A Role for States in Addressing the Affordable Housing Shortage

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“But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society.” -- James Madison, Federalist No. 10.

The Housing Affordability Crisis

Housing is a key element of a flourishing society, yet availability of affordable, quality housing in the U.S. is under pressure. Since the onset of the COVID-19 pandemic, pricing of for-sale homes and rental apartments has skyrocketed. This rise in prices has been fueled by the combination of the rise of remote work, which opened up new, often non-coastal, housing markets to white-collar workers; low-interest rates, followed by higher interest-rates; supply-chain problems; higher costs for construction materials; a shortage of construction labor; inaction by developers with lingering post-traumatic stress from the Great Recession; and, perhaps most importantly, a century of bad local housing policy.

Housing shortages once mainly confined to the coasts have made landfall in places like Boise, Idaho, and Bozeman, Montana. According to Freddie Mac, the United States “is short 3.8 million housing units to keep up with household formation.” 2021 saw record demand for rental housing, and the national market-rate rent was up 9% year-over-year as of September 2022. The problem is even more acute for low-income individuals: “A meager thirty-seven affordable and available rental homes exist for every 100 extremely low-income households” and “[o]ne in seven renting families spend at least half of their income on housing.” There are signs the housing market may be cooling, but rising interest rates and fears of a recession could result in a housing-construction slowdown that would exacerbate the shortage. While other factors—including land costs, lack of available land, and high labor costs—contribute to the housing shortage, experts agree that overly restrictive zoning policies are a major part of the problem.

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1 THE FEDERALIST No. 10 (James Madison).
3 Id.
4 See generally M. NOLAN GRAY, ARBITRARY LINES 13–30 (Island Press 2022).
7 See Chan, supra note 2.
8 See Chan, supra note 2.
10 Khater, et al., supra note 6.
Exclusionary Zoning, Neighborhood Defenders & NIMBYS

It is well-established that exclusionary zoning, “a residential zoning plan whose requirements ([such as] minimum lot size and house size) have the effect of excluding low-income residents,” is a headwind to creating affordable housing (and housing generally). Exclusionary zoning “makes housing less affordable, makes the economy less productive, exacerbates income and racial inequalities, imposes increased environmental harms, and limits the types of housing available for different living arrangements, including at different stages of life.” “In most major cities, zoning restricts roughly three-quarters of the city to low-slung single-family housing, banning apartments altogether.”

Where zoning laws do allow multifamily housing, requirements regarding lot size, the number of parking spots, setbacks or height restrictions often make building apartments cost prohibitive. Traditionally, developers can seek relief from restrictive zoning and land use laws by applying for a variance or special permit from a local zoning board. These processes typically involve environmental reviews and public hearings, which add costs to the project and create opportunities for neighborhood residents to delay them or shut them down entirely. Neighbors can raise objections that require developers to conduct expensive environmental or traffic studies, or can initiate litigation to run out the clock on building permits.

Often these neighborhood defenders raise concerns that have nothing to do with the variance or special permit at issue in the public hearing. For example, while the majority of projects in a study of Massachusetts public hearings required variance applications for issues related to setbacks, lot size and dimensions, 68 percent of the public meetings featured comments about parking, 41 percent included comments on design aesthetics and “37 percent included comments about the proposal’s fit with the ‘neighborhood character.’” In California, housing opponents filed litigation under the California Environmental Quality Act to challenge nearly half of the state’s housing production in 2020. Even when a project is finally cleared, it may not resemble what was intended. In Brookline, Massachusetts, neighborhood defenders used every regulatory tool imaginable to obstruct the redevelopment of a former church— “[t]he project ultimately took eleven years to complete, and the final version included nearly 60 percent fewer housing units than the original proposal.”

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14 Kazis, supra note 12, at 5 (internal citation omitted).
15 GRAY, supra note 4, at 2.
16 See Note, Addressing Challenges to Affordable Housing in Land Use Law: Recognizing Affordable Housing as a Right, 135 HARV. L. REV. 1104, 1106 (2022); see also Christopher S. Elmendorf, Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts, 71 HASTINGS L.J. 79, 88 (2019) (noting that economic studies have found “that metro areas with stricter regulation also have higher housing prices”) (internal citation omitted).
17 See GRAY, supra note 4, at 43.
19 Id. at 27.
20 Id. at 87.
21 See Jennifer Hernandez, Anti-Housing CEQA Lawsuits Filed in 2020 Challenge Nearly 50% of California’s Annual Housing Production, CENTER FOR JOBS & ECON., HOLLAND & KNIGHT 1 (Aug. 2022) https://www.hklaw.com/-/media/files/insights/publications/2022/08/082222fullceqaguestreport.pdf?la=en (finding CEQA lawsuits targeted 47,999 new housing units in 2020). Notably, despite these lawsuits being filed under the guise of environmental protection, only 13 percent of them “were filed by environmental organizations that existed prior to filing their CEQA lawsuit.” Id. at 3.
22 EINSTEIN, ET AL, supra note 18 at 25.
closely related “not in my backyard” (NIMBY) activists play a significant role in contributing to extreme housing costs from coast to coast.

The State as a Solution

State legislation designed to preempt or circumvent local exclusionary zoning rules and burdensome and costly permitting and variance processes is a promising, yet often improperly and underutilized, tool to expand the affordable housing supply. Zoning preemption is attractive because it comes at a lower cost to the taxpayer than solutions like government tax credits or housing vouchers, and it empowers private developers—in other words, folks in the business of actually building housing—to build. Done correctly, state preemption can marry democratic values with free-market capitalism to address a major societal need.

States are better positioned to address restrictive land use policies than municipalities for many reasons. First, local governments, which rely on property taxes to provide services, fear that an apartment development, which typically generates less property tax revenue per capita than single-family housing, will be too costly to the government in terms of the services-to-tax-revenue ratio. This fear is often unfounded—new development in Patchogue on New York’s Long Island created six times more tax revenue than educational costs—but it remains a barrier. Additionally, multifamily development is often unpopular among homeowners in the neighborhood of the proposed development, so local politicians have an additional incentive to oppose it. Residents who oppose the development can mobilize to block it (or vote against politicians who support it), but those in favor of the development are less likely to mobilize to support it.

But state-level debates center on affordable housing generally, not on specific projects. “[W]hen land use decisions are made at the state level, people can vote their values, not their most parochial fears.” For example, in 2010 Massachusetts held a ballot referendum to repeal Chapter 40B, a state-level affordable housing statute. Fifty-eight percent of voters opposed the repeal of the statute, and the referendum failed. Yet in a study of public hearings regarding housing proposals throughout Massachusetts, only 15 percent of meeting commenters supported specific local housing proposals. In addition, affordable housing and civil rights groups are typically more active in state politics than locally, so shifting the debate to the state level helps these groups mobilize voters.

Furthermore, states have an ability to advance legislation and regulate land use to create housing that the federal government does not, given that the U.S. Supreme Court has limited the federal government’s powers in recent years. “Subject to a relatively limited set of constitutional constraints, states can impose taxes, create new spending programs, exercise the power of eminent domain,

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23 Kazis, supra note 12, at 18.
24 Id.
25 Id. at 19.
26 Id.
27 EINSTEIN, ET AL., supra note 18 at 107.
28 Id.
29 Id.
30 Id.
regulate participants in the housing market like real estate agents and insurance companies, and regulate land use.”

Preempting restrictive local land use has had bipartisan support in states as diverse as Arkansas and California. Republicans and Democrats alike could each find a compelling narrative to tell about the need for zoning reform—the former emphasizing housing production and economic growth through deregulation, the latter appealing to the need to end exclusionary zoning and contain sprawl.” Thus, addressing restrictive zoning can be politically viable at the state level, although it has faced recent resistance in New York and Texas.

Assuming that state politicians want their states to continue to be (or become) viable places for their populaces to live, they have a duty to act. “After all, when one municipality decides to block new housing development or exclude certain classes of people, it can have a detrimental impact on the region as a whole, to the extent that it shifts development elsewhere or raises costs across an entire region.”

The Legality of State Preemption

The 10th Amendment of the United States Constitution gives states the ability to empower their local governments. States grant local governments either narrow (Dillon’s Rule) or broad (home rule) power, either through their state constitution and/or by statute. Dillon’s Rule states require cities to “defer to the state to make and implement policy, unless it is expressly authorized,” while home rule states allow cities to operate with more authority and limited state interference or delegate specific powers to cities. Any municipality with zoning has been granted that power by its state—“subject to certain standards, state enabling legislation authorizes local governments, including municipalities and counties, to undertake the work of segregating uses and controlling densities...Once delegated the powers, local policy makers may adopt zoning.” Even home-rule states can generally legislate around municipal zoning authority through specific legislation. In fact, “insofar as the state legislature attempts to preempt local action, the state typically wins and local governments lose.” States can also “strip localities of the power to regulate on the subject of that law [zoning, for example] entirely.”

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33 Gray, supra note 4, at 119.
34 Id.
36 Gray, supra note 4, at 118.
37 Id.
38 Id.
39 Id.
40 Id.
41 Gray, supra note 4, at 34–35.
44 See Rick Su, Have Cities Abandoned Home Rule?, 44 FORDHAM URB. L.J. 181, 201 (2017) (internal citation omitted).
Economic zoning,\textsuperscript{45} which the U.S. Supreme Court upheld as a constitutional and lawful use of police power in \textit{Village of Euclid v. Amber Realty Co.} (1926),\textsuperscript{46} was essentially created as a workaround for overtly race-based zoning after the latter was prohibited in \textit{Buchanan v. Warley} (1917),\textsuperscript{47} promoted by the federal government,\textsuperscript{48} and widely adopted by the 1970s.\textsuperscript{49} Because states granted municipalities zoning power, it is logical that they can take it away. In fact, 41 states have already preempted municipal law to limit or prohibit rent control,\textsuperscript{50} and both state and federal courts have upheld state zoning preemption.\textsuperscript{51}

\section*{A Potential Model State Solution}
Affordable housing is such a broad challenge that it is unlikely that any single solution could address it. Based on the premise that new development by nature increases housing supply, which can help reduce demand pressure on housing markets in low and middle-income communities,\textsuperscript{52} a range of policy options could help state and local government motivate private sector action. A number of states have long had legislation designed to preempt restrictive local control, and other states have passed similar legislation more recently and continue to experiment. Yet for various reasons the existing state-level strategies may not go far enough to make a dent in the needed additional housing supply.

This paper explores a model, multifaced state-level strategy that could include (1) allowing accessory dwelling units in single-family neighborhoods, with permitting processes no more strenuous or costly than those for single-family homes; (2) banning single-family zoning entirely; (3) allowing residential construction in commercial zones without cumbersome and often arbitrary barriers; (4) creating state-level housing appeals boards and subjecting all municipalities to them; and (5) banning minimum parking requirements for multifamily projects near public transit. Each section will briefly discuss why the strategy is beneficial, what models states can follow, and how these models can be improved.

\subsection*{Accessory Dwelling Units}
Allowing accessory dwelling units (ADUs), also known as mother-in-law apartments or granny flats, in areas zoned for single-family use is the easiest state-level zoning preemption to implement. This would have the effect of banning single-family zoning. ADUs are less controversial than apartment buildings because they introduce fewer new neighbors (i.e., don’t alter the neighborhood’s “character”) and have less impact on street, water, and utility use. They also allow homeowners (and existing members of the neighborhood) to create passive, supplemental income. On the other hand, since 3.8 million homes are

\begin{footnotesize}
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\item Restrictions that prohibit certain economic uses from specific zones, e.g., banning apartment buildings or factories from areas zoned for residential use or use minimum building or lot size requirements to make a neighborhood’s housing prohibitively expensive. See \textit{Village of Euclid v. Amber Realty Co.}, 272 U.S. 365 (1926); see also Michael Kim, \textit{Exclusionary Economic Zoning: How the United States Government Circumvented Prohibitions on Racial Zoning Through the Standard State Zoning Enabling Act}, 48 J. LEGIS. 124, 144 (2021).
\item \textit{Village of Euclid v. Amber Realty Co.}, 272 U.S. 365 (1926).
\item \textit{Buchanan v. Warley}, 245 U.S. 60 (1917).
\item \textit{GRAY}, supra note 4, at 26–30.
\item \textit{GRAY}, supra note 4, at 30.
\end{enumerate}
\end{footnotesize}
needed,\textsuperscript{53} they are not ultimately going to make a huge dent in the housing shortage. But they make more of a dent than just single-family homes alone, and thus are better than nothing, so allowing them in areas zoned for single-family use statewide is a no brainer. ADUs also help meet the goal of creating housing for different living arrangements.

California, New Hampshire, Oregon, Rhode Island, and Vermont have preempted local ADU prohibitions to at least some degree.\textsuperscript{54} Other states, like Connecticut, have passed state-level legislation allowing ADUs as of right in single-family neighborhoods but allow municipalities to opt out of the law.\textsuperscript{55} It is too early to assess the impact of most of these laws, but in 2016 California amended its law to limit how local governments could regulate ADUs, including banning burdensome parking and owner-occupancy mandates,\textsuperscript{56} and the number of ADUs permitted has increased by more than 1,400 percent since then.\textsuperscript{57}

Although it took 40 years and more than a dozen state-level bills for ADUs to take hold in California,\textsuperscript{58} other states can learn from California’s process. For instance, it is safe to assume that many Connecticut towns will opt out of the state’s optional ADU law—that should not have been on the table. Importantly, ADUs should not be treated as a lesser type of housing and should be subject to the same rules as any single-family home, and not more stringent rules. For example, owner-occupancy provisions limit the opportunity for passive income, and [i]f single-family homes can be rented out (by a nonresident owner), then what is the policy basis for requiring occupancy when there is an ADU on the property?\textsuperscript{59} States should also consider limiting permit processing fees local governments can charge, particularly if only modest capital improvements are needed.\textsuperscript{60}

\textit{Banning Single-Family Zoning}

States can take it a step further and ban single-family zoning. As of 2019, 75 percent of the residential land in the U.S. was zoned exclusively for single-family use.\textsuperscript{61} Zoning that does not allow for any multifamily development is arguably as “exclusionary” as zoning gets without violating the equal protection or due process clauses of the U.S. Constitution.\textsuperscript{62}

Oregon has essentially banned single-family zoning, requiring cities to permit development of two-unit buildings in all residential zones in cities of more than 10,000 people and in the Portland-area suburbs, and up to four-unit buildings in cities of more than 25,000 people and in the Portland-area suburbs, in a

\textsuperscript{53} Khater, et al., \textit{ supra} note 6.

\textsuperscript{54} \textit{ADU Model State Act and Local Ordinance}, AARP LIVABLE COMMUNITIES (January 2021), \url{https://www.aarp.org/livable-communities/housing/info-2021/adu-model-state-act-and-local-ordinance.html}.

\textsuperscript{55} Brendan Crowley, \textit{Middletown Opt for Local Control Over Accessory Apartments}, CT EXAMINER (Dec. 6, 2022), \url{https://ctexaminer.com/2022/12/06/middletown-opts-for-local-control-over-accessory-apartments/}.


\textsuperscript{57} \textit{Id}.

\textsuperscript{58} \textit{Id}.

\textsuperscript{59} \textit{Supra} note 56.

\textsuperscript{60} \textit{Supra} note 56.


\textsuperscript{62} See Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926), which referred to an apartment house as a “mere parasite” and held that governments have a legitimate interest in protecting a neighborhood’s character. In Buchanan v. Warley, 245 U.S. 60 (1917), the Court held that a municipal zoning ordinance that prohibited the sale or occupancy of real estate by Black people in a white neighborhood was in violation of the Fourteenth Amendment’s due process clause.
2019 law.\textsuperscript{63} The law also includes a provision prohibiting “unreasonable cost or delay” on development of apartments covered under the law, which state regulators have interpreted “to ban local mandates of non-standard lot sizes or more than one parking space per home.”\textsuperscript{64} This both keeps local governments in check and limits the ability of neighborhood defenders and NIMBYs to delay or shut down development. State lawmakers expect it to take 20 years for the law to make a meaningful difference to Oregon’s housing supply, but there should be incremental changes year-over-year.\textsuperscript{65}

In 2021, California passed a similar bill, SB 9,\textsuperscript{66} which seems to have generated more local backlash than Oregon’s bill, with critics suggesting it will exacerbate gentrification or environmental problems\textsuperscript{67} (the latter being a consistent NIMBY talking point throughout America).\textsuperscript{68} But unlike the Oregon law, SB 9 provides too much room for cities to “attempt to effectively preclude any SB 9 development by introducing a litany of onerous, often creative new restrictions, such as requirements that any new units must meet corporate headquarters-level LEED standards or that new tenants can’t own cars.”\textsuperscript{69} Unless remedied, this will blunt the law’s impact on the housing crisis. States can look to Oregon, not California, as a better model for ending single-family zoning.

\textit{Housing Appeals Statutes}

A housing appeals statute is a state statutory mechanism that creates an appeals system, often in conjunction with a municipal permitting process, to ensure local governments or neighborhood defenders do not unfairly reject or drag out affordable housing development to the point where it is no longer viable.\textsuperscript{70} Massachusetts, Connecticut, Rhode Island, Illinois, and New Hampshire all have housing appeals statutes,\textsuperscript{71} and while the statutes vary slightly by state, they all are intended to accelerate affordable housing development permits, “establish a formal review process for local affordable housing decisions...and provide significant authority to modify the decisions made by local housing commissions.”\textsuperscript{72} If a local zoning board grants an affordable housing developer a permit, but imposes conditions that make the project economically unviable, the developer has a “builder’s remedy”\textsuperscript{73} and can appeal to the state board to review those conditions.\textsuperscript{74} These statutes provide affordable housing developers recourse against neighborhood defenders and NIMBYs, while maintaining the right for neighborhood residents to raise legitimate environmental or other concerns.

\begin{itemize}
  \item Kazis, supra note 12, at 33.
  \item Hernandez, supra note 21.
  \item Bach, supra note 67.
  \item Neel, supra note 9, at 1401.
  \item Neel, supra note 9, at 1403.
  \item Neel, supra note 9, at 1401.
  \item Christopher S. Elmendorf, \textit{Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts}, 71 HASTINGS L.J. 79, 94 (2019).
  \item Neel, supra note 9, at 1401.
\end{itemize}
States are the appropriate actors to implement housing appeals statutes for several important reasons. First, as established earlier in this paper, municipalities tend to favor exclusionary zoning. Second, many housing appeals statutes utilize state courts in the appeals process, so it would be impractical and perhaps unconstitutional to have municipal appeals statutes. Finally, a state has more resources than a municipality and can share these resources across the state to ensure the appeals process does not end up becoming a logistical nightmare that ultimately increases project timelines and costs.

Many housing appeals statutes require municipalities to maintain 10 percent of their housing stock as affordable.\(^75\) As long as the municipality achieves and maintains this threshold, it will no longer be subject to appeals board review. But this acts as more of a carrot than a stick—in Massachusetts, only 65 of 351 municipalities meet the threshold.\(^76\) There also does not seem to be any science to the 10 percent requirement—many municipalities need more than 10 percent of their housing to be affordable,\(^77\) and ideally all housing should be more affordable across income groups than it is now.

Expanding the appeals system might create a backlog and burden appeals boards, but states can increase the number of people who serve on the boards, or perhaps implement a jury-duty-style system where all residents are required to serve. Given that neighborhood zoning meetings tend to be dominated by homeowners who live in the immediate vicinity of the proposed development,\(^78\) a jury pool reflecting the state’s true diversity (in terms of race, gender, economic status, and homeowner vs. renter) might be inclined to “vote their values, not their parochial fears,”\(^79\) and approve projects on appeal.\(^80\)

Several Western states also have housing appeals statutes, but municipalities are only subject to them if they are out of compliance with state-required plans to accommodate projected population growth.\(^81\) California has a particularly confusing, ambiguous, and ineffective statute, and although its builder’s remedy has been in effect since 1990, it has rarely been used.\(^82\) Under Governor Gavin Newsom, the state has taken a more aggressive approach to enforcing the required municipal plans to accommodate future growth, and with many cities currently out of compliance with the required housing element plans, developers are beginning to utilize the builder’s remedy.\(^83\) But because California’s builder’s

\(^{75}\) Neel, supra note 9, at 1419.

\(^{76}\) Note, Addressing Challenges to Affordable Housing in Land Use Law: Recognizing Affordable Housing as a Right, 135 HARV. L. REV. 1104, 1113 (2022).

\(^{77}\) Neel, supra note 9, at 1419.

\(^{78}\) EINSTEIN, ET AL., supra note 3 at 103.

\(^{79}\) Kazis, supra note 12.

\(^{80}\) “One might think that renters, who comprise a large share of the voting-eligible population in many cities, would be stalwart allies of developers. But renters vote at much lower rates than homeowners, and though renters are generally more pro-development than homeowners, renters in expensive cities have classic NIMBY preferences. They oppose projects in their neighborhood, even though they would favor citywide measures to increase housing development.” Christopher S. Elmdendorf, Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts, 71 HASTINGS L.J. 79, 91 (2019). This suggests that project approval via a state-wide (or perhaps regional or virtual in larger states) jury pool could be viable.

\(^{81}\) Christopher S. Elmdendorf, Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts, 71 HASTINGS L.J. 79, 94–95 (2019).


remedy statute is confusing and there is little legal precedent in using it, it remains to be seen whether these efforts will be successful. The western states, including California, would be well served by strengthening, streamlining, and screaming about the existence of the builder’s remedy from the rooftops. Rather than allowing the remedy only when a city is out of compliance with the housing element, the states could allow it in all municipalities at any time. States can also explore other tools at their disposal, like bringing direct litigation against cities who try to avoid the builder’s remedy,84 to hold municipalities accountable.

Commercial to Multifamily Conversions & Commercial Zones

The rise of remote work, spurred in part by the COVID-19 pandemic, has lowered office-building usage and demand, driving the national office vacancy rate to a nearly 30-year high.85 Many organizations who wish to maintain in-person work tend to prefer modern, amenity-filled buildings over older buildings.86 In fact, economists have estimated that remote work could destroy $453 billion in commercial office value over the long term in New York City alone.87 As a result, it is reasonable to assume that many central business districts will be filled with office buildings that are either empty or not serving their highest and best use. Given the housing crisis, converting many of these office buildings into multifamily housing units is a logical notion.

One might think this would be commonplace; however, between 2016 and 2022, there were only 89 completed office-to-multifamily conversions across 26 major U.S. markets, creating a measly 14,000 apartments, with more than 200 projects underway or planned.88 Part of the reason for this is that light and airflow challenges make many office buildings unsuitable for conversion.89 Sometimes these challenges can be overcome, but they often make conversions cost-prohibitive.90 Local zoning requirements and regulations also create a barrier to office-to-multifamily conversions, given that many neighborhoods are zoned for commercial—but not residential—use. While some commercial zones where manufacturing or other heavy industrial work is done may be legitimately unsuited for apartment buildings, there is no good reason that a neighborhood comprised primarily of office buildings and retail stores cannot also include apartments.

A new bill in California goes a step further in removing conversion barriers: Assembly Bill 1532 would give office-to-residential conversions “by right” status, “relaxing the permitting and review process for housing projects by preventing a city or county from requiring certain permits to convert a vacant office into housing.”91 The bill would also allow conversions “in any area of a city regardless of local zoning laws,” require at least 10 percent of the units be held for low- and moderate-income families, and offer

88 Morin, et al., supra note 85.
89 Morin, et al., supra note 85.
90 Morin, et al., supra note 85.
partial state subsidies to incentivize these projects. This bill has a long way to go before it becomes a law, and even longer before its effectiveness can be assessed, but if passed as drafted, it could serve as a model for other states seeking to revitalize their central business districts through the creation of housing.

Office-to-multifamily conversions may not always be financially or technically feasible, but why should arbitrary regulations stand in the way of an otherwise feasible project? Additionally, given that these conversions would take place in neighborhoods otherwise used for commercial use, these projects should face considerably less backlash from neighborhood defenders and NIMBYs than other policies, such as banning single-family zoning.

California recently enacted two other laws that make it easier to develop residential properties in commercial zones. The Affordable Housing and High Road Jobs Act of 2022 (AB 2011) provides for a streamlined, ministerial approval process for housing developments in commercial zones that meet certain standards. There are two processes, one for projects where 100 percent of the proposed units are sold or rented at a price consistent with the limits established by the California Tax Credit Allocation Committee to low income households, and the second for developments located along commercial corridors (such as a vacant strip malls) which meet local or state-defined affordable housing criteria.

There are numerous other conditions, such as distance from a freeway, and density and setback requirements that differ depending on whether or not the project is within half a mile of a major transit stop. These projects are exempt from the California Environmental Quality Act and “a decision on the project must be made within 90 days for projects with less than 150 homes or within 180 days for projects with more than 150 homes.” Review is based on objective standards and if a local government determines the project does not comply with these standards, it has to explain why within a 60-90-day period. The law also requires developers to pay the project’s construction workers a prevailing wage.

California’s other recently enacted affordable housing law, the Middle Class Housing Act of 2022 (SB 6), allows developers to build residential projects in areas zoned for retail, parking and office space without a rezoning. This law does not provide ministerial approval, but it has no affordability requirements (although projects must comply with local inclusionary zoning laws) and lower minimum density requirements. It also requires developers to pay “a skilled and trained workforce” a prevailing wage. One California state senator estimated that this law could result in the development of at least

92 Id.
94 Id.
95 Id.
96 Id.
97 Id.
98 Id.
99 Id.
100 Id.
101 Id.
102 Id.
2 million housing units. The law also enables developers to invoke the Housing Accountability Act (HAA) to limit local discretion to deny or condition approval."

Both of these laws encourage development, so they are a step in the right direction, and the streamlined approval processes are likely to shorten project timelines and lower zoning and permitting costs. However, several California real estate developers, who spoke to me anecdotally and off the record, have expressed skepticism that these laws, particularly SB 6, will be utilized regularly, arguing that the labor requirements will offset the savings from the streamlined process, raising total project costs perhaps by more than 10 percent. These developers suggest that SB 6 is more likely to encourage development in areas with a heavy union presence, like Los Angeles and the Bay Area, as California construction unions already have apprenticeship, prevailing wage, and skilled and trained workforce requirements. Developers in areas such as Orange County, the Inland Empire, San Diego, and Central California, where construction unions are weaker, are less likely to utilize SB 6. Developers are more likely to use AB 2011 overall due to its lack of skilled and trained labor requirements, but the neighborhoods where they can utilize the law are more limited.

A good compromise would be to meld the two laws, and allow residential development in all office, retail, and parking zones, without the skilled and trained labor components. This would encourage developments where 100-percent affordable housing might not pencil out, keep labor costs down, streamline projects, and incentivize development across the state. Construction workers would still be paid a prevailing wage, and developers would still be incentivized to train their workers to ensure an efficient and safe project.

Ending Parking Minimums

Municipal regulations that require housing developments to include a certain number of parking spaces add installation costs and, in many cases, limit development. Ending parking minimums would also free up land that could be used to develop housing. As established above, parking was the most common complaint in a study of Massachusetts public variance hearings. In the U.S., there are nearly seven parking spaces for every car and “[i]n some cities, as much as 14 percent of land area” is dedicated to parking. As more people work from home, there will be even less need for parking. Like floor-area restrictions, parking ratios are arbitrary (or pseudoscience).

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107 EINSTEIN, ET AL., supra note 18 at 87.
109 Id.
110 Shoup, supra note 106 at 2.
California recently ended parking minimums for developments within a half-mile of public transportation (AB 2097), and Oregon enacted a similar law through administrative action. This is a step in the right direction, but most Californians do not live within a half-mile of public transportation, so the law is unlikely to be particularly effective. However, over time, as driverless fleets of vehicles take hold or as public transportation improves as part of efforts to combat the climate crisis, this could be a good solution.

Other states with better transportation infrastructure may see greater impact from similar laws. For instance, in New York, Senate Bill S162 aims to limit municipalities’ power to require the construction of off-street parking for developments within a quarter mile of a commuter rail or subway station. The New York metro area has the most public transportation commuters of any metro area in the country, so this law, if passed, could ultimately be quite effective. Laws like this could also encourage developers to work together to share parking resources, and states and cities to innovate with on-street parking programs, and perhaps public transportation. For now, state solutions like these may very well speed up housing development timelines in eligible neighborhoods, if nothing else.

Conclusion

Even if state-level zoning reform provides more opportunities for developers to build, significant hurdles remain—interest rate hikes, increased material costs, and labor shortages have increased the cost of new development. No one strategy explored in this paper will solve the housing crisis on its own, and there are other concepts that can and should be considered, such as states directly funding developments or providing housing credits, or both. But taken together, these strategies can begin to make a dent in the supply shortage. States should consider taking steps to remove arbitrary and artificial barriers that are likely holding back market forces, because affordable, quality housing is a key ingredient to the future of the American experiment.

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111 EINSTEIN, ET AL., supra note 18 at 87.
115 Anderson & Gould, supra note 112.
116 Chan, supra note 2.