. CODE §§ 17.136.040(3)–(4), 17.136.025(B)(1)(d).

265. REDWOOD CITY MUNI. CODE § 45.2(A); PALO ALTO MUNI. CODE § 18.76.020(b)(2)(B).

266. SAN JOSE MUNI. CODE § 20.100.010.

267. A city charter is the constitution for that local government. The provision of San Francisco's charter rendering all permits discretionary can be found in S.F. BUS. AND TAX REGULATIONS CODE § 26(a).

Figure 4: Discretionary Review of Developments Consistent with Zoning

Jurisdiction	Primary Discretionary Review Mechanism	Residential Developments Exempt from Discretionary Review
San Francisco	Building Permits	None
San Jose	Site Development Permit	Single-family homes in limited circumstances.[268]
Redwood City	Architectural Permit	One-story single-family homes and duplexes
Palo Alto	Design Review	Up to two single-family homes and two duplexes.[269]
Oakland	Design Review	Secondary units

It is also notable that within these five cities, the total numbers of land use/planning approvals are greater than the number of overall development projects in each jurisdiction. A single project might need to obtain Design Review approval and a Minor Variance from the Director of the Planning Department and a rezoning from the City Council.[270] Figure 5 illustrates. This requires a project to navigate multiple levels of local government review, which means that there is more than one step in the approval process that would pull the project within the scope of local discretion and trigger environmental review. It should also be noted that if development requires the subdivision of land into smaller parcels, additional discretionary review by local governments generally applies as well, which is accounted for in these numbers.[271] As Figure 5 also shows, the number of discretionary reviews per project does not differ dramatically across our jurisdictions, with Redwood City requiring, on average, the highest number of discretionary approvals.[272]

268. To be exempt from site development permits, single-family homes must meet height, FAR, and lot size requirements and cannot be located in riparian areas. SAN JOSE MUNI. CODE § 20.100.1030(A)–(C).

269. To qualify for design review exemption, the proposed development cannot be located in a conservation zone. PALO ALTO MUNI. CODE § 18.76.020(b)(2)(D).

270. *See* S.F. MUNI. CODE § 305 (limiting review of variances to the Zoning Administrator and Board of Appeals). In practice, many jurisdictions do permit concurrent review of entitlement applications. *See e.g.*, SAN JOSE MUNI. CODE § 20.100.140 (permitting concurrent review of multiple entitlement applications); OAKLAND MUNI. CODE § 17. 136.040(D) (permitting the Director to refer design review applications to the Planning Commission when coupled with certain types of variances).

271. For more information on subdivision, *see supra* notes 38–39.

272. To determine the number of discretionary approvals required per jurisdiction, we calculate total approvals and divide by the number of projects and then add one extra approval for CEQA.

Figure 5: Types of Discretionary Review per Jurisdiction

Entitlement Types	San Jose	San Francisco	Oakland	Palo Alto	Redwood City
Site Development Permit/Design Review	13	0	89	5	9
Planned Development Permit	50	5	9	0	4
Conditional Use Permit ("CUP")	0	33	55	0	1
Tentative Map Permit	36	59	33	4	8
Rezoning	46	4	1	0	0
Historic Preservation Permit/Certificate of Appropriateness	3	2	0	1	4
GP Amendment	5	1	0	0	0
State or Local Density Bonus	1	3	2	0	1
Specific Plan Permit	0	50	0	0	4
Specific Plan Exception	0	32	0	0	0
Variance	0	34	39	3	1
Development Agreement	0	0	0	0	4
Other Approval	4	6	1	0	0
Total	158	229	229	13	36
Average Approvals per project	**2.43**	**2.41**	**2.54**	**2.60**	**2.77**
Average Approvals with CEQA	**3.43**	**3.41**	**3.54**	**3.60**	**3.77**

B. Four of these cities are all employing state-level statutory provisions to facilitate and expedite environmental review for developers

State law allows cities to take a diverse range of approaches to comply with CEQA requirements.[273] EIRs—the most onerous form of CEQA review—

273. For a discussion of the various environmental review options, *see supra* Part I.A.2.

occurred infrequently across all jurisdictions.[274] Relatively few projects within these five cities require a full EIR process primarily because jurisdictions are taking advantage of project- or tiering-based exemptions.[275] The figure below demonstrates that exemptions are the most common type of CEQA review for projects in most jurisdictions, with EIRs and MNDs in second and third place, respectively.[276] The most common forms of project-based exemptions included the Class 32 (infill), Class 3 (small structures), and Class 1 (existing facilities) exemptions discussed in Part I supra.

Figure 6: Percentage of Projects by CEQA Review Type

	San Jose	San Francisco	Oakland	Redwood City	Palo Alto
Exempt (Tiering)	46%	69%	106%	69%	0%
Exempt (Project Based)	3%	11%	83%	15%	40%
ND	2%	2%	0%	0%	0%
MND	46%	9%	0%	8%	20%
EIR	22%	8%	3%	8%	40%

Even when adjusting by number of units, relatively few units go through EIRs with the exception of Palo Alto; however, more units are going through EIRs than MNDs. Additionally, more units go through tiering than project-based exemptions, with the exception of Oakland.

274. These are similar findings with LANDIS ET AL., *supra* note 168, at 99, 105.

275. For a discussion of tiering, *see supra* Part I.A.2.

276. As discussed below, a single project can undergo more than one type of CEQA review. Figures 6 and 7 do not back out these projects that receive multiple exemptions, which is why the percentages exceed 100 percent of the total number of projects and units. Oakland in particular will apply multiple tiering and project-based exemptions to a single project.

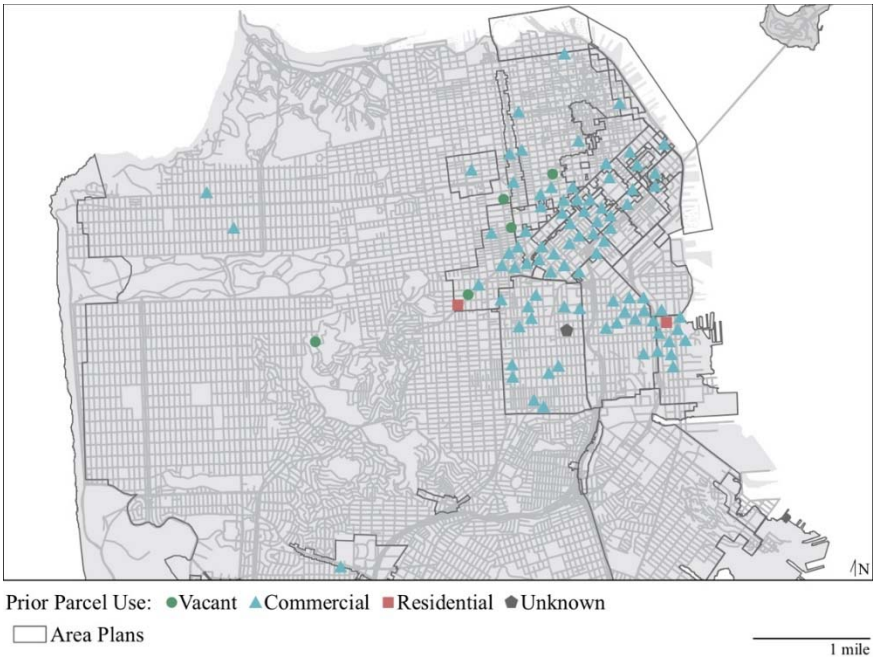
Figure 7: Percentage of Units by CEQA Review Type

	San Jose	San Francisco	Oakland	Redwood City	Palo Alto
Exempt (Tiering)	54%	64%	89%	89%	0%
Exempt (Project Based)	0%	3%	52%	9%	7%
ND	0%	3%	0%	0%	0%
MND	14%	11%	0%	1%	3%
EIR	49%	24%	9%	1%	90%

Four of these jurisdictions appear to be making good faith efforts to engage in strategies that link housing and jobs to transportation and facilitate environmental review for developers. This means that each of these four cities is tapping into state-level statutory provisions designed to promote sustainable development by doing the bulk of the work to comply with CEQA, rather than imposing additional time and costs on developers. For example, the vast majority of relevant projects entitled within San Francisco and Oakland are also within specific plan areas that rely on these state-level statutory provisions to facilitate environmental review.[277]

277. For similar findings in the prior literature, *see* LANDIS ET AL., *supra* note 168, at 107–08.

Figure 8: San Francisco Project Locations and Prior Uses[278]



278. This map does not include residential development that OCII would be responsible for; however, this development is occurring in the eastern part of San Francisco, which does not alter our analysis that permissive density is not spread across the City evenly.

Figure 9: San Jose Project Locations and Prior Uses

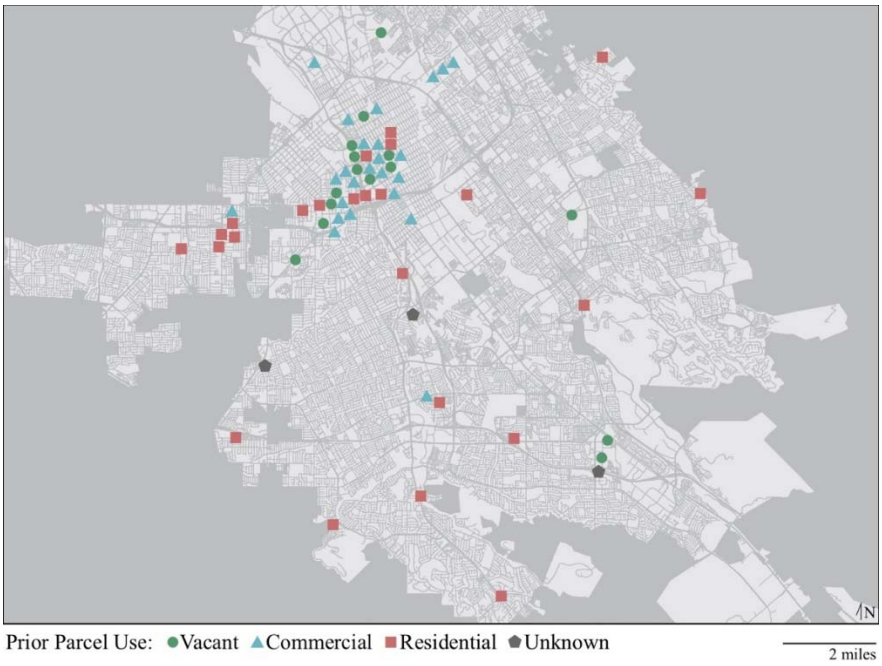


Figure 10: Oakland Project Locations and Prior Uses

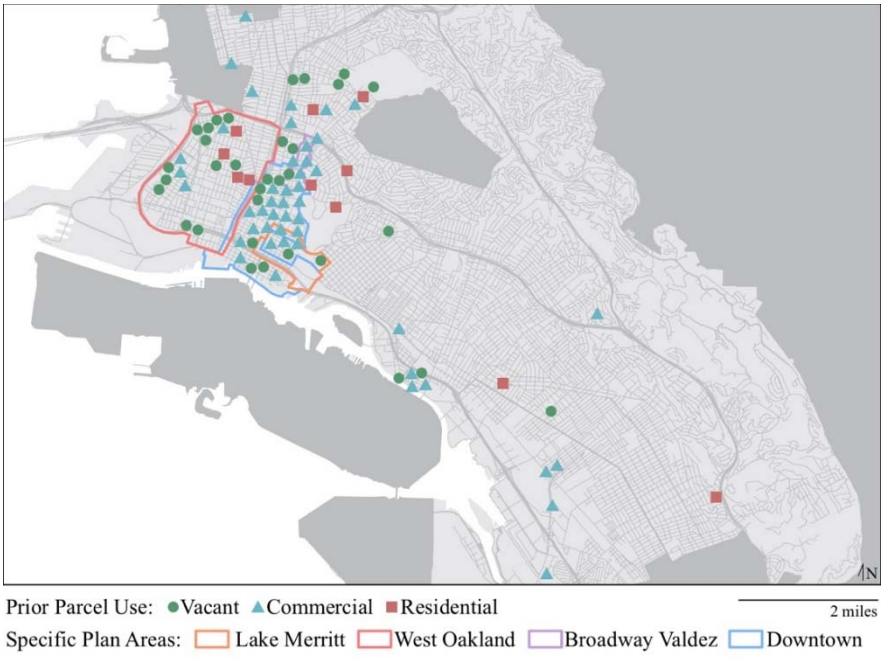


Figure 11: Redwood City Project Locations and Prior Uses

Figure 12: Palo Alto Project Locations and Prior Uses

C. Use of CEQA exemptions varies across cities

Like the discretionary review mechanisms discussed above, many projects in Oakland are receiving multiple CEQA exemptions, which leaves open the question of why planners take these additional measures. Interview data suggests planners are doubling up on CEQA exemptions to forestall against perceived political challenges to the project. If a project qualifies for more than one CEQA exemption, planners will evaluate the project under each possible exemption. Other jurisdictions, however, rarely make use of exemptions outside of tiering situations. For example, given that most development in these jurisdictions is infill, the fact that so much development receives the Class 32 exemption in Oakland, but not San Francisco or San Jose, is peculiar. Interview data also indicates that within Palo Alto, Redwood City, and San Jose there may be some confusion within planning departments and amongst developers about which types of CEQA documents are the most legally vulnerable on appeal. Perception of legal defensibility may in turn inform decisions on which type of CEQA review to undertake.

Analyzing project size as a function of CEQA, data shows that projects with EIRs in these five cities generally tend to be larger than projects that undergo other types of CEQA review. All jurisdictions with the exception of Redwood City prepared an EIR for their single largest project. Nonetheless, the projects going through the exemption process are not small, averaging over fifty units for four of our five jurisdictions.[279]

Yet significant inter-jurisdictional variations still persist.[280] Projects that received a project-based exemption in Oakland are on average, twice the size as projects that received a project-based exemption in San Francisco. In Redwood City, projects that use tiering are larger than projects that use tiering in both San Francisco and Oakland. Figure 7 shows that even with a larger mean size for EIRs, EIRs are a small fraction of the total capacity being entitled in most jurisdictions.

279. *Cf.* Hernandez, Friedman & DeHerrera, *supra* note 219, at 31 ("the overwhelming majority of CEQA compliance documents, however, involve the use of restricted regulatory exemptions for extremely minor projects, such as repairing single-family homes, acquiring park lands, making minor modifications to existing uses such as modifying signage or repairing piping or other infrastructure, etc.").

280. The variability in environmental review processes is consistent with Gyourko, Saiz & Summers, *supra* note 113, at 694, who found significant variability in local land use regulation.

Figure 13: Mean Project Size By CEQA Type

	San Jose	San Francisco	Oakland	Redwood City	Palo Alto
All Types of Exemption	193	84	93	98	10
Tiering Exemptions	205	94	96	109	0
Project Based Exemptions	8	24	67	51	10
ND	10	125	0	0	0
MND	69	117	0	12	8
EIR	403	291	282	8	125

D. There is substantial variation in entitlement timelines across these five cities that does not appear to correspond with stringency in either environmental regulation or local entitlement processes, or project size

Timeframes for entitlements vary significantly across jurisdictions for similar projects and across different project sizes within the same jurisdiction. Focusing first on environmental review processes, the difference in timeframes does not appear immediately attributable to environmental review legal requirements. Instead, it appears these cities apply the same environmental review provisions to similar projects in different ways—with significant variations in the total timelines for entitlement. For example, both the City of Oakland and the City of San Francisco use the section 15183 Community Plan Exemptions ("CPE") to reduce CEQA compliance obligations for proposed projects within plan areas[281] that have a relatively recent full EIR that the respective city completed. However, Oakland's CPE process moves much faster than San Francisco's. The median CPE entitlement in Oakland is seven months. In San Francisco, a CPE takes over twenty-four months. In contrast, a full EIR in San Jose, for which there is no prior study, takes nearly thirty months, just six months longer than a CPE in San Francisco.[282]

281. Plan Area terminology varies according to jurisdictions and the size of the plan area. Redwood City refers to these plans as "Precise Plans," San Jose and Oakland both use the terms "Area Plans" and "Specific Plans," and San Francisco calls them "Area Plans."

282. Some jurisdictions apply different types of CEQA review to a single project. A CPE in Oakland is often combined with a section 15332 exemption. EIRs in San Jose are often paired with later addendums or supplemental EIRs. A CPE in San Francisco can be paired with a Focused EIR. The numbers above do not control for these multiple types of CEQA review due to the small sample sizes that would result. Even controlling for multiple types of CEQA review, the general trends hold true. Projects that only received a CPE in Oakland took 7 months; projects in San Francisco that only received a CPE still take 23

Interview data attributes the delay in environmental review within cities to planning practice and the level of attention put into staff reports, rather than the complexities of particular project proposals. Jurisdictions vary in a developer's ability to manage and communicate with their CEQA consultants during the preparation of the environmental documents. Interview participants shared the perception that the inability to directly select or manage consultants can lead to lower quality environmental documents, as well as time delays.[283] These results also indicate the potential importance of political context in the approval process.[284]

Figures 14 and 15 together indicate that the number of approvals required (often used as one important metric for stringency) does not necessarily correspond to entitlement timelines.[285] All five cities impose discretionary review on all projects through multiple local regulations, and all require, on average, more than three approvals (including environmental review). But, the variability in timelines for similarly sized projects is great. Redwood City had shorter timeframes for entitlement, particularly compared to San Francisco and San Jose. Interview participants highlighted how variability in entitlement timelines tends to be related to local practice. Examples include staff-level variations in performing application intake, to higher-level decisions on the amount of commercial development that must occur before a developer-applicant can even propose residential development in certain neighborhoods.[286] These choices in practice may be a response to political and fiscal pressures that prompt cities to embed discretionary review into the entitlement process.

Project size also does not appear to explain delay in approval timelines. Large projects do not always take longer to entitle than small projects. In San Jose,

months; projects that only received an EIR in San Jose took 14 months (measuring by the median).

283. *See e.g.*, SAN FRANCISCO PLANNING DEP'T, *Environmental Review Process Summary* 5 (2011), https://perma.cc/8BLP-B4T4 ("While the project sponsor pays all costs for preparation of the necessary consultant-prepared documents, the Department scopes, monitors, reviews, and approves all work completed by consultants").

284. *See* John Quigley, Raphael & Rosenthal, *supra* note 14, at 281–282.

285. These results are consistent with Jackson, *supra* note 130, at 141, who found that regulatory stringency did not affect supply elasticity, and are in tension with Gyourko, Saiz & Summers, *supra* note 113, at 695, who found that regulatory stringency did correlate with timeframes. *See also, supra* Figure 5.

286. San Jose's Urban Villages, for example, are transit-oriented, mixed-use neighborhoods that aim to balance job and housing growth. San Jose, *Envision San Jose 2040 General Plan*, Chapter 1 at 18 (2018). To achieve this, Urban Villages utilize "Growth Horizons" that stipulate certain commercial and office targets before residential development can be unlocked (with the exception of 100% affordable housing developments). *Id.* at Chapter 7 at 6, 19. While San Jose has long shouldered much of the region's housing burden without commensurate increases in job growth, these policies can impede residential growth in transit-accessible locations. *See* Memorandum from Harry Freitas and Kim Walesh to Honorable Mayor and City Council (Apr. 3, 2015), https://perma.cc/LM39-GC3T (noting that San Jose is the only major city in the US with more residents leaving San Jose during the day to go to work than non-residents commuting in for work).

projects between five to twenty-five units take nearly seven months longer to entitle than projects with more than 150 units. In Redwood City the difference is about five months, which is significant given Redwood City's entitlement timeframe is seven months across all projects. Figure 14 shows the mean and median entitlement timeframes across jurisdictions by project size.[287] The extreme intra-jurisdictional variation skews mean timeframes higher.

Figure 14: Total Entitlement Time Frames by Project Size

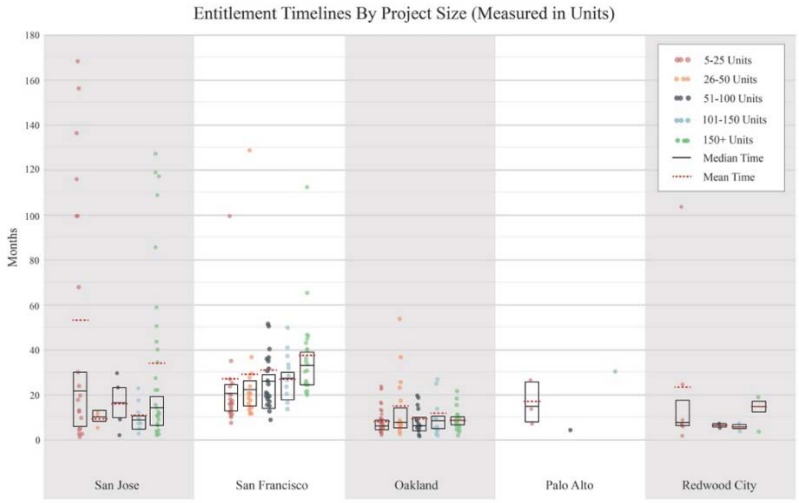
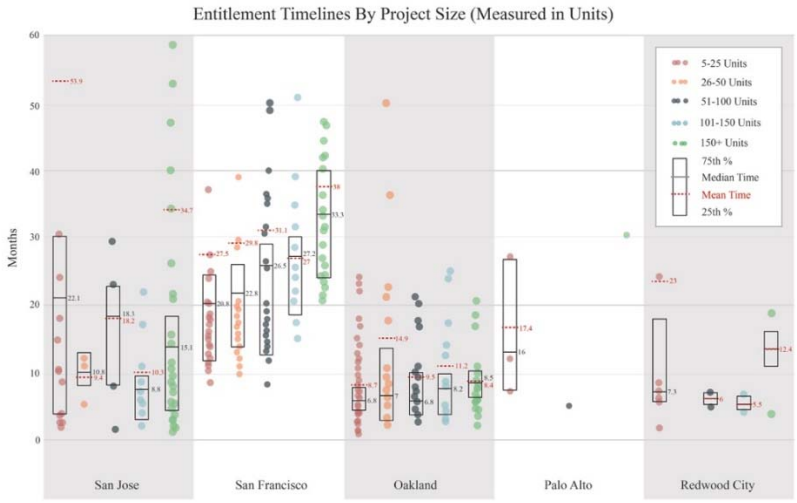


Figure 15 below narrows the approval timeframe to sixty months—in the process removing some outlier projects visible in Figure 14—but provides a better representation of means and medians across all jurisdictions.

287. When referencing timeframes in this Article we refer to the median unless otherwise noted.

Figure 15: Entitlement Timelines Within 60 Months by Project Size



Although we are pursuing additional research to better understand issues with project size, multiple explanations for the different outcomes emerged in interviews. One potential explanation is that smaller projects are occurring in areas that do not benefit from prior environmental review and thus cannot tier off a prior environmental document. Another potential theory is that the type of developer building in the twenty-five-unit range lacks the capital and sophistication to navigate the approval process as efficiently as developers undertaking larger projects. In interviews, small developers expressed feelings of being shut out from the Bay Area development boom because of a lack of access to key planning departmental staff or the inability to afford the right consultants with well-established relationships in the planning department.

E. Substantial variation in housing project entitlement across these five cities exists despite regulatory stringency

Similarly, housing entitlement—both as a measure of land area and population—varies dramatically. As a measure of land area, San Francisco entitles the most housing despite it having the longest approval timeframe. [288] San Francisco is also the most geographically constrained jurisdiction in our dataset years; when measuring land area as a function of population, San Francisco has the densest existing development. This is not entirely consistent with research in Part I that linked more geographically constrained regions with supply constraints.[289]

288. As discussed in Part II, entitlement numbers for San Francisco do not include units approved through OCII—the successor to the former Redevelopment Agency—in Redevelopment Plan Areas. This data is still unavailable.

289. *See* Saiz, *supra* note 129, at 1254.

Redwood City has the second-fastest approval timeline, but entitles less housing per square mile than San Francisco, Oakland, and San Jose. Redwood City is also one of the least geographically constrained cities. Interview data suggests that market barriers, such as the differential cost of construction and sale or rental prices, do not entirely explain this discrepancy. In low-density communities, developers are also factoring in the political feasibility of proposing a denser product, even where that density is permissible under the base zoning. This suggests that in jurisdictions with overall low-density development patterns, a streamlined approval process may be insufficient to entitle substantial housing, if barriers like lack of appropriately zoned land and/or lack of political will are present. [290]

Figure 16: Entitlement Production by Land Area and Population Intensity

	Land Area (mi^2)[291]	Total Entitled Units	Entitled Units per Square Mile	Population	Population Per Square Mile[292]
San Francisco	47	9,768	208	870,887	18,581
San Jose	177	11,463	65	1,025,000	5,806
Oakland	56	8,958	161	420,005	7,528
Redwood City	19	1,100	57	84,950	4,374
Palo Alto	24	277	12	67,024	2,807

Adjusting on a per capita basis, Oakland and Redwood City—the two jurisdictions with the fastest timelines—are on top in terms of output, with Oakland in a distant lead.

290. This appears consistent with Kristoffer Jackson, *supra* note 130, at 141, who found that regulatory stringency did not affect supply elasticity, and is in tension with Gyourko, Saiz & Summers, *supra* note 113, at 695.

291. Land areas taken from the 2010 Census. *See*, *QuickFacts*, U.S. CENSUS BUREAU, https://perma.cc/L97A-BD8T (last visited Oct. 23, 2018).

292. Population taken from American Communities Survey 2012-2016 estimates. *See American Community Survey Data Profiles*, U.S. CENSUS BUREAU, https://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/2016/ [https://perma.cc/3T9K-8RPQ] (last visited Oct. 23, 2018).

Figure 17: Units Entitled Per 1,000 People Over 3 Years

	Population	Entitled Units	Units per 1,000 people over 3 years
San Francisco	870,887	9,768	11
San Jose	1,025,000	11,463	11
Oakland	420,005	8,958	21
Redwood City	84,950	1,100	13
Palo Alto	67,024	277	4

Potential explanations for Oakland's lead may be both local context[293] and local government initiatives to accelerate dense infill development.[294] The community's response to concerns of gentrification, increasing housing costs, and displacement have included community based organizations advocating and collaborating with the regional transit agency to support dense TOD with major affordability components.[295] These combined factors involved major phased developments, some beginning in the 1990s, with phases in the 2014, 2015, 2016 data years contributing to the number of units entitled during our study years. Interview participants also shared perceptions of differing political and community pressure around development outcomes and processes across these cities. Interview participants described Oakland as generally welcoming development, San Francisco as welcoming of affordable development but not as favorable to major market-rate development projects, and Palo Alto as welcoming of very little dense development. Some participants who work in multiple cities also shared the perception that the political and community responses to development in Oakland will begin to mirror their observations in San Francisco.

293. Oakland experienced decades of population decline and disinvestment distinguishable from the other cities and has historically had a lower median household income and higher rate of poverty. *See generally* Robert O. Self, AMERICAN BABYLON: RACE AND THE STRUGGLE FOR POSTWAR OAKLAND (2005); Chris Rhomberg, NO THERE THERE: RACE, CLASS, AND POLITCAL COMMUNITY IN OAKLAND (2007). We draw comparisons of rate of poverty and median household incomes from 2010 census data and American Community Survey estimates. *See QuickFacts*, U.S. CENSUS BUREAU, *supra* note 291.

294. The City of Oakland began its 10K program in the 1990s under former Mayor Jerry Brown, who Professor Rhomberg described as having "offered Oakland as a haven to private developers fleeing overbuilt conditions in San Francisco and promised to expedite approval for market-rate apartments and condominiums built without city subsidies or requirements for affordable housing." Rhomberg, *supra* note 293, at 189. The 10K initiative generated controversy and exacerbated existing concerns about increasing housing costs, gentrification, and the displacement of people of color. Rhomberg, *supra* note 293, at 183–94.

295. For example, the Unity Council in the Fruitvale neighborhood took the lead on several major TOD development projects around the Fruitvale BART station with affordability and community use components—work that began as early as 1992. Rhomberg, *supra* note 293, at 190–92.

F. Most of the projects entitled within these three years involve the development of housing where there was none

Whether proposed development risks displacement through the conversion or elimination of affordable housing—including rent controlled, deed restricted, or naturally affordable housing—presents an important equity consideration. This also implicates important climate concerns if residential demolition is reducing overall density. During these project years, the majority of residential developments of five or more units or more entitled within all cities are on vacant or commercial land,[296] rather than land with a prior residential use. These results are summarized below and displayed in Figures 8–12 above.

Figure 18: Prior Parcel Uses

Prior Parcel Use	San Jose	San Francisco	Oakland	Palo Alto	Redwood City
Residential	23	2	11	1	4
Residential %	35%	2%	12%	20%	31%
Commercial	24	87	45	3	5
Commercial %	37%	92%	50%	60%	38%
Vacant	15	5	34	1	1
Vacant %	23%	5%	38%	20%	8%

Redwood City and San Jose have higher occurrences of entitlement where the prior use was residential. Of the four projects that replaced residential uses in Redwood City, at least two were multifamily structures. In San Jose, the vast majority of these residential uses are single-family homes—and the new developments were substantially denser than the single-family homes that were demolished. In San Jose, four of the twenty-three projects that replaced residential uses were multi-family structures that could potentially have been subject to rent control. One of these multi-family buildings was a 216-unit rent-controlled building whose demolition left many long-time residents with few other affordable rental options.[297] These rent-controlled units were not replaced in the new development, nor did the new development contain inclusionary housing units.[298] From our limited data, it seems this scale of rent-controlled demolition is rare in these cities; however, more research is needed to investigate other potential rent-

296. Vacant land includes lots with no improvements or lots that contain a surface parking lot with no permanent structures. Commercial land includes lots with commercial or industrial uses, such as warehouses, restaurants, storage facilities, or retail. Residential lots include single-family homes, mobile homes, multifamily buildings, single room occupancy hotels, and residential motels.

297. Ramona Giwargis, *San Jose council denies appeal to stop Reserve apartment demolition*, THE MERCURY NEWS (June 22, 2016), https://perma.cc/EN52-FXDE.

298. Ramona Giwargis, *San Jose: Tempers flare over The Reserve displacement*, THE MERCURY NEWS (Mar. 16, 2016), https://perma.cc/5HCX-28AL.

controlled demolitions in our jurisdictions. Lastly, we found no deed-restricted affordable housing that was demolished during our project-years.

G. Deed-restricted affordable housing entitlement is low across all jurisdictions; however, deed-restricted affordable housing benefits from faster approval time frames

Entitlement rates (in terms of units) to support affordable housing production across all jurisdictions are low for these years. San Francisco—the only jurisdiction to apply inclusionary housing requirements to both rental and for sale housing during the project years[299]—has the highest rates of entitlement of affordable housing by units, with 11% of all new units deed-restricted to low and middle income households. 100% of deed-restricted affordable housing in San Francisco is entitled in just over twelve months, which is thirteen months faster than market rate development. In San Jose, an affordable development is entitled nearly ten months faster than market rate development. In Oakland—where the process is compressed relative to San Francisco and San Jose—affordable development is approved about two months faster than market rate development.

Unlike other Bay Area jurisdictions, most of the affordable housing units entitled in San Francisco outside of former Redevelopment Areas came through inclusionary obligations imposed on market-rate developers.[300] While we do not have complete data on inclusionary housing compliance for all our developments in San Francisco, at least twenty-eight developments—30% of projects—elected to pay the in-lieu fee rather than build the housing on-site. As our interviews highlight, the in-lieu fees are important sources of gap finance for nonprofit affordable housing developers especially after the dissolution of the Redevelopment Agency.[301] Interestingly, the jurisdictions with the fastest

299. San Jose's inclusionary housing ordinance was on hold during the first two years of our research due to ongoing litigation. *See Cal. Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 443 (2015) (noting that the California Superior Court enjoined implementation of the ordinance). Though the California Supreme Court upheld the inclusionary housing ordinance against a takings challenge, the ordinance only applied to for-sale developments during our project years. *See id.* at 442, 461. The ordinance currently applies to both for-sale and rental developments. *See* SAN JOSE MUNI. CODE § 5.08.400.

300. The opposite is likely true in former Redevelopment Areas managed by OCII. *See* Office of Community Investment and Infrastructure, *Affordable Housing Production Report Fiscal Year 2016-2017* (noting that 552 funded affordable housing units and 51 inclusionary units were completed in fiscal year 2016-2017). Funded projects refer to 100% affordable housing developments as opposed to inclusionary housing units, where the affordable housing units are a smaller percentage of the total units. This also underscores the importance of redevelopment for affordable housing production.

301. The Community Redevelopment Act gave local governments the authority to declare areas as blighted and in need of urban renewal, which enabled the city or county to distribute most of the growth in property tax revenue for the project area to the relevant Redevelopment Agencies as tax-increment revenues. *See* CAL. HEALTH & SAFETY CODE §§ 33020 et seq. In 2011, the California legislature dissolved the Redevelopment Agencies. *See*

entitlement time frames—Oakland and Redwood City—also have the lowest rate of entitlement of affordable units, which may suggest affordable housing developers need more than an efficient process to make deals feasible. Interview data also suggests that high land and labor costs, coupled with the loss of funding from Redevelopment Agency tax increment programs[302] are primary barriers to developing more affordable units within these cities. The interviews yielded differing accounts as to whether discretionary approval imposed significant challenges to affordable development. Notably, interview data indicated that an increasingly elaborate building permit process also poses barriers to the timely completion of affordable developments. While the scope of this study does not address the length and complexity of the actual building permit process, this is an important area for future study.

Figure 19: Affordable Units by Jurisdiction

	San Jose	San Francisco	Oakland	Palo Alto	Redwood City
# Units	11,463	9,755	9,555	277	1,100
# Affordable Units	613	1,110	333	70	11
Affordable %	5%	11%	4%	25%	1%

Given the three-year timeframe of our study, and because 100% affordable housing developments are so infrequently entitled, the rate of entitlement (in terms of percentage number of units entitled) is by itself insufficient to determine a jurisdiction's policy on affordable housing. Palo Alto is emblematic. While Palo Alto had the lowest rate of entitled units across all our Bay Area cities, it had the highest rate of affordable housing entitlements (25%), because a large affordable development happened to be entitled during our project years. Instead, looking at the planning and development codes for the presence of local ordinances that directly incentivize affordable development, the overall rate of entitlement in terms of units entitled, and entitlement timeframes provides a more accurate assessment of a city's affordable housing policy.

A.B. X126, 2011-2012 (Cal. 2011), https://perma.cc/5FSN-AMNH. Dissolution has severely constricted local governments' ability to finance affordable housing. *See* Casey Blount et al., *Redevelopment Agencies in California: History, Benefits, Excesses, and Closure* (2014), https://perma.cc/3QUD-FPTY (estimating a statewide average annual loss of 4,500 to 6,500 new affordable units).

302. These tax-increment revenues were a large source of affordable housing finance. *See* Blount, *supra* note 301.

H. San Francisco, Redwood City, Oakland, and San Jose all provide for density and development incentives to promote transit-oriented development that have caused developers to site most development in these growth incentive zones

Most jurisdictions in our study are easing density and parking restrictions in targeted growth areas near transit and are drawing on Specific Plans to facilitate development in targeted growth areas. Downtown San Jose—with its proximity to Caltrain and light rail—is one example. San Jose's General Plan lifted height limitations in most downtown areas, giving developers more flexibility in design and construction type.[303] The General Plan also allows for up to 800 dwelling units per acre and a 30.0 FAR for mixed-use projects in the downtown area.[304] These are high densities relative to San Jose's Mixed-Use Commercial Districts where residential developments max out at six stories and fifty dwelling units per acre.[305] Parking reductions of up to fifty percent are also available for certain mixed-use projects in downtown.[306] Additionally, San Jose's Diridon Station Area Plan rezoned land including portions of downtown and areas adjacent to the Diridon Caltrain station, to allow for residential use at higher densities than previously allowed, with the goal of connecting transit-accessible housing to jobs.[307]

While Redwood City's historic pattern of land use development is largely auto-centric, the City's current General Plan focuses growth and development in mixed-use activity centers and along pedestrian-friendly transportation corridors that are connected to the regional transit system. The General Plan allows for more intense development (40 to 60 dwelling units per acre) along major thoroughfares, particularly Veterans Boulevard, Broadway, and El Camino Real.[308] Redwood City's Downtown Precise Plan ("DTPP") also seeks to create a "pedestrian friendly, walkable district [with] good transit access."[309] Instead of focusing solely on increased development incentives, like reduced parking or open space requirements or more permissive density, Redwood City accomplishes its vision by improving processes that facilitate faster review and approvals for development

303. SAN JOSE MUNI. CODE § 20.70.200. Because of the downtown area's proximity to the airport, no building can be permitted with a height that exceeds the elevation restrictions prescribed under Federal Aviation Regulations Part 77 (14 C.F.R. Part 77) unless certain conditions are met.

304. *See* City of San Jose, *supra* note 286, at Chapter 5 at 9.

305. *Id*. at Chapter 5 at 6.

306. SAN JOSE MUNI. CODE § 20.70.330.

307. *See* CITY OF SAN JOSE, DIRIDON STATION AREA PLAN, Appendix B (last visited Oct. 26, 2018) https://perma.cc/D9E5-53ZE.

308. *See* CITY OF REDWOOD CITY, GENERAL PLAN, Urban Form and Land Use at BE-39 (2010), https://www.redwoodcity.org/departments/community-development-department/planning-housing/planning-services/general-plan-precise-plans/general-plan/.

309. *See* REDWOOD CITY, DOWNTOWN PRECISE PLAN, Introduction at 3, (2011), https://www.redwoodcity.org/departments/community-development-department/planning-housing/planning-services/general-plan-precise-plans/downtown-precise-plan.

projects within the DTPP. Conformance with the DTPP's prescriptive design and development standards is mandatory; however, participants share the perception that conformance with the guidelines ensures swifter approvals, which is also shown in our project data.[310]

Like Redwood City, San Francisco has used specific planning to concentrate growth in key transit-accessible neighborhoods. The City has lifted traditional density limitations by shifting to a form-based code in these areas so that building envelope and bedroom mix are the primary limitation on density.[311] San Francisco has also attempted to facilitate development in infill, transit-accessible neighborhoods outside the boundaries of these specific plan areas through the use of local density bonus programs like HomeSF that can provide up to an additional two stories of height outside of the specific plan neighborhoods.[312]

Since most development is indeed occurring within these growth areas, we can infer that these efforts have been successful overall—consistent with prior research that found that Specific Plans can facilitate approval processes.[313] Much can also be inferred based on where projects are not sited in these jurisdictions, as shown by the maps in *supra* Part III 4. Indeed, cities are not relaxing density and development standards uniformly within their boundaries. Interviews suggest that the political will to allowing dense development only extends to certain geographic areas. Interview participants from Redwood City, San Francisco, and San Jose have characterized this as the "grand bargain," in which constituents consent to increased density in growth in key areas in return for "leav[ing] the low-density residential neighborhoods alone."

In addition to the obvious equity implications of refusing to site dense development in lower-density areas,[314] the lack of political will also has ramifications in cities like San Francisco, that may undermine efforts to address climate change. San Francisco's western side sees virtually no development, yet is linked to the city's downtown via high quality light rail and bus lines.[315] Interviews have also raised examples of transitional single-family home neighborhoods where a denser residential product could be possible on paper, but not politically. The lack of development in these areas supports the presence of political—not necessarily planning or zoning—barriers.

I. Very few of these entitled projects were challenged in court

A close examination of the projects entitled during our study period in these five cities suggests litigation rates are quite low. At a basic level, our data

310. *Id.*at 25.

311. *See e.g.*, COUNTY OF SAN FRANCISCO, EASTERN NEIGHBORHOODS PLAN: EAST SOMA AREA PLAN,

312. S.F. MUNI. CODE § 206.3.

313. *See* LANDIS ET AL., *supra* note 168, at 95-96.

314. *See* Mangin, *supra* note 198, at 92.

315. *See e.g.*, J.K. Dineen, *In a wealthy SF neighborhood, residents fight low-income housing*, S.F. CHRONICLE (Nov. 16, 2016), https://perma.cc/YN4X-3YNR.

reveals that lawsuits challenging residential and mixed-use projects over five units is more common than the generic CEQA litigation rates reported in prior studies (all estimated at below 1%).[316] Nonetheless, the overall litigation rates are low regardless of whether they were measured with respect to number of projects or number of units. This directly conflicts with the perceptions of our interview participants, many of whom perceived CEQA litigation rates to be much higher within each city.

Figure 20: Litigation Rates by Project and Unit Counts

	Total Projects	Total Units	Litigated Projects	%	Litigated Units	%
All Jurisdictions	268	31,566	7	3%	1,994	6%
San Francisco	95	9,768	3	3%	1,273	13%
San Jose	65	11,463	2	3%	583	5%
Oakland	90	8,958	1	1%	47	0%
Redwood City	13	1,100	1	--	91	8%
Palo Alto	5	277	0	--	0	0%

The total number of projects litigated across all five cities is low. We have omitted the litigation rates by projects in Redwood City and Palo Alto because of the limited number of projects within each city (Palo Alto had no litigated projects; it had only a handful of projects.). For example, in Redwood City, one out of thirteen projects lead to a litigation rate of 8%. Comparing San Francisco (95 entitled projects), Oakland (90 entitled projects), and San Jose (65 entitled projects) gives us more information on the potential impact of CEQA litigation.

Notably, the variation in the number of lawsuits within these jurisdiction does not appear to coincide with overall housing entitlement approval timelines, at least not in these project years. San Jose's environmental review process appears faster than San Francisco's, which is one of the slowest among our jurisdictions. Moreover, not a single CPE was litigated in San Francisco nor in Oakland, therefore the litigation rates likely cannot explain the stark differences in CPE timeframes in these two jurisdictions.

It also appears that only two of the nine litigated projects had affordable housing units within them (one with 11% and the other 33%). Both were located in San Francisco. Notably, none of the 100% affordable housing developments entitled during the study period within these five cities were litigated; however,

316. *See* CAL. OFFICE OF SENATE RESEARCH, POLICY MATTERS (2018), https://perma.cc/34HL-K8SX; Smith-Heimer et al., *supra* note 194; CAL. ST. SENATE ENVTL. QUALITY COMM., CEQA SURVEY (2017), https://perma.cc/9HXP-RFYR.

affordable housing developments have been litigated outside our time frames and remain the subject of substantial press coverage.[317]

Excluding settlement, CEQA defendants have frequently won more cases than plaintiffs.[318] Settlement could be treated as a partial victory for plaintiffs, in which case success rates are about twice as high than for defendants. Of the ongoing cases, the plaintiff lost in the trial court in all three cases and then appealed. The success rates do not appear to vary substantially by type of claim. Of the six lawsuits including CEQA claims, three settled and defendants won once. Of the five lawsuits including non-CEQA claims, three settled and defendants won one.

CEQA and non-CEQA claims were approximately equally likely to be raised by plaintiffs in the lawsuits. Of the seven lawsuits, six raised CEQA claims, but four of those six also raised planning and zoning claims. One lawsuit also raised planning and zoning related claims but did not raise CEQA claims. This means that six projects raised CEQA claims, five projects raised non-CEQA claims, two lawsuits raised CEQA claims only, and one lawsuit raised non-CEQA claims. There are two potential explanations for this. Once a plaintiff decides to sue a project based on planning and zoning violations, the marginal cost of adding an additional CEQA claim is likely not prohibitive. But the reverse is also true—the marginal cost of adding a planning and zoning claim to a CEQA suit is likely not great either. Regardless, non-CEQA claims (for example, that project approvals violated state or local zoning or planning codes) appear to be just as common as CEQA claims. This suggests that CEQA is not the only driver of litigation in this context. It also suggests that eliminating CEQA might not eliminate legal challenges to most of the projects that were litigated during this study period in these cities.[319]

317. The lawsuit against Habitat for Humanity in Redwood City is illustrative. Two attorneys filed suit against an approved affordable housing development, alleging that the height of the building would block sunlight in their office windows. The project was only half of the allowable height in the Downtown Precise Plan area. The lawsuit eventually settled. *See* Press Release, Holland & Knight, Holland & Knight Achieves Favorable Settlement for Habitat for Humanity in Legal Battle over Proposed Affordable Housing Development (July 26, 2018), https://perma.cc/ZST9-UG3B; *See also* Zachary Carr, *Settlement reached over height of downtown affordable housing*, THE DAILY J. (Jul. 21, 2018) https://perma.cc/UUD8-W9X3.

318. We note that given the small sample size of our litigation data set (seven lawsuits), any conclusions we draw about the nature and resolution of litigation will be limited. We expect to draw firmer conclusions after collecting additional litigation data from the Los Angeles area.

319. One caveat to this conclusion is that different levels of judicial scrutiny to different kinds of claims may mean that non-CEQA land use lawsuits may be less (or more) likely to succeed in court than CEQA lawsuits. If this is the case, then eliminating one kind of lawsuit may have some impact on litigation outcomes and impacts on development. Again, our limited data set from the Bay Area does not allow us to draw firm conclusions on this point, but we will gather more data on this from the Los Angeles area.

Figure 21: Types of Legal Claims

Lawsuits with CEQA claims	6
Lawsuits with non-CEQA claims*	4
Projects that raised only CEQA claims	2
Projects that raised only non-CEQA claims*	1

*non-CEQA claims include procedural violations or violations of planning and zoning law.

J. Administrative appeal rates are much higher than CEQA litigation rates within these five cities

We recognize that litigation rates do not tell the entire story of the threat of litigation and how it impacts the residential development process. CEQA critics have discussed how the threat of litigation may deter developers from even filing entitlement applications; this threat can also lead developers to capitulate to a plaintiff's demands even before a lawsuit is filed. While it is difficult to empirically measure the threat of CEQA litigation given existing datasets, project administrative appeals provide a useful proxy in several ways. First, under state law a project appeal is a prerequisite to filing a CEQA lawsuit, since a plaintiff must first exhaust administrative remedies.[320] Second, a project appeal can provide a potential plaintiff with a hook to leverage settlement before filing suit.

We found that appeals rates in Oakland, San Francisco, and San Jose are significantly higher than the litigation rates across all three of these jurisdictions for these study years. Notably, the appeals rates also more closely approximate our interview participants' estimations of the frequency of CEQA litigation—however, in some cases, interview estimations were still significantly higher. When adjusting for appeals as a percentage of total units entitled, the appeals rate increases in every jurisdiction, showing that larger-than-average projects are being challenged. One potential explanation for the higher rate of appeals is that projects expend significant resources in making projects "bulletproof" in anticipation of future litigation. The lower litigation rates might reflect the fruit of those labors, with the higher appeals rates proxying for the threat of that litigation.

The success rates for administrative appeals are more difficult to determine than litigation, due to the limitations in how certain jurisdictions track appeals in the meeting minutes for their appellate bodies. From the high appeals rates relative to litigation rates, it can be inferred that developers are settling with potential plaintiffs before a lawsuit is filed. An alternative explanation is that if appeals usually fail, that failure may discourage some plaintiffs from filing lawsuits. Further data on how these appeals are resolved will help distinguish between these possibilities. We will be collecting that data in our future research, as well as data on the types of claims raised in appeals.

320. CAL. PUB. RES. CODE § 21177 (2016).

Figure 22: Appealed Projects Per Jurisdiction

Project Characteristics	San Jose	San Francisco	Oakland	Palo Alto[321]	Redwood City
# Projects	65	93	93	5	13
# Appealed Projects	6	15	13	--	2
% of total projects	9%	16%	14%	--	15%
# Units	11,463	9,768	8,958	277	1,100
# Appealed Units	1,631	2,996	1,941	--	493
% of total units	14%	31%	22%	--	45%

Part IV: Discussion

Our findings reveal that all the jurisdictions studied provided for dense infill development but retained discretionary control over new residential developments of five or more units, primarily through aesthetic control. All five cities required a similar number of approvals. Despite these similarities, the local processes yielded widely different results in rates of entitlements, length of approval periods, and implications for equity. These findings are both consistent and in conflict with past research and leave open important questions for future exploration. They also directly inform current political and policy debates.[322]

A. In these cities, time lags in entitlement (and associated costs) are most likely driven by local factors and not CEQA or its requirements

CEQA reform continues to hold the attention of politicians and policymakers.[323] Data collected from these five cities (some of the most expensive cities in the state) suggests that reforming CEQA does little to address time lags in entitlement (and associated costs) within these cities, primarily because the time lag variations across cities does not appear to be driven by CEQA or its

321. We were not able to obtain Palo Alto appeals data at the time of publication.

322. In these conclusions, we emphasize that we will continue to collect data from cities around the state. We limit our conclusions to these five cities and will present comparative analysis across the Bay Area and Los Angeles in future work.

323. Most recently in the 2018 Gubernatorial debate, the Republican candidate (with experience developing housing in the Midwest) attributed the high costs of housing to the law "for slowing project approvals and adding to costs of development" but focused his attention on "overhauling" CEQA as a potential solution to California's persistent housing crisis, noting that the power that cities and counties currently have over land development "is appropriate." *See* Liam Dillon, *Newsom, Cox split on how California governments should respond to the housing affordability crisis*, L.A. TIMES, (Oct. 8, 2018), http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-may-2018-newsom-cox-split-on-how-california-1539020247-htmlstory.html.

requirements. First, data indicates these cities often employ tools to facilitate CEQA compliance, and that neither entitlement timelines nor production appears to coincide with the type of land-use approval processes or environmental review employed. For example, an exempt project in San Francisco takes twice as long as in Oakland, and nearly as long as a full EIR in San Jose. Thus, local practices and context (such as staffing levels, political dynamics and leadership, or planning department practices that respond to political dynamics and directives), appear to more strongly influence environmental review and entitlement timelines, rather than CEQA requirements.[324]

Based on our initial findings, a better focus for the state to improve housing production and reduce delay in approval processes would be changing the local regulatory systems that cities develop for land-use approvals. This might include altering the processes or discretion of local governments to structure and administer local land-use review processes, changing the political and fiscal incentives around housing approval by local governments, and providing stronger and more enforceable legal obligations against cities to use their land use approval processes to facilitate housing entitlements.[325]

Second, it is unclear whether CEQA reform would address the impact of litigation on the housing entitlement process. Some of our interview participants discussed the necessity of "bullet-proof EIRs"[326] to forestall CEQA litigation from neighborhood groups. Nonetheless, we have not observed many of these project-level EIRs in the five cities, which suggests that variations in entitlement process timelines between these five cities may not be easily attributable to neighborhood groups abusing state regulation in response to proposed project characteristics. While op-eds, research, and reform proposals often focus on EIRs and CEQA litigation,[327] the data from these five cities indicates that some of the largest projects, those most likely to have significant environmental impacts, do not

324. *See* Christopher S. Elmendorf, *Beyond the Double-Veto: Land Use Plans as Preemptive Intergovernmental Contracts* 9 (Draft Oct. 10, 2018) ("the actual intensity of regulation is a function not just of the rules that exist on paper but of the interest groups that have organized to enforce them, and the attitudes and priorities of the local officials who implement them.").

325. In this last category, we particularly have in mind continuing efforts to strengthen the obligations of local governments under state law to provide Housing Elements in their general plans that facilitate issuance of housing entitlements. Here the state legislature could build on its efforts in the housing package it enacted in 2017. *See, e.g.*, CAL. GOV'T CODE §§ 65400, 65883.2, 65884.09; *see also* Elmendorf, *supra* note 324, at 41-8.

326. This refers to our interpretation of statements from interview participants, describing the need for an EIR document that has sufficient analysis of environmental impacts and technical information to withstand judicial review should the project be challenged in court in terms similar to the term "bullet-proof" used by Barbour & Michael Teitz, *supra* note 63, at 15.

327. Hernandez, Friedman & DeHerrera, *supra* note 219, at 8; Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENVTL. L. J. 21, 23 (2018), https://perma.cc/J7GV-TB48; *see also supra* note 11.

require EIRs (although EIR projects are on average larger than non-EIR projects), and that CEQA litigation is infrequent.[328]

Finally, comparing our findings to the HCD Landis Report reinforces our conclusion that targeting CEQA may not achieve intended policy goals—at least not in these cities—and shows the importance of the increase in discretionary review as a potential driver of timeframes. Landis found a lower overall instance of EIRs in California—about 4% of multi-family developments or 9% of single-family home developments. Our EIR rate is comparatively higher, with around 10% of all projects across all jurisdictions. Our average approval times are also notably longer at 25 months across all cities (with a range of 10 to 34), versus the 11 months for a single-family and 6.7 months for multi-family developments in the Landis study. However, the use of project-based tiering is dissimilar from the rate of 26% in the Landis study; we found a rate of 55% in our project years. Notably, the number of approvals per project is also distinguishable. The Landis study found 2.8 approvals per project on average while our research shows 3.6 on average. Our data suggests that despite more frequent streamlined CEQA review, overall approval time frames within certain cities are increasing as numbers of approvals per project increase. This further illustrates the inability of state CEQA reform to address the issue of time lags in entitlement processes. The local land use regulatory process in general—and the imposition of discretionary review by local governments in particular—is therefore a key issue for policymakers and researchers to consider.

B. Variability and uncertainty in the entitlement process across these jurisdictions may be a more critical factor influencing entitlement timelines than stringency

Our findings generally conform to national surveys like Pendall and WRLURI. These five cities are highly regulated coastal communities that have permissive density, high (and similar) numbers of approvals, and affordable housing incentives. Our findings are also somewhat consistent with the BLURI, in that the BLURI found that the timeframe to complete "permit-review" was about 2 years for multi-family housing and 2.5 years for single-family housing.[329] We found a 25-month review period on average in our jurisdictions across all project types, which is roughly consistent with BLURI's findings, provided their

328. However, we again note the limitations of our current data which can only assess to a limited extent how important the threat of litigation is to whether projects are proposed and how projects are modified in the approval process. We hope to further investigate those questions once we gather additional data on litigation and administrative appeal data from across the state. In particular, one question is whether projects go through EIRs not because of higher environmental risk, but because of higher political risk. Projects that face significant community opposition require EIRs because of the nature of the entitlement process that political opposition creates. Those projects in turn are therefore more likely to be litigated. Again, with additional data from more projects, we hope to explore this question.

329. Quigley, Raphael & Rosenthal, *supra* note 14, at 289.

timeframes do not include the issuance of building permits,[330] but again, we found that the range is great (10 to 34 months). We also found, similar to the Pendall study, that aesthetic controls can be an important factor in the number of units entitled.

However, these are general consistencies that say little about how local regulation, discretionary review, or local process operates. BLURI found that larger cities have more required approvals, which is not entirely supported by our data, as smaller cities like Palo Alto, Redwood City, and Oakland required more approvals than San Francisco and San Jose, which are larger in size.[331] Also, although four of the five cities use aesthetic controls (considered subjective)[332] as the primary mechanism for discretionary review, while also providing for density within the base zoning, and all cities required approximately the same number of approvals, Oakland and Redwood City had comparatively shorter entitlement timelines.[333] This tells us that stringency, if defined by the type and number of discretionary approvals, appears to operate in Redwood City and Oakland in very different ways than in neighboring cities. This also cautions against generalizing state-level policy reform proposals from how land use processes operate within a single city, or even a single region.[334]

In addition, the variation in entitlement processes across these jurisdictions may factor into constraining supply or increasing costs. This variation appears to present informational barriers for newcomers to the market—even for some working within the same region. Variation may impede a developer from navigating the development process within each of these cities without substantial local knowledge. This complexity and variation could also impact the capacity of planning staff to help developers understand the entitlement process. Our interview data confirms that well-capitalized developers with existing relationships and experience in specific jurisdictions are the best situated to navigate these complex local contexts, giving them a competitive advantage. Also, project-level data indicates that larger projects do not necessarily take more time, but often take less time, than smaller projects. If the complexity and requirements of environmental review were the issue, this is not intuitive. This suggests that larger market-rate projects—to the extent that they benefit from expertise and better capitalization—can navigate the processes in these cities in less time than smaller-scale developments. This raises concerns about monopolization, as the cost of acquiring local knowledge forces new market participants out, which could also contribute

330. The BLURI is unclear about whether it is measuring the entire development process from entitlement application to building permit issuance or just the process to obtain a land use entitlement. Depending on how the survey was itself phrased, the vague terminology might have also influenced participants' responses. If the BLURI is including building permit issuance, our timeframes would be much longer.

331. *Id.* at 282. Note that BLURI might have been measuring approvals to obtain a building permit, which might also skew this response.

332. *See* Blaesser, *supra* note 36, at xix.

333. Oakland and Redwood City also had median timelines on certain size projects that were also closer to the 6 months average.

334. This last point emphasizes the importance of collecting additional data from Los Angeles and other areas in California, which we are in the process of collecting.

to increased housing costs. The difficulty in accessing this data for our research purposes also supports this proposition.

A second related issue is the lack of predictability in the process within specific cities. Interviews suggest that unpredictability, as opposed to stringency, in process imposes costs that may keep developers from advancing a project. As discussed in Part III, Redwood City successfully mitigated this unpredictability issue by its Downtown Precise Plan, which imposes more prescriptive development requirements to help with certainty and reduced timeframes. Although prescriptive design requirements have drawbacks,[335] if a jurisdiction is going to impose aesthetic review, explicit design standards can reduce the inherent subjectivity of aesthetic review.[336] As project-level data across all five cities demonstrates, Redwood City moves comparatively quicker, although all five cities have stringent local ordinances. This suggests that Redwood City's approach, which maintains local discretion and a high number of approvals (compared to national averages), could potentially reduce approval timeframes and increase production yields.[337]

Redwood City therefore provides a compelling case study of how to incorporate improvements in discretionary processes in the planning of a new, dense transit-oriented neighborhood, and how to maintain discretionary review and stringency while also expediting entitlement processes. San Francisco, on the other hand, illustrates how the benefits of specific planning tools that promote infill development might be significantly outweighed by the costs of a protracted approval process. This approval process appears related to either San Francisco's unique charter provision (that renders even building permits discretionary actions) or a political culture that influences (and slows) planning practices.

335. Interview participants have noted that highly prescriptive design standards generally give architects less ability to maneuver around building form. They can also have cost impacts if the regulations prescribe more expensive materials, more open space, or a more expensive construction type.

336. *See* e.g., Lemar, *supra* note 218, at 1563 (noting that "whether a building is visually appealing is a subjective inquiry. Whether a building is consistent with the existing architectural context is a *supposedly* objective one) (emphasis added); Brian Soucek, *Aesthetic Judgment in Law*, 69 ALA. L. R. 382, 417 (2017) (noting that aesthetic judgment in land use regulation extends beyond the question of "what types of buildings or uses of land are the prettiest" to judgments about an area's identity and social cohesion).

337. Litigation is another potential source of uncertainty for entitlement processes that can increase costs. However, at least in our current data, litigation occurs at relatively low rates, while all projects go through ambiguous and uncertain design review. Thus, at least initially it appears to us that providing certainty in the design review process is more important for improving the entitlement process than reducing litigation (again with the caveat identified in note 311, *supra*, about the threat of litigation). This is the approach taken by the state legislature when it enacted SB 35, which eliminates much discretionary review for certain qualifying affordable housing developments in cities that have not met their housing goals. *See* CAL. GOV'T CODE § 65400 (West 2018).

C. Uneven land use regulation across a city may operate as a tool of exclusion

Lens and Monkkonen's research indicates that stringency in land use regulation correlates with income segregation, but that this correlation still exists in jurisdictions with permissive density.[338] This suggests that other land use controls, beyond base zoning, contribute to income segregation. Our findings may contribute to an understanding of what may be occurring—at least within these five cities.

As discussed in Part III,[339] all these cities move affordable housing development through entitlement much faster than market rate development. None of the 100% affordable housing developments within our data set were the subject of litigation. This suggests that entitlement processes (in terms of timelines) and environmental review (in terms of opportunity for legal challenge) were likely not the constraint on affordable housing supply during these three years. We emphasize, however, that because these cities approved so few 100% affordable housing developments within our dataset years, it is difficult to ascertain too much about timelines. Moreover, it is possible that opposition to affordable housing might shift if these cities approved substantially more 100% affordable housing developments or approved them in different areas.

Planning and zoning analysis indicates that four of our five cities provide for permissive density and employ tools to incentivize dense residential development near transit, but that permissive density and incentives for growth are not evenly distributed in these same cities.[340] This can create a scarcity issue (in terms of appropriately zoned land within cities) even though these same cities presumably have permissive density. Interview data suggests that the increasing cost of appropriately zoned land presents a major obstacle to affordable housing supply. This combined with drastic reductions in financing available for affordable housing impacts production, because combined, they create fewer opportunities for affordable housing development within these cities. Study participants across all categories repeatedly emphasized that legislative efforts must target both issues, as they operate together to limit deed-restricted affordable development, particularly after the loss of redevelopment funds.

Project data also confirmed that very few affordable units were entitled in our study years across all cities. San Francisco had the highest rate of affordable units entitled, at 11%, which came primarily through its inclusionary ordinance (outside of the former Redevelopment Areas). The lack of financing and suitable zoning for affordable housing developments, along with the importance of affordable housing mandates on market-rate developments in producing affordable units, lends some support to Lens and Monkkonen's recommendation for inclusionary zoning.[341] Still, inclusionary housing is insufficient to solve the

338. *See* Lens and Monkkonen, *supra* note 129.
339. *See supra* Part III.7.
340. *See supra* Part III.8.
341. *See* Lens and Monkkonen, *supra* note 129, at 12.

affordable housing crisis for all segments of the population. The formerly homeless, for example, require service-enriched housing,[342] as do other special needs populations.[343] Inclusionary housing aside, the fact that San Francisco had essentially no development of 5 or more units outside of specific plan areas and former Redevelopment Areas indicates inadequately zoned land may be a barrier to future dense development, both for affordable and market-rate.

D. More data is needed about the risk of displacement through new development

Supply-side solutions have been proposed repeatedly in both the academic and policy literature, as well as proposed legal reforms, with some research identifying potential displacement as an immediate and direct consequent of development. This poses difficult questions for policymakers at both the local and state level on how to promote dense infill development without displacing existing residents, and whether or how local or state proposals are avoiding a tradeoff of displacement for increased future supply.[344] Most of the proposed development in these five cities was on vacant, commercial or industrial land, except San Jose which had one entitled project involving the demolition of a 216 unit rent-controlled building subject to rent stabilization. However, these findings are limited. We only observed five cities in a region, and not all these cities had rent stabilization ordinances. More data across high cost cities with minimal vacant land, particularly those with rent stabilization ordinances, is needed to evaluate the potential impact of any proposed policy that may implicate this issue.

E. State-level reform proposals that would reduce local authority require better data

In these five cities, legal reform to promote equitable infill development may come in the form of state legislative reductions in local discretion over specific types of development; alternatively, legal reform may originate in the electorate or city council of these cities by choosing to reduce the amount of discretionary review for development. State-level action is difficult; there have been successful efforts to reduce local discretion,[345] but two major recent proposals for by-right or

342. *See e.g.*, Kevin Fagan, *Solution to SF's homeless problem starts with supportive housing*, S.F. CHRONICLE (June 29, 2016), https://perma.cc/9EFH-J4U2.

343. The California Tax Credit Allocation Committee defines these special needs populations as "[i]ndividuals living with physical or sensory disabilities and transitioning from hospitals, nursing homes, development centers, or other care facilities; individuals living with developmental or mental health disabilities; individuals who are survivors of physical abuse; individuals who are homeless . . . ; individuals with chronic illness, including HIV; homeless youth . . . ." *See* 4 C.C.R. § 10325(g)(3) https://perma.cc/J3R4-9SWP.

344. *See e.g.*, Zuk and Chapple, *supra* note 208.

345. *See* S.B. 35, 2017 2017-2018 Leg., Reg. Sess. (Cal. 2018).

limited by-right development have failed.[346] While our case studies suggest that some political will to increase affordable housing supply exists in at minimum four of these cities, it is unclear how broad that impulse extends across the state or how strong it may be.

Assuming a new proposal limiting local discretion over infill development with affordability is politically feasible, the variation in local processes observed in these five cities in a single region is substantial enough that without good data across multiple cities and regions, there is a high risk that state-level reform of local process may not advance intended policy goals.

For example, recent legislation such as SB-35[347] attempts to eliminate the CUP requirement for certain projects consistent with zoning, but the complexity of the entitlement processes may prevent this legislation from accomplishing what is needed in these five cities. For instance, some cities impose a myriad of specific plan approvals on zoning-compliant projects that happen to be located within a specific plan area.[348] Although these approvals are functionally similar to CUPs, on paper they are different processes. HCD has drafted proposed regulations that appear to cover specific plan permits within the ministerial process.[349] San Jose provides another example. Most projects in San Jose go through the PUD process, which requires rezoning and thus renders a project ineligible for SB-35. Yet the same PUD process in San Francisco and Oakland can occur without rezoning. Even though the PUD process accomplishes the same goals in these jurisdictions, the application is significantly different. Without knowledge of these nuances, lawmakers cannot draft legislation that accurately addresses the problem and provides clear guidance to local stakeholders. Moreover, without an understanding of the distribution of non-zoning compliant projects entitled each year, lawmakers may find their legislative tools unable to solve the right problems. Even legislation that is effective when enacted may quickly become ineffective due to local government efforts to restore control over new development. For instance, SB-35 may be unable to avoid cities downzoning or enacting more inflexible design criteria to force all approvals through rezoning or variance processes that are not subject to state streamlining. SB 166—California's "no net loss" law—prohibits jurisdictions from reducing residential density to a lower residential density than what was utilized to determine compliance with housing element law.[350] While this helps mitigate unintended impacts of SB-35, it is unclear if the provision applies

346. *See* CAL. DEP'T OF FIN., STREAMLINING AFFORDABLE HOUSING APPROVALS: TRAILER BILL TECHNICAL MODIFICATIONS (6-10-16) (2016), https://perma.cc/GDS6-XVCR, at 5–6; S.B. 827 Reg. Leg. Sess. (2017-2018) (Cal. 2018).

347. *See* S.B. 35, 2017 Leg., Reg. Sess. (Cal. 2018).

348. Examples of this include the Large Project Authorization in certain use districts of San Francisco's Eastern Neighborhood plan area or the Planned Community Permit in Redwood City's Downtown Precise Plan. *See* S.F. MUNI. CODE § 329; REDWOOD CITY MUNI. CODE § 47.1-47. 5.

349. *See* Memorandum from Cal. Dep't. Housing & Community Dev., Draft SB-35 Regulations § 301(a), Sept. 28, 2018, https://perma.cc/J5U7-KDKN (defining the ministerial process as "non-discretionary and cannot require a conditional use permit or other discretionary local government review or approval").

350. *See* CAL. GOV'T CODE § 65863 (2018).

to charter cities.[351] Moreover, SB-35 may be ineffective in jurisdictions where base zoning has not been updated to reflect General Plan updates.[352] Finally, jurisdictions are increasingly regulating density based on height and building form. In many places, height—not a limit on dwelling units per acre or FAR—is the major barrier to building more units. Future state legislation should consider these evolving zoning standards.[353]

F. The state should not only mandate, but directly support good data reporting

Perhaps the single most important finding explored in this article is also the most obvious—poor data access to project approvals in many jurisdictions. Results are only accurate to the extent that data provided to the public through public portals and commission minutes are accurate. While better-resourced jurisdictions have advanced parcel information tools and sophisticated websites, many rely on outdated online permit systems that are not updated with current data. Oakland is an extreme example of what can result from inadequate resources—their online permit system often contains incomplete information and has no link to approval documents. While we supplemented these shortfalls with minutes from Planning Commission and City Council meetings, some projects go through an administrative, department-level review for which complete data was not available. While we erred on the side of caution and included six projects in our database that do not have complete data, we caution that it is possible that these six projects skew the total number of approved projects higher than what it actually is. Additionally, Oakland's pre-application process that some projects utilize prior to submitting a formal application was also inconsistently logged in their online system, which could influence approval timelines. We cannot infer that Oakland's poor data access is either deliberate or a reflection of local policy; the city's continued work to supplement state requirements around open government suggests the opposite.[354] It is more likely that Oakland, which faces a uniquely persistent budget

351. Section 65803 exempts charter cities from compliance with §§ 65800 – 65912 of the Planning and Land Use Code unless explicitly stated otherwise. The text of SB 166 does not explicitly apply its requirements to charter cities. All of the jurisdictions studied are charter cities. *See* CAL. GOV'T CODE § 65803 (2018). For a legal interpretation that the new requirements do apply to charter cities, *see* Public Interest Law Project, SB 166 (2017) Memorandum at 6, https://perma.cc/TK7V-AMYD. Without an amendment to the Government Code, determining applicability will likely require litigation.

352. *See* discussion of San Jose, *supra* Part I n.33.

353. We note that SB 827, which failed, attempted to do this. *See* S.B. 827, 2017-2018 Leg., Reg. Sess. (Cal. 2018) (the proposed legislation exempted eligible applicants from certain height requirements).

354. In 1997 Oakland passed its own Sunshine Ordinance to supplement Brown Act requirements around open government, developed in partnership with the League of Women Voters and the California First Amendment Coalition. This ordinance covers meeting minutes and agendas relevant to discretionary approvals of residential development. *See* OAKLAND MUNI. CODE §§ 2.20.010 et seq. (Oakland Sunshine Ordinance).

crisis,[355] is severely under-resourced given city initiatives to accelerate development and the growing demand for housing.

In contrast, cities like San Francisco have excellent data access that allows us to determine precisely what was approved each year according to our parameters. However, even good publicly accessible data does not fully reflect the complexity of the planning process. San Francisco employs a streamlined application process[356] that integrates processes that constitute distinct approval pathways in other jurisdictions, like design review. The fact that there are no formal design review approvals in San Francisco does not mean these processes are not happening. San Francisco's various specific plan permits also combine what is essentially a CUP and variance process into one, reducing the number of CUPs and variances in that jurisdiction. More projects are receiving variances than these numbers suggest. Jurisdictions like San Jose, on the other hand, employ very distinct approval processes, which also influences timeline. The majority of developments in San Jose go through the PUD process, which involves a rezoning and a permit approval that happen sequentially, rather than in tandem. Our interviews suggest that developers often complete the rezoning and then sell the land to different developers who later secure the permit. The time lag between these two milestones may slightly exaggerate approval timelines in San Jose for PUD projects.

Although top-down state reform of environmental regulations (or local regulation over land use) may encounter substantial difficulties, improving data access is an important first step to accurately understand the problem. Extracting project-level data is very time and resource intensive. There are few jurisdictions statewide that have development approval data in one centralized repository. Supporting jurisdictions to provide access to project-specific data on land use approvals, CEQA compliance, and overall time frames will help inform top down policy making in critical ways. Improving the quality of data and access to data can also help researchers and policymakers identify how long processes take and identify inefficiencies and redundancies that exist in local processes. This could also immediately help affordable housing developers determine what funding is required for the entitlement process. Finally, publicly available data about approval timeframes and processes may increase public and political pressure on local governments to make processes more effective and efficient.

SB 35 has somewhat advanced this issue some, in that it requires annual data reporting (which includes reporting total number applications received, projects entitled, building permits issued, and total number of certificates of occupancy issued).[357] The state could build on this requirement to support this

355. *See* Daniel Borenstein, *Despite booming economy, Oakland finances deteriorate*, THE MERCURY NEWS (March 3, 2017), https://perma.cc/8MT4-7X3P.

356. In early 2018, San Francisco overhauled its entitlement application process. While this new process would likely impact data collection for projects applying for entitlements post-2018, this new process does not affect our data years. CITY AND COUNTY OF SAN FRANCISCO, CHANGES TO PRELIMINARY PROJECT ASSESSMENT, Apr. 2, 2018, https://pe rma.cc/AEE5-LD4T.

357. *See* CAL. GOV'T CODE § 65400 (2018); *see also* Elmendorf, *supra* note 324, at 47.

work through two additional mechanisms. The first would be funding to support existing data reporting requirements (including those proposed here). As discussed previously, not all jurisdictions are equally resourced, and this appears to have a significant impact on the quality of a city's data. We anticipate that without additional support, at least some city reports will be unreliable. The second would be an enhanced housing element reporting obligation that requires jurisdictions to log information on approval processes and timeframes in a centralized repository with consistent terminology across jurisdictions. To the extent that processes are so dissimilar that they cannot be analogized, this centralized repository could contain explanations. This will aid not only in understanding entitlement processes, but will also help legal organizations to enforce housing element obligations. Housing issues present regional concerns, and current data accessibility and quality presents obstacles to comparative and regional analysis on both trends (rate of entitlement), and processes (which processes may work better).

Smaller steps would also be beneficial. For example, linking existing GIS or zoning data with assessor parcel information and building permit systems is a great first step to understanding how entitlements and building permit processes interact. Linking these systems to provide this data can make housing element reporting obligations more robust. Ideally, improved data access can illuminate more of the internal planning process, by providing detail that is not immediately apparent from approval documents (like the amount of time environmental review adds to the approval process). Interview data suggests that improved entitlement reporting and data can particularly benefit affordable housing developers. Financing affordable housing requires artful layering of state, local, and federal finance—each with their own set of eligibility requirements.[358] Funding applications also happen in cycles. For example, in California, the 9% Low Income Housing Tax Credit has two funding rounds per year.[359] For most of these programs, the site must already be entitled in order to be eligible for funding.[360] Thus, timing entitlements with the funding cycles is very important to affordable housing developers. In an era of limited funding, timing the cycle correctly maybe the difference between a project being funded or not. Improved data can assist developers to improve their predevelopment strategy, especially in areas where they have less experience developing. As discussed above, we observed that these jurisdictions appear to process affordable housing faster than market rate housing.

358. *See e.g.*, *Affordable Housing and Sustainable Communities Program*, CAL. DEP'T OF HOUSING AND COMMUNITY DEV. (last visited Oct. 26, 2018), https://perma.cc/TBV2-E759; *Low Income Tax Credit Programs*, CAL. TAX CREDIT ALLOCATION COMM. (last visited Oct. 26, 2018), https://perma.cc/C6NE-7N2Q; *See also Affordable Housing Trust Fund*, CITY OF LOS ANGELES AND CMTY. INV. DEP'T. (last visited Oct. 26, 2018), https://perma.cc/99KB-SK5S.

359. *See e.g.*, *Application Information*, CAL. TAX CREDIT ALLOCATION COMM. (last visited Oct. 26, 2018), https://perma.cc/D8CS-8S7H (detailing deadlines for two funding rounds).

360. *See e.g.*, 4 C.C.R. § 10325(f)(4) (2018) ("Applicants shall provide evidence, at the time the application is filed, that the project as proposed is zoned for the intended use and has obtained all applicable local land use approvals which allow the discretion of local elected officials to be applied . . .").

From this, we can infer that some jurisdictions treat affordable housing differently, and nuances in process should be made publicly available. This is especially true in jurisdictions where affordable housing entitlement is slower than comparable market-rate development.

Conclusion: Complex issues require a multi-pronged research approach

Our work continues and we are exploring how entitlement operates within other cities throughout the state. At each turn we are reminded there is no single solution to this perplexing problem. Even within land use regulation, entitlement is not the only issue for housing production in California. Increasingly onerous building safety regulations—ranging from seismic standards to renewable energy mandates—may also impose substantial costs on development. The building permit process itself is highly variable by jurisdiction, and interviews suggest it is another source of time delay. Interview participants also referenced construction and labor costs as a major barrier to feasibility. Labor costs, however, do not stem solely from Project Labor Agreements[361] or prevailing wage requirements;[362] developers have also noted a drop in skilled tradespeople post-Great Recession, which has created labor scarcity and implicates workforce development issues. Further study on these factors is necessary. More information is also required on the demand side of the equation—specifically how income and preferences influence where people live and whether they use transit. In sum, we need a better understanding of both sides of the equation (supply and demand), with a clear focus on equity in order to reduce GHG emissions through equitable infill development.

361. Project Labor Agreements are collective bargaining agreements between building trade unions and contractors that govern terms and conditions of employment for all workers on a construction project. *See Project Labor Agreements*, AFL-CIO, (last visited Oct. 26, 2018), https://perma.cc/C8VX-UC8G.

362. *See, e.g.*, CAL. GOV. CODE § 65913.4(a)(1)-(10) (2004) (defining prevailing wage to be the "general prevailing rate of per diem wages for the type of work and geographic area, as determined by the Director of Industrial Relations pursuant to Sections 1773 and 1773.9 of the Labor Code").

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