
A New Approach to Housing: Changing Massachusetts's Chapter 40R from an Incentive to a Mandate

“But how do you build up when neighbors want down?”¹

I. INTRODUCTION

The United States is facing a housing crisis.² Simply put, there is an enormous demand for affordable housing and the country's supply is not keeping up.³ Both the private housing market and state subsidies for affordable housing have succeeded in increasing the housing stock, but have largely failed at closing the gap between supply and demand, leaving housing prices out of reach for many.⁴ While the country as a whole feels the effects of this economic phenomenon, coastal cities experience the worst effects as an increasing number of jobs cluster into these areas.⁵ As such, within the last year, both the California and Massachusetts state legislatures have attempted to address the root of the problem: local land use restrictions on constructing homes.⁶

1. See Conor Dougherty, *The Great American Single-Family Home Problem*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/2017/12/01/business/economy/single-family-home.html> [http://perma.cc/4UDQ-2P9P] (explaining taboo of building housing in single-family neighborhoods).

2. See Laura Kusisto, *The Next Housing Crisis: A Historic Shortage of New Homes*, WALL ST. J. (Mar. 18, 2018, 1:51 PM), <https://www.wsj.com/articles/american-housing-shortage-slams-the-door-on-buyers-1521395460> [http://perma.cc/Q86S-GLY7] (noting home construction per household remains near lowest level in sixty years).

3. See Glenn Thrush, *As Affordable Housing Crisis Grows, HUD Sits on the Sidelines*, N.Y. TIMES (July 27, 2018), <https://www.nytimes.com/2018/07/27/us/politics/hud-affordable-housing-crisis.html> [http://perma.cc/2SRU-CN7K] (noting millions of Americans paying 70% or more of their income for shelter).

4. See Bryce Covert, *The Deep, Uniquely American Roots of Our Affordable-Housing Crisis*, NATION (May 24, 2018), <https://www.thenation.com/article/give-us-shelter/> [http://perma.cc/ZD39-UZMV] (noting only thirty-five affordable and available rental homes for every 100 low-income families). “In 1970, a 300,000-unit surplus of affordable rental homes meant that nearly every American could find a place to live.” *Id.*

5. See Adam Nagourney & Conor Dougherty, *The Cost of a Hot Economy in California: A Severe Housing Crisis*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/us/california-housing-crisis.html> [http://perma.cc/4LP7-YNZH] (discussing “explosive” California housing costs). “For California, this crisis is a price of this state's economic boom.” *Id.*

6. See Conor Dougherty & Brad Plumer, *A Bold, Divisive Plan to Wean Californians from Cars*, N.Y. TIMES (Mar. 16, 2018), <https://www.nytimes.com/2018/03/16/business/energy-environment/climate-density.html> [http://perma.cc/TKF9-MCC8] (discussing how California's bill proposed preempting local zoning rules to allow new housing); see also Simón Rios, *To Solve State's Housing Inventory 'Crisis,' Advocates Say Liberalize Zoning*, WBUR: BOSTONMIX (Aug. 30, 2018), <http://www.wbur.org/bostonmix/2018/08/30/housing-crunch-zoning-reform> [http://perma.cc/S6HX-C7QZ] (discussing Governor Baker's proposal to reform local zoning). Baker's “legislation would make it easier for municipal bodies to rezone districts to allow for greater housing production.” Rios, *supra*. “Instead of the two-thirds supermajority vote now required under state law, a simple majority vote would be enough to make changes to local zoning bylaws.” *Id.*

A state government encouraging the development of new, affordable homes is not an innovative approach.⁷ In Massachusetts, chapter 40B of the Massachusetts General Laws (Chapter 40B or 40B) already provides legislative tools for private developers to build affordable housing where local zoning forbids such action.⁸ What is new, however, is the recent shift from simply building affordable housing to building housing near transit.⁹ This is a subtle shift, in the sense that the goal of affordable housing remains the same, but a shift that nonetheless has the potential to remake both large metropolitan cities and small municipalities alike.¹⁰

In California, State Senator Scott Weiner proposed a Transit Zoning Bill (SB 827) that would have usurped local building restrictions for new construction near transit hubs.¹¹ The bill would have allowed residential developers to skirt local rules on height, density, and parking if their buildings are within a half-mile of transit.¹² Soon after, Senator Weiner proposed a revised version, Senate Bill No. 50 (SB 50), that attempted to add areas classified as “job-rich” to the transit areas covered in SB 827.¹³ Less radically, in Massachusetts, Governor Charlie Baker proposed An Act to Promote Housing Choices (HB 4075), which would allow cities and towns to change their zoning practices by a simple majority, rather than the two-thirds supermajority currently required.¹⁴ The key difference

7. See Kara L. Dardeno, Note, *Chapter 40B Should Buy the Farm*, 42 SUFFOLK U. L. REV. 129, 134 (2008) (discussing legislative intent behind Chapter 40B). Under Chapter 40B, developers may circumvent local zoning regulations by designating a number of units as affordable in municipalities that have not reached the threshold of affordable housing. See *id.*; PAUL G. LEWIS, PUB. POLICY INST. OF CAL., CALIFORNIA’S HOUSING ELEMENT LAW: THE ISSUE OF LOCAL NONCOMPLIANCE 11, 16-18 (2003), https://www.ppic.org/content/pubs/report/R_203PLR.pdf [<https://perma.cc/87WG-4R4M>] (discussing California Housing Element Law’s state review process for building housing).

8. See MASS. GEN. LAWS ch. 40B, § 21 (2018) (allowing affordable housing developer to bypass zoning board review); see also CAL. GOV’T CODE § 65581 (West 2020) (outlining legislative intent to ensure local governments address state housing needs).

9. See M. Tanner Clagett, Article, *If It’s Not Mixed-Income, It Won’t Be Transit-Oriented: Ensuring Our Future Developments Are Equitable & Promote Transit*, 41 TRANSP. L.J. 1, 8-9 (2014) (discussing increased recognition of investments in transit-oriented development).

10. See *id.*; Liam Dillon, *California Lawmakers Killed One of the Biggest Housing Bills in the Country*, L.A. TIMES (Apr. 17, 2018, 6:40 PM), <http://www.latimes.com/politics/la-pol-ca-big-housing-bill-dies-2018-0417-story.html> [<http://perma.cc/YMZ2-NJ2Q>] (noting California’s bill would have attempted to connect housing development with state’s climate efforts).

11. See S.B. 827, 2017-2018 Leg., Reg. Sess. (Cal. 2018) (detailing provisions of SB 827).

12. See *id.* § 2 (providing exemption for “transit-rich housing project”).

13. See S.B. 50, 2019-2020 Leg., Reg. Sess. (Cal. 2018) (providing proposed language for housing development). Most recently, lawmakers killed SB 50 on California’s senate floor. See George Skelton, *Suburban Sprawl Wins Again in the Battle Against California’s Housing Crisis*, L.A. TIMES (Feb. 3, 2020, 12:01 AM), <https://www.latimes.com/california/story/2020-02-03/skelton-sb50-housing-california-legislation-fails-los-angeles-county> [<https://perma.cc/VK4Z-UDYK>] (stating SB 50 too “complex and scary, especially for many local governments”).

14. See Press Release, Office of Governor Charlie Baker & Lt. Governor Karyn Polito, Baker-Polito Administration Announces New Housing Choice Initiative (Dec. 11, 2017), <https://www.mass.gov/news/baker-polito-administration-announces-new-housing-choice-initiative> [<http://perma.cc/VF68-89SM>] (describing voting procedure change in local zoning). “Massachusetts is currently one of only ten states to require a

between the two states' approaches is the severity of the state preemption, as California's bills would have allowed developers in qualifying districts to build without local zoning input.¹⁵ The Massachusetts proposal would simply make it less onerous for a municipality to change its local zoning laws through a majority vote rather than an often unattainable supermajority.¹⁶

Although incomparable in land area size, both California and Massachusetts have robust and extensive mass transit systems that are vital to each state's economy.¹⁷ These systems are not limited to urban areas such as Boston, Los Angeles, and San Francisco, but rather connect suburban, residential communities to urban areas where jobs are clustered.¹⁸ These urban and suburban connections offer a case study for the housing crisis as a whole, as dense urban environments build a substantial number of housing units, while the suburban communities these transit connections serve are unable to build more housing due to local land use restrictions.¹⁹ To combat the housing crisis, these communities must build more housing.²⁰

This Note will first examine the local land use controls used to restrict housing supply beginning in the early twentieth century.²¹ It will then compare and contrast the various state legislative responses in the twentieth century to a growing affordable housing crisis.²² This Note will also compare the twenty-first century approaches, examining Massachusetts's transit-based initiatives to

supermajority to change local zoning; all other northeastern states rezone through simple majority votes." *Id.*

15. See Henry Graber, *California Bill Would Allow Unrestricted Housing by Transit, Solve State Housing Crisis*, SLATE (Jan. 5, 2018, 4:37 PM), <https://slate.com/business/2018/01/california-bill-sb827-residential-zoning-transit-awesome.html> [<http://perma.cc/TDJ3-G8KH>] (highlighting California bill's preemption powers).

16. See Press Release, *supra* note 14 (indicating inherent difficulty in overcoming supermajority threshold).

17. See BAY AREA RAPID TRANSIT, BART SUSTAINABILITY ACTION PLAN 4 (2017), https://www.bart.gov/sites/default/files/docs/BART_SustainabilityActionPlan_Final.pdf [<https://perma.cc/9CJ3-SRAC>] (discussing public transportation in Bay Area); James E. Rooney & Richard A. Dimino, *State's Economy Depends on Good Transit*, BOS. GLOBE (Mar. 8, 2016, 9:24 PM), <https://www.bostonglobe.com/opinion/2016/03/09/state-economy-depends-good-transit/wTnLGkhs0COFZtu0dTvHRM/story.html> [<https://perma.cc/SUE7-PTY>] (noting poor transit performance potential to stall and reverse Massachusetts's economic growth).

18. See BAY AREA RAPID TRANSIT, *supra* note 17, at 72 (stating transit system connects San Francisco in variety of areas); Sandra Larson, *Report: MBTA Is Vital for Economy, Worthy of Investment*, BAY ST. BANNER (Feb. 14, 2018), <https://www.baystatebanner.com/2018/02/14/report-mbta-is-vital-for-economy-worthy-of-investment/> [<http://perma.cc/HJZ5-VEW5>] (noting Massachusetts Bay Transportation Authority system delivers \$11.4 billion annually to Greater Boston economy).

19. See BARRY BLUESTONE ET AL., THE BOS. FOUND., THE GREATER BOSTON HOUSING REPORT CARD 2014-2015: FIXING AN OUT-OF-SYNC HOUSING MARKET 9, 11 (2015), https://www.tbf.org/~media/TBFOrg/Files/Reports/2014-2015_Housing_Report.pdf [<http://perma.cc/NJ8C-NN5Y>] (stating housing crisis displacing working class families and increasing homelessness).

20. See Andre Leroux, *Six Steps for Solving the Statewide Affordable Housing Crisis*, WGBH NEWS (July 16, 2018), <https://www.wgbh.org/news/commentary/2018/07/16/six-steps-for-solving-the-statewide-affordable-housing-crisis> [<http://perma.cc/V5DX-XJRV>] (stating too few homes located in neighborhoods convenient to jobs).

21. See *infra* Section II.A (discussing zoning authority and restrictions).

22. See *infra* Section II.B (examining mid-century zoning legislation); see also Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. (PAPERS & PROC.) 329, 329 (2005) (discussing supply constraints effect on housing).

bypass local zoning control in comparison with California's attempts to completely preempt local zoning regulations by allowing housing development near existing transit.²³ Part III of this Note will argue that Massachusetts's incentive-based approach to housing production has both failed to effectively address the crisis in the past and will fail again under the rebranded "Housing Choice Initiative."²⁴ Finally, this Note will argue that preempting local authority, as attempted in California, and establishing a nexus between housing and transportation provides a necessary solution to one of the country's biggest challenges: a critical lack of affordable housing.²⁵

II. HISTORY

A. Local Control

1. *The Origins of Zoning: The Euclid Decision*

As set forth in *Village of Euclid v. Ambler Realty Co.*,²⁶ local zoning regulations are a valid exercise of state police power.²⁷ At issue in *Euclid* was a local ordinance that not only separated residential uses from commercial and industrial uses, but also separated certain types of residential uses from residential districts, namely apartment houses.²⁸ In its reasoning, the Supreme Court acknowledged the practical wisdom of separating land uses from one another, highlighting the traffic, fire safety, and noise concerns zoning can address.²⁹ But the Court also alluded to the exclusionary effects of zoning when it condemned apartment houses as "mere parasite[s]" when constructed in single-family neighborhoods.³⁰ In doing so, the Court held that segregating housing types is not only constitutional, but also sound municipal policy that courts will

23. See *infra* Section II.C (examining modern legislative responses).

24. See *infra* Sections III.A-B (critiquing incremental approach); see also Mark Bobrowski, *The Massachusetts "Smart Growth" Experiment: Chapter 40R*, 92 MASS. L. REV. 1, 6 (2009) (discussing prior Massachusetts legislative response to affordable housing crisis). The supermajority requirement has thwarted Chapter 40R's "opt-in" approach, where municipalities elect to adopt zoning overlay districts near transit. See Bobrowski, *supra*, at 1.

25. See *infra* Section III.C, Part IV (analyzing and concluding why Massachusetts should model its housing reform after California).

26. 272 U.S. 365 (1926).

27. See *id.* at 387, 395 (holding constitutional zoning regulations not clearly arbitrary or unreasonable); *City of Aurora v. Burns*, 149 N.E. 784, 788 (Ill. 1925) (explaining reasonable segregation of industries may bear rational relation to community welfare).

28. See *Euclid*, 272 U.S. at 390 (narrowing issue to excluding all uses from residential districts). The Court explained its intent was to address the trend of recent zoning legislation, focusing specifically on the particular exclusion at issue. See *id.*

29. See *id.* at 394 (discussing conclusions drawn from expert reports relating to public health and safety).

30. See *id.* at 394-95 (noting apartment houses in single-family home environment almost constitute nuisances). The Court stressed that apartment houses on their own are not nuisances and can even be "highly desirable" if placed in the correct environment. See *id.*

not interfere with if there is a rational basis for the zoning classification.³¹

State legislatures swiftly responded to *Euclid*.³² All states eventually passed a zoning enabling act—modeled after the Standard State Zoning Enabling Act (SSZEA)—that delegated zoning authority from the state level to municipalities.³³ State legislatures intended these acts to promote zoning schemes that adhered to a comprehensive plan, rather than the “hodgepodge” of authorities previously governing land use.³⁴ These zoning acts reflected the prevailing opinion of the time, namely that zoning is primarily a local concern, best handled by residents of that particular community.³⁵ And so, “Euclidean zoning” was born.³⁶

31. See *id.* at 391-92, 395 (describing review standard); State *ex rel.* Civello v. City of New Orleans, 97 So. 440, 443-44 (La. 1923) (requiring lower standard than rational basis for municipal zoning ordinances). “It is sufficient that the municipal council could reasonably have had such considerations in mind. If such considerations could have justified the ordinances, we must assume that they did justify them.” *Civello*, 97 So. at 444.

32. See Jay Wickersham, *Jane Jacobs’s Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. ENVTL. AFF. L. REV. 547, 555 (2001) (discussing evolution of zoning before and after *Euclid*). The *Euclid* decision both validated zoning measures already enacted and provided a template for zoning going forward. See *id.*

33. See, e.g., COLO. REV. STAT. § 31-23-301 (2019) (providing Colorado zoning authority); N.J. STAT. ANN. § 40:55D-2 (West 2019) (providing New Jersey zoning authority); 45 R.I. GEN. LAWS § 45-22-1 (2019) (providing Rhode Island zoning authority). The U.S. Department of Commerce noted that even before the *Euclid* decision, nineteen states had already modeled their laws after SSZEA. See Herbert Hoover, *Foreword to ADVISORY COMM. ON ZONING, U.S. DEP’T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS*, at iii n.1 (rev. ed. 1926) (projecting more states to pass zoning enabling acts granting power to local legislative bodies); see also James C. Nicholas, *State and Regional Land Use Planning: The Evolving Role of the State*, 73 ST. JOHN’S L. REV. 1069, 1072 (1999) (noting states rely on federal model zoning act). Prior to comprehensive zoning acts, local authority over land use involved case-by-case zoning decisions which produced different policies, programs, and ordinances in an incoherent approach. See Nicholas, *supra*, at 1071-72.

34. See Nicholas, *supra* note 33, at 1071-72 (explaining SSZEA intended to promote comprehensive planning through regulation); see also Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 740 (2004) (discussing centralized and comprehensive features of Euclidean zoning).

35. See *Adler v. Deegan*, 167 N.E. 705, 711 (N.Y. 1929) (Cardozo, C.J., concurring) (describing local features of zoning resolutions). “A zoning resolution in many of its features is distinctively a city affair, a concern of the locality, affecting, as it does, the density of population, the growth of city life, and the course of city values.” *Id.*; see Nicholas, *supra* note 33, at 1072 (arguing adopting SSZEA removed doubt surrounding local authority over land regulation). This development model assumes a relationship between the entity making the decisions—the local government—and the area receiving the benefits and incurring the costs—the local community. Nicholas, *supra* note 33, at 1072.

36. See 1 SARA C. BRONIN & DWIGHT H. MERRIAM, *RATHKOPF’S THE LAW OF ZONING AND PLANNING* § 1:4 (4th ed. 2019) (defining scheme of land use regulations following *Euclid*). “The term ‘Euclidean’ zoning describes the early zoning concept of separating incompatible land uses through the establishment of fixed legislative rules that would be largely self-administering.” *Id.*; see Andres Duany & Emily Talen, *Making the Good Easy: The Smart Code Alternative*, 29 FORDHAM URB. L.J. 1445, 1451 (2002) (describing conventional zoning approaches). “Euclidean systems of separation—conventional zoning—have been implemented ubiquitously.” Duany & Talen, *supra*, at 1451; see Andrew G. Dietderich, *An Egalitarian’s Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23, 29-33 (1996) (discussing consequences of local control over zoning). “About ninety-seven percent of incorporated communities zone.” Dietderich, *supra*, at 29.

Since state legislatures passed their zoning enabling acts, zoning power is largely concentrated with local decision-makers.³⁷ And as the Court noted in *Euclid*, courts give deference to state and local land use decisions.³⁸ As such, cities and towns enjoy almost unlimited power to restrict the use of property as long as they can provide a rational basis for doing so.³⁹

2. *The Mechanics of Local Control*

State zoning enabling acts give municipalities zoning power.⁴⁰ From there, zoning ordinances and bylaws aim to promote the public health, safety, and welfare by regulating both land uses and building types.⁴¹ In exercising their zoning rights, municipalities act under their independent police power, entitling them to the traditional deference this power affords.⁴²

Due to this broad grant of power, there is no shortage of ways in which a municipality can restrict where and what type of building a developer can construct.⁴³ Courts have upheld minimum lot size and setback requirements, single-family residential districts, and height restrictions as a valid use of the police power.⁴⁴ In this sense, the power to zone is best thought of as the power

37. See *City of Raleigh v. Fisher*, 61 S.E.2d 897, 902 (N.C. 1950) (outlining how municipal authority exercises state police power when enacting and enforcing zoning regulations); Nicholas, *supra* note 33, at 1072 (stating following SSZEA, local governments given authority to regulate land).

38. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 391 (1926) (noting zoning restrictions have rational relation to health and safety of community); see also *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 73-74 (1976) (Powell, J., concurring in part and concurring in the judgment) (outlining zoning boundaries established in *Euclid*); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 4 (1974) (comparing Court's zoning review to its traditional review under police power). "But even those historic police power problems need not loom large or actually be existent in a given case." *Vill. of Belle Terre*, 416 U.S. at 4.

39. See Eliza Hall, Note, *Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning*, 68 U. PITT. L. REV. 915, 919 (2007) (proposing Euclidean zoning's negative effects). The police power has such a low standard of deferential review that zoning codes can restrict property to an almost unlimited extent. See *id.*

40. See MASS. GEN. LAWS ch. 40A, § 1A (2018) (granting municipalities expansive regulatory power over land, buildings, and structures). Massachusetts law defines zoning as "ordinances and by-laws, adopted by cities and towns to regulate the use of land, buildings and structures to the full extent of the independent constitutional powers of cities and towns to protect the health, safety and general welfare of their present and future inhabitants." *Id.*

41. See *Sturges v. Town of Chilmark*, 402 N.E.2d 1346, 1350-51 (Mass. 1980) (emphasizing zoning act permits municipal adoption of any and all constitutionally permissible zoning provisions). *But see* Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d 393, 409 (Mass. 1973) (noting municipalities' independent zoning power cannot conflict with state power).

42. See *Lanner v. Bd. of Appeal*, 202 N.E.2d 777, 783 (Mass. 1964) (discussing review standards for local zoning decisions). "Every presumption is to be made in favor of the amendment and its validity will be upheld unless it is shown beyond reasonable doubt that it conflicts with the enabling act." *Id.*

43. See Wayne Batchis, *Enabling Urban Sprawl: Revisiting the Supreme Court's Seminal Zoning Decision Euclid v. Ambler in the 21st Century*, 17 VA. J. SOC. POL'Y & L. 373, 380 (2010) (defining and outlining exclusionary zoning and its land use goals); *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1628-29 (1978) (discussing selection paradigm of zoning power). "Use selection can be achieved through virtually all types and processes of the zoning power." *Developments in the Law—Zoning, supra*, at 1629.

44. See *Simon v. Town of Needham*, 42 N.E.2d 516, 517-18 (Mass. 1942) (approving minimum lot size requirement); *Town of Lexington v. Bean*, 172 N.E. 867, 868-70 (Mass. 1930) (upholding constitutionality of

to exclude.⁴⁵

But the power to exclude is not limited to types of buildings or uses; rather, it often includes the power to exclude people.⁴⁶ For example, municipalities may set minimum lot sizes far above what a prospective buyer needs, thus significantly inflating the cost of entry into the market.⁴⁷ Likewise, minimum lot space requirements force buyers to purchase larger houses than they can afford, and age restrictions force families to compete for a limited supply of housing.⁴⁸ In essence, the original purpose of zoning—to prevent overcrowding and congestion—justifies using zoning ordinances to exclude all but a well-off few.⁴⁹

3. *Effects of Local Control*

The exclusionary phenomenon of land use regulations, which prevents a new supply of housing, negatively affects prospective homebuyers and contributes to residential stagnation.⁵⁰ Areas with high demand for jobs are unable to attract new workers due to exclusionary land use restrictions.⁵¹ Without workers to satisfy demand, residential stagnation suppresses economic growth and separates communities along class lines.⁵²

In a similar vein, exclusionary zoning contributes to, if not causes, racial segregation.⁵³ It is well-settled that a zoning law explicitly seeking to exclude

single-family district); *Welch v. Swasey*, 79 N.E. 745, 745-46 (Mass. 1907) (declaring height restriction constitutional).

45. See Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 8 (2001) (noting exclusionary essence of zoning).

46. See Batchis, *supra* note 43, at 380 (noting zoning's dark side). Exclusionary zoning not only segregates buildings, but also people according to race, class, and lifestyle. See *id.*

47. See Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1, 9 (2016) (analyzing effect of minimum lot size regulations on home prices); see also Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645, 1645-46 (1971) (summarizing exclusionary zoning techniques). Minimum lot sizes, minimum floor space requirements, and multifamily dwelling bans are all pervasive forms of exclusionary zoning. See Note, *supra*, at 1645-46.

48. See Span, *supra* note 45, at 8-9 (explaining connection between exclusionary zoning techniques and low-income housing). "In short, exclusionary zoning keeps out lower-income households in three main ways: (1) by raising the cost of housing generally, (2) by restricting supply of low-income housing types and mandating minimum land and housing purchases, and (3) by zoning out families with school-aged children." *Id.* at 9.

49. See *id.* at 10 (arguing zoning enabling acts encourage excluding low-income housing construction and limiting overall housing supply).

50. See David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 114-15 (2017) (arguing housing restrictions in coastal areas lead to high prices without population growth); see also Alana Semuels, *The Barriers Stopping Poor People from Moving to Better Jobs*, ATLANTIC (Oct. 12, 2017), <https://www.theatlantic.com/business/archive/2017/10/geographic-mobility-and-housing/542439/> [http://perma.cc/YD6S-YGYK] (citing housing restriction as potential cause of low migration to high income areas).

51. See Schleicher, *supra* note 50, at 115 (stating demand for living outpacing supply in major economic areas).

52. See *id.* at 116-17 (explaining connection between land-use restrictions and economic growth).

53. See Bernard K. Ham, Comment, *Exclusionary Zoning and Racial Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L.J. 577, 587-88 (1997) (explaining exclusionary zoning's indirect effect on racial minorities).

racial minorities is unconstitutional.⁵⁴ But exclusionary zoning techniques that raise the price of housing or discourage renting indirectly bar poor minorities from living in certain areas and exacerbate segregation.⁵⁵

Finally, exclusionary zoning negatively affects the environment by producing “sprawl.”⁵⁶ Restraining the supply of new homes does not restrain the demand for new homes, creating a phenomenon where development *sprawls* outward from urban areas into open land.⁵⁷ This sprawl causes longer vehicle trips and commutes, which in turn increases carbon dioxide emissions.⁵⁸ Likewise, exclusionary zoning pushes development into environmentally-sensitive areas, such as wetlands, once cities and towns effectively ban new development.⁵⁹

Courts, when evaluating zoning challenges, consider only whether the municipality enacted zoning “to further the general welfare.”⁶⁰ This standard’s vagueness makes a zoning challenge almost impossible, as municipalities only need to argue they proceeded “with the welfare of its own residents in mind.”⁶¹ Further, courts are reluctant to step into an area they view as a matter of local control.⁶² As such, one of the most effective approaches to overcoming local zoning control was a landmark piece of Massachusetts legislation, Chapter 40B,

54. See *Buchanan v. Warley*, 245 U.S. 60, 82 (1917) (invalidating racially exclusive zoning provision). “We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power” *Id.*; see Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 780 (1969) (stating explicit, racially-exclusive provisions consistently struck down).

55. See Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 755 (1993) (stating local governments’ exclusionary zoning laws impede African-American residential mobility); Marc Seitles, Note, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, 14 J. LAND USE & ENVTL. L. 89, 95 (1998) (arguing facially neutral zoning regulations exclude poor minorities and create de facto segregation).

56. See Wayne Batchis, *Suburbanization and Constitutional Interpretation: Exclusionary Zoning and the Supreme Court Legacy of Enabling Sprawl*, 8 STAN. J. C.R. & C.L. 1, 2-4 (2012) (defining sprawl and discussing its negative effects on environment).

57. See Batchis, *supra* note 43, at 375, 380 (discussing strong causal relationship between zoning and sprawl). “The fact that homes, by legal fiat, must be large, single-family, and widely dispersed unquestionably fosters lower population density.” *Id.* at 380.

58. See Robert L. Liberty, *Abolishing Exclusionary Zoning: A Natural Policy Alliance for Environmentalists and Affordable Housing Advocates*, 30 B.C. ENVTL. AFF. L. REV. 581, 587 (2003) (discussing relationship between large-lot zoning and per capita driving). As an area’s population decreases, the total amount of driving increases. See *id.* at 587-88; see also COMM’N ON THE FUTURE OF TRANSP. IN THE COMMONWEALTH, CHOICES FOR STEWARDSHIP: RECOMMENDATIONS TO MEET THE TRANSPORTATION FUTURE, VOLUME 1, at 28 (2018) <https://www.mass.gov/files/documents/2019/01/10/FOTCVolume1.pdf> [<https://perma.cc/8EJ4-R4S8>] (noting housing costs pushing people and businesses outside Boston’s core).

59. See Liberty, *supra* note 58, at 586 (noting development’s impact on wetland destruction).

60. See Span, *supra* note 45, at 27 (explaining “general welfare” standard of judicial deference to municipal zoning decisions). “It is difficult to conceive of a more inherently political and essentially standardless issue than the determination of what constitutes the general welfare and the best means to attain it.” *Id.* at 28.

61. See *id.* at 27-28 (describing zoning challenge’s futility under general welfare standard); see also Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning Law*, 22 HARV. C.R.-C.L. L. REV. 623, 624 (1987) (describing typical judicial responses to exclusionary zoning challenges).

62. See McDougall, *supra* note 61, at 624 (explaining courts’ preference for legislative solution to zoning).

aply referred to at the time as the “Anti-Snob Zoning Law.”⁶³

B. The Response to Local Control: A Chronology of Massachusetts and California Zoning Legislation

1. The 1960s: Massachusetts’s Comprehensive Permit Law

In 1969, Massachusetts confronted exclusionary zoning and the state’s affordable housing shortage in a landmark piece of legislation commonly referred to as Chapter 40B.⁶⁴ Similar to other states, the Massachusetts Legislature granted zoning power to individual municipalities through a zoning act.⁶⁵ But after decades of possessing this right, a legislative committee found widespread abuse of zoning power.⁶⁶

In response, the state legislature attempted to encourage affordable housing production by creating a statutory override of local zoning regulations.⁶⁷ Under the scheme, developers can apply for a “comprehensive permit” from the local Zoning Board of Appeals (ZBA) if 10% of the total housing units in a municipality are not low-or-moderate income housing.⁶⁸ If the local ZBA subsequently denies the proposal, the developer may appeal to the Housing

63. See Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381, 381-82 (2001) (examining Massachusetts’s legislative response to exclusionary zoning).

64. See MASS. GEN. LAWS ch. 40B, §§ 21-23 (2018) (supplying relevant law); see also Theodore C. Regnante & Paul J. Haverty, *Compelling Reasons Why the Legislature Should Resist the Call to Repeal Chapter 40B*, 88 MASS. L. REV. 77, 77 (2003) (summarizing 40B statutory scheme). The law is frequently referred to as the anti-snob zoning statute, the Comprehensive Permit Law, or Chapter 40B. Regnante & Haverty, *supra*, at 77.

65. See MASS. GEN. LAWS ch. 40A, § 5 (2018) (outlining extent of municipal zoning power).

66. See *Bd. of Appeals v. Hous. Appeals Comm.*, 294 N.E.2d 393, 403-04 (Mass. 1973) (summarizing legislative committee’s findings). The legislative report found:

(1) Large lot requirements (minimum lot size) have a substantial negative effect on the availability of land in the suburbs which could be used for low and moderate income housing. The Report listed twenty-one municipalities, including Hanover, that restricted 50% or more of their territory to large lot zoning. (2) Building height limitations were also found to have a significant negative impact on low and moderate income housing. . . . To the extent that inner suburban communities prohibit multi-family and apartment housing, or attach height or other restrictions which make such housing feasible only on a “luxury” basis, the modest income housing problems of the entire metropolitan area are aggravated.

Id. at 403 (citations omitted); see Dardeno, *supra* note 7, at 133-34 (tracing 40B’s legislative history through committee to passage). The legislative committee “found that municipalities abused [their zoning power] by implementing restrictive zoning practices that frustrated the construction of low-income housing.” Dardeno, *supra* note 7, at 133.

67. See Dardeno, *supra* note 7, at 134 (detailing 40B statutory requirements).

68. See ch. 40B, §§ 20-21 (describing “consistent with local needs” requirements and process to issue comprehensive permit). If the municipality has not met the 10% requirement, a proposed affordable housing development is presumed “consistent with local needs” under the statute. See *id.* § 20.

Appeals Committee (HAC).⁶⁹ At this point, the law provides that in communities where at least 10% of housing units are affordable, the HAC will not overturn the local ZBA.⁷⁰ Conversely, the HAC may overturn the decision if the community does not meet the 10% affordable housing threshold.⁷¹

Under this scheme, the threat of 40B intervention seeks to streamline the development process for affordable housing production changes, rather than dramatically alter or circumvent local zoning power.⁷² But even this small incentive has met significant opposition since its inception.⁷³ Common arguments against 40B are that developers build projects too densely under applicable zoning laws and that the number of projects filed overwhelm the municipalities' ability to provide services.⁷⁴ Nevertheless, 40B has survived years of judicial and legislative opposition and remains a nationwide model for affordable housing construction.⁷⁵

Since its inception, 40B has both initiated and produced a substantial amount of affordable housing across Massachusetts.⁷⁶ Before 40B, only four Massachusetts municipalities met the 10% threshold for affordable housing, while as of 2012, forty towns meet the threshold.⁷⁷ Housing advocates credit the law with producing around 58,000 housing units, 31,000 of which are affordable.⁷⁸ These results confirm that even after fifty years, 40B remains the "principal vehicle" for creating affordable housing in Massachusetts.⁷⁹

69. See *id.* §§ 21-22 (outlining permit process and defining standards); *Taylor v. Bd. of Appeals*, 885 N.E.2d 98, 100 (Mass. 2008) (applying statutory process).

70. See ch. 40B, § 20 (defining appeals process). "Requirements or regulations shall be consistent with local needs when imposed . . . in a city or town where (1) low or moderate income housing exists which is in excess of ten per cent . . ." *Id.*

71. See MASS. GEN. LAWS ch. 40B, § 23 (2018) (outlining HAC's power to overturn ZBA's decisions); Krefetz, *supra* note 63, at 387 (detailing when HAC may overturn).

72. See Krefetz, *supra* note 63, at 386 (outlining legislative intent to streamline and simplify affordable housing construction).

73. See Christopher Baker, Note, *Housing in Crisis—A Call to Reform Massachusetts's Affordable Housing Law*, 32 B.C. ENVTL. AFF. L. REV. 165, 166 (2005) (commenting on local opposition to 40B). "Massachusetts's experience with 40B has been marked with ugly tension between the state and municipal governments." *Id.*

74. See Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509, 530 (2003) (arguing 40B allows greater population density than typically permitted); Dardeno, *supra* note 7, at 140-41 (outlining criticism of 40B).

75. See *Bd. of Appeals v. Hous. Appeals Comm.*, 294 N.E.2d 393, 414 (Mass. 1973) (upholding HAC's ability to override local zoning); see also Dardeno, *supra* note 7, at 137-39 (discussing failed legal challenges to 40B's authority).

76. See Krefetz, *supra* note 63, at 392-94 (outlining 40B's positive effects). "[I]t seems clear that *without* the Act the amount of affordable housing that does exist would be much lower, and the locations of this housing would be far more limited . . ." *Id.* at 394-95.

77. See Carolina K. Reid et al., *Addressing California's Housing Shortage: Lessons from Massachusetts Chapter 40B*, 25 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 241, 251 (2017) (discussing 40B's progress in creating housing).

78. See *id.* (stating housing creation figures).

79. See Dardeno, *supra* note 7, at 139 (detailing results of 40B).

2. *The 1980s: California's Housing Element Law*

Like its Massachusetts counterpart, California's state legislature recognized a lack of affordable housing options in 1980.⁸⁰ In response, California passed the "housing element statute," or California Government Code sections 65580-89.8 (Housing Element Law).⁸¹ The Housing Element Law requires each municipality to plan for new housing.⁸²

The Housing Element Law has several required components.⁸³ One component is an "assessment of housing needs and an inventory of resources and constraints relevant to the meeting of these needs."⁸⁴ This assessment is ultimately a numerical figure representing the number of housing units needed to meet the community's demand.⁸⁵ At the heart of the law, communities must adopt an "action program" that defines a five-year schedule to achieve the housing goals articulated in the assessment and identifies adequate sites for new housing.⁸⁶

Notably, the Housing Element Law has no state-level enforcement authority.⁸⁷ Instead, the law provides for private enforcement, and any interested party may bring an action to force compliance with the statute.⁸⁸ Absent a statutory enforcement mechanism, a considerable number of California municipalities fail to fulfill the law's requirements.⁸⁹

3. *The 2000s: Massachusetts's Chapter 40R*

Continuing to address housing concerns, Massachusetts made another notable update to its zoning law in 2004 when it passed the Smart Growth Zoning Overlay District Act (40R).⁹⁰ The goal—similar to its predecessor 40B—is facilitating "the building of single-family homes on smaller lots and [increasing]

80. See CAL. GOV'T CODE § 65580(a), (e) (West 2020) (outlining legislative findings). "The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian, including farmworkers, is a priority of the highest order." *Id.* § 65580(a).

81. See generally GOV'T §§ 65580-89.8 (providing relevant law). See Brian Augusta, Comment, *Building Housing from the Ground Up: Strengthening California Law to Ensure Adequate Locations for Affordable Housing*, 39 SANTA CLARA L. REV. 503, 506 (1999) (explaining law's intent). The statute "was created in part to combat exclusionary land use policies and their impact on the development of affordable housing." Augusta, *supra*, at 506.

82. See Augusta, *supra* note 81, at 508 (explaining housing element requirement).

83. See GOV'T § 65583(a)-(d) (outlining element requirements under statute).

84. See *id.* § 65583(a).

85. See *id.* § 65583(a)(1); Augusta, *supra* note 81, at 509-10 (explaining assessment requirement). A "housing unit" under the statute covers any type of individual residence, not only single-family homes. See GOV'T § 65583(c)(1).

86. See CAL. GOV'T CODE § 65583(b)(2)-(c) (West 2020) (detailing requirements of Housing Element Law).

87. See Augusta, *supra* note 81, at 513 (discussing statute's enforcement provisions).

88. See *id.* at 513-14 (describing private right powerful tool for aggrieved parties).

89. See Ben Field, Note, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35, 44 (1993) (discussing statutory noncompliance).

90. See generally MASS. GEN. LAWS ch. 40R, §§ 1-14 (2018) (providing relevant law).

the construction of apartments for families at all income levels.”⁹¹ In keeping with 40B’s incentive-based approach to affordable housing construction, 40R allows municipalities to adopt overlay zoning districts called Smart Growth Zoning Districts (SGZD).⁹² SGZD districts do not replace existing zoning requirements, but rather allow higher density developments than normally allowed.⁹³

To adopt such a district, the project must receive approval from the local municipal government and the state’s Department of Housing and Community Development (DHCD).⁹⁴ DHCD’s approval is based primarily on the location and density of the SGZD and the affordable housing increase in the district.⁹⁵ Most notably, areas available for overlay designation include areas near transit stations and areas of concentrated development.⁹⁶ Designating these factors reflects the aims of “smart growth,” which seeks to encourage high-density, clustered development near transit areas.⁹⁷ As of 2018, “37 of the state’s 351 municipalities have created 42 [SGZDs], authorizing over 15,000 ‘future zoned units.’”⁹⁸

Regardless of 40R’s progress, the same continued opposition to affordable housing construction that 40B encountered has muted the law’s intended effects.⁹⁹ In fact, many projects approved in early 40R districts were already either under discussion or approved without 40R, leading some to question its

91. See Karla L. Chaffee, Note, *Massachusetts’s Chapter 40R: A Model for Incentive-Based Land Use Planning and Affordable Housing Development*, 10 VT. J. ENVTL. L. 181, 192 (2008) (stating 40R’s goals and legislative history).

92. See 760 MASS. CODE REGS. 59.01 (2019) (establishing authority for 40R’s smart growth programs); Chaffee, *supra* note 91, at 193 (outlining 40R approval process).

93. See Chaffee, *supra* note 91, at 193 (describing 40R’s “as-of-right” zoning feature).

94. See *id.* (explaining 40R approval process).

95. See *id.* (describing location factor influencing DHCD’s approval).

96. See MASS. GEN. LAWS ch. 40R, § 2 (2004) (amended 2016) (defining “eligible locations”). The law defines eligible locations as “areas near transit stations, including rapid transit, commuter rail and bus and ferry terminals” and “areas of concentrated development, including town and city centers, other existing commercial districts in cities and towns, and existing rural village districts.” *Id.*

97. See *id.* § 1 (stating 40R’s purpose).

Smart growth is a principle of land development that emphasizes mixing land uses, increases the availability of affordable housing by creating a range of housing opportunities in neighborhoods, takes advantage of compact design, fosters distinctive and attractive communities, preserves open space, farmland, natural beauty and critical environmental areas, strengthens existing communities, provides a variety of transportation choices, makes development decisions predictable, fair and cost effective and encourages community and stakeholder collaboration in development decisions.

Id.; see *id.* § 2 (describing types of “eligible locations”).

98. See CITIZENS’ HOUS. & PLANNING ASS’N, THE USE OF CHAPTER 40R IN MASSACHUSETTS 4 (2018), https://www.chapa.org/sites/default/files/TheUseofCh40R_2018.pdf [http://perma.cc/RBG4-REXA] (providing relevant statistics).

99. See Chaffee, *supra* note 91, at 205 (summarizing 40R criticism). Just as with 40B, opponents of 40R are concerned with losing local control over projects. See *id.*

impact as an incentive.¹⁰⁰ These concerns can heavily influence the approval process for a 40R project, especially where approval requires a two-thirds supermajority of the local government body.¹⁰¹ As such, regardless of 40B and 40R's lofty intentions to increase affordable housing, a municipality can still block affordable housing construction quite easily.¹⁰² Continued opposition to housing construction ensures that the affordable housing crisis will endure unless significant action is taken.¹⁰³

C. The Tipping Point: Taking Back Zoning Control from Municipalities

1. Housing Choice Initiative

In December of 2017, Massachusetts—ever searching for answers to increase housing production—released a new proposal involving another incentive to produce affordable housing.¹⁰⁴ In a press release, the Massachusetts governor's office proposed the Housing Choice Initiative (HCI), which takes aim at the two-thirds supermajority required by cities and towns to adopt specific zoning measures, such as a 40R district.¹⁰⁵ Most states require a simple majority vote to change zoning laws, and so HCI's goal is to further streamline the 40R process and prevent local opposition from blocking the project.¹⁰⁶

Only the Massachusetts Legislature, however, has the authority to change state zoning law, and so the HCI was accompanied by a legislative action: HB 4075.¹⁰⁷ HB 4075 would amend Massachusetts zoning law to allow local municipalities to approve certain zoning changes by a simple majority, rather than a supermajority.¹⁰⁸ Most notably, the law would allow a town to adopt a

100. See Erika Barber, Note, *Affordable Housing in Massachusetts: How to Preserve the Promise of "40B" with Lessons from Rhode Island*, 46 NEW ENG. L. REV. 125, 150 (2011) (arguing rezoning efforts under 40R occurred prior to legislature passing law).

101. See MASS. GEN. LAWS ch. 40A, § 5 (2009) (outlining zoning amendment procedures).

No zoning ordinance or by-law or amendment thereto shall be adopted or changed except by a two-thirds vote of all the members of the town council, or of the city council where there is a commission form of government or a single branch, or of each branch where there are two branches, or by a two-thirds vote of a town meeting

Id.

102. See Chaffee, *supra* note 91, at 206 (arguing 40R process leaves municipalities with "reasonable degree" of local control). In fact, compared with 40B, 40R places a "substantial degree" of control in the hands of local communities compared with 40B. See *id.* at 205.

103. See *supra* notes 49-51 (discussing lack of supply produces lack of affordable homes).

104. See Press Release, *supra* note 14 (explaining legislature intended law to provide tools and incentives for towns to build affordable housing).

105. See *id.* (outlining legislative proposal). "Building mixed-use, multi-family, and starter homes, and adopting 40R 'Smart Growth' zoning in town centers and near transit" would qualify for the simple majority threshold. *Id.*

106. See *id.* (noting most states lack supermajority requirement).

107. See H. 4075, 190th Gen. Court, Reg. Sess. (Mass. 2017) (providing proposed bill's relevant language).

108. See *id.* § 4 (listing zoning amendments subject to simple majority). The law subjects a number of as-

40R district by a simple majority, fulfilling the goal of the HCI.¹⁰⁹

Less obvious in HB 4075's text are the multiple as-of-right provisions that would allow municipalities to implement with a simple majority.¹¹⁰ These provisions demonstrate that the bill's sponsors recognize the need for a stronger housing solution than allowing amendments by a simple majority.¹¹¹ Allowing a 40R development as-of-right gives municipalities who want to build housing a tool to do so more easily.¹¹²

2. California Senate Bill 827

Around the same time as Massachusetts's HCI, California proposed a stronger solution, SB 827, which involved a radical break from local control over zoning stretching back to the *Euclid* decision.¹¹³ SB 827 would have altered the applicable zoning for any "transit-rich housing project," or a residential development within a one-half mile radius of a major transit stop.¹¹⁴ These projects would have been exempt from, among other things, local density controls, minimum parking requirements, and height restrictions that historically hinder housing construction.¹¹⁵ This bill echoed 40R's "as-of-right" elements, but departed from 40R significantly in that the local government would not need to approve the project.¹¹⁶ Thus, SB 827 would have preempted local control by allowing a development in transit areas to go forward even if the municipality opposed the project.¹¹⁷ Not surprisingly, SB 827 was met with fierce criticism arguing against the loss of local control, and failed to pass.¹¹⁸

of-right amendments, accessory dwelling units, bulk and height restrictions, and special permits to the simple majority requirement. *See id.*

109. *See id.* § 10 (proposing simple majority for votes to adopt zoning measures).

110. *See id.* § 4 (listing amendments). The law would "allow as of right, by special permit and/or with site plan approval multi-family housing in a location that would qualify as an eligible location for a smart growth zoning district under [40R]." *Id.*

111. *See* Press Release, *supra* note 14 (outlining initiative support). "Our region is in a housing crisis. Solving it will require bold action and a comprehensive solution set." *Id.* (quoting Mayor Joseph Curtatone of Somerville, Massachusetts).

112. *See id.* (stating initiative goals). The legislation is designed to "remove barriers to improved land use[.]" like the supermajority requirement, and add new housing, "by promoting the adoption of local zoning best practices." *Id.*

113. *See* S.B. 827, 2017-2018 Leg., Reg. Sess. (Cal. 2018) (providing relevant law).

114. *See id.* § 2 (defining "transit-rich housing project"). A project would not qualify under this district if the district already prohibited the construction of housing as a principal or conditional use, such as industrial or manufacturing districts. *See id.*

115. *See id.* (proposing to amend California Government Code). The law contains a provision for limiting height increases if the increase would have a "specific, adverse impact upon public health or safety, and there is no feasible method to satisfactorily mitigate or avoid" this impact. *Id.*

116. *See* Dougherty & Plumer, *supra* note 6 (discussing SB 827's preemption goals). Localities would be prevented from restricting areas zoned for residential use and within a half-mile of train stations to single-family homes. *See id.*

117. *See* Graber, *supra* note 15 (discussing SB 827's radical departure from traditional zoning assumptions). "It's just about the most radical attack on California's affordability crisis you could imagine." *Id.*

118. *See* Jane Kim, *SB 827 Postmortem: Let's Build More Housing the Right Way*, S.F. EXAMINER (Apr.

3. California Senate Bill 50

Undeterred by SB 827's failure, California legislators proposed a revised version of the bill featuring the same preemptory teeth.¹¹⁹ The new bill, SB 50, focused on incorporating three changes from SB 827 to combat opposition from tenant groups and municipalities.¹²⁰ First, SB 50 would have prevented developers from using the bill's preemption provisions on properties that renters had occupied within the previous seven years.¹²¹ Second, it would have allowed communities to propose alternative plans to boost homebuilding without using the bill's framework.¹²² Third, SB 50 would have expanded on SB 827's preemption provisions for transit-rich areas by preventing land use restrictions near "job-rich" areas, such as Silicon Valley.¹²³ Nevertheless, in early 2020, SB 50 failed to gain majority support on California's senate floor, and thus failed to pass.¹²⁴ Despite the continued failure of housing bills, the plan in California

25, 2018, 12:00 AM), <http://www.sfexaminer.com/sb-827-postmortem-lets-build-housing-right-way/> [<http://perma.cc/J4EQ-YTEH>] (advocating for different housing construction approach than SB 827 upzoning). "SB 827 gives developers all the benefits while taxpayers have to pay for the resulting new burdens on transit, schools and services." *Id.* SB 827's "radical attempt to subvert local control in the interest of creating more homes" was "[o]pposed by virtually every Californian in a position of power." See Henry Grabar, *Why Was California's Radical Housing Bill So Unpopular?*, SLATE (Apr. 20, 2018, 5:22 PM), <https://slate.com/business/2018/04/why-sb-827-californias-radical-affordable-housing-bill-was-so-unpopular.html> [<https://perma.cc/NVE4-9F3F>] (explaining political challenges SB 827 faced).

119. See S.B. 50, 2019-2020 Leg., Reg. Sess. (Cal. 2018) (incorporating changes and updating SB 827); see also Liam Dillon, *California Legislator Revives Bill to Boost Apartment Complexes Near Transit*, L.A. TIMES (Dec. 4, 2018, 12:05 AM), <https://www.latimes.com/politics/la-pol-ca-housing-transit-bill-20181204-story.html> [<http://perma.cc/GM5K-KTCP>] (noting new bill largely similar to SB 827).

120. See Dillon, *supra* note 119 (explaining major changes from SB 827); Liam Dillon, *A Major California Housing Bill Failed After Opposition from the Low-Income Residents It Aimed to Help. Here's How It Went Wrong*, L.A. TIMES (May 2, 2018, 12:05 AM), <https://www.latimes.com/politics/la-pol-ca-housing-bill-failure-equity-groups-20180502-story.html> [<http://perma.cc/FBC3-L4DF>] [hereinafter *How SB 827 Went Wrong*] (discussing SB 827 opposition). The divide between low-income, minority residents who fear new housing and wealthier, white residents who embrace new housing was one of the primary reasons for SB 827's failure. See *How SB 827 Went Wrong, supra*.

121. See Cal. S.B. 50 (proposing residential development eligibility requirements). Eligible sites cannot contain "[h]ousing occupied by tenants within the seven years preceding the date of the application." *Id.*

122. See *id.* (encouraging communities to lead planning process). The law would have "allow[ed] a local government, in lieu of the requirements of this chapter, to opt for a community-led planning process aimed toward increasing residential density and multifamily housing choices near transit stops." *Id.*

123. See *id.* (requiring certain criteria for developments). A "job-rich housing project" is "a residential development within an area identified by the Department of Housing and Community Development and the Office of Planning and Research." *Id.* The agency bases its determinations on "proximity to jobs, high area median income relative to the relevant region, and high-quality public schools." *Id.*; see Editorial Bd., *California Needs a Housing Revolution*, BLOOMBERG: OPINION (Dec. 14, 2018, 8:30 AM), <https://www.bloomberg.com/opinion/articles/2018-12-14/sb-50-a-welcome-response-to-california-housing-crisis> [<https://perma.cc/G7FF-XF22>] (praising SB 50's efforts to combat housing crisis). SB 50's reach would have extended to the "gilded real-estate meccas of Silicon Valley." Editorial Bd., *supra*.

124. See Conor Dougherty, *California, Mired in a Housing Crisis, Rejects an Effort to Ease It*, N.Y. TIMES (Jan. 30, 2020), <https://www.nytimes.com/2020/01/30/business/economy/sb50-california-housing.html> [<https://perma.cc/A3N3-B8UG>] (summarizing SB 50's recent failure). Despite sweeping agreement on the need for housing, "[o]pponents decried [SB 50] as state overreach into local land-use rules." *Id.* (discussing strong opposition from suburbanites and less-affluent city dwellers).

remains the same: “upzone” residential areas located near transit and jobs at the state level to prevent municipalities from banning housing construction.¹²⁵

4. Massachusetts’s Current Crisis Compared to California

Massachusetts, like California, faces a housing crisis.¹²⁶ This crisis is predominantly due to a “low rate of housing production which has not kept pace with population growth and needs, soaring rents that have outpaced wages, and the lingering effects of the foreclosure crisis.”¹²⁷ Shockingly, 207 of Massachusetts’s 351 cities and towns have not permitted construction of *any* multifamily housing with more than five units in over a decade.¹²⁸ Additionally, over a third of Massachusetts’s municipalities have permitted only single-family housing.¹²⁹ Contrast this anemic building pace with job demand and the solution becomes clear: 17,000 new homes are needed each year through 2040 *just to maintain* Massachusetts’s current job base.¹³⁰

In California, the situation is equally as dire.¹³¹ California needs 1.8 million

125. See Justin Fox, *California May Be Turning a Corner on Housing*, BLOOMBERG: OPINION (Jan. 31, 2020, 1:44 PM), <https://www.bloomberg.com/opinion/articles/2020-01-31/california-sb-50-failure-isn-t-end-of-high-density-housing-push> [<https://perma.cc/3AY2-W7EB>] (addressing “status quo cannot stand”); see also Matthew Yglesias, *Gavin Newsom Promised to Fix California’s Housing Crisis. Here’s a Bill That Would Do That*, VOX (Dec. 7, 2018, 4:00 PM), <https://www.vox.com/policy-and-politics/2018/12/7/18125644/scott-wiener-sb-50-california-housing> [<http://perma.cc/3CHD-CZDP>] (explaining SB 50’s changes compared to SB 827). The success of a future bill containing a job-rich requirement may be somewhat unclear, but the legislature’s intent remains clear: “target suburban jurisdictions that like playing host to corporate office parks . . . while excluding any new residents.” Yglesias, *supra*.

126. See SPECIAL SENATE COMM. ON HOUS., FACING MASSACHUSETTS’ HOUSING CRISIS 4 (2016), https://ma-smartgrowth.org/wp-content/uploads/Final_Housing_Report_3-1-6.pdf [<http://perma.cc/Y35A-UVRF>] [hereinafter SENATE REPORT] (declaring Massachusetts housing shortage “crisis”); see also BARRY BLUESTONE & JAMES HUESSY, THE BOS. FOUND., THE GREATER BOSTON HOUSING REPORT CARD 2017: IDEAS FROM THE URBAN CORE 8 (2017), <https://www.tbf.org/-/media/tbf/reports-and-covers/2017/2017-housing-reportcard.pdf> [<http://perma.cc/35JH-9CXQ>] [hereinafter HOUSING REPORT CARD] (evaluating Boston area and Greater Boston housing production).

127. SENATE REPORT, *supra* note 126, at 4 (noting housing production “economic imperative” for Massachusetts).

128. See *id.* at 22 (providing relevant data); see also Eli Sherman, *Affordable Housing Still Scarce in Massachusetts Communities*, PATRIOT LEDGER (May 30, 2018, 11:00 AM), <https://www.patriotledger.com/news/20180530/affordable-housing-still-scarce-in-massachusetts-communities> [<http://perma.cc/Z5UA-7M9F>] (discussing 40B housing production progress).

129. See SENATE REPORT, *supra* note 126, at 22 (noting lack of multifamily zoning most significant barrier to affordable housing). The report stated unequivocally that multifamily zoning is “so basic a requirement that no other long-term production goals can be achieved successfully without it.” *Id.*

130. See *id.* (declaring need for Massachusetts housing “revolution”); Benjamin Swasey, *Report: Greater Boston Has America’s Worst Rush-Hour Traffic*, WBUR: BOSTONMIX (Feb. 12, 2019), <https://www.wbur.org/bostonmix/2019/02/12/boston-gridlock-congestion-rank> [<http://perma.cc/Y88X-9CLY>] (stating Massachusetts traffic worst among sixty urban areas).

131. See Michael Hiltzik, *California’s Housing Crisis Reaches from the Homeless to the Middle Class—But It’s Still Almost Impossible to Fix*, L.A. TIMES (Mar. 29, 2018, 9:55 AM), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-housing-crisis-20180330-story.html> [<https://perma.cc/48X4-D2FZ>] (explaining housing supply versus demand issues); see also Liam Dillon, *Gov. Gavin Newsom Threatens to Cut State Funding from Cities That Don’t Approve Enough Housing*, L.A. TIMES (Jan. 10, 2019, 7:05 PM),

to 3.5 million homes by 2025 just to absorb demand and population growth, but it is currently only building 80,000 homes a year—creating a 100,000 per year home gap between supply and demand.¹³² Further, most of the construction that is occurring takes place far from job growth areas, thus increasing sprawl.¹³³ In economic terms, California loses over \$140 billion per year in output (6% of state gross domestic product) due to the housing shortage.¹³⁴ Simply put, this crisis “threatens to cut the state’s economic boom off at the knees.”¹³⁵

III. ANALYSIS

Massachusetts needs more housing.¹³⁶ But building has been maddeningly frustrated by local opposition as well as complex and inefficient zoning laws.¹³⁷ The historical approach in Massachusetts has been to incentivize housing production by threatening state-level preemption.¹³⁸ The current housing crisis, however, demands stronger action.¹³⁹

A. *The State Granted Zoning Authority to Its Municipalities and It Can Take It Away*

The Supreme Court in *Euclid* granted the states zoning power as a function of their police power.¹⁴⁰ Once granted, most states passed that authority onto

<https://www.latimes.com/politics/la-pol-ca-gavin-newsom-housing-money-budget-20190110-story.html>
[<https://perma.cc/2M76-46PJ>] (noting local governments’ housing crunch role).

132. See Hiltzik, *supra* note 131 (providing relevant statistics).

133. See *id.* (noting “overpay[ing]” and “over-commut[ing]” phenomena when housing affordability decreases).

134. JONATHAN WOETZEL ET AL., MCKINSEY GLOB. INST., A TOOL KIT TO CLOSE CALIFORNIA’S HOUSING GAP: 3.5 MILLION HOMES BY 2025, at 6 (2016), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/Urbanization/Closing%20Californias%20housing%20gap/Closing-Californias-housing-gap-Full-report.ashx> [<http://perma.cc/F6AQ-GPUA>] (summarizing housing shortage’s economic consequences).

135. See Hiltzik, *supra* note 131 (detailing housing shortage’s negative effects).

136. See SENATE REPORT, *supra* note 126, at 4 (describing “severe” housing crisis). The report highlights a rapidly changing demographic as a further impetus for action. See *id.* “Baby Boomers”—those born between 1946 and 1964—made up 50% of the state’s labor force in 2010, but in the coming decades an estimated 1.4 million of them are anticipated to retire or relocate elsewhere. See *id.* To house new, skilled workers, Massachusetts must increase its housing supply. See *id.*

137. See *id.* at 22 (emphasizing shortage of multifamily zoning greatest obstacle to building affordable housing); see also *supra* note 118 and accompanying text (discussing local opposition to housing construction in California).

138. See *supra* Section II.B.1 (outlining state’s need for new housing incentive).

139. See SENATE REPORT, *supra* note 126, at 22 (outlining need for increased action). The Senate Report’s statistics show the depth of the problem: over a third of Massachusetts did not allow multifamily housing in over a decade. See *id.* Continuing with the status quo—such as leaving multifamily zoning reform to 40B and 40R—is not an option as “no other long-term production goals can be achieved” without multifamily zoning reform. See *id.*

140. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 397 (1926) (declaring zoning constitutional under police power). The Court in *Euclid* set the stage for America’s current housing crisis, referring to apartment houses as “parasite[s], constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.” *Id.* at 394. Apartment houses were not a problem per se, the

municipalities, recognizing that zoning is primarily a local function.¹⁴¹ Massachusetts is no exception.¹⁴²

Municipalities, however, have largely used that power to prevent housing construction in their communities rather than facilitate housing construction at the local level.¹⁴³ Even though each municipality has the authority to build how much or how little housing it desires, existing homeowners within each municipality often dominate local zoning decisions in favor of exclusionary zoning.¹⁴⁴ The current dynamic, therefore, is that a few cities build the vast majority of new housing in the state while the rest do nothing.¹⁴⁵ This is unsustainable.¹⁴⁶

The Massachusetts Legislature's first response was to preempt local control of zoning by enacting 40B.¹⁴⁷ This preemption was the first acknowledgement that municipalities were unable to provide sufficient housing on their own.¹⁴⁸

Roughly forty years later, the Massachusetts Legislature again offered a preemption tool to circumvent local land use controls.¹⁴⁹ Enacting 40R was another acknowledgement that municipalities were not doing enough to meet housing needs.¹⁵⁰ The new preemption tool, however, was another incentive to construct housing that was not required.¹⁵¹ Although the historical incentive-

Court clarified, only that they come close to a "nuisance" once placed in a single-family environment. *See id.* at 394-95. Thus, the Court gave state and local legislatures the green light to separate not only industrial and residential uses, but also different types of residential units. *See id.*

141. *See supra* notes 33-35 and accompanying text (discussing state zoning enabling acts following *Euclid*).

142. *See generally* MASS. GEN. LAWS ch. 40A (2018) (providing municipalities with regulatory authority over local land use decisions).

143. *See supra* notes 43-45 and accompanying text (discussing exclusionary zoning mechanisms).

144. *See* Span, *supra* note 45, at 24 (explaining homeowners' voting power influenced land use decisions). Each municipality has its own "residential homeowners [who] can easily express their preferences to local government decision-makers and make sure that they act according to those preferences." *Id.*

145. *See* SENATE REPORT, *supra* note 126, at 22 (noting more than half of Massachusetts municipalities permitted no multifamily housing during past decade); HOUSING REPORT CARD, *supra* note 126, at 8 (comparing Boston's housing construction permits to Greater Boston). "Zoning restrictions in many of the region's cities and towns continue to hamper the development of needed housing, especially units in multifamily buildings and accessory apartments in single-family homes." HOUSING REPORT CARD, *supra* note 126, at 8.

146. *See supra* Section II.A.3 (discussing exclusionary zoning's negative effects); *see also* Span, *supra* note 45, at 15-20 (detailing exclusionary zoning's racial and income disparity problems).

147. *See* Dardeno, *supra* note 7, at 134 (discussing 40B's preemption mechanisms). The law includes, but is not limited to, building multifamily homes in single-family zones. *See id.*

148. *See* Bd. of Appeals v. Hous. Appeals Comm., 294 N.E.2d 393, 404 (Mass. 1973) (summarizing legislative intent). After seven of the eight local restrictive zoning practices studied had a negative impact on housing construction, the "housing shortage problem had reached crisis proportions." *Id.*

149. *See* 760 MASS. CODE REGS. 59.01 (2019) (providing 40R smart growth authority); Chaffee, *supra* note 91, at 192-93 (detailing 40R's incentives). "In contrast to the mandatory nature of Chapter 40B, Chapter 40R provides an incentive-based, optional program for encouraging affordable housing and concentrated development." Chaffee, *supra* note 91, at 192-93.

150. *See* MASS. GEN. LAWS ch. 40R, § 1 (2004) (stating 40R purpose). The law simply states the purpose of Chapter 40R is "to encourage smart growth and increased housing production in Massachusetts." *See id.*; Chaffee, *supra* note 91, at 184-85 (detailing Massachusetts's housing crisis).

151. *See* Chaffee, *supra* note 91, at 192-93 (contrasting 40R and 40B).

based approaches do not remove land use decisions from localities, they do ultimately recognize both the power and the need to do so.¹⁵² This is evident in the approaches of both laws to remove the local barriers to new housing construction, rather than have the state construct new housing.¹⁵³

B. The Housing Choice Initiative Is Another Incremental Step Where a Leap Is Required

Massachusetts's recent HCI proposal is yet another acknowledgement that the state must do more to confront the continued lack of affordable housing.¹⁵⁴ In addition to its housing crisis, the Boston area suffers from arguably the worst traffic congestion in the country.¹⁵⁵ These two problems are connected, as people forced to move farther away from where they work face longer commutes, and must spend more time driving each day.¹⁵⁶

Although Massachusetts acknowledges the severe impacts of its housing crisis, the state continues the status quo policy of incentivization.¹⁵⁷ The HCI would simply change the voting procedure for municipalities to encourage them to implement zoning changes on their own.¹⁵⁸ The HCI states explicitly that it is *not* a mandate, and thus compares with Massachusetts's long history of refusing to hold cities and towns accountable for banning multifamily housing.¹⁵⁹ It is contradictory to acknowledge such a crisis but offer the same tired solutions.¹⁶⁰

152. See Dardeno, *supra* note 7, at 133-34 (discussing intent behind 40B's preemptory powers). 40B was intended in part "to prevent unreasonable exclusion of low-income housing." *Id.* at 134. To do so, developers are allowed to "flout" local zoning regulations, which leads to an inference that the local zoning regulations are the problem. *See id.* at 134-35. Likewise, "Chapter 40R may necessitate adjustments to existing zoning laws[,] again inferring that existing zoning laws *are* the problem." *Id.* at 151.

153. See Barber, *supra* note 100, at 129, 149-50 (describing 40B and 40R's approaches). Prior to 40R's passage, when municipalities were faced with the "stick" of 40B, they were already considering proposals for affordable housing. *See id.* at 150.

154. See Press Release, *supra* note 14 (acknowledging price increases for homes and rent). "Massachusetts home prices have increased at the fastest rate in the nation, and metropolitan Boston rent prices rank among the highest in the country." *Id.*

155. See Swasey, *supra* note 130 (reviewing Greater Boston traffic).

156. See *supra* note 58 and accompanying text (discussing relationship between traffic and sprawl).

157. See Press Release, *supra* note 14 (outlining legislative goals behind HCI). The HCI, if enacted, does not include any municipal mandates. *See id.* Rather, the HCI espouses the hope that allowing land use decisions by majority vote would spur housing production and align Massachusetts law with that of other states. *See id.*

158. *See id.* (encouraging municipal zoning changes). One initiative proponent said as much, explaining "the Housing Choice Initiative will provide municipalities with the tools and incentives needed to drive meaningful housing production that is appropriate for their community." *Id.*

159. *See id.* (clarifying HCI does not mandate zoning changes); Sherman, *supra* note 128 (describing 40B's shortcomings). Remarkably, it has been "[n]early 50 years since [40B] was enacted, and more than eight in every ten of the 351 Massachusetts municipalities still fall short of the 10 percent benchmark. Almost 50 percent have less than 5 percent of affordable housing units and 42 communities don't count a *single* unit." Sherman, *supra* note 128 (emphasis added). Although "[t]here's no monetary penalty if a community falls below the 10 percent benchmark[.]" the law does give developers leverage. *Id.*

160. See SENATE REPORT, *supra* note 126, at 22 (proposing housing production solutions). The Senate Report, after explaining that the vast majority of municipalities do not build enough housing, proposes legislation requiring "all communities to permit a reasonable, minimum level of multifamily housing for increased housing

C. Massachusetts Should Model Its Housing Reform on California's Proposed Housing Legislation

Both of California's recent legislative proposals, SB 827 and SB 50, attempted to take the final and necessary step to fully address the housing crisis: preempting local zoning as-of-right.¹⁶¹ SB 50 recognized the need for housing both along transit corridors and in job-rich areas while simultaneously recognizing that local municipalities will not build it.¹⁶² Although SB 50 failed to pass, the bill's preemptory measures are an example of a bold, yet necessary response to a growing crisis.¹⁶³

Massachusetts acknowledged this dynamic when the legislature passed 40R, and thus allowed municipalities to circumvent local zoning restrictions in transit corridors.¹⁶⁴ Rather than mandate the local land use circumvention, however, 40R favors an opt-in approach.¹⁶⁵ Massachusetts's recent HCI would only make this opt-in easier without mandating any municipal action.¹⁶⁶

Modeling 40R after the recent California proposals, where transit-rich areas are exempted from local zoning restrictions, would do more to accomplish the legislative goals behind both 40B and 40R by finally allowing, rather than incentivizing, housing development.¹⁶⁷ Similar to 40R, SB 827 and SB 50 recognized the nexus between housing and transportation and sought to *allow*, rather than incentivize, the production of new housing near transit stations.¹⁶⁸

production." *Id.* But see Dardeno, *supra* note 7, at 140 (discussing 40B's effects and efficacy). "Perhaps the best solution is mandatory inclusionary zoning." *Id.* at 155.

161. See Dillon, *supra* note 119 (discussing SB 50 preemption); Dougherty & Plumer, *supra* note 6 (discussing SB 827 preemption). The bills' as-of-right provisions were at the root of the public outcry against them, because the fear of losing local control over zoning suggests a radical change from the status quo. See Dougherty & Plumer, *supra* note 6. "[L]ocal activists and homeowners too often use zoning codes to prevent apartments from being built in California's cities." *Id.*

162. See S.B. 50, 2019-2020 Leg., Reg. Sess. (Cal. 2018) (providing relevant law); see also Dillon, *supra* note 119 (discussing SB 50's goals). The bill addressed "how far the state should impinge on local authority to shape community development amid a housing shortage that's been estimated in the millions." Dillon, *supra* note 119. Since both SB 827 and SB 50's failure, housing costs in California have remained at or near record highs, and the state is failing to reduce vehicle travel. See *id.*; Dougherty, *supra* note 124 (noting "higher-density neighborhoods near job centers . . . crucial to curbing emissions").

163. See Dillon, *supra* note 119 (addressing intense opposition to both SB 50 and earlier legislation); Dougherty, *supra* note 124 (describing examples of opponents). State Senator Scott Wiener, SB 50's sponsor, declared "[w]e have to be bold in solving" the estimated 3.5-million-home deficit in California. Dillon, *supra* note 119.

164. See *supra* note 97 and accompanying text (providing 40R's legislative purpose).

165. See MASS. GEN. LAWS ch. 40R, § 3 (2018) (indicating municipalities may adopt smart growth principles). The law explains that a municipality "may adopt a smart growth zoning district[.]" but does not include any new requirement or enforcement measure for 40B. *Id.*

166. See Press Release, *supra* note 14 (explaining HCI incentivizes without mandating).

167. See Rios, *supra* note 6 (discussing removing supermajority requirement to spur housing construction). "Some say that threshold (to get a supermajority in a three-member body, for instance, there must be unanimity) is hindering housing production at the local level." *Id.*

168. See Dougherty & Plumer, *supra* note 6 (noting SB 827's preemptory procedures). Because "zoning codes are governed by tens of thousands of municipalities nationwide," it is difficult to change zoning rules piece by piece. See *id.*

These California bills confronted a situation, similar to Massachusetts, where local municipalities who have the authority to build housing are using that authority to block it.¹⁶⁹ SB 827 and SB 50 would have addressed this situation not by incentivizing municipalities with transit stations to remove height restrictions or increased density, but by rezoning these areas at the state level.¹⁷⁰

The HCI and its legislative counterpart, HB 4075, which are currently stalled in the Massachusetts Legislature, reflect an incremental, incentive-based approach to housing production.¹⁷¹ The idea is to give municipalities the tools to allow housing production, so that they will build more housing units.¹⁷² But the United States' and Massachusetts's housing history has shown the opposite to be true: Give municipalities the authority to build housing and they will stop building.¹⁷³

IV. CONCLUSION

Since municipalities were given authority of local land use decisions in the early twentieth century, they have been restricting housing growth. For over seventy years, state governments have been crafting ways to incentivize, and sometimes mandate, the construction of housing, and yet the country is still facing an ever-growing housing shortage. Although a continuing battle, California's goal to remove local authority over housing construction is the right way to combat a status quo of static housing construction. On the other hand, Massachusetts's proposal offers an adjustment to local control, changing the supermajority requirement to a simple majority, without addressing the local control itself. There is little to suggest municipalities, who already intentionally do not build enough housing, will begin to build more now that it is easier for them to do so. Massachusetts should therefore join California in recognizing that

169. See Dillon, *supra* note 131 (explaining California housing crisis response). In a radical new step, California is proposing to punish communities that block homebuilding by withholding state tax dollars. See *id.* The aggressive approach "speaks to the depth of the state's [housing] problems," which have forced millions to pay more than half of their income on rent, increased home prices, and added thousands to the homeless population. *Id.* Such a plan is another example of state action on the housing crisis that would "mark an incursion by the state into how housing is approved at the local level." *Id.*

170. See S.B. 50, 2019-2020 Leg., Reg. Sess. (Cal. 2018) (proposing new sections of California Government Code). The law specifically aimed at common local land use restrictions:

- (a) A residential development that meets the criteria specified in Section 65918.52 shall receive, upon request, an equitable communities incentive as follows: (1) Any eligible applicant shall receive the following: (A) A waiver from maximum controls on density. (B) A waiver from maximum automobile parking requirements greater than 0.5 automobile parking spots per unit. (C) Up to three incentives and concessions pursuant to subdivision (d) of Section 65915.

Id.

171. See Press Release, *supra* note 14 (providing incentive language).

172. See *id.* (attempting to promote best practices).

173. See *supra* Section II.A.2 (discussing local control mechanisms).

the problem is *the municipalities*, not the laws, and begin to question whether municipalities should have local control over housing construction at all.

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