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California Housing Crisis Persists Despite Legislative Breakthroughs

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The 2020–21 Legislative Session Drew Headlines, But Will It Lead to More Housing?

In California, the incredibly high cost of housing remains one of the biggest issues affecting our quality of life, long-term economic prospects, and ability to mitigate the worst impacts of climate change. The lack of affordable housing has been a leading driver of homelessness and is a key driver of migration out of the state. At its core, the issue can be easily summarized as one of supply and demand: The Legislative Analyst's Office recently concluded that, between 1980 and 2010, the construction of 70,000 to 110,000 more housing units was needed, on average, in excess of what was actually built on an annual basis. Taylor, Legislative Analyst's Office, *California's High Housing Costs: Causes and Consequences*, Mar. 17, 2015, p 21, available at https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf. This historic deficit mirrors the 3.5 million new homes that Governor Newsom has said the state needs by 2025. Newsom, *The California Dream Starts at Home*, Oct. 20, 2017, available at https://medium.com/@GavinNewsom/the-california-dream-starts-at-home-9dbb38c51cae.

This deficit is so large that it will continue to keep home prices largely out of reach, despite the state's sluggish population growth and out-migration over the past decade.

Housing policies are primarily implemented through local zoning and land use controls. As a result, state lawmakers have struggled to meaningfully address local policies that have contributed to the housing shortfall. In 2021, the state legislature continued to focus its attention on the growing crisis, passing nearly 30 housing-related bills. This article examines the most pertinent of those new laws, along with some of the stalled legislation, to provide insight into laws that might be reconsidered during the next session. Although the rate of housing production has recently increased, most housing experts agree that more robust policies are needed to expedite the type of housing production needed most, such as workforce housing that most California households can actually afford, in higher-density, transit-oriented areas or in proximity to major employment centers.

Housing Laws Passed in 2020–21

After limited success during the 2019–20 legislative session, the legislature made up for the pandemic year by enacting many new laws during the 2020–21 session. The following is a sampling of bills designed to increase housing production.

- Senate Bill 8 extended key provisions of the Housing Crisis Act of 2019 (SB 330) and is arguably the most impactful new law, given that SB 330 has successfully accelerated housing approvals throughout California. Senate Bill 330 requires cities and counties to apply objective standards in the review of housing projects; if an affordable housing project is denied, the city or county must base its denial on a clearly documented public health or safety impact. Senate Bill 330 also limits project reviews to a maximum of five public hearings, and it provides early vesting of local fees, policies, and zoning standards at the time that a preliminary application is submitted. In response to SB 330, local agencies are revising design standards to be more objective, which has provided additional certainty to developers, with a significant uptick in housing production since 2019. Sheyner, *Palo Alto begins overhaul of design rules for approving new housing*, Palo Alto Weekly, Oct. 4, 2021, available at https://www.paloaltoonline.com/news/2021/10/04/council-begins-overhaul-of-design-rules-for-housing-projects. Senate Bill 8 extends the sunset of these provisions from 2025 to 2030.
- Senate Bill 9 brought about the highly reported "end of single-family zoning" in California. All cities must now allow one duplex in most single-family zones; larger lots may be split to create two duplexes if the lot split is in conformance with local design standards.
- Senate Bills 10 and 478 support certain small-scale housing developments by providing a CEQA exemption for upzoning and limiting floor area ratio (FAR) requirements.
- Senate Bill 290 provides additional incentives and limits on local discretion when evaluating density

bonus applications that provide affordable student housing.
- Assembly Bill 803 allows certain lots zoned for multifamily residential housing to be subdivided to create multiple small lots for separate "starter" houses.

In addition to housing production, the legislature enacted laws to promote fair housing.

- Senate Bill 60 increases the maximum fines that a local agency may impose for violating laws prohibiting permanent housing from being converted into short-term vacation rentals (the maximum allowable fine was increased to $5000).
- Assembly Bill 1304 builds on previous laws that require local governments to "affirmatively further fair housing" and to analyze racial segregation patterns when assessing and addressing an area's housing needs and when identifying potential housing sites in the jurisdiction's Housing Element.
- Assembly Bill 1466 simplifies the process for removing discriminatory language from deeds and covenants, in part to combat tools historically used to maintain racial segregation.
- Assembly Bill 491 specifies that affordable housing units must be spread throughout mixed-income multifamily buildings. Affordable units must have access to common entrances, common areas, and amenities, as compared to the market-rate units in the same building.
- Assembly Bill 787: In annual housing creation reports, local governments may count conversions of existing market-rate units to affordable housing units, up to a maximum of 25 percent of the jurisdiction's moderate-income housing need allocation.

Were the Changes to Single-Family Zoning Worth the Political Cost?

Pro-housing advocates have long pointed to single-family zoning as a symbol of racial exclusion and as a significant obstacle to increasing California's housing stock. With the passage of SB 9, California and Oregon are now the only states that allow, by right, more than one home on single-family parcels. Property owners may also split parcels of over 2400 square feet into two lots and then build a duplex on each lot. The lot split must be in accordance with local design standards; however, the local agency may not adopt design standards that have the effect of precluding duplex development. Parcels in historic or high fire-risk areas are excluded, as are units designated as affordable housing. Lot splits are also not permitted for projects that alter or destroy units that a tenant has occupied within the last 3 years. To limit speculation, the homeowner must sign an affidavit that they will not move for 3 years after the lot split.

Senate Bill 9 was not enacted without dispute. More than 244 California cities, along with the League of California Cities, opposed SB 9 (and SB 10). A group of opponents is seeking a statewide proposition for the November 7, 2022, ballot. While the proposed initiative targets SB 9 and SB 10, it goes much further, as it proposes to significantly unravel the supremacy clause of the California Constitution, which provides that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal Const art XI, §7. The proposed initiative would amend the California Constitution by declaring that local land use policies "shall prevail over a conflicting state statute" and that "no voter approved local initiative that regulates the zoning, development or use of land within the boundaries of any city shall be overturned or otherwise nullified by any legislative body." For the text of the proposed initiative, see https://oag.ca.gov/system/files/initiatives/pdfs/21–0016A1%20%28Local%20Land%20Use%29.pdf.

Some municipalities are not resisting the state's zoning reforms. In fact, a few cities have adopted ordinances and local policies to eliminate single-family zoning, regardless of SB 9. The City of Berkeley, for example, adopted a resolution establishing a goal to end single-family or exclusionary zoning by December 2022. The City of Sacramento is also preparing a general plan policy to eliminate single-family zoning by allowing the development of up to a fourplex on single-family zoned parcels. The City of San Jose (where 94 percent of residential land is reserved for single-family zoning) is looking at a broader set of local policies through its consideration of "opportunity housing," which would also allow up to a fourplex, plus ADUs, on single-family zoned parcels.

In all, the real impact of SB 9 has largely been hyperbolized. The Terner Center for Housing Innovation at UC Berkeley, for example, published a report in July 2021 documenting the potential for SB 9 to increase housing production. Although the report found that SB 9 applies to approximately 6.1 million single-family parcels throughout the state, it concluded that, at best, SB 9 will facilitate the production of an additional 111,500 new units, as it is unlikely to result in the tear-down and redevelopment of existing housing stock. Metcalf, Garcia, Carlton & MacFarlane, *Will Allowing Duplexes and Lot Splits on Parcels Zoned for Single Family Create New Homes? Assessing the Viability of New Housing Supply Under Calilfornia's Senate Bill 9*, Terner Center for Housing Innovation (July 2021), available at https://ternercenter.berkeley.edu/wp-content/uploads/2021/07/SB-9-Brief-July-2021-Final.pdf.

Using Berkeley as an example, approximately 78 percent of all city parcels are zoned for single-family residences. But with nearly all of the land within Berkeley's city limits built out, changes to existing housing stock will be extremely incremental. Sacramento has much more land available than Berkeley for infill development; nevertheless, Sacramento's Community Development Director recently stated in a webinar to the Urban Land Institute that he does not expect a large uptick in development due to the implementation of SB 9 or the city's local zoning reforms.

Picking at the Margins

Despite all the efforts of pro-housing advocates, the state's 2020–21 housing legislation will at best lead to minor increases in housing production. In the context of a 3- to 3.5-million housing unit shortage, laws that result in the creation of hundreds, or even several thousands, of units are unlikely to make a significant dent in the housing crisis. Here, SB 290, SB 10, and SB 478 provide good examples.

After a multiyear effort, Sen. Nancy Skinner (D-Oakland) was able to get SB 290 passed. Senate Bill 290 amends the state density bonus law, creating a pathway for student housing projects to benefit from the law by allowing such projects to obtain development incentives and waivers of local zoning standards. Student housing projects that reserve at least 20 percent of the base units for lower-income students can now qualify for a density bonus. A less-publicized change brought by SB 290, however, clarifies that cities and counties may not deny a density bonus application on the basis of the project's impacts to the "physical environment." This suggests that a city or county cannot cite significant impacts identified during the CEQA process as a basis to deny a density bonus project. Accordingly, CEQA impacts may no longer provide a basis for local agencies to deny a density bonus to the extent that the environmental impacts of the project are related to waivers of development standards, incentives, or concessions.

Other density bonus law revisions include:

- Revising the definition of "total units" that must be set aside to qualify for density bonuses and incentives. Density bonus units are now excluded from that calculation, while units needed to satisfy inclusionary zoning requirements are now included. While this change is reflective of existing case law, not all cities and counties were applying those precedents.
- Making certain moderate-income projects eligible for reduced parking requirements. If a project proposes to provide at least 40 percent of the units for moderate-income households, and is located within a half-mile of a major transit stop, local agencies may not impose a parking ratio exceeding 0.5 spaces per bedroom.

Senator Scott Wiener (D-San Francisco), one of the biggest pro-housing advocates in the legislature, toned down his bills in 2020–21 to secure their enactment. Senate Bill 10, for example, provides a CEQA exemption for local agencies that seek to upzone parcels to allow up to 10 units per parcel. This exemption is only available for parcels in urban infill or transit-rich areas. Senate Bill 10 establishes a voluntary pathway and therefore does not require local governments to take any action. Any actual project that is proposed on an upzoned parcel will still be subject to environmental review unless the project qualifies for its own CEQA exemption. Older laws, such as SB 35, could provide an avenue for streamlining in connection with SB 10, if the local jurisdiction allows residential units to be developed as a permitted use, subject to objective design standards.

Senator Wiener's SB 478 supports small-scale projects in multifamily residential and mixed-use zones. Under SB 478, local governments cannot establish a FAR requirement that is less than 1.0 for projects with 3–7 units, or less than 1.25 for projects with 8–10 units. Minimum lot size cannot be the basis for denying an otherwise qualifying project.

Overall, the bills enacted in the 2020–21 legislative session will likely not lead to a significant uptick in housing production; however, over the long term, they may provide more certainty in local development processes for smaller projects and a more limited subset of student housing projects that include an affordable housing component.

Tracking the Rise of HCD

On the enforcement side, the legislature has expanded the role of state agencies, such as the Department of Housing and Community Development (HCD), in enforcing the implementation of state housing laws by local agencies. HCD was formerly a little-known agency tasked with certifying the Regional Housing Needs Assessment of regional planning organizations and with monitoring local agency compliance with state planning and zoning laws, such as housing elements and mobilehome park regulations. Since 2017, Governor Newsom's administration has looked to HCD to carry out the Governor's "carrot and stick" approach to encouraging local agencies to increase housing production. For carrots, HCD has been bestowed with significant resources to issue Priority Development Area planning grants to local agencies seeking to increase housing production. HCD has also set up a Housing Accelerator Fund to bridge the financing gap for approved affordable housing tax-credit projects. HCD has established a new Surplus Land Unit to provide technical

assistance in connection with the development of affordable housing on property owned by state and local agencies.

On the "stick" or enforcement side, HCD has become much more active in challenging local land use decisions that contravene state housing law. Assembly Bill 215 significantly expands HCD's enforcement powers by establishing a 3-year statute of limitations for HCD to bring legal action and providing HCD with more authority to enforce state housing laws. As of January 1, 2022, HCD is authorized to enforce Affirmatively Furthering Fair Housing Law, the Housing Crisis Act of 2019 (SB 330), Streamlined Ministerial Permit Processes (SB 35), "By Right" Supportive Housing Provisions (AB 2162), "By Right" Low Barrier Navigation Centers (AB 101), and limitations on development standards (AB 478). Assembly Bill 215 also requires HCD to notify the Attorney General of local housing law violations; it expands the Attorney General's authority to initiate enforcement actions; and it authorizes HCD to contract with outside counsel if the Attorney General's office declines to take a case. Coupled with this new law, Attorney General Rob Bonta recently announced the creation of a "housing strike force" to assist HCD in the enforcement of state housing laws, which will likely result in more legal actions against cities and counties (as opposed to developers) that violate state housing laws.

Although AB 215 took effect in January 2022, HCD had already become much more involved in local land use decision making. HCD recently requested information from the San Francisco Board of Supervisors pertaining to its denial of two projects consisting of more than 800 units. HCD's initial concerns were that the Board denied the projects without written findings and that the Board exceeded the five-hearing limit, both in violation of the Housing Accountability Act. Santa Cruz drew HCD's ire by rejecting a housing project that provided affordable units in a building separate from the market-rate units. Although the city denied the project based on the provisions of AB 491, HCD reminded the city that AB 491 was not in effect at the time of the city's denial and, even if it was, it would not apply because it only applies to "mixed-income multi-family structures," which the project did not propose to develop. Most recently, HCD alleged that the City of Anaheim, with its proposed sale of Angel Stadium, violated the Surplus Land Act by failing to offer the land for sale to affordable housing developers. HCD contended that the land should have been classified as surplus even though the transaction involved the sale of an existing stadium from public to private ownership. Cities and counties should expect this rising enforcement trend to continue through the remainder of Governor Newsom's administration, especially as more local jurisdictions grapple with meeting the aggressive Regional Housing Needs Allocation (RHNA) targets that are needed to achieve the appropriate balance of housing stock throughout the state.

Zombie Bills to Watch in 2022

Three notable bills (SB 5, SB 6, and SB 477) failed to move forward in 2021 and could return in some form during the 2021–22 legislative session.

- Senate Bill 5 sought to establish a $6.5 billion affordable housing bond to fund affordable rental housing and homeownership programs. It did not move past the Senate Housing Committee.
- Senate Bill 477, which Governor Newsom vetoed, would have expanded the data local governments must include in their annual Housing Element progress report. The Governor explained the veto by favoring a housing plan based on statewide data instead of adding a new local requirement.
- Senate Bill 6, which was a rehash of the prior year's SB 1385, would have allowed high-density residential development of least 20 acres per unit in zones previously dedicated for commercial or office uses. Commercial zoning reform may be ripe for renewed debate in the next legislative session. Commercial corridors usually involve low-rise, single-use buildings with huge parking lots that could potentially be redeveloped into housing units. Under SB 6, buildings with extended vacancy would have been targeted. The bill would have required the payment of prevailing wages and would have included onsite affordability requirements.

Land-Use Politics Makes Strange Bedfellows

While single-family zoning may be one of the root causes of the current housing crisis, reforms to single-family zoning are unlikely to have an immediate impact on the existing, built environment. Zoning reform for commercial lots, on the other hand, could drastically change urban land use patterns and, more importantly, garner the interest of larger developers that have the resources to develop larger projects that could meaningfully address the current housing deficit.

Although advocates for local control have prevailed in this debate, variations of SB 6 are likely to emerge during the next legislative session. More recently, some of the groups opposed to SB 9 and SB 10, such as United Neighbors, have expressed that they would prefer seeing residential development focused along commercial corridors, especially in areas that were already struggling before the pandemic. See Applegate, *Fight isn't over for many opponents of SB 9 and 10*, USC Annenberg Media (Sept. 23, 2021), available at https://www.uscannenbergmedia.com/2021/09/23/fight-isnt-over-for-many-opponents-of-sb-9-and-10/.

Peter Calthorpe, a nationally recognized urban planner, has developed a framework for expediting high-density, residential infill development in commercial corridors in the San Francisco Bay Area. He concluded that the redevelopment of commercial corridors could support the production of at least 300,000 mixed-use and residential units, particularly along El Camino Real stretching from Daly City to San Jose and other commercial corridors, formerly referred to in previous eras as “miracle miles” due to their convenience for shoppers.

In comparing his strategic, commercial infill strategy with SB 9, Mr. Calthorpe opined that SB 9 takes a shotgun approach, by allowing higher density to be scattered throughout traditionally residential neighborhoods, and that the resulting political pushback could be best avoided through the development of a targeted, yet comprehensive, commercial infill strategy. Although this is already occurring in many areas, most commercial infill projects require zoning and general plan amendments, or the adoption of specific plans, which can add years to the development process.

If neighborhood interest groups could align with cities and the development community on an urban development strategy truly centered on smart-growth principles, such as transit-oriented design and the redevelopment of commercial corridors, legislators would surely take notice and, perhaps, pass the ambitious legislation needed to resolve our housing crisis.