

Proxy War: The Role of Recent CEQA Exemptions in Fixing California's Housing Crisis

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As California's housing crisis continues to balloon, legislators are scrambling to identify its root causes and fashion fixes. One major challenge to the state's housing fix is its existing fix for a different issue: environmental protection. The California Environmental Quality Act (CEQA) is one of the strongest state-level environmental statutes in the United States, and mandates that residential projects of a certain scale and potential impact undergo rigorous rounds of public review prior to approval. It also grants a private right of action against a project approval to any anonymous individual, and given the glacial pace of such litigation, the exercise of this right often informally functions as an injunction. Recognizing its defensive potential, prosperous communities have repurposed a law intended to preserve the environment into a weapon of exclusion that preserves property values and views by preventing the construction of new and affordable housing where most needed.

To counteract CEQA abuse in the housing domain, the California legislature has passed three bills that streamline environmental review for projects that reserve a certain portion of units for affordable housing: SB 35, SB 540, and AB 73. This Note examines each bill in turn and, after reviewing their requirements in light of inclusionary housing literature, ultimately argues that the streamlining efforts are unlikely to produce the effects hoped for due to their mismatched incentives and concessions. Finally, the Note concludes with several recommendations for improving future CEQA-based affordable housing initiatives in the Golden State.

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I. INTRODUCTION

California is a study in extremes: The Golden State boasts not only the largest GDP¹ and population² in America, but also the second least housing per capita,³ most homelessness,⁴ and highest poverty rate⁵ of any state. The latter three factors are intimately intertwined: 97.6% of the state's cities failed to produce enough housing over the last eight years to meet demand across the full range of income levels,⁶ and this shortage has been especially excruciating for the poor. Because there is only one affordable housing unit for every five "extremely low-income households" in the state,⁷ most who fail to secure a coveted unit either join the

1. U.S. BUREAU OF ECON. ANALYSIS, GROSS DOMESTIC PRODUCT BY STATE: SECOND QUARTER 2018 Table 3 (Nov. 14, 2018), <https://www.bea.gov/system/files/2018-11/gdpstate1118.pdf> [<https://perma.cc/V5SC-2DVE>].

2. Over 39 million people live in California, almost 11 million more than the runner-up state of Texas. See *NST-EST2018-02: Table 2. Cumulative Estimates of Resident Population Change for the United States, Regions, States, and Puerto Rico and Region and State Rankings: April 1, 2010 to July 1, 2018*, U.S. CENSUS BUREAU (Dec. 19, 2018), <http://www2.census.gov/programs-surveys/popest/tables/2010-2018/national/totals/nst-est2018-01.xlsx> (on file with Colum. J.L. & Soc. Probs.).

3. See CAL. DEP'T OF HOUS. & CMTY. DEV., CALIFORNIA'S HOUSING FUTURE: CHALLENGES AND OPPORTUNITIES 15 (Feb. 2018), http://www.hcd.ca.gov/policy-research/plans-reports/docs/SHA_Final_Combined.pdf [<https://perma.cc/3CPL-KVDP>] [hereinafter *Housing Future*].

4. In 2017, California alone accounted for twenty-five percent of the nation's homeless population and nearly half of its unsheltered citizens — no other state claims a larger share of the total national homeless population. New York is the only state with a higher rate of homeless-to-housed, or .45% of the state's population compared with .34% of California's population. However, California's rate of homelessness increased at approximately three times the rate of New York in the year of the cited report, 2016 to 2017, and unsheltered persons constituted a much higher portion of California's homeless than that of New York. See U.S. DEP'T OF HOUS. & URBAN DEV., THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS, PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 12–13 (Dec. 2017), <https://www.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf> [<https://perma.cc/Z9W7-ECNN>].

5. The U.S. Census Bureau estimated that California's poverty rate is nineteen percent. See Megan Keller, *California's Poverty Rate Highest in the Nation*, HILL (Sept. 13, 2018), <https://thehill.com/policy/finance/406595-california-has-highest-poverty-rate-in-us-feds> [<https://perma.cc/BKT5-N2D5>].

6. See Katy Murphy, *Housing Shortage: New Report Shows How California Cities and Counties Stack Up*, MERCURY NEWS (Feb. 2, 2018), <https://www.mercurynews.com/2018/02/01/housing-shortage-new-report-shows-how-california-cities-and-counties-stack-up> [<https://perma.cc/3WE3-JDE8>].

7. See Cassandra Giraldo & Roberto Ferdman, *California's Housing Crisis Is So Bad People Are Living in Cars*, VICE NEWS (Sept. 6, 2018), https://news.vice.com/en_us/article/qvmgem/california-has-a-hidden-homelessness-crisis [<https://perma.cc/BJ3J-VYNB>]. The California Department of Housing and Community Development defines "extremely low-income households" as being "30 percent (or less) of the area median income." CAL. DEP'T OF HOUS. & CMTY. DEV., EXTREMELY LOW-INCOME HOUSING NEEDS,

twenty percent of Californians spending over half their income on rent⁸ or find themselves on the street. The latter reality is increasingly common as skyrocketing median rents and home prices drive⁹ the homelessness rate to staggering new heights: between 2016 and 2017 alone, homelessness increased fourteen percent in California, compared with just one percent nationally.¹⁰ To complicate matters further, one recent study found that the housing crisis has in fact begun to *re-segregate* communities among racial and class lines, undoing the civil rights work of generations.¹¹

Though the potential long-term effects of California's housing crunch are legion, the mandate is clear: we must build, and fast. In order to both keep pace with projected population and household growth and to close the 1.8 million-home deficit by 2025, the Department of Housing and Community Development estimates that California will need to more than double its annual production rate.¹² Why a state with an otherwise powerhouse economy cannot churn out more housing is a complex question, but there are two particular regulatory mechanisms that work in tandem to jam the production machine. Proposition 13¹³ gives localities a

<http://www.hcd.ca.gov/community-development/building-blocks/housing-needs/extremely-low-income-housing-needs.shtml> [<https://perma.cc/WF8X-7M64>] (last visited Jan. 12, 2020).

8. See Sara Kimberlin, CAL. BUDGET & POLICY CTR. CALIFORNIANS IN ALL PARTS OF THE STATE PAY MORE THAN THEY CAN AFFORD FOR HOUSING (Sept. 2017), <https://calbudgetcenter.org/resources/californians-parts-state-pay-can-afford-housing> [<https://perma.cc/HSQ2-C3LK>] ("More than 1 in 5 households statewide faced severe housing cost burdens, spending more than half of their income toward housing expenses.").

9. See Andrew Khouri, *High Cost of Housing Drives up Homeless Rates, UCLA Study Indicates*, L.A. TIMES (June 13, 2018), <https://www.latimes.com/business/la-fi-ucla-anderson-forecast-20180613-story.html> [<https://perma.cc/URW8-VA4S>].

10. See *Faced with a Housing Crisis, California Could Further Restrict Supply*, ECONOMIST (May 10, 2018), <https://www.economist.com/united-states/2018/05/10/faced-with-a-housing-crisis-california-could-further-restrict-supply> [<https://perma.cc/VFK2-R2EB>].

11. See *Rising Housing Costs Are Re-Segregating the Bay Area, Study Shows*, BERKELEY NEWS (Sept. 19, 2018), <https://news.berkeley.edu/2018/09/19/rising-housing-costs-are-re-segregating-the-bay-area-study-shows> [<https://perma.cc/P7JW-RN7P>] ("In the Bay Area, a 30 percent tract-level increase in median rent paid between 2000 and 2015 was associated with a 43 percent decrease in low-income households of color and a 7 percent decrease in low-income white households."); see also Marisa Kendall, *How the Housing Crisis Segregates the Bay Area*, MERCURY NEWS (Sept. 19, 2018), <https://www.mercurynews.com/2018/09/19/how-the-housing-crisis-segregates-the-bay-area> [<https://perma.cc/J2VB-YKNZ>].

12. See *Housing Future*, *supra* note 3, at 5.

13. CAL. CONST. Art. XIII A.

strong incentive to approve more commercial¹⁴ rather than residential development, while the California Environmental Quality Act (CEQA) offers a potent *disincentive* to approve affordable residential development.¹⁵ Together, these regulatory regimes ultimately stall low-income unit production.

While any housing panacea will be incomplete without also addressing Proposition 13's effects, the focus of this Note is on recent legislative reforms to the labyrinthine environmental compliance process that has long proven such a deterrent to, and grievance among, developers. CEQA was originally intended to protect the environment, but in recent years, residents who hold a "Not In My Backyard" (NIMBY) view of new development have repurposed CEQA's review and enforcement mechanisms to become a gatekeeping weapon.¹⁶ In an effort to counteract this effect and accelerate affordable housing development, state legislators recently approved three new bills geared towards streamlining the CEQA review process: SB 35, AB 73, and SB 540. Governor Jerry Brown signed these bills into law in 2017, along with an array of other initiatives tackling affordable development from other angles on the crisis.¹⁷

14. When approved in 1978, Proposition 13 rolled back property valuations to 1975–76 levels and limited the tax on those values to a one percent ad valorem tax, subject to reassessment only when the property changed hands. See Jonathan Schwartz, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 S. CAL. L. REV. 183, 193 (1997). Prior to Proposition 13, local governments financed residential infrastructure like sewage out of their independently determined property taxes. *Id.* at 203. After Californians installed the property tax ceiling, local officials began to fear that new housing developments, "particularly those that require significant investment in infrastructure like roads and sewers, [would] fail to pay for themselves" and instead turned to sales tax instead to support operations. *Id.* Sales taxes now comprise the bulk of municipal revenue, and dependence on this source "has created a system of local government finance that minimizes the value of new housing and manufacturing development" in favor of consumer-oriented land uses. *Id.* at 202–03; Seth Miller, *Pay Dirt: State Tax Policies Drive Local Land Use Policies to Ground*, 15 J. RACE POVERTY & ENV'T 1, 53 (Spring 2008), <https://www.jstor.org/stable/41554588> [<https://perma.cc/3G2X-PB7Y>].

15. See *infra* Part II.B.

16. See Chip Johnson, *Bay Area Housing Crisis Fueled by Greed, Study Finds*, S.F. CHRON. (Mar. 10, 2016), <https://www.sfchronicle.com/bayarea/johnson/article/Bay-Area-housing-crisis-fueled-by-greed-study-6883161.php> [<https://perma.cc/FLA3-XYH4>] ("Not In My Back Yard" is a phrase that's been used quite often in California over the last 30 years, usually as a precursor to challenge, block, delay or kill construction projects across the state.").

17. These other angles include: (1) directly funding state and local governments' affordable development projects; (2) strengthening the Regional Housing Needs Assessment (RHNA) by requiring more data of cities, more frequent plan updates, and additional state review of local plans; (3) legalizing inclusionary zoning for rental housing; (4) protecting

This Note argues that while a commendable step in the right direction, this trio of streamlining statutes is unlikely to produce the momentum hoped for because it overestimates the influence that both opt-in measures and state funding will have. Further, the statutes are heavily encumbered by labor concessions, site eligibility restrictions, and steep affordability requirements. Part II first lays out the relevant features of existing housing and environmental law, while Part III examines how SB 35, AB 73, and SB 540 each modify this framework. Part IV then evaluates the strengths and weaknesses of these new measures to project their likely impact on California's housing crisis. This Note concludes in Part V by offering recommendations for improving the statutes' impact. The proffered recommendations include: combining ministerial review in underproducing districts with automatic project approvals upon gross review delay; geo-fencing CEQA lawsuits; reducing inclusionary minimums; and exchanging prevailing wage clauses for other labor interest concessions. Though not a panacea, these improvements are likely to kickstart California's idling private construction engine and increase the desperately needed supply while Californians deliberate over the best way to retool tax disincentives in the long term.

II. THE FRICTION BETWEEN EXISTING HOUSING AND ENVIRONMENTAL REGIMES

In California, housing is primarily within the domain of local government, but certain limited statutory structures regulate aspects of housing administration across the state. Two such statutes that are particularly relevant for the purposes of this Note — the Regional Housing Needs Assessment (RHNA) and the California Environmental Quality Act (CEQA) — advance goals

dense projects from undue denials by increasing the burden of proof on, and reducing deference to, local government defendants; (5) permitting more farmworker-tenant projects to qualify for low-income housing tax credit (LIHTC); and (6) preserving affordable housing stock by requiring preferential sale to “qualified buyers who intend to maintain the properties as below-market rental housing and who make a fair-market-value purchase offer.” Sara Kimberlin, *Understanding the Recently Enacted 2017 State Legislative Housing Package*, CAL. BUDGET & POLICY CTR. (Oct. 17, 2017), <https://calbudgetcenter.org/blog/understanding-recently-enacted-2017-state-legislative-housing-package> [<https://perma.cc/M4AD-PDCC>]. Each of these approaches implies a different contributor to the housing crisis: (1) funding shortage, (2) lack of local transparency, (3) market rate rentals, (4) litigation power imbalances, (5) migrant homelessness, and (6) stock retention. SB 35, SB 73, and SB 540 identify a different villain: protectionist and bureaucratic delay.

that are compatible in theory but often conflict in practice. Specifically, RHNA aims to increase the supply of affordable housing across the state, yet in its pursuit of environmental preservation, CEQA inhibits production by stapling extensive financial and temporal costs onto the housing approvals process. Part II.A examines the current RHNA regulatory framework, while Part II.B lays out the scope of CEQA's effects on the housing domain.

A. REGIONAL HOUSING NEEDS ASSESSMENT

The California State Legislature established RHNA in 1969¹⁸ to promote increased, equitable, and diversified residential development and to furnish accountability for persistent housing stock imbalances.¹⁹ RHNA requires that each local jurisdiction both forecast and account for in the housing element of its general plan²⁰ the minimum amount of housing needed at each of the four income levels to meet future demand.²¹ These income levels are calculated with reference to a county's area median income (AMI): an above-moderate income is over 120% of AMI; moderate is 80–120% of AMI; low is 50–80% of AMI; and very-low is under 50% of AMI.²² The RHNA process itself begins with the Department of Housing and Community Development (HCD), which determines California's overall housing need for a given planning cycle and assigns quotas based on that estimate to bodies of locally elected officials known as the Councils of Government.²³ These groups are in turn charged with distributing their share of hous-

18. See *RHNA — Regional Housing Needs Allocation*, ASS'N BAY AREA GOV'TS, <https://abag.ca.gov/our-work/housing/rhna-regional-housing-needs-allocation> [<https://perma.cc/3X9J-FJCV>] (last visited Jan. 2, 2020).

19. See CAL. DEP'T OF HOUS. & CMTY. DEV., PROJECTED HOUSING NEEDS — REGIONAL HOUSING NEEDS ALLOCATION, <http://www.hcd.ca.gov/community-development/building-blocks/housing-needs/projected-housing-needs.shtml> [<https://perma.cc/J65Y-PUS3>] (last visited Jan. 8, 2019) [hereinafter *Projected Housing Needs*].

20. See *Regional Housing Needs Allocation and Housing Elements*, CAL. DEP'T OF HOUS. & CMTY. DEV., <http://www.hcd.ca.gov/community-development/housing-element/index.shtml> [<https://perma.cc/TC2Z-84XR>] (last visited Jan. 12, 2020) (“General plans serve as the local government’s ‘blueprint’ for how the city and/or county will grow and develop and include seven elements: land use, transportation, conservation, noise, open space, safety, and housing.”).

21. *Projected Housing Needs*, *supra* note 19 (“The RHNA is a minimum projection of additional housing units needed to accommodate projected household growth of all income levels by the end of the housing-element’s statutory planning period. Each locality’s RHNA must be segmented into four income categories.”).

22. See *id.*

23. See *id.*

ing need among the cities and counties, who must then update their housing elements to account for the assigned housing need before submitting an annual progress report to HCD.²⁴

However, because RHNA's enabling statute lacks a sufficient enforcement mechanism,²⁵ most jurisdictions have flouted the imperative with impunity. In fact, only thirteen of California's 482 municipalities have met their affordable development burden for the past planning cycle.²⁶ One in particular stands as perhaps the most poignant comment on the RHNA mechanic's failure: palatial Beverly Hills was only required to build one very low-income, one low-income, and one moderately priced housing unit in the last cycle.²⁷ Without a bite to accompany its bark, RHNA's greatest contribution to affordable housing may be limited to the data it collects and its role as a measuring stick.

B. CALIFORNIA ENVIRONMENTAL QUALITY ACT

In contrast to RHNA, CEQA is one of the most sweeping environmental laws in the nation.²⁸ While its primary goal is to protect California's environment, its requirements create secondary impacts across a range of legislative concerns, not least of which is inhibiting affordable housing construction. The sweeping stat-

24. *Id.*

25. See Matt Schwartz et al., Presentation Summary, CALIFORNIA'S HOUSING CRISIS: LONG-TERM & COMPREHENSIVE FUNDING AND REGULATORY SOLUTIONS, CAL. S. TRANSP. & HOUS. COMM. (Mar. 7, 2017), <https://www.jamboreehousing.com/uploads/pdfs/californias-housing-crisis-background-paper.pdf> [<https://perma.cc/X3MB-SAUQ>] ("Enforcement depends on private developers or non-profit lawyers suing cities and counties that are in non-compliance. In instances where the court does find cities or counties out of compliance, remedies are limited. The court may order the jurisdiction to adopt an adequate housing element and may halt development in the community in the meantime. For local governments that do not have major commercial or industrial projects pending, this is equivalent to no remedy at all.")

26. Irvin Dawid, *Most California Cities Now Subject to State-Mandated Development Streamlining*, PLANETIZEN (Feb. 6, 2018), <https://www.planetizen.com/news/2018/02/97088-most-california-cities-now-subject-state-mandated-development-streamlining> [<https://perma.cc/724S-7JGW>].

27. See Thomas Fuller & Conor Dougherty, *California Today: The Beverly Hills Affordable Housing Loophole*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/2018/02/05/us/california-today-beverly-hills-affordable-housing.html> [<https://perma.cc/E2SM-2KTU>] ("The city was not required to build any high-income housing units, since it already has a lot of them. Nevertheless, it blew its goal of zero out of the water, and issued 75 new permits for high-income housing.")

28. See *CEQA Frequently Asked Questions*, PLAN. & CONSERVATION LEAGUE, <https://www.pcl.org/campaigns/ceqa/ceqa-faqs> [<https://perma.cc/EH2Y-YWSU>] (last visited Jan. 12, 2020).

ute has contributed much to curbing emissions and preserving California's delicate and diverse ecosystem, yet it has also severely handicapped the construction of direly needed human habitats. In order to illustrate how CEQA inhibits affordable housing development, this subpart will first discuss the scope of CEQA's application before delving into its specific requirements, namely the expansive and expensive review process as well as the contested approval process.

1. *Projects That Fall Within CEQA's Purview*

Not every project falls within the purview of CEQA. CEQA only applies to projects that require discretionary approval from a public agency; are conducted or supported by a public agency, or require a permit from a public agency; and have the potential to physically change the environment.²⁹ The first element, discretionary approval, is distinguishable from ministerial approval in that it requires “the exercise of judgment or deliberation”³⁰ as opposed to checking applications against “fixed standards or objective measurements” that involve “little or no personal judgment by the public official as to the wisdom or manner of carrying out the project.”³¹ Essentially, under a ministerial standard, the same result should occur across evaluations, whereas discretionary processes grant the adjudicator significantly more leeway. Whether a given aspect of a project calls for discretionary approval varies by jurisdiction, but most large housing projects are not allowed by right (i.e., they are ministerial).³² Moreover, a 2018 survey of five of the most expensive Californian housing markets — San Francisco, Oakland, San Jose, Redwood City, and Palo Alto — found that each local government has imposed discretionary review on “all residential development projects of five or more units . . . even if these developments comply with the underlying zoning code.”³³ Mandating discretionary review for resi-

29. See CAL. CODE REGS. tit. 14, §§ 15060(e)(1)–(3), § 15378 (West 2020).

30. *Id.* tit. 14, § 15357.

31. *Id.* tit. 14, § 15369.

32. See Mac Taylor, *Considering Changes to Streamline Local Housing Approvals*, LEGIS. ANALYST'S OFF. 4 (May 17, 2016), <https://lao.ca.gov/Publications/Report/3470> [<https://perma.cc/3NKE-2R8W>].

33. Moira O'Neill et al., *Getting It Right: Examining the Local Land Use Entitlement Process in California to Inform Policy and Process 2* (Feb. 2018) (working paper) (on file with the University of California Berkeley Center for Law, Energy & the Environment),

dential developments containing five or more units can therefore frustrate the aims of affordable housing advocates who depend on scale to efficiently house the most people possible.³⁴

Projects meet the second element of being supported by, or requiring a permit from, a public agency almost by default. This is so because new construction must obtain permits from a public agency.³⁵ However, ventures that receive public funding doubly fulfill the second condition.

The third element of CEQA eligibility — having the potential to physically change the environment — encompasses physical changes that can be either direct and immediately apparent or merely indirect and “reasonably foreseeable.”³⁶ Qualifying indirect effects include any potential change to an area’s “pattern of land use, population density, or growth rate,”³⁷ as well as economic impact.³⁸ In assessing whether a project could produce such change, a public agency completes an initial review checklist (also referred to as the Appendix G checklist) issued by the California Natural Resources Agency.³⁹ This checklist covers not only traditional environmental concerns like air quality, waste or flood hazards, and species endangerment, but also aesthetic, noise, and neighborhood composition concerns.⁴⁰ The latter three items (i.e.,

https://www.law.berkeley.edu/wp-content/uploads/2018/02/Getting_It_Right.pdf
[<https://perma.cc/5NML-ZZBY>].

34. See *Breaking Ground: A Beginner’s Guide for Nonprofit Developers*, Fed. Reserve Bank of Dallas 15 <https://community-wealth.org/sites/clone.community-wealth.org/files/downloads/tool-breaking-ground.pdf> [<https://perma.cc/C7YA-XURR>] (last visited Jan. 24, 2020) (“Seasoned nonprofit developers recommend that a multifamily project be large enough to take advantage of economies of scale. When a project is too small, per foot construction costs may be too high, and once it is operating, a small project may not generate enough cash flow to cover management and maintenance costs.”).

35. See *Do I Need a Building Permit for My Project?*, CAL. ST. CONTRACTORS LICENSE BOARD, https://www.cslb.ca.gov/Consumers/Hire_A_Contractor/Building_Permit_Requirements.aspx [<https://perma.cc/Q49P-S323>] (last visited Jan. 24, 2020) (“[N]o building or structure may be erected, constructed, enlarged, altered, repaired, moved, improved, removed, converted or demolished unless a separate permit for each building or structure has first been obtained from the building official.”).

36. CAL. CODE REGS. tit. 14, § 15358 (West 2020).

37. *Id.*

38. See *id.* § 15126.2(e). A project manifests a growth-inducing effect where it “could foster economic or population growth, or the construction of additional housing . . . which would remove obstacles to population, . . . [and] may tax existing community service facilities.” *Id.*

39. See *CEQA Appendix G*, http://resources.ca.gov/ceqa/guidelines/Appendix_G.html [<https://perma.cc/7X4X-8GT2>] (last visited Jan. 24, 2020).

40. Projects violate aesthetic prohibitions when they “[s]ubstantially degrade the existing visual character or quality of the site and its surroundings,” noise prohibitions when they trigger an “increase in ambient noise . . . above levels existing,” parking prohi-

aesthetic, noise, and neighborhood composition) are more open to self-interested interpretation by citizens who take umbrage at the thought of having more neighbors.⁴¹ For each concern, the agency will indicate whether the project will have no impact, less than significant impact, less than significant impact where mitigating measures are incorporated, or a potential significant impact.⁴² A project with any significant impacts or “possible environmental effects which are individually limited but cumulatively considerable”⁴³ will trigger the production of a much more thorough and expensive environmental impact report (EIR).⁴⁴

One instance of NIMBYs invoking the Appendix G checklist was when residents of San Francisco’s wealthy Forest Hill neighborhood⁴⁵ raised an uproar over a proposed low-income senior center because they thought it would “increase traffic, noise, and crime.”⁴⁶ At the time, the proposed site hosted a church and preschool, so the argument implied that elders in the proposed assisted living facility would be noisier than worship services and four-year-olds at play; would attract substantially more car-borne visitors than preschoolers whose parents must drop them off and pick them up every day; and would invite more crime in the sur-

bitions when they “[r]esult in inadequate parking capacity,” and neighborhood composition prohibitions when they “[p]hysically divide an established community.” *Id.*

41. See Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California’s Housing Crisis*, 24 HASTINGS ENV’T L. J. 21, 40 (2018), https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1032&context=hastings_environmental_law_journal [<https://perma.cc/WEE3-HPJY>] (“‘Impacts’ to this existing environment — ranging from temporary construction noise, to changes in private views, to increases in the number of kids playing in a park, going to school or using a library — are all required to be avoided or reduced to a ‘less than significant level,’ to ‘the extent feasible given the objectives of the project.’ CEQA does not create clear criteria for any of these terms, nor does CEQA define what can be considered an ‘impact’ to the environment. Since CEQA was enacted in 1970, judges have periodically creatively interpreted the law to discover new ‘environmental impacts,’ like changes to private views, or temporary construction noise that complies with construction noise standards required by state and local laws. . . .”).

42. See *CEQA Appendix G*, *supra* note 39.

43. CAL. CODE REGS. tit. 14, § 15065 (West 2020).

44. *Id.* § 15063(b).

45. According to Zillow, as of March 1, 2020, the median home value in Forest Hill was \$2,164,058. See *Forest Hill Home Prices & Values*, ZILLOW, <https://www.zillow.com/forest-hill-san-francisco-ca/home-values/> [<https://perma.cc/HX6A-XQG3>] (last visited Mar. 1, 2020).

46. J.K. Dineen, *In a Wealthy SF Neighborhood, Residents Fight Low-Income Housing*, S.F. CHRON. (Nov. 16, 2016), <https://www.sfchronicle.com/bayarea/article/In-a-wealthy-SF-neighborhood-residents-fight-10617213.php> [<https://perma.cc/3UNY-2GBW>] [hereinafter *Wealthy SF*].

rounding neighborhood even though elders may be typically less able-bodied citizens.

The San Francisco Planning Department also ultimately opposed the project but for another reason, stating it would not support any plan that involved demolition of the Expressionist church building,⁴⁷ despite the fact that the church itself was one of the partners who put forward the senior center proposal.⁴⁸ The attorney spearheading the NIMBY protest voiced a similar concern that a senior center of such size could not be made to “look like the Arc de Triomphe,” and that such an initiative would be better suited to another neighborhood, one “somewhere along the Van Ness corridor next to a Holiday Inn,” where the elders’ primary neighbors would be tourists.⁴⁹ A third group of protestors shared a worry that some center residents might be “homeless,” “people with mental illness and drug addictions,” or “sex offenders,”⁵⁰ whereas a fourth group raised concerns about construction on the hillside’s sandy soil.⁵¹ After months of vociferous backlash and unexpected cost increases related to stabilizing the hillside, the San Francisco Mayor’s office pulled its funding and the project folded.⁵²

2. *The Expansive and Expensive Review Process*

The San Franciscan Forest Hill center met its demise in the first stage of review, but should a project with the potential for a single or cumulative significant impact survive past initial review to the EIR stage, its developer faces intensified scrutiny, balloon-

47. The Planning Department called the church “an exceptional, rare and intact example of Expressionist architecture” and a “monument of midcentury modernism,” implying, in disagreement with the church itself, that it holds greater value in the present day as a historical structure than as housing for the homeless. J.K. Dineen, *Housing Developer Undeterred by Report Urging Work to Stabilize SF Hillside*, S.F. CHRON. (Jan. 13, 2018), <https://www.sfchronicle.com/bayarea/article/Housing-developer-undeterred-by-report-urging-12495068.php> [<https://perma.cc/Q9NA-UJS5>] [hereinafter *Developer Undeterred*].

48. See Adam Brinklow, *San Francisco Axes 150-Unit Affordable Housing Plan in Forest Hill*, CURBED (Mar. 9, 2018), <https://sf.curbed.com/2018/3/9/17101728/forest-hill-senior-affordable-housing-nimbys-san-francisco> [<https://perma.cc/9SL7-578R>].

49. *Wealthy SF*, *supra* note 46.

50. The plan proposed that twenty percent of the units would be reserved for the formerly homeless. *Id.*

51. *Developer Undeterred*, *supra* note 47.

52. See J.K. Dineen, *Senior Housing Project Near SF’s Forest Hill Dies from Expense, Opposition*, S.F. CHRON. (Mar. 10, 2018), <https://www.sfchronicle.com/bayarea/article/Senior-housing-project-near-SF-s-Forest-Hill-12742358.php> [<https://perma.cc/6BED-F2C8>].

ing costs, and an expanding timeline. After submitting a detailed⁵³ draft EIR to the lead public agency, which can be hundreds of pages long and require hiring technical experts, the proposal must undergo at least three rounds of public comments and three rounds of administrative proceedings before the authorized agency can tender approval or denial.⁵⁴ This circuitous EIR process can tack twelve to twenty-four months onto a project's timeline, and the Turner Center found that EIR-related "production and litigation costs are assumed to start at \$300,000 and rise based on project size by about \$1500 per unit."⁵⁵

For developers who must borrow any portion of their funding, these EIR-related costs are compounded by interest payments. Even as EIR review delays construction by months or years, loan payments do not toll; they must be rendered regardless of the project's profitability status. Accordingly, even more developers who might otherwise produce valid affordable housing projects for the community are likely to drop out of the running at this second stage.

3. *A New Challenger Appears: Contested Approvals*

While not mandatory, when invoked after the EIR phase, the final stage of CEQA review can prove the most contentious. CEQA enables a concerned party, who can be an individual citizen or a corporation, to bring a citizen suit against an approved project on the basis of what she believes to be an improperly evaluated initial study or EIR.⁵⁶ Even if all but one person in a

53. For an exhaustive list of required EIR content, see CAL. CODE REGS. tit. 14, §§ 15120–15132 (For example, "[d]irect and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects. The discussion should include relevant specifics of the area, the resources involved, physical changes, alterations to ecological systems, and changes induced in population distribution, population concentration, the human use of the land (including commercial and residential development), health and safety problems caused by the physical changes, and other aspects of the resource base such as water, historical resources, scenic quality, and public services.").

54. See Hernandez, *supra* note 41, at 21–22.

55. *Housing Development Dashboard: Development Calculator*, TURNER CTR. FOR HOUS. INNOVATION AT UNIV. OF CAL. AT BERKELEY, <http://turnercenter2.berkeley.edu/proforma> [<https://perma.cc/7XZJ-A6BT>] (last visited Jan. 26, 2020) [hereinafter *Dashboard*].

56. For each project subject to CEQA, the local lead agency must conduct an initial study. A finding of no significant environmental impact (i.e., functional clearance to proceed past the CEQA gate) is called a "Negative Declaration." A finding of significant impacts triggers the more in-depth EIR process, after which the agency may still approve the

community backs a proposal, the lone holdout can take a desperately-needed project hostage for only a few hundred dollars.⁵⁷ Worse, she may do so anonymously,⁵⁸ or even openly for the purpose of extorting money from a development located in an entirely different region.⁵⁹

In order to overturn a project's pre-approval, a plaintiff need only demonstrate the existence of a single error in an agency's analysis of almost 100 environmental impact issues.⁶⁰ From there, a typical case spends three to five years winding its way through the trial and appellate level courts, during which the developer hemorrhages money she cannot replace in the short term and may never recover in the long term, even if the judgment turns out to be in her favor. According to Clem Shute, an environmental advocate,⁶¹ plaintiffs who merely file a CEQA suit can functionally obtain an injunction without demonstrating a high

project, even in the face of significant impacts, if it determines there are overriding considerations which outweigh the environmental costs. A citizen suit may challenge the adequacy of either process in court. See *CEQA Process Flow Chart*, CAL. NAT. RESOURCES AGENCY, <http://resources.ca.gov/ceqa/flowchart> [<https://perma.cc/BLE4-C3MF>] (last visited Jan. 26, 2020); see also *Save the Plastic Bag Coalition v. City of Manhattan Beach*, 254 P.3d 1005, 1014–15 (Cal. 2011).

57. See Hernandez, *supra* note 41, at 41–42.

58. California state senators introduced two bills requiring disclosure of identity and any financial interest in a project in 2016, but both efforts fizzled. See Jeff Collins, *Does California's Environmental Protection Law Impede Development?*, MERCURY NEWS (Aug. 29, 2016), <https://www.mercurynews.com/2016/08/29/does-californias-environmental-protection-law-impede-development> [<https://perma.cc/9VPA-JBP2>]. For the text of one such state Senate bill, see S.B. 1248, 2016 Leg., Reg. Sess. (Cal. 2016), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB1248 [<https://perma.cc/AL4A-DSJD>].

59. See Hernandez, *supra* note 41, at 43 (“Those filing CEQA lawsuits anonymously, or even for openly extortionate purposes, are protected from becoming the target of CEQA lawsuits by California’s anti-SLAPP (strategic lawsuits against public participation) statute, and are entitled to treble damages if improperly targeted by a lawsuit”). The case in point is illustrated by one J. Michael Goolsby, an Irvine attorney disbarred for fleecing clients, who has since found a new vocation in suing and securing five-figure settlements from developments across the state through his wholly-owned corporation, Better Neighborhoods. See Jennifer Wadsworth, *CEQA Racket Extracts 11th Hour Payoffs Amidst Housing Crisis*, SAN JOSE INSIDE (July 11, 2018), <https://www.sanjoseinside.com/2018/07/11/ceqa-racket-extracts-11th-hour-payoffs-amidst-housing-crisis> [<https://perma.cc/R55S-7EN9>].

60. See Hernandez, *supra* note 41, at 42 (“When a judge decides that an agency should have conducted its CEQA preapproval review process differently, even if the error is confined to whether the traffic flow at a single intersection was appropriately counted, the most common CEQA judicial remedy is to ‘vacate’ the project approval until more environmental analyses is completed.”).

61. See *Clem Shute Receives Lifetime Achievement Award*, SHUTE, MIHALY, & WEINBERGER LLP, <http://www.smwlaw.com/news/show/172> [<https://perma.cc/WUE3-LUKF>] (last visited Jan. 9, 2020).

probability of success because lenders will not fund projects facing pending litigation.⁶² The barriers to frivolous suits are further reduced by the absence of a bond requirement “to offset damage to the developer should he or she prevail.”⁶³ Moreover, because CEQA permits duplicative suits against a project,⁶⁴ disgruntled parties can force developers who have properly complied with all terms into surrender through a war of financial attrition.

This exploitation of the CEQA framework for personal motives often harms the communities and environments the statute was otherwise meant to protect. California’s legislature intended CEQA’s individual private right of action to grant communities a voice and defense against better-heeled businessmen steamrolling over their interests. However, a recent survey of CEQA lawsuits conducted by attorney Jennifer Hernandez found the feature has instead been most frequently deployed to sink projects that further affordable housing and environmental objectives.⁶⁵ Hernandez found that the majority of citizen suits lodged between 2013 and 2015 sought “to block infill housing and transit-oriented land use plans, as well as public service and infrastructure projects in existing California communities . . . [which] are precisely the types of projects and plans that today’s environmental and climate policies seek to promote.”⁶⁶ Hernandez’s argument is one that Dr. Christopher Jones’ 2014 independent study of emissions in all fifty states confirmed.⁶⁷ Dr. Jones’ data not only revealed that denser housing in urban cores yields cleaner air, but also that “the primary drivers of carbon footprints are household income, vehicle ownership and home size, all of which are considerably higher in suburbs.”⁶⁸ In this sense, when a wealthy, sprawling suburb rejects the denser, transit-oriented development that would make housing accessible to lower-income households, its choice undermines the optimal environmental protection sought by CEQA.

62. See Hernandez, *supra* note 41, at 43–44 (citing E. Clement Shute, Jr., *Reprise of Fireside Chat, Yosemite Environmental Law Conference*, 25 ENV’T L. NEWS, 3 (2016)).

63. *Id.*

64. See *id.* at 61.

65. *Id.* at 21.

66. *Id.*

67. Christopher Mark Jones, *Enabling Low Carbon Communities: The Roles of Smart Planning Tools and Place-Based Solutions*, (Fall 2014) (unpublished Ph.D. dissertation, University of California at Berkeley), at 128, <https://escholarship.org/content/qt80f4j71p/qt80f4j71p.pdf> [<https://perma.cc/2EYE-AZS9>].

68. *Id.*

A second disconcerting finding of Hernandez's study is that the proportion of suits filed against the more environmentally-friendly, higher density residential developments *increased* from when the author conducted an identical survey from 2010 to 2012.⁶⁹ Conversely, the swathes of natural wilderness that one might ordinarily expect to be the prime magnets for defensive CEQA suits were the least frequent target of litigation in both data sets.⁷⁰ Taken together, the results of Hernandez's and Dr. Jones' studies demonstrate that citizens most often use CEQA's enforcement mechanism in contravention of environmental preservation efforts and for ulterior purposes.⁷¹

The place where CEQA creates the greatest destructive interference with RHNA's objectives is the developer balance sheet. While an extravagant development like the multibillion-dollar Playa Vista plan⁷² may pencil out after fending off twenty years of CEQA lawsuits, affordable housing projects that contribute to RHNA quotas often do not have such a substantial profit margin and, accordingly, have a much smaller buffer to absorb legal expenses from CEQA challenges. Developers who might otherwise be open to accepting smaller profit margins are thus deterred from pursuing affordable housing projects by the specter of bankruptcy that CEQA litigation summons. The absence of affordable housing in a moment where California must double its production to match the state's swelling population prompted the legislature to reexamine the issue in 2017, resulting in the enactment of a trio of bills geared towards fast-tracking the CEQA review process for projects that include affordable housing units.

69. See Hernandez, *supra* note 41, at 29.

70. *Id.* at 27–28.

71. Common motivations include concern regarding dampened property values, increased traffic congestion or reduced parking, increased strain on existing services, changes to community character, social or racial animus, and even resentment towards developers for turning a profit at all. See Paavo Monkkonen & Michael Manville, *Opposition to Development or Opposition to Developers? Experimental Evidence on Attitudes Toward New Housing*, 41 J. URB. AFF. 1123, 1124 (2019), <https://www.anderson.ucla.edu/Documents/areas/ctr/ziman/2018-04WP.pdf> [<https://perma.cc/WK9C-H96F>].

72. See Patrick Range McDonald, *Playa Vista Quicksand*, LA WEEKLY (Sep. 19, 2007), <https://www.laweekly.com/news/playa-vista-quicksand-2150531> [<https://perma.cc/F9JT-97JV>].

III. NEW KIDS ON THE BLOCK: SB 35, AB 73, AND SB 540

Although SB 35, AB 73, and SB 540 all aim to streamline affordable project approvals, the manner in which each goes about achieving that goal varies according to its originating district and what its sponsors perceive to be the sources of bureaucratic lag. Senator Scott Wiener of San Francisco County⁷³ — whose extraordinarily dense and wealthy district is infamous for the highest housing prices in the nation,⁷⁴ a persistent homeless population,⁷⁵ and a well-documented NIMBY sentiment that pervades even its environmentalist groups⁷⁶ — undoubtedly drew from personal experience in selecting a deterrent to non-compliance over an incentive for compliance as SB 35's operative mechanism. Under SB 35, local governments that fail to approve sufficient housing for the poor automatically forfeit the privilege to deny qualifying infill projects until they rectify such a deficit.⁷⁷ Unsurprisingly, the list of cities opposing this bill occupied several pages in the state's Senate Floor Analysis.⁷⁸

By contrast, city officials flocked to endorse AB 73 and SB 540,⁷⁹ which, by virtue of the state-supplied fiscal incentives of-

73. See *Scott Wiener: District*, CAL. ST. S., <https://sd11.senate.ca.gov/district> [<https://perma.cc/UZ3W-85M9>] (last visited Feb. 21, 2020).

74. See Grant Suneson, *These Are the Most Expensive Zip Codes in the US This Year*, USA TODAY (Dec. 17, 2018), <https://www.usatoday.com/story/money/2018/12/17/these-are-the-most-expensive-zip-codes-in-2018/38693069> [<https://perma.cc/2MKE-HRA3>].

75. See Heather Knight, *SF Tourist Industry Struggles to Explain Street Misery to Horrified Visitors*, S.F. CHRON. (Jan. 30, 2018), <https://www.sfchronicle.com/news/article/SF-tourist-industry-struggles-to-explain-street-12534954.php> [<https://perma.cc/3HQ5-6Z3V>] (“In a city that spends \$305 million a year to combat homelessness, those who serve as San Francisco’s hosts struggle to explain why the problem isn’t getting any better.”).

76. See RANDY SHAW, *GENERATION PRICED OUT: WHO GETS TO LIVE IN THE NEW URBAN AMERICA* 113–14 (2018) (“The Seattle Sierra Club’s strong pro-housing position differs strikingly from the stance taken by San Francisco’s Sierra Club chapter. . . . [T]he local Sierra Club remained a key ally in the city’s anti-housing coalition. It has opposed nearly every market-rate project proposed for San Francisco on which the club took a stand. In 2017 it even backed a CEQA appeal for the conversion of a parking garage into a sixty-six-unit residential building (with nine affordable units).”).

77. See CAL. GOV’T CODE § 65913.4 (West 2020).

78. See *SB-35 Planning and Zoning: Affordable Housing: Streamlined Approval Process: Senate Floor Analyses*, CAL. LEGIS. INFO. (Sep. 15, 2017), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB35# [<https://perma.cc/C9E9-F88M>].

79. See *SB-540 Workforce Housing Opportunity Zone: Senate Floor Analyses* (Sep. 15, 2017), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB540 [<https://perma.cc/W6FC-MLJ8>]; see also *Request for Signature: AB 73 (Chiu) Planning and Zoning: Housing Sustainability Districts*, CAL. LEAGUE OF CITIES,

ferred, implicitly identified funding rather than local political intransigence as the primary obstacle to streamlined affordable development. However, although closely related, the two bills continue to exist as separate enactments because they are tailored to address different region-specific problems. AB 73, proposed by Assemblyman David Chiu of San Francisco,⁸⁰ establishes public transportation as its lodestar and organizing principle,⁸¹ but transit clustering is of little avail to a sprawling suburb. Impoverished, single-story towns like Senator Richard Roth's Riverside⁸² are instead more likely to take advantage of SB 540, which calls for a substantially higher low-income set-aside⁸³ paired with a baked-in first-floor commercial development option.⁸⁴

In light of the geographic and demographic disparities that shaped them, SB 35, SB 540, and AB 73 likely fall on their audience's ears less as a cohesive orchestra in which each musician contributes one line of a unified score, and more like individual buskers along the boardwalk, each playing a different tune. The listening audience for the legislative performances in this case comprises three stakeholders — local governments, private developers, and residents — so to help forecast how the intended audience will respond to the statutes, it is helpful to examine each bill in greater detail.

A. SB 35: LIMITING DISCRETIONARY OBSTRUCTION IN RHNA NON-COMPLIANT MUNICIPALITIES

SB 35, the highest profile and farthest-reaching of the three bills, enables multifamily housing developments proposing two or more residential units⁸⁵ to bypass CEQA review and conditional use permit requirements through a ministerial approval process⁸⁶

[https://www.cacities.org/Policy-Advocacy/Action-Center/Past-Items/REQUEST-FOR-SIGNATURE-AB-73-\(Chiu\)-Planning-and-Z \[https://perma.cc/PV3M-TMDK\]](https://www.cacities.org/Policy-Advocacy/Action-Center/Past-Items/REQUEST-FOR-SIGNATURE-AB-73-(Chiu)-Planning-and-Z [https://perma.cc/PV3M-TMDK]).

80. See *AB-73 Planning and Zoning: Housing Sustainability Districts: Text*, CAL. LEGIS. INFO. (Sep. 29, 2017), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB73 [https://perma.cc/EHH8-37V8].

81. See CAL. GOV'T CODE § 66200(e) (West 2020).

82. See *Richard D. Roth: District*, CAL. ST. S. (2019), <https://sd31.senate.ca.gov/district> [https://perma.cc/6MW7-WTEH] (last visited Feb. 21, 2020).

83. SB 540 requires a fifty percent minimum, compared with AB 73's twenty percent set-aside floor. Compare CAL. GOV'T CODE § 65623(c)(3) (West 2020) with CAL. GOV'T CODE § 66201(f)(2)(A).

84. See CAL. GOV'T CODE § 65620(a).

85. See *id.* § 65913.4(a)(1).

86. See *id.* § 65913.4(a).

in any jurisdiction that has not met its RHNA goals for all four income levels.⁸⁷ In this instance, 97.6% of jurisdictions have failed to meet these goals.⁸⁸ Additional benefits of SB 35 include a shorter timeframe — the relevant agency must send notice of standards conflicts within ninety days of an application⁸⁹ and must render final approval within 180 days total⁹⁰ — and an upper limit on the parking a jurisdiction may require.⁹¹ As discussed in greater detail below, in order to qualify for this exemption, a project must comply with four sets of conditions related to site choice, objective zoning and design standards, inhabitant income, and workforce hiring.

The statute's site selection provisions are both prescriptive and proscriptive. Qualifying developments must not only be located in an urban area where seventy-five percent of the site's perimeter has already been developed, but they must also be zoned or have a general plan designation for either residential use, or mixed-use in which two-thirds of the total designation is residential.⁹² By contrast, the proposed development may *not* be located on a site a tenant has occupied at any point in the last ten years,⁹³ nor can it replace a historic structure⁹⁴ or existing rent-controlled housing,⁹⁵ or be situated within a coastal zone,⁹⁶ wetlands,⁹⁷ prime farmland,⁹⁸ conservation zones,⁹⁹ environmental hazard zones,¹⁰⁰ or motor home sites.¹⁰¹

The number of units an SB 35 developer must set aside for affordable housing depends on how well her jurisdiction complied

87. *See id.* § 65913.4(a)(4)(A).

88. *See* Murphy, *supra* note 6.

89. *See* CAL. GOV'T CODE § 65913.4(b)(1) (West 2020).

90. *See id.* § 65913.4(c)(1).

91. A jurisdiction cannot require a qualifying development to build any parking if on-street parking permits are required but not offered to its occupants, or if the project is located within a block of a car share vehicle, within a half mile of transit, or in a historically significant district. The maximum parking a local government may require for developments which do not manifest these attributes is one space per unit. *See id.* § 65913.4(d)(1)(D)(2).

92. *See id.* § 65913.4 (a)(2)(A)–(C).

93. *See id.* § 65913.4 (a)(7)(A)(iii), (a)(7)(B), (a)(7)(D).

94. *See id.* § 65913.4 (a)(7)(C).

95. *See id.* § 65913.4 (a)(7)(A)(i)–(ii).

96. *See id.* § 65913.4 (a)(6)(A).

97. *See id.* § 65913.4 (a)(6)(C).

98. *See id.* § 65913.4 (a)(6)(B).

99. *See id.* § 65913.4 (a)(6)(I)–(K).

100. *See id.* § 65913.4 (a)(6)(D)–(H).

101. *See id.* § 65913.4 (a)(10).

with RHNA over the past planning cycle. A developer must reserve fifty percent of units for low or very-low income households if the jurisdiction neglected to issue enough permits for either of those income levels' RHNA quotas.¹⁰² The minimum drops to ten percent for eleven or more units in jurisdiction that either did not submit its RHNA production report or failed to issue enough building permits to meet its above-moderate income housing quota.¹⁰³ A developer may also choose this lower ten percent threshold regardless of how many units she proposes if the government either did not submit its report, or did not issue enough building permits to meet both above-moderate and low- or below-income RHNA quotas.¹⁰⁴ Whether she dedicates ten percent or fifty percent of units to affordable housing, the developer must legally commit to maintaining these units at affordable rates for at least fifty-five years if renting them to tenants, or forty-five years if selling them to new owners.¹⁰⁵

Although SB 35 enables developers to circumvent the discretionary element of CEQA review in pursuit of a permit, they cannot completely bypass community will as codified in zoning, subdivision, and design review standards. However, qualifying projects are only bound to comply with “objective” standards — those that “involve no personal or subjective judgment by a public official and are uniformly verifiable by reference to an external and uniform benchmark or criterion” established before the proposal.¹⁰⁶ In this way, the provision safeguards community values while preventing their unequal application to affordable housing projects.

SB 35's final condition compels developers to pay prevailing wages and employ a skilled and trained workforce¹⁰⁷ according to

102. *See id.* § 65913.4 (a)(4)(B)(ii).

103. *See id.* § 65913.4(a)(4)(B)(i). The California Legislature passed AB 1485 in 2019, which offers an alternative threshold to this provision for Bay Area developers specifically. A project in the Bay Area need only dedicate twenty percent of its units to moderate or below incomes to qualify for SB 35, so long as the rent or sale of moderate-income units does not exceed thirty percent of the household's gross income. *See id.* § 65913.4(a)(4)(B)(i)(II).

104. *See id.* § 65913.4(a)(4)(B)(iii).

105. *See id.* § 65913.4(a)(3)(A).

106. *Id.* § 65913.4(a)(5).

107. Skilled and trained workforces differ from unrestricted construction crew sourcing in that, with the exception of teamsters, they are composed entirely of skilled journeymen or apprentices in a construction trade, and thirty to sixty percent of the workers in each occupation must have graduated from an apprenticeship program. *See* CAL. PUB. CONT. CODE § 2601(d). Apprenticeships last three to six years, and graduates can earn a

the scale of the project. All projects must pay prevailing wages,¹⁰⁸ which is “the basic hourly rate paid on public works projects to a majority of workers engaged in a particular craft, classification or type of work within the locality and in the nearest labor market area.”¹⁰⁹ The basis for the determination of prevailing wages each year are the collective bargaining agreements that unions submit to the state.¹¹⁰ The original purpose of prevailing wages was to prevent bidders on public works from shortchanging their workers to submit a more competitive government bid,¹¹¹ but SB 35’s CEQA exemption extends the prevailing wage requirement to privately funded development as well. The only exceptions to the higher wage threshold are entirely public works projects¹¹² or those projects which propose fewer than eleven units,¹¹³ unless they also involve the subdivision of a parcel.¹¹⁴ Projects involving a subdivision must either pay prevailing wages and receive funding from a low-income housing tax credit (LIHTC), or pay prevailing wages and hire a skilled and trained workforce.¹¹⁵ Depending on where a project is located and how many units it proposes, a developer proposing anything less than a 100% subsidized affordable housing project may also be obligated to hire a skilled and trained workforce, as illustrated below in Figure A.

minimum of \$35 an hour. *See Apprenticeships: Earning While Learning*, CAL. CAREER CTR., <https://www.calcareercenter.org/Home/Content?contentID=143> [perma.cc/L3P7-Y4QH].

108. *See* CAL. GOV’T CODE § 65913.4(a)(8)(A) (West 2020).

109. *Frequently Asked Questions — Prevailing Wage*, CAL. DEP’T OF INDUS. REL., https://www.dir.ca.gov/dlse/FAQ_PrevailingWage.html [perma.cc/2JU9-HCXL]; *see also* CAL. LAB. CODE §§ 1771, 1773.

110. *See* CAL. CODE REGS. tit. 8, § 16200(a)(1)(A) (West 2020).

111. *See* CAL. DEP’T OF INDUS. REL., *supra* note 109.

112. *See* CAL. GOV’T CODE § 65913.4(a)(8)(A) (West 2020).

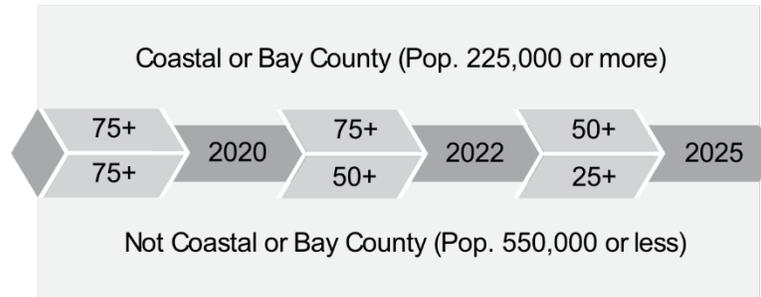
113. *See id.* § 65913.4(a)(8)(C).

114. *See id.* § 65913.4(a)(9).

115. *See id.*

FIGURE A¹¹⁶

Number of Units Requiring a
Skilled & Trained Workforce



B. SB 540: FRONTLOADING AND CONSOLIDATING
ADMINISTRATIVE APPROVALS

SB 540 approaches the housing shortage from a different direction than SB 35. Rather than focusing its energies on councils which oppose affordable construction despite possessing the means to facilitate it, SB 540 furnishes local governments who are already in favor of building but lack the ability to do so with the financial and operational resources necessary to create development-friendly “Workforce Housing Opportunity Zones” (WHOZs). These WHOZs incur one-time, up-front administrative costs, but offer streamlined approvals within a zone for five years thereafter.¹¹⁷ To establish a WHOZ, an interested local government will first identify parcels within its jurisdiction that can collectively support a minimum of 100 and maximum of 1500 housing units.¹¹⁸ Next, it will draft a specific plan to govern critical elements of the development within that zone. The specific

116. Prior to 2020, projects composed of fewer than seventy-five units located anywhere in California did not need to hire a skilled and trained workforce. However, as time goes on, smaller and smaller projects will need to hire skilled and trained workforces. This burden is amplified outside of coastal or bay counties: before 2022, non-coastal projects of fifty or more units are subject to the hiring obligation, while comparable projects in coastal areas are not. After 2022, however, even fifty-unit coastal projects must hire a skilled and trained workforce, and projects in non-coastal areas as small as twenty-five units come within the hiring requirement. *See id.* § 65913.4(a)(8)(B)(i). Graphic by author.

117. *See id.* § 65622(a).

118. *See id.* § 65620(c), § 65621(a)(1).

plan must detail the location of future units, the infrastructure required to support them, and anticipated sources of funding, as well as environmental mitigation measures, density ranges,¹¹⁹ parking, view protection, and design standards that will apply to all development within the zone.¹²⁰ After the planning commission and legislative body each hold public hearings to allow for community feedback, they will adopt a modified draft of the plan and then commission the production of one EIR that will suffice for all future development in the zone.¹²¹ Local governments may apply to HCD for a grant, a no-interest loan, or both to finance the frontloaded costs of generating the specific plan and EIR,¹²² and may also charge an application fee to developers to further defray these costs.¹²³ Upon completion of the specific plan and EIR, a WHOZ may begin accepting applications.

Project proposals that comply with the WHOZ's specific plan standards¹²⁴ include at least some affordable housing¹²⁵ and either pay prevailing wages or are an entirely public work¹²⁶ that cannot be denied unless *all* of the following are true: (1) the WHOZ authority finds based on "substantial evidence"¹²⁷ that a previously unknowable physical condition of the site will have a "specific adverse impact upon the public health or safety";¹²⁸ (2) the cost of impact mitigation measures would render the project unaffordable for middle- and lower-income residents; and (3) approval would cause more than half of the units to go to above-moderate income households.¹²⁹ The jurisdiction may not require an otherwise qualified developer to produce a second, project-specific EIR unless either the project is affordable to above-

119. Multifamily housing's minimum density must be at least that appropriate to lower-income households as outlined in Cal. Gov't Code § 65583.2(c)(3)(B), and single-family housing must be at least ten units to the acre. *See id.* § 65621(a)(4).

120. *See id.* § 65621(a).

121. *See id.* § 65621(b), § 65623(c).

122. *See id.* § 65624.

123. *See id.* § 65621(e).

124. *See id.* § 65623(a)(1).

125. The units reserved for middle- and lower-income households must be kept so for fifty-five years if rented, or forty-five years if sold. *See id.* § 65623(c)(3)(B).

126. *See id.* § 65623(c)(9).

127. *See id.* 65623(a)(2).

128. "Specific, adverse impact" here means "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." *Id.* § 65623(b).

129. *See id.* § 65623(a)(2).

moderate income and does not reserve at least ten percent of units for lower-income households,¹³⁰ or the WHOZ as a whole does not maintain appropriate income stratification.¹³¹ SB 540 defines this stratification as thirty percent of units or more reserved for moderate income households, fifteen percent or more for lower income, five percent or more for very–low income, and no more than half of units for above–moderate income.¹³² As a boon to developers, a residential project may also include commercial development so long as it is limited to the first floor and does not occupy more than half of the structure’s square footage.¹³³ Finally, the WHOZ authority must render approvals within sixty days of receiving an application.¹³⁴

C. AB 73: FUNDING LOCAL EFFORTS

AB 73 is a fun house mirror of SB 540 in that it also offers local governments incentives to create “Housing Sustainability Districts” (HSDs) with a one-time, upfront cost and streamlined approvals thereafter. However, on the whole, AB 73 is much narrower in scope than SB 540 and departs significantly from the WHOZ model in four critical respects: incentive mechanism, affordable housing minimums, land eligibility, and the development approval process.

First, the type of incentive AB 73 offers to approved HSDs is a series of cash payments instead of the grant or no-interest loan a WHOZ applicant may receive.¹³⁵ In contrast to SB 540, local governments may only petition for AB 73 funds after they have completed their requisite EIR and drafted a preliminary plan.¹³⁶ Upon a successful petition, HCD will only disburse half of the total incentive payment, and will reserve the second half for disbursement as the HSD authority permits newly constructed units.¹³⁷ Also unique to AB 73, HCD will conduct yearly performance reviews of each HSD, and if it determines a district is out of compliance with the statute, that district forfeits its incentive pay-

130. *See id.* § 65623(c)(8).

131. *See id.* § 65623(c)(3).

132. *See id.* § 65623(c)(3).

133. *See id.* § 65620(a).

134. *See id.* § 65623(d)(2).

135. *See id.* § 66204(a)(1).

136. *See id.* § 66202(a).

137. *See id.* § 66204(b).

ments for the year.¹³⁸ Finally, if an HSD fails to maintain sufficient density as specified in the statute, a local government must repay the full amount of incentives it has received to HCD.¹³⁹

Second, AB 73 is more concerned with preserving existing affordable housing than SB 540, which focuses purely on adding stock. Whereas SB 540 specifies new affordable housing percentage floors for each income level that must cumulatively total fifty percent of a WHOZ, HSDs need only ensure that twenty percent of units remain available to any combination of moderate, low, and very-low income households.¹⁴⁰ In exchange for a thirty percent lower set-aside, though, an HSD accepts two unique burdens: the local government must provide relocation assistance to all households the district displaces,¹⁴¹ and developers must replace any affordable housing units they destroy with like units.¹⁴²

Third, fewer types of tracts are eligible for HSDs than WHOZs. Residential land only qualifies for inclusion in an HSD if it is zoned for use via a ministerially-issued permit,¹⁴³ although the whole district does not need to be exclusively residential in order to qualify as an HSD. A jurisdiction may elect to allow mixed-use development within the zone provided that it is consistent with residential use,¹⁴⁴ no more than half of a project's square footage bears such designation,¹⁴⁵ and the jurisdiction issues the related permits on a conditional or discretionary basis.¹⁴⁶ In comparison, SB 540 does not require ministerial issuance of residential permits, but does limit complementary uses to commercial development on the first floor of a project. On a more granular level, HSDs may not encompass any substantially developed land — which includes parks and open space¹⁴⁷ — and must either be located within a half mile of public transit or otherwise feature existing infrastructure, transportation access, under-utilized facilities, or a location that is “highly suitable.”¹⁴⁸

138. *See id.* § 66203(a)–(b), § 66204(b).

139. *See id.* § 66210.

140. *See id.* § 66201(f)(2)(A).

141. *See id.* § 66201(f)(6).

142. *See id.* § 66208.

143. *See id.* § 66201(b)(2).

144. *See id.* § 66201(b)(2).

145. *See id.* § 66200(f).

146. *See id.* § 66201(b)(2).

147. *See id.* § 66200(d)(1).

148. *See id.* § 66200(e).

Finally, HSD authorities may take twice as long to approve individual projects as their WHOZ counterparts,¹⁴⁹ but AB 73 boasts developer remedies that SB 540 lacks. Under AB 73, if the designated HSD authority does not produce a decision on an application within 120 days, the development is automatically approved.¹⁵⁰ If the authority does deliver a decision, but the developer believes it to be in error, she may file an appeal in court within twenty days of receiving either a rejection or an approval accompanied by conditions that would render the project infeasible for residential use.¹⁵¹ A more detailed comparison of HSD and WHOZ requirements is available as Table 1 in the Appendix.

Each of SB 35, SB 540, and AB 73 adopt approaches to the housing crisis that are informed by the specific challenges of their proponents' districts, but the true test of their success will be measured according to the impact at the state level.

IV. WIN CONDITIONS: WHAT ENDS SHOULD THE CALIFORNIA BILLS PRIMARILY SERVE?

To assess how well each of these bills addresses the affordable housing crisis, we must first define and rank the goals to be achieved. Is California's highest priority to construct the most units possible as rapidly as possible to close the supply deficit, or is it to make housing more affordable to those least equipped to keep pace with market prices? To what extent is the first goal compatible with the second? The literature reveals three general responses to these questions all covered in Part IV.A: a market-focused "volume" approach, a public underwriter "vulnerability" approach, and a hybrid approach termed "inclusionary housing." Part IV.B then dissects the bills' intersection with increased production in particular, while Part IV.C returns to examine SB 35, SB 540, and AB 73's success through the lens of the other policy values.

149. Approval may take 120 days, compared with sixty days under SB 540. *See id.* § 66205(c)(2).

150. *See id.* § 66205(c)(3).

151. *See id.* § 66206.

A. THREE BASIC APPROACHES

The first approach, which prioritizes volume, aims to encourage market rate construction and leverage the market's self-interest in building with speed and size until supply exceeds demand, at which point older expensive units cannot compete with their newer neighbors and are expected to "filter" downward to lower-income households.¹⁵² This approach prioritizes maximizing supply in the present moment, with the potential side benefit of increasing low-income housing years down the road. Beyond the years- or decades-long delay in realizing an impact on affordability, critics such as Andrew Dietderich are skeptical that any of the increased housing will reach poor households at all because of new market entrants and the very nature of housing likely to be built.¹⁵³ The filtering mechanism operates ideally in a closed ecosystem where housing increases but the population does not. However, cities are not closed loops, and better-resourced families who move into a booming market may interrupt the filtering process by intercepting the cheaper units that would otherwise filter into existing low-income residents' hands.¹⁵⁴ Even without new entrants, Dietderich posits that low-income households may not upgrade because characteristics of the newly vacant units — such as number of bedrooms, lot size, commuting location, and lack of public transportation in the area — were tailored to upper-income tastes and are not amenable to the needs of poorer families.¹⁵⁵

The second approach, by contrast, focuses all its energies on housing the most needy, based on the assumption that the market will not serve their interests. Proponents of this approach are not particularly concerned with closing the state's overall housing deficit, and largely entrust other income range development to the market forces that have heretofore supplied them.¹⁵⁶ The

152. See Benjamin Powell & Edward Stringham, *Housing Supply and Affordability: Do Affordable Housing Mandates Work?*, REASON PUB. POL'Y INST., at 34 (Apr. 2004), <https://reason.org/wp-content/uploads/files/020624933d4c04a615569374fdbef41.pdf> [<https://perma.cc/7HAR-SXBB>].

153. See Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L. J. 23, 93–98 (1996).

154. *Id.* at 97.

155. *Id.* at 96.

156. See, e.g., Margareta Lin et al., *Housing Is Essential: A Commonsense Paradigm Shift to Solve the Urban Displacement and Racial Injustice Crisis*, 29 BERKELEY PLAN. J. 79, 84–87 (2017).

primary critique of this approach is its extraordinary expense, which must be borne by the state and non-profits because the market will not build without profit.¹⁵⁷ Even where private developers build affordable housing through incentives like the Low-Income Housing Tax Credit (LIHTC), the median development cost per rental unit in California is \$326,000.¹⁵⁸

The final method — “inclusionary housing” (IH) — is a hybrid of the first two, and seeks to harness the market-rate building engine to pull affordable housing construction forward with the market’s interests. Under the IH approach, whenever a developer seeks to build market-rate units, she must reserve some portion of the total produced for specified lower income ranges.¹⁵⁹ Proposals vary for which conditions ought to trigger an inclusionary housing requirement and what percentage ought to be reserved, but all seek to balance supply and affordability interests. Some advocates go one step further, arguing that in addition to maximizing affordable, quality shelter through efficient use of public resources, inclusionary housing initiatives ought to improve the economic mobility and wealth of low-income households and encourage social integration and development, thus attaching two more weights to the delicate balancing act.¹⁶⁰ Critics of IH, however, allege that it saps developer profit and has a chilling effect on the market,¹⁶¹ but this has not proven to be the case in California: two separate studies found that IH has no negative impact on overall housing production.¹⁶² Given that IH

157. *The Cost of Affordable Housing: Does It Pencil Out*, URB. INST., <https://apps.urban.org/features/cost-of-affordable-housing> [<https://perma.cc/D2NA-RW4X>] (“[T]here is a huge gap between what these buildings cost to construct and maintain and the rents most people can pay. . . . In many places, the rent the poorest families can pay is too little to cover the costs of operating an apartment building, even if developers could build that building for free.”).

158. See U.S. GOV’T ACCOUNTABILITY OFF., PUB. NO. GAO-18-637, *LOW-INCOME HOUSING TAX CREDIT: IMPROVED DATA AND OVERSIGHT WOULD STRENGTHEN COST ASSESSMENT AND FRAUD RISK MANAGEMENT* (2018).

159. See Nico Calavita et al., *Inclusionary Housing in California and New Jersey: A Comparative Analysis*, 8 HOUS. POL’Y DEBATE 109, 110 (1997).

160. See J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed* 7 (Georgetown Univ. Law Ctr. Pub. Law & Legal Theory Working Paper Series, Paper No. 976410, 2007).

161. See Benjamin Powell & Edward Stringham, *supra* note 152, at 18–20.

162. See David Rosen, *Inclusionary Housing and Its Impact on Housing and Land Markets*, 3 NAT’L HOUS. CONF. AFFORDABLE HOUS. POL’Y REV. 38 (2004) (“An analysis of these data shows that for the jurisdictions surveyed, adoption of an inclusionary housing program is not associated with a negative effect on housing production. In fact, in most jurisdictions as diverse as San Diego, Carlsbad and Sacramento, the reverse is true. Housing production increased, sometimes dramatically, after passage of local inclusionary

may latch onto the market engine without substantially handicapping its movement, the question then becomes one of how much affordable housing an IH initiative is likely to produce without deterring developers from its income ranges. In light of the terms on which some IH measures have succeeded and others have failed at achieving this balance to date, SB 35, SB 540, and AB 73, which all adopt the third approach, are unlikely to yield the improvement hoped for.

B. INCREASING THE NUMBER OF UNITS PRODUCED

Setting aside for a moment three of the four policy values associated with the IH approach — efficient resource use, household economic benefit, and social integration — the streamlining statutes are unlikely to satisfy the first value of producing substantially more housing for lower-income households because of their optionality, labor concessions, income requirements, site and building qualifications, and funding.

1. *Optionality*

The last few decades of experimentation in IH have demonstrated that, on the whole, programs that mandate developer compliance produce far more affordable housing units than those which offer merely voluntary participation, both in terms of absolute numbers and percentage of total development.¹⁶³ Professor Robert J. Wiener and Dr. Stephen E. Barton found that the Cali-

housing ordinances.”); Antonio Bento et al., *Housing Market Effects of Inclusionary Zoning*, U.S. DEPT OF HOUS. & URBAN DEV., 11 CITYSCAPE: J. POLY DEV. & RES. 7 (2009) (“The analysis found that inclusionary zoning policies had measurable effects on housing markets in jurisdictions that adopt them; specifically, the price of single-family houses increases and the size of single-family houses decreases. The analysis also found that, although the cities with such programs did not experience a significant reduction in the rate of single-family housing starts, they did experience a marginally significant increase in multifamily housing starts.”). Benjamin Powell and Edward Stringham conducted a third study finding that inclusionary housing programs *did* dampen market production, but it has since been discredited for its flawed methodology. See Powell & Stringham, *supra* note 152, at 17–18; Nicholas J. Brunick, *The Inclusionary Housing Debate: The Effectiveness of Mandatory Programs Over Voluntary Programs*, 21 ZONING PRACTICE 2, 5 (2004) (“The study’s methodology exhibits a number of failings, including a failure to include communities without inclusionary zoning in the analysis and a failure to account for or hold constant other factors that could have an effect on levels of housing production, such as the unemployment rate, the prime interest rate, growth boundaries, lack of available land, vacancy rates, etc.”).

163. See Brunick, *supra* note 162, at 2.

formian IH programs most likely to fail were those that were (1) optional and relied on “carrots’ with no ‘sticks’”; (2) mandatory with too many sticks and few carrots; and (3) mandatory with weak compliance alternatives.¹⁶⁴ While SB 35 contains “sticks” for cities, none of the three statutes presently under consideration contain sticks for *developers*. Instead, they only offer carrots like ministerial CEQA approval, exemption from conditional use permits, and parking waivers (SB 35); project-specific EIR waiver (SB 540 and AB 73); automatic approval where a jurisdiction misses its approval deadline as well as developer appeals (AB 73); and a 60-, 120-, or 180-day cap on approval timeframes (all). SB 35, SB 540, and AB 73 can only defy the historical odds and succeed in producing vast amounts of housing where these carrots are very attractive indeed.

2. Labor Costs

Developers who do find these fast-tracking and financial incentives both attractive and applicable to their unique building context must weigh the savings they generate against the costs incurred by labor requirements, income thresholds, and building restrictions. The prevailing wages and skilled and trained workforce requirements common to SB 35, SB 540, and AB 73 will take a substantial bite out of those savings for all projects, except those that are either entirely public works or propose ten units or less, and may prove the greatest deterrent to otherwise interested developers. As data from the Turner Center shows, construction costs and local rents or sales prices are the greatest determining factors in whether a developer elects to pursue a project or not.¹⁶⁵ Studies show that paying prevailing wages can increase construction costs anywhere between twelve percent and forty-eight percent.¹⁶⁶ Two reasons for these inflated costs are a labor

164. Robert J. Wiener & Stephen E. Barton, *The Underpinnings of Inclusionary Housing in California: Current Practice and Emerging Market and Legal Challenges*, 29 J. HOUS. & BUILT ENV'T 403, 408 (2014).

165. See *Dashboard*, *supra* note 55.

166. See Hernandez, *supra* note 41, at 63 (“While the magnitude of cost increase to housing prices caused by paying higher wages and benefits to construction workers are disputed, at the low side estimate prepared by union advocates housing costs increase by 12%, in a middle range as reported by UC Berkeley’s Program on Housing and Urban Policy concluded that prevailing wages added 9% to 37% to construction, and a 48% construction cost increase was reported by Beacon Economics in a 2016 study of a prevailing wage ballot initiative enacted in Los Angeles.”).

shortage and industry-wide inefficiency. Eighty percent of Californian contractors have difficulty finding and hiring enough construction workers to complete projects, leading to cost overruns for forty-four percent of projects.¹⁶⁷ Construction has also lagged behind the global economy in productivity, in part because it fails to innovate.¹⁶⁸ Amplifying construction costs in such a market by requiring even higher wages will functionally disqualify developers who operate on a minimal profit margin and would otherwise be open to building inclusionary housing.

3. *Income Requirements*

Those developers who can afford the more expensive payroll must next consider whether their profit model can accommodate each statute's percentage of lower-income units: at least ten percent per project and twenty percent total for the HSD under AB 73; at least ten percent per project and fifty percent total for the WHOZ under SB 540; and either ten percent or fifty percent per project under SB 35, depending on the jurisdiction's RHNA compliance. Unfortunately, developers are unlikely to submit proposals at all where income-restricted units exceed ten percent of the total.¹⁶⁹ A survey of Bay Area development found that "[r]educing inclusionary requirements by 50% — for example, from 20% of units to 10% — can increase the odds that a project

167. See ASSOCIATED GEN. CONTRACTORS OF AM., 2018 WORKFORCE SURVEY RESULTS: NATIONAL RESULTS 1, 7 (2018), https://www.agc.org/sites/default/files/Files/Communications/2018_Workforce_Survey_National.pdf [<https://perma.cc/SRK8-MVYX>] (last visited Feb. 21, 2020).

168. See Filipe Barbosa et al., *Reinventing Construction Through a Productivity Revolution*, MCKINSEY GLOB. INST. (Feb. 2017), <https://www.mckinsey.com/~media/McKinsey/Industries/Capital%20Projects%20and%20Infrastructure/Our%20Insights/Reinventing%20construction%20through%20a%20productivity%20revolution/MGI-Reinventing-construction-A-route-to-higher-productivity-Full-report.ashx> [<https://perma.cc/MZ7X-ZPEL>] ("Labor-productivity growth in construction has averaged only 1 percent a year over the past two decades, compared with growth of 2.8 percent for the total world economy and 3.6 percent in the case of manufacturing. . . . Examples of innovative firms and regions suggest that acting in seven areas simultaneously could boost productivity by 50 to 60 percent. They are: reshape regulation; rewire the contractual frame work to reshape industry dynamics; rethink design and engineering processes; improve procurement and supply-chain management; improve on-site execution; infuse digital technology, new materials, and advanced automation; and reskill the workforce.").

169. See Graham MacDonald, *The Effect of Local Government Policies on Housing Policy*, TERNER CTR. FOR HOUS. INNOVATION AT UNIV. OF CAL. AT BERKELEY, at 20 (May 2016), http://turnercenter.berkeley.edu/uploads/The_Effect_of_Local_Government_Policies_on_Housing_Supply.pdf [<https://perma.cc/PF52-GGCS>].

gets developed from 0% to 99%.¹⁷⁰ Increasing inclusionary requirements by 100%, from 10% to 20%, would have the opposite effect.”¹⁷¹

This resistance may be attributed to any of several factors. First, the developer may determine that the disparity between market rate rents and low-income rents eats too far into her operating profit to be sustainable. Second, even where she is willing to accept the loss on the affordable units, her potential market rate tenants may not be interested in having low-income neighbors, affecting the rate at which she can let the market rate units. Third, as exemplified by the Forest Hill senior housing debacle in Part II above, the existing neighboring community may threaten formidable opposition for the same reason as higher-income tenants, and add litigation costs to the income loss. Summing the certain loss with potential loss partway through and after project completion, many developers will turn away from SB 35, SB 540, and AB 73’s incentives at this juncture.

4. *Site and Building Stipulations*

Developers with a high tolerance for risk or no obligation to produce market-rate units (i.e., non-profits) still face the challenge of securing eligible sites under the relevant statute. SB 540 is theoretically the most permissive in that qualifying sites need only be suitable for residential development and fall within the not-necessarily-contiguous WHOZ’s borders.¹⁷² AB 73 raises the bar significantly, stipulating that land be residentially zoned through a ministerial¹⁷³ permit, not already substantially developed, and located within a half-mile of public transit or be otherwise “highly suitable.”¹⁷⁴ Developers in districts where NIMBYs have successfully fenced out newcomers by issuing residential permits on a discretionary basis only, or which lack public transit either by design or funding constraints, will find little use for AB 73’s incentives and will look elsewhere. Even where communities welcome new low-income housing and expand transit to service

170. *Id.*

171. *Id.*

172. *See* CAL. GOV’T CODE § 65620(c) (West 2018).

173. In other words, requiring no discretion on the part of the administrator, only measurement against objective standards.

174. *See* CAL. GOV’T CODE § 66200(e) (West 2018).

it,¹⁷⁵ developers may not be able to secure the land at a reasonable price due to speculation.¹⁷⁶ SB 35, perhaps by virtue of its “by-right” nature, is the most restrictive.

Although a qualifying development must be located in an urban, residentially zoned area surrounded by seventy-five percent developed land,¹⁷⁷ its own site may not have been occupied at any point within the last ten years or replace rent-controlled housing,¹⁷⁸ as permitted under AB 73 and SB 540. Accordingly, the sort of sites eligible for SB 35 are likely those targeted by the failed urban renewal initiatives of years past: abandoned urban cores that may prove unappealing to a potential IH development’s market-rate tenants.¹⁷⁹ If market-rate tenants cannot be successfully persuaded to move there, only non-profits building 100% affordable housing are likely to complete projects in those areas, again contributing to the centralization of poverty.

Finally, two of the streamlining statutes’ inclusionary frameworks fail to counteract some of the hallmarks of the exclusionary housing that has inhibited low-income development for so long — namely, parking and design requirements — although all three pay appropriate attention to density. Historically, wealthier communities have often “kept lower income families from moving into the community through ‘exclusionary’ zoning by requiring large minimum lot sizes and large minimum floor areas, prohibiting mobile homes, and limiting multifamily residential areas.”¹⁸⁰

175. See John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. LAW 188, 197 (2003) (“The overemphasis on funding highway construction has reduced access to job opportunities for low-income households. It has also benefited suburbs, encouraged longer commutes from auto-dependent communities, and provided hidden subsidies to motorists. Nationally, people of color tend to rely on public transportation far more than whites, and the distances that they must travel to new jobs under a fragmented metropolitan scheme can hurt their employment prospects.”).

176. See Joshua David Rosa, *INCLUSIONARY HOUSING IN SACRAMENTO COUNTY: COSTS, BENEFITS, AND POLITICS*, at 30 (Cal. St. Univ. Sacramento Spring 2008) (“In 2007, a survey of five metropolitan regions found home prices near transit stations increased due to speculation once a new transit line was announced, and affordable housing developers often lack the capital to acquire land before the prices go up and then hold it until it is ready to develop. Moreover, existing planning and zoning makes the types of infill development near transit generally time-consuming and expensive, causing developers to build to the high end of the housing market.”).

177. See CAL. GOV’T CODE § 65913.4(a)(2)(B) (West 2020).

178. See *id.* § 65913.4(a)(7)(A)(ii)–(iii).

179. For a discussion on failed urban renewal initiatives, see Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 HOUSING POLY DEBATE 443 (2000).

180. See Brian R. Lerman, *Mandatory Inclusionary Zoning — The Answer to the Affordable Housing Problem*, 33 BOSTON C. ENV’T AFF. L. REV. 383, 386 (2006). See also Rosa, *supra* note 176, at 7 (“These regulations included certain aesthetic qualities, such as

SB 35 mitigates this anti-density tactic well by granting its incentives to multifamily housing proposals in districts that have not produced enough low-income units; SB 540 and AB 73 also make laudable efforts by establishing multi-family density floors for their respective zones.

However, SB 35 continues to shine where the others wane by limiting the amount of parking a jurisdiction may require of an eligible development,¹⁸¹ and overriding discretionary design review.¹⁸² Each additional parking space can cost a Californian developer up to \$75,000 to construct,¹⁸³ reduce the space available for more units,¹⁸⁴ and damage the environment by promoting car use over more efficient forms of transportation.¹⁸⁵ Even so, despite the increased emissions and congestions thereby produced, communities often deploy parking requirements under the guise of environmental review to “insulate the transportation status quo from changes caused by development” and “keep drivers in their cars, with the same ease of parking as before the development was built.”¹⁸⁶

A second tactic NIMBY governments use to restrict low-income housing in their area is specific design standards requiring more expensive materials, skill, or labor, along with discretionary review; often such exclusionary practices appear masked as “measures to preserve the community character.”¹⁸⁷ While SB 35 does not bypass all of a community’s input on design, it does limit developer compliance to codified characteristics capable of “objective” review, which protects both existing and future tenants’ interests. Because SB 540 and AB 73 preserve a locality’s ability to prescribe restrictive parking parameters and conduct

requiring residential lots to be a specified minimum size and houses to be set back from the street by a specified minimum space. Later dubbed ‘exclusionary zoning,’ these laws often imposed standards that were cost-prohibitive for more modest homes.”)

181. See CAL. GOV’T CODE § 65913.4(d)(1).

182. See *id.* § 65913.4(a)(5).

183. See MacDonald, *supra* note 169170, at 15.

184. See Wenyu Jia & Martin Wachs, *Parking Requirements and Housing Affordability: A Case Study of San Francisco*, UNIV. OF CAL. TRANSP. CTR., at 1 (July 1998), <https://cloudfront.escholarship.org/dist/prd/content/qt0fm8k169/qt0fm8k169.pdf?t=lpofsc> [<https://perma.cc/S3TE-VWYY>].

185. See Noah M. Kazis, *Environmental Review as an Incentive for Parking Provision in New York and California: Moving from Conservatism to Conservation*, 41 TRANSP. L.J. 157, 165 (Apr. 21, 2015).

186. *Id.* at 159.

187. Lerman, *supra* note 180, at 387.

design review discretionarily, they are likely to deter new housing in some of the regions that need it most.

5. *Funding*

SB 35 projects, which pencil out after accounting for the above incentives, as well as increased wages, decreased returns on low-income units, and risks related to site and building requirements, may figuratively pass Go and collect \$200, but for AB 73 and SB 540 developers, there remains one final obstacle: the local government must find its own set of state-issued incentives worthwhile. The amount of each monetary incentive is not written into the statute, but rather delegated to HCD to determine, so the frameworks' attractiveness on that basis is difficult to determine. However, SB 540 is more likely to prove attractive on the basis of its form alone because it may provide both one-time grants and no-interests loans in full, whereas AB 73 issues a series of incentive payments over time with a compliance mechanism attached. After witnessing the legislature repeatedly raid local coffers in moments of crisis,¹⁸⁸ otherwise ambivalent local governments may (understandably) wish to steer clear of reliance on ongoing state-backed funding when assuming a massive up-front cost for an HSD, and opt for a WHOZ instead.

Overall, though, SB 35 seems the most likely candidate of the three to produce the most affordable housing because of its mandatory effect on 97.6% of jurisdictions, ministerial CEQA and design review, two-tier income requirement, parking waivers, and independence from a variable state budget. Further, SB 35 will also be most successful in cities where NIMBYs are best-heeled and most active in the regulatory process. AB 73 and SB 540's impact will likely be confined to niche contexts with supportive communities, fewer local regulatory burdens, and smaller differences between income ranges.

188. See Shane Goldmacher, *Groups File Measure to Block State Raids of Local Funds*, L.A. TIMES (Oct. 20, 2009), <https://latimesblogs.latimes.com/lanow/2009/10/groups-file-measure-to-block-state-raids-of-local-funds.html> [perma.cc/FHN2-NCWA].

C. COST-EFFECTIVELY SECURING SOCIAL BENEFITS

Having discussed the extent to which each statute is likely to spur the creation of more affordable housing, this Note returns to the question of how well SB 35, SB 540, and AB 73 further the other three policy values of inclusionary housing: i.e., household economic benefit, social integration, and efficient use of state funds. There are two types of financial benefits that advocates believe an inclusionary housing program may grant to low-income households, both of which are intricately intertwined with one of the other IH values. Since the first of these benefits — upward economic mobility — relies heavily on social integration for its operative mechanism, this Note examines them together. Similarly, this Note examines the second benefit — the opportunity to build wealth — alongside the value it inherently implicates, the efficient use of state funds.

1. *Upward Economic Mobility and Social Integration*

The theory underlying upward economic mobility is rooted in the failure of entirely low-income public housing projects. Local governments historically built projects in cheap, “marginal neighborhoods . . . that would generate the least public economic and political cost,” effectively concentrating the poor.¹⁸⁹ The close proximity to others in deep poverty, isolation from businesses and other parts of society, and institutionalized racism “magnified the effects of poverty,” and transformed the affordable housing projects into “ghettoes of poverty without resources, role models, or apparent paths to individual success.”¹⁹⁰

Consequently, some hypothesized that dispersing low-income households among wealthier neighborhoods would ameliorate poverty’s worst effects.¹⁹¹ Through access to the safer neighbor-

189. Byrne & Diamond, *supra* note 160, at 35.

190. *Id.* at 36. See also Rosa, *supra* note 176, at 39 (“[M]arket prejudice imposes additional penalties on poorer neighborhoods; upscale retailers are unlikely to open a new store, restaurant, or other establishment in a low-income neighborhood, for the reason that they are trying to attract higher-income clientele. Similarly, banks are less likely to open a new financial institution in a low-income neighborhood than they are in a middle- or upper-income neighborhood. Consequently, greater concentrations of low-income renters invite a greater concentration of unwanted land uses, crime, violence, and social detachment, in addition to warding off more desirable land uses.”).

191. See Mark L. Joseph, *Is Mixed-Income Development an Antidote to Urban Poverty?*, HOUSING POL’Y DEBATE 2, 209 (2006), <https://www.tandfonline.com/doi/abs/10.1080/>

hoods, better schools and services, and expanded social networks available in upper-income communities,¹⁹² the poor could also attain more employment opportunities and higher wages. IH's social integration value intersects with the ladder of mobility at the network and employment rungs: ideally, by "facilitating socialization across different income groups, economic integration lends lower-income families better social networks and employment opportunities,"¹⁹³ and enables them to "learn skills from association with wealthier people, who in turn develop a less stereotyped attitude toward the needy."¹⁹⁴

Unfortunately, however, a host of studies indicate that while mixed-income housing yields increased health and safety for all members of a low-income household,¹⁹⁵ improved academic performance and behavior among the children,¹⁹⁶ and higher em-

10511482.2006.9521567 [https://perma.cc/SL55-U28S?type=image] ("I critically assess the potential for mixed-income development as a means of helping lift families in U.S. inner cities out of poverty. I identify four main propositions for the promise of mixed-income development, provide a conceptual framework that delineates the pathways through which mixed-income development can be hypothesized to improve the quality of life for the urban poor, and review the evidence from existing research on the relevance of these propositions. . . . The most compelling propositions are those that do not rely on social interaction to promote a higher quality of life for low-income residents and instead predict benefits through greater informal social control and higher-quality goods and services. I consider the limitations of this strategy and policy implications for future mixed-income development.").

192. See Diane K. Levy et al., *Mixed-Income Living: Anticipated and Realized Benefits for Low-Income Households*, 15 CITYSCAPE: J. POL'Y DEV. & RES. 2, 15, 17 (2013) ("The hypothesized benefits associated with this place-oriented goal for mixed-income developments, or at least their lower income residents, include better quality housing, improved services, increased neighborhood amenities, and a safer environment relative to what is available in most homogenously poor areas. . . . The benefits associated with this people-oriented goal have included access to more instrumentally valuable networks and to behavior and lifestyle alternatives as modeled by higher income neighbors. . . . The benefits associated with this place-oriented goal for areas in and around mixed-income developments have included increased safety; the development of more or improved amenities, such as stores, parks, and playgrounds; and, possibly, improvements to transit access and schools.").

193. Rosa, *supra* note 176, at 36–37.

194. Byrne & Diamond, *supra* note 160, at 40.

195. See Levy, *supra* note 192, at 21 ("[M]ost benefits reported by residents of mixed-income developments and income-diverse areas derive from improvements to their surroundings. A number of studies found that residents of mixed-income developments were satisfied with their housing quality and with the maintenance and management of the developments. Residents also indicated satisfaction with neighborhood services and amenities. Perhaps most importantly, they commented on safety improvements related to reductions in criminal activities.") (citations omitted).

196. *Id.* at 22 ("Schwartz (2010) argued that, although her study found academic gains among children who moved to low-poverty areas, greater gains were found among those students who attended low-poverty schools. Gautreaux and MTO studies have found that children who relocate to income-diverse areas have fewer behavioral and health problems.

ployment rates among the parents, the mixed-income model ultimately produces neither upward economic mobility,¹⁹⁷ nor social integration.¹⁹⁸ Because SB 35, SB 540, and AB 73 adopt the same model, they are likely to manifest the same failings as their predecessors with regard to any economic mobility and inter-class relationships that advocates hope to develop.

2. *Opportunity to Build Wealth and the Efficient Use of Funds*

IH's second financial benefit to low-income families, the opportunity to build wealth, arises only in the context of owned units because "wealth creation in our society often centers on ownership of assets that endure and appreciate," and "[f]or most Americans, their home is their most valuable asset."¹⁹⁹ Owned units constructed through IH programs help their recipients accrue wealth because monthly mortgage payments engender a practice of savings, and homeowners are eligible for special tax breaks.²⁰⁰ Furthermore, owners have a greater incentive to maintain and improve a property where they can realize a return on that investment upon sale of the unit. However, the preservation of equity for one homeowner directly conflicts with inclusionary housing's fourth policy value of optimizing fund use: "the greater the opportunity for the subsidized owners to sell their home at the market price, the less subsidized housing the same public dollars will have produced."²⁰¹ This will increase prices for future devel-

Johnson, Ladd, and Ludwig (2001) found that children reported feeling less sad, arguing less, and disobeying their parents less often after moving to a lower poverty area. They reported working harder in more challenging schools, and findings show that they did not experience a drop in grades relative to nonmovers.") (citations omitted).

197. *Id.* at 21 ("Briggs argued that, although lower-income households moved to areas with more employment opportunities, they were not necessarily more likely to access and retain jobs or obtain jobs with higher wages. Similar results have been found from the MTO demonstration program. Households that moved to low-poverty areas as part of MTO had higher employment rates than families who had not moved, but they had about the same hourly wage.").

198. *Id.* at 20 ("Most studies that examined resident interactions in mixed-income developments found that relationships are more likely to form among people of similar income and housing tenure (Kleit, 2005; Rosenbaum, Stroh, and Flynn, 1998; Tach, 2009). . . . Chaskin and Joseph (2010) found that resident participation in communitywide events intended to foster interaction tended to fall along lines of income. . . . 'Across tenure and class, many residents are simply withdrawing from engagement with others locally and relying on pre-existing relationships for social and instrumental support'").

199. Byrne & Diamond, *supra* note 160, at 20.

200. *Id.* at 22.

201. *Id.* at 25.

opments, and decrease the land is available for new affordable housing.²⁰²

One proposed harmonization of these interests restricts IH home ownership to members of the same income range for a given number of years, at which point the unit may be released for sale at the market rate. This is the stance SB 35, SB 540, and AB 73 assume. While intended to maximize the number of families that owned affordable housing may serve, in some ways this model merely reallocates the original cost flaw. The only way to ensure that households do not sell their affordable units at market rate immediately (as they could under a non-income-restricted model) is to establish an ongoing monitoring system, which will continue to incur steep administrative costs well past expiry of the developer initiatives.²⁰³ Depending on the scale of administration required and the discrepancy between market and low-income prices in any given locality, one method may conserve more resources for future affordable housing than the other. In the present case, because all three streamlining statutes apply income-based restrictions to owned units for fifty-five years while making no provision for a supply-monitoring system, they are more likely to help a smaller group of low-income families build equity than house the most low-income households possible with allotted funds.

When assessed against four proposed metrics of affordable housing — maximizing supply, optimizing fund use, financially stabilizing low-income families, and increasing social integration — SB 35 appears the most promising of the three streamlining statutes. Its mandatory nature, coupled with CEQA and design review bypasses, encourages the most affordable housing construction across the most jurisdictions without taxing the state treasury, in contrast to the optional SB 540 and AB 73, which preserve exclusionary housing tactics and rely on sizeable state grants for their sustainability. None of the initiatives are well-equipped to foster social integration, upward economic mobility, or equity accumulation, but perhaps these admirable and essen-

202. *Id.* at 25, 32.

203. *See, e.g.*, Richard A. Epstein, *The Unassailable Case against Affordable Housing Mandates*, in EVIDENCE AND INNOVATION IN HOUSING LAW AND POLICY 68 (Lee Anne Fennell & Benjamin J. Keys eds., 2017) (“[D]etermining annual eligibility is costly and error ridden when current tenants and future applicants change jobs from time to time, often work off the books, or fraudulently conceal income sources.”).

tial goals are not properly the domain of housing policy after all, and would be better served from another social vantage point.

V. RECOMMENDATIONS FOR IMPROVEMENT

Several modifications could improve the tripartite streamlining framework's ability to reconcile RHNA with CEQA and produce affordable housing rapidly and cost-efficiently in California's desperate housing climate. These modifications include: mandatory ministerial review in RHNA non-compliant localities; a review timeframe guaranteed by the threat of automatic approval upon excessive delay; a residence requirement for CEQA lawsuits; reduced IH minimums; and the swapping of prevailing wage clauses with other labor concessions. Part V.A addresses how to encourage local governments and stakeholders to approve more housing, while Part V.B covers how to make submitting proposals more attractive to developers.

A. SPURRING LOCAL GOVERNMENTS

To ensure more proposals carry through to completion successfully, revisions must account for both government officials and local constituents' attempts to circumvent the laws' scope. An optimized CEQA bill could incentivize intransigent local governments to approve more qualified affordable housing proposals (as defined below) by adopting SB 35's mandatory ministerial CEQA review "stick" over SB 540 and AB 73's opt-in "carrots" for jurisdictions that have failed to comply with RHNA. Such a mechanism encourages local governments to use discretionary review to accommodate the needs of all their residents on their own terms, or risk forfeiting some control until they account for the most vulnerable. However, since some reticent districts could yet blunt the effect of the ministerial review mandate by stretching review over a financially infeasible timeline, it is important to pair SB 35's fast-tracking with AB 73's developer recourse of automatic approvals where local officials fail to meet the 180-day decision deadline.

Certain NIMBY-dominated communities may also attempt to circumvent the ministerial hurdle by instituting objective design standards that are functionally incompatible with the needs and fiscal capacity of poorer families. The statute could preempt

these avoidance maneuvers by explicitly limiting the extent to which four of the more common exclusionary design standards may be considered in ministerial review: parking, noise, interior aesthetics, and minimum floor sizes and curb setbacks.

First, NIMBYs can price low-income neighbors out of a market by mandating more parking. Because the median cost of constructing LIHTC-funded rental units in California is \$326,000,²⁰⁴ and each additional parking space can tack up to \$75,000 onto a project's cost,²⁰⁵ the prospect of including additional parking can effectively drive away low-income housing developers. The improved CEQA bill could counteract this tactic by capping the number or proportion of parking spots that may be required of a qualifying affordable housing project in RHNA-triggered ministerial review, with the added boon of limiting pollutive emissions.²⁰⁶

A second tactic protectionist communities may deploy is prohibiting increases in noise above the current level.²⁰⁷ For an established neighborhood characterized by single family homes, construction will necessarily create temporary noise. A multi-family housing development is sure to increase the permanent noise level by virtue of more persons present per square mile. Accordingly, the bill should prevent construction noise at a level permitted by state regulation and noise increases commensurate with that of multi-family housing from disqualifying an IH proposal.

Third, NIMBYs may establish standards requiring minimum unit floor sizes and curb setbacks²⁰⁸ that only 100%+ AMI single-family buyers or renters could afford on the open market. In 2019, the California Legislature responded to this concern by specifically prohibiting such local development policies through SB 330.²⁰⁹

Finally, the revised CEQA bill should limit neighborhood aesthetic design standard compliance to building facades. While poor exterior design can dampen surrounding home prices and engender a stigma that encourages neighbors to oppose building

204. See *Low-Income Housing Tax Credit*, *supra* note 158.

205. See MacDonald, *supra* note 169, at 15.

206. See Kazis, *supra* note 185, at 180 (“[B]y producing a supply of parking greater than the market would otherwise supply, parking mandates increase housing costs”).

207. See Hernandez, *supra* note 41, at 40.

208. See Lerman, *supra* note 180.

209. See CAL. GOV'T CODE § 66300(b)(1)(A), (b)(1)(C) (West 2020).

affordable housing next door,²¹⁰ structures that externally blend into the neighborhood but internally make use of cheaper fixtures and amenities can satisfy both legitimate community tastes and developer budgets.²¹¹

B. ATTRACTING DEVELOPERS

Along with encouraging local governments to approve more affordable housing, the enhanced CEQA bill could make submitting qualified bids more attractive to developers by inhibiting disingenuous CEQA challenges to approved projects, limiting inclusionary minimums to ten percent low- or very low-income units, and scrapping the prevailing wage and skilled and trained workforce requirements for projects in exchange for other labor interest concessions.

CEQA granted the private right of action to protect the interests of residents affected by potentially environmentally-unsafe construction beginning next door, but the statute could more effectively serve this aim by allowing only individuals living within the zip code of the proposed project to bring suit against its approval. A proximity condition for challenging CEQA approvals also defends against third-party interference for the purpose of extracting settlements or other deals from developers at the expense of local community consensus and benefit. By way of example, some Congressional district offices already have taken a similar approach to preserving the integrity of their constituents' interests by asking callers to identify themselves and their addresses before recording feedback that could influence the Congressman's decision-making.²¹²

The revised bill could also bring more developers into the fold and make full use of the market-rate engine's development speed by capping the inclusionary minimum at ten percent. As noted above, halving the minimum set-aside can increase the odds of development from zero percent to ninety-nine percent,²¹³ and ten

210. See generally W. Keener Huguen & Dustin C. Read, *Inclusionary Housing Policies, Stigma Effects and Strategic Production Decisions*, 48 J. REAL EST. FIN. & ECON. 589 (2014).

211. See Wiener & Barton, *supra* note 164, at 418.

212. See Issie Lapowsky, *What It Takes to Make Congress Actually Listen*, WIRED (Feb. 1, 2018), <https://www.wired.com/story/opengov-report-congress-constituent-communication> [perma.cc/J9QY-T59G].

213. See MacDonald, *supra* note 170.

developments with twenty affordable units each cannot compare to thirty developments with ten affordable units each. To ensure these units remain in the affordable housing stock, the bill should also authorize funding for ongoing monitoring.

Finally, prevailing wage clauses tacked onto private-sector projects serving the most vulnerable must be scrapped. Given the scope of their impact on developers' marginal analysis, prevailing wages and a skilled and trained workforce transform what is an inhibitor in market rate projects into a prohibitor in the low-income context. However, labor is rightly concerned that its workers will not be able to afford living near the very projects they construct — in some particularly dense and expensive regions, workers earn too much to qualify for low-income housing but not enough to afford shelter on the open market.²¹⁴ To address this concern, the revised CEQA bill could lift the wage and workforce requirements for projects that reserve an additional ten percent of units at a rate affordable to the median regional construction worker's income, and offer a first right of refusal for rent or purchase on these units to construction teams working on affordable projects in the area. The state could further support labor and combat a crippling talent shortage by designating funding to expand trade training programs in high schools and community colleges.²¹⁵

VI. CONCLUSION

No version of CEQA streamlining on its own will solve California's enduring housing crisis — a comprehensive solution implicates a whole ecosystem of regulations and interests not easily disentangled — but perhaps the greatest contribution of SB 35, SB 540, and AB 73 is to illustrate the contours of the road ahead. The path to affordable housing is drawn in the tension between labor and developers, between state and local power, between home values and the homeless, and CEQA is in some ways just the proxy battleground for a larger conflict of present individual profit with public future benefit. As the homelessness epidemic

214. See Hernandez, *supra* note 41, at 67.

215. See Andrew Soergel, *Where Are All the Builders?*, U.S. NEWS (June 15, 2018), <https://www.usnews.com/news/the-report/articles/2018-06-15/the-us-construction-industry-is-booming-but-where-are-the-builders> [perma.cc/XJL3-Y248].

multiplies year-over-year, every Californian must give her own answer to the age-old question: who is my neighbor?

APPENDIX A:

AB 73 & SB 540 DETAILED COMPARISON CHART

	AB 73	SB 540
INCENTIVE MECHANISM		
Affordable housing minimum for entire area	20% moderate, low, and very-low income combined ²¹⁶	30%+ moderate income 15%+ low income 5%+ very-low income
Relocation assistance for displaced households required	Yes ²¹⁷	No
Duration	10 years, renewable for 10 more years only ²¹⁸	5 years, renewable upon revisited EIR
Type of incentive	Incentive payment, ²¹⁹ developer application fees ²²⁰	Grant and/or no-interest loan, developer application fees
Incentive disbursement and contingencies	Half disbursed on approved EIR and plan, half as new units are built; ²²¹ total revocable if density not maintained ²²²	Total disbursed on successful application prior to EIR and specific plan development
HCD compliance review	Yearly, with award forfeited on non-compliance ²²³	No

216. CAL. GOV'T CODE § 66201(f)(2) (West 2019).

217. *Id.* § 66201(f)(6).

218. *Id.* § 66201(g).

219. CAL. GOV'T CODE § 66204(a) (West 2018).

220. *Id.* § 66205(a)(2).

221. *Id.* § 66204(b).

222. *Id.* § 66210.

223. *Id.* § 66203(a)-(b); § 66204(b).

	AB 73	SB 540
INCENTIVE MECHANISM, cont'd.		
Jurisdiction eligibility	Only those with housing elements in compliance with Cal. Gov. Code § 65580 ²²⁴	Any
LAND RESTRICTIONS		
Type of land eligible	Zoned for residential through ministerial permit; ²²⁵ compatible uses permitted discretionarily or conditionally; ²²⁶ not substantially developed; ²²⁷ located either within half mile of public transit or in area otherwise highly suitable for HSD; ²²⁸ not age- or occupancy-restricted other than for the elderly, disabled, or living-assisted ²²⁹	Suitable for residential development
Mixed use permitted	Jurisdiction may choose to allow residential-compatible use, up to half of total square footage ²³⁰	Commercial only, up to half of total square footage, on the first floor only

224. *Id.* § 66202(a)(2).

225. CAL. GOV'T CODE § 66201(b)(2) (West 2019).

226. *Id.*

227. "Substantially developed" includes existing parks and open space. CAL. GOV'T CODE § 66200(d) (West 2018).

228. *Id.* § 66200(e).

229. CAL. GOV'T CODE § 66201(b)(6) (West 2019).

230. CAL. GOV'T CODE § 66200(d), (f) (West 2018); CAL. GOV'T CODE § 66201(b)(2), (d) (West 2019).

	AB 73	SB 540
LAND RESTRICTIONS, cont'd.		
Maximum area size	15% of jurisdiction, 30% with approval ²³¹	1500 units
Density minimums	Multifamily must be low income appropriate, and single-family must be at least 10/acre ²³²	
DEVELOPER CONCERNS		
Affordable housing minimum for individual developments	10% lower income where any units are available to above-moderate income	
Building on existing or previously affordable housing site permitted	Yes, where units are replaced in kind ²³³	[not addressed]
Prevailing wages required	Yes, unless either 100% public work or under 11 units ²³⁴	Yes, unless 100% public work
Skilled and trained workforce required	Yes, as per Figure A, ²³⁵ unless not a public work <i>and</i> under 11 units ²³⁶	No
Subdivisions permitted	Only with prevailing wages and either LIHTC or skilled and trained workforce ²³⁷	[not addressed]

231. CAL. GOV'T CODE § 66201(b)(8)–(9) (West 2019).

232. *Id.* § 66201(b)(3).

233. CAL. GOV'T CODE § 66208 (West 2018).

234. CAL. GOV'T CODE § 66201(f)(4)(C) (West 2019).

235. *Id.* § 66201(f)(4)(B), *see supra* Part III.A.

236. *Id.* § 66201(f)(4)(C).

237. *Id.* § 66201(f)(5).

	AB 73	SB 540
DEVELOPER CONCERNS, cont'd.		
Neighborhood character compliance required	As reasonable, qualitative design review may require, subject to HCD approval; ²³⁸ must comply with neighborhood building and use patterns ²³⁹	As specific plan's design review may require
Development approval window	120 days ²⁴⁰	60 days
Grounds for rejection	Substantial evidence of specific adverse impact on public health or safety due to previously unknowable physical site condition that cannot be feasibly mitigated ²⁴¹	All of: (1) substantial evidence of specific adverse impact on public health or safety due to previously unknowable physical site condition, (2) mitigation measures would render the project unaffordable for middle- and lower-income residents, and (3) approval would cause more than half of the units go to above-moderate income households

238. CAL. GOV'T CODE § 66207 (West 2018).

239. CAL. GOV'T CODE § 66201(b)(4) (West 2019).

240. CAL. GOV'T CODE § 66205(c)(2) (West 2018).

241. *Id.* § 66205(d)(2).

	AB 73	SB 540
DEVELOPER CONCERNS, cont'd.		
Remedies	Automatic approval if no response within 120 days; ²⁴² court appeals in which HSD authority bears the burden of proof ²⁴³	None

242. *Id.* § 66205(c)(3).

243. *Id.* § 66206.