

3-28-2019

The New State Zoning: Land Use Preemption Amid a Housing Crisis

John Infranca

Suffolk University Law School, jinfranca@suffolk.edu

Follow this and additional works at: <https://lawdigitalcommons.bc.edu/bclr>



Part of the [Land Use Law Commons](#), [Law and Society Commons](#), [Property Law and Real Estate Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C.L. Rev. 823 (2019), <https://lawdigitalcommons.bc.edu/bclr/vol60/iss3/3>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

**THE NEW STATE ZONING: LAND USE
PREEMPTION AMID A HOUSING CRISIS**

JOHN INFRANCA

INTRODUCTION 825

I. LOCALISM AND LAND USE 830

II. THE FIRST GENERATION OF STATE LAND USE INTERVENTIONS 836

A. Massachusetts: A Focus on Streamlining Development Approvals and Encouraging Zoning Reform..... 837

B. New Jersey: A Focus on Planning and Development Approvals..... 839

C. California: A Focus on Planning and Procedure 841

D. Some Trends 844

III. A NEW GENERATION OF STATE LAND USE INTERVENTIONS 846

A. The New Housing Preemption..... 848

 1. California..... 848

 2. Massachusetts..... 855

B. Yes in My (Own) Backyard..... 857

 1. Accessory Dwelling Units..... 857

 2. State Efforts to Encourage ADU Development 860

 3. A Drop in the Affordability Bucket or the Opening of a Spigot? 870

IV. A NOT-SO-QUIET REVOLUTION..... 875

A. From Channeling to Displacing Local Discretion 875

B. The (Increasingly Apparent) Costs of Low-Density Zoning..... 876

C. Homeowners as Developers..... 879

D. Opening the Door to Further Reform 882

E. Positive Preemption? 884

CONCLUSION 886

THE NEW STATE ZONING: LAND USE PREEMPTION AMID A HOUSING CRISIS

JOHN INFRANCA*

Abstract: Commentators have long decried the pernicious effects that overly restrictive land use regulations, which stifle new development, have on housing supply and affordability, regional and national economic growth, social mobility, and racial integration. The fragmented nature of zoning rules in the United States, which are set primarily at the local level, renders it seemingly impossible to address these concerns systematically. Although there have been some efforts to address local exclusionary tendencies and their suboptimal effects by means of greater state control, these efforts, which remain contentious, have been limited to just a few states. In the past few years, a new wave of state interventions in local zoning has appeared. These interventions are motivated in part by the harsh reality of housing shortages and skyrocketing costs in significant parts of the country, which have made housing affordability a salient issue for a broader segment of the population. At the same time, states have grown increasingly willing to preempt local governments across a range of policy realms. This Article contends that the confluence of these and other factors suggests the potential for a recalibration of the balance of power between state and local governments in the realms of housing and land use regulation. State governments are increasingly displacing local restrictions on new development, mandating that municipalities permit certain forms of housing, and providing incentives for local governments to adopt certain forms of housing. I argue that the current housing crisis justifies bold new forms of state intervention. Such interventions should expressly preempt certain narrow elements of local law, rather than, as an earlier generation of interventions did, add additional planning requirements, procedural steps, or potential appeals. At the same time, these interventions can, and should, provide clear mechanisms for addressing significant countervailing local interests.

© 2019, John Infranca. All rights reserved.

* Associate Professor of Law, Suffolk University Law School. Thanks to Vicki Been, Sara Bro-nin, Nestor Davidson, Paul Diller, Chris Elmendorf, William Fischel, C.J. Gabbe, Anika Singh Lemar, Michael Pollack, and Rich Schragger for comments and suggestions. This paper also benefited from feedback received during presentations at the Association for Law, Property & Society 9th Annual Meeting at Maastricht University, the University of New Hampshire School of Law's Faculty Work-shop, the 7th Annual State and Local Government Works-in-Progress Conference at Fordham Law School, and the 2017 Property Works-in-Progress Conference at Northeastern University Law School. Thanks to Maegan O'Rourke, Chris Redd, the staff of Suffolk University Law Library for research assistance, and the staff of the *Boston College Law Review* for their excellent editing work.

INTRODUCTION

Zoning is the quintessential local government power.¹ Yet in the past few years, affordable housing crises in communities across the country have sparked calls for more significant state intervention in land-use decision making.² The most controversial and high profile of these efforts, California's Senate Bill 827, would have preempted local land use regulations and effectively rezoned significant portions of the state, allowing denser development near public transit.³ Senate Bill 827 failed to make it out of committee, but state officials in California and elsewhere—from both sides of the aisle—continue to seek ways to confront restrictive local zoning that prohibits or slows new development, reduces housing supply, and drives up costs.⁴

Simultaneously, the seemingly mundane field of land use regulation is garnering national attention amid broader recognition of the effects of zoning regulations not only on housing supply and affordability, but also on regional and national economic growth, social mobility, economic equality, racial inte-

¹ Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990) (“[E]ducation and zoning are the principal operations of local governments.”); DANIEL P. SELMI ET AL., *LAND USE REGULATION: CASES AND MATERIALS* 478 (5th ed. 2017) (“Land use authority is the most important power remaining at the local level . . .”).

² See *infra* notes 58–120 and accompanying text; see also Anika Singh Lemar, *The Role of States in Liberalizing Land Use Regulations*, 97 N.C. L. REV. 293, 294 (2019) (stating that “[f]or the first time in decades, there are widespread calls for states to intervene in local land use regulation”).

³ See *infra* notes 140–149 and accompanying text.

⁴ Press Release, Governor Charlie Baker, Baker-Polito Administration Testifies on Housing Choice Initiative (Jan. 30, 2018), <https://www.mass.gov/news/baker-polito-administration-testifies-on-housing-choice-initiative> [https://perma.cc/XF7R-TUUD] (“[T]here is no way that the State can fund enough subsidies to drive the level of housing production that we need to meet demand.”). California’s Democratic former Governor Jerry Brown, in announcing the 2017 state budget, emphasized the high cost of housing development and “made clear he would again support new laws that would make it easier to build new homes, lower costs to develop low-income housing and provide financial incentives for cities that meet housing production goals.” Liam Dillon, *California Governor: We’re Not Spending More on Low-income Housing Because It’s Too Expensive to Build*, L.A. TIMES (Jan. 10, 2017), <https://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-governor-we-re-not-spending-more-on-1484082718-htmstory.html> [https://perma.cc/RDH8-M6H5]. As this Article neared publication, California’s newly elected Governor Gavin Newsom was taking significantly bolder steps to push local governments to accommodate more new housing. Liam Dillon, *At Governor Newsom’s Urging, California Will Sue Huntington Beach over Blocked Homebuilding*, L.A. TIMES (Jan. 25, 2019), <https://www.latimes.com/politics/la-pol-ca-gavin-newsom-huntington-beach-housing-lawsuit-20190125-story.html> [https://perma.cc/L29J-45TT]. The state sued the city of Huntington Beach for failing to comply with the state housing law’s requirement that cities set aside a certain amount of land for new development. See *id.* This follows Governor Newsom’s recently proposed budget, which would provide \$500 million to cities that show progress towards satisfying short-term housing goals. CALIF. DEP’T OF FIN., 2019–20 GOVERNOR’S BUDGET: BUSINESS, CONSUMER SERVICES, AND HOUSING 85, <http://www.ebudget.ca.gov/2019-20/pdf/GovernorsBudget/1000.pdf> [https://perma.cc/2PZC-WX7X]. The budget would also deny transportation funding to cities that fail to satisfy longer-term housing quotas. Matt Levin, *It’s a Big Deal: Newsom’s Housing Budget Explained*, MERCURY NEWS (Jan. 14, 2019), <https://www.mercurynews.com/2019/01/13/its-a-big-deal-newsoms-housing-budget-explained/> [https://perma.cc/H4XB-7BZS].

gration, and the environment.⁵ In the waning months of the Obama Administration, the White House highlighted the national implications of local land use regulations, critiquing “[l]ocally-constructed barriers to new housing development,” which threaten to exacerbate income inequality and stifle GDP growth.⁶ Current Secretary of Housing and Urban Development Ben Carson has similarly spoken of the need to ease restrictions on housing development so as to increase supply.⁷ 2020 presidential candidates Cory Booker and Elizabeth Warren have proposed measures to address restrictive zoning.⁸ Focusing on one particular barrier to greater housing supply—the significant amount of land, including in major cities, zoned to permit only single-family homes—some critics have gone so far as to declare that the United States has a “single-family home problem”⁹ and the nation’s “future depends on the death of the single-family home.”¹⁰ As one commentator remarked, “[z]oning is having a

⁵ See *infra* notes 37–42 and accompanying text.

⁶ THE WHITE HOUSE, HOUSING DEVELOPMENT TOOLKIT 1, 2 (2016), https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf [<https://perma.cc/6837-KQF9>] (“Local policies acting as barriers to housing supply include land use restrictions that make developable land much more costly than it is inherently, zoning restrictions, off-street parking requirements, arbitrary or antiquated preservation regulations, residential conversion restrictions, and unnecessarily slow permitting processes. The accumulation of these barriers has reduced the ability of many housing markets to respond to growing demand.”).

⁷ See Laura Kusisto, *HUD to Shift Focus on Fair Housing*, WALL ST. J., Aug. 13, 2018, at A4 (quoting Carson declaring: “I want to encourage the development of mixed-income multi-family dwellings all over the place.”); see also Kriston Capps, *Ben Carson Is a YIMBY Now and Everything’s Confusing*, CITYLAB (Aug. 14, 2018), <https://www.citylab.com/equity/2018/08/ben-carsons-new-argument-against-fair-housing-rules-its-about-nimbys/567449/> [<https://perma.cc/BE9S-ZSNP>]. The Department of Housing and Urban Development (HUD) released an advance notice of proposed rulemaking in August 2018 requesting comments on potential changes to the agency’s affirmatively furthering fair housing regulations. In that notice HUD specifically requested comments on “changes that will . . . seek to encourage actions that increase housing choice, including through greater housing supply” *Affirmatively Further Fair Housing: Streamlining and Enhancements*, 83 Fed. Reg. 40,713 (proposed Aug. 16, 2018) (to be codified at 24 C.F.R. pts. 5, 91, 92, 570, 574, 576, 903).

⁸ See Madeleine Carlisle, *Elizabeth Warren’s Ambitious Fix for America’s Housing Crisis: The Massachusetts Democrat Introduced Legislation That Takes Aim at Segregation, Redlining, Restrictive Zoning, and the Loss of Equity by Low-Income Homeowners*, THE ATLANTIC (Sept. 25, 2018), <https://www.theatlantic.com/politics/archive/2018/09/elizabeth-warrens-fix-americas-housing-crisis/571210/> [<https://perma.cc/DTQ4-EZAF>] (explaining the bill that Elizabeth Warren put forward to increase federal subsidies for affordable housing and encourage local governments to address zoning restrictions); Richard Kahlenberg, *Taking on Class and Racial Discrimination in Housing*, AM. PROSPECT (Aug. 2, 2018), <https://prospect.org/article/taking-on-class-and-racial-discrimination-housing> [<https://perma.cc/WH8L-6E2N>] (discussing the legislation brought by Cory Booker that would require states, cities, and counties that receive funding under the Community Development Block Grant program to develop strategies to reduce barriers to housing development and increase the supply of housing).

⁹ Conor Dougherty, *Getting to Yes on Nimby Street*, N.Y. TIMES, Dec. 3, 2017, at BU1 (asserting that high percentage of land area zoned for single-family homes in most American cities makes such neighborhoods “an obvious place to tackle the affordable-housing problem”).

¹⁰ Tanza Loudonback, *America’s Future Depends on the Death of the Single-Family Home*, BUS. INSIDER (Dec. 4, 2017), <https://www.businessinsider.com/us-housing-crisis-homeownership-single->

moment” as individuals across the political spectrum grow increasingly aware of the effect of zoning not only on their neighborhoods, but also on their lives in general.¹¹

On the ground, the harsh effects of housing shortages in significant parts of the country have given rise to the pro-development Yes in My Back Yard (“YIMBY”)¹² movement as an antidote to the anti-development tendencies of the more familiar Not In My Back Yard (“NIMBY”) phenomenon.¹³ YIMBY advocates played a significant role in recent statewide housing reform efforts in California and elsewhere as well as local efforts to ease restrictions on new development.¹⁴ YIMBYs frequently invoke the growing consensus among academic researchers that restrictive land use regulations have a detrimental effect on housing supply and affordability.¹⁵ In addition to reducing the supply of

family-home-2017-12 [https://perma.cc/5UHE-5VLN]; see also Owen Pickford, *The Path to Eliminating Single-Family Zoning in Seattle*, THE URBANIST (Oct. 23, 2017), https://www.theurbanist.org/2017/10/23/the-path-to-eliminate-single-family-zoning-in-seattle/ [https://perma.cc/975T-XDUV] (discussing proposals to reduce single-family housing in Seattle).

¹¹ Theo Mackey Pollack, *Time for a Left-Right Consensus on Zoning Reform*, AM. CONSERVATIVE: NEW URBS (Feb. 16, 2018, 12:01AM), https://www.theamericanconservative.com/urbs/time-for-a-left-right-consensus-on-zoning-reform/ [https://perma.cc/FHK8-6JVQ] (stating that “[b]ad zoning laws threaten some of the deepest values of both of our major political traditions, so the circumstances are ripe for unusual bedfellows”). At the other end of the political spectrum, Vox’s Matthew Yglesias declared California’s SB-827 bill, which would preempt local zoning and allow greater density near transit, “one of the most important ideas in American politics today.” Matthew Yglesias, *The Myth of “Forcing People Out of Their Cars”; It’s About More Options, Not Fewer*, VOX (Mar. 19, 2018), https://www.vox.com/policy-and-politics/2018/3/19/17135678/sb-827-cars-california-transit-trains-buses [https://perma.cc/42T6-BN7T].

¹² Jeff Collins, *Meet YIMBY: Pro-development Groups Join the Battle in California Housing Wars*, ORANGE CTY. REG. (Sept. 11, 2017), https://www.ocregister.com/2017/09/10/meet-yimby-pro-development-groups-join-the-battle-in-california-housing-wars/ [https://perma.cc/TG8X-XVUE]; Dennis Lynch, *The YIMBYs Are Coming: LA’s Pro-development Groups Are Building Momentum*, REAL DEAL (June 29, 2018), https://therealdeal.com/la/2018/06/29/the-yimbys-are-coming-las-pro-development-groups-are-building-momentum/ [https://perma.cc/6HJN-8RJQ]; Erin McCormick, *Rise of the Yimbys: The Angry Millennials with a Radical Housing Solution*, THE GUARDIAN (Oct. 2, 2017), https://www.theguardian.com/cities/2017/oct/02/rise-of-the-yimbys-angry-millennials-radical-housing-solution [https://perma.cc/U4C8-9Y4E]. See generally Kenneth A. Stahl, “Yes in My Backyard”: Can a New Pro-housing Movement Overcome the Power of NIMBYs?, 41 ZONING & PLAN. L. REP. 1 (2018) (discussing the pro-housing YIMBY movement).

¹³ NIMBY is typically used pejoratively to refer to existing residents who resist new development in their community, typically due to concerns regarding home values or neighborhood character. See Kenneth A. Stahl, *The Challenge of Inclusion*, 89 TEMPLE L. REV. 487, 491 (2017) (noting that “NIMBYs are homeowners who vociferously oppose new developments in their communities—especially affordable housing or any other type of housing—and they have the political clout to get their way with local regulatory authorities”).

¹⁴ See, e.g., Michael Anderson, *Housing Advocates in Portland Just Did the Nearly Impossible*, SIGHTLINE INST. (Sept. 17, 2018), https://www.sightline.org/2018/09/17/residential-infill-project-portland-oregon/ [https://perma.cc/2AP8-YP6J] (noting “in the end (and here’s what was truly unusual) the people [at two public hearings] calling for the city to re-legalize more homes in more varieties slightly outnumbered the ones who showed up to defend the status quo—55% to 45%”).

¹⁵ See *infra* notes 31–32 and accompanying text.

housing statewide, restrictive land use regulations drive up the cost of housing production, necessitating even larger state subsidies for affordable housing.¹⁶

This is not the first time that state governments have sought to play a more prominent role in regulating land use. In the early 1970s observers suggested that a “quiet revolution” was shifting the locus of land use regulations from local to state governments, in part to address issues of statewide concern.¹⁷ Although this earlier period gave rise to the three most prominent state housing policy interventions—New Jersey’s *Mount Laurel* doctrine, Massachusetts’s Chapter 40B, and California’s Housing Element Law¹⁸—the revolution never really came to pass and generally speaking, local control and discretion only expanded.¹⁹ Efforts at the federal level to confront exclusionary zoning similarly failed.²⁰

This Article examines a new generation of state interventions in local zoning and land use policy, particularly in the realm of housing. These new interventions include measures that preempt local laws regarding rent regulation, mandatory inclusionary zoning, and short-term rentals; that displace local restrictions on housing development; that provide incentives for municipalities to adopt certain forms of zoning; and that mandate that municipalities permit the as-of-right development of accessory dwelling units (“ADUs”).²¹ The earlier generation of state land use interventions focused on channeling local decisions and in some instances allowed appeals to a state entity from adverse local

¹⁶ Joe Cortright, *Why Is “Affordable” Housing So Expensive to Build?*, CITY COMMENT. (Oct. 18, 2017), http://cityobservatory.org/why_affordable_so_expensive/ [<https://perma.cc/U6NC-G3FZ>].

¹⁷ See FRED BOSSELMAN & DAVID CALLIES, COUNCIL ON ENVIRONMENTAL QUALITY, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971), <https://files.eric.ed.gov/fulltext/ED067272.pdf> [<https://perma.cc/B6EZ-T6JX>]; see also *infra* notes 52–56 and accompanying text.

¹⁸ See *infra* notes 30–57 and accompanying text.

¹⁹ SELMI ET AL., *supra* note 1, at 477 (“Now, many decades later, it is apparent that the fundamental change in the governmental level of regulatory control detected in the early 1970s has proceeded more slowly than anticipated.”).

²⁰ See Nolan Gray, *When the Federal Government Takes on Local Zoning*, CITYLAB (Aug. 20, 2018), <https://www.citylab.com/perspective/2018/08/what-a-bipartisan-push-against-exclusionary-zoning-looks-like/567901/> [<https://perma.cc/2HSL-NJRI>] (discussing an effort in 1991 led by Jack Kemp, then-Secretary of Housing and Urban Development under President George H. W. Bush). See generally ADVISORY COMM’N ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, “NOT IN MY BACKYARD”: REMOVING BARRIERS TO AFFORDABLE HOUSING (1991), <https://www.huduser.gov/publications/pdf/notinmybackyard.pdf> [<https://perma.cc/M8CS-VCAE>] (detailing the barriers to creating affordable housing).

²¹ See *infra* notes 120–133 and accompanying text. Accessory dwelling units, which are also referred to as secondary units, in-law units, and granny flats, are separate self-contained housing units located on the property of a single-family home but that cannot be sold separately from the main house. They may be built within an existing structure, such as in an attic or basement, or may be physically separate from the primary dwelling but located on the same lot, such as a backyard cottage or a unit above a garage. See generally John Infranca, *Housing Changing Households: Regulatory Changes for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL’Y REV. 53 (2014) (discussing ADUs in further detail).

decisions. In contrast, recent laws and proposed measures tend to expressly preempt and displace specific elements of local zoning.

Although these substantive differences are important, I argue that the social context in which these interventions are occurring is equally if not more important. The breadth and depth of the housing crisis in communities throughout the country has made housing affordability a salient issue for a broader swath of the population, including young professionals and the businesses that seek to employ them.²² At the same time, while an earlier generation of environmental activists focused on slowing new development, younger environmentalists are more actively embracing denser urbanized development, particularly around public transportation, and challenging local laws that prevent it. Smart growth is taking the place of growth management.²³ Finally, for better or worse, in recent years states are increasingly willing to preempt local governments across a range of policy realms.²⁴

The confluence of these and other factors suggests the potential for a recalibration of the balance of power between state and local governments in the realm of land use regulation. Descriptively, then, my claim is that something new is occurring, in terms of the substance of legal reforms, the salience of housing affordability concerns, and the public discourse regarding land use policy and its broader implications. Collectively these augur a not-so-quiet revolution in land use regulation. That descriptive claim leads into three normative claims. First, the current housing crisis, and the effects of local land use policies on housing supply statewide, justify bold new forms of state intervention. Second, such interventions should expressly preempt specific elements of local law, rather than add additional planning requirements, procedural steps, or potential appeals. Third, these interventions can and should still provide mechanisms for addressing significant countervailing local interests.

This Article proceeds in four Parts.²⁵ Part I briefly reviews justifications for local control of land use and articulates a framework for evaluating state inter-

²² See, e.g., Adam Nagourney & Conor Dougherty, *Housing Costs Put California in Crisis Mode*, N.Y. TIMES, July 18, 2017, at A1 (discussing the lack of affordable housing for middle-class families in California).

²³ Admittedly, these terms are amorphous and overlapping, but as I am using them, “smart growth” emphasizes streamlining regulations to enable denser development, whereas “growth management” emphasizes limiting new development. See Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 262 (2000) (stating that “[u]nlike more traditional growth management approaches, smart growth targets the governmental regulations that drive sprawl development and revises or streamlines these regulations to make it easier to build more compact, mixed use, pedestrian- and transit-friendly projects”).

²⁴ NAT’L LEAGUE OF CITIES, CIVIL RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 1 (2018), <https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf> [<https://perma.cc/7CXL-597B>].

²⁵ See *infra* notes 30–372 and accompanying text.

ventions.²⁶ Part II examines the most prominent past examples of state interventions that encourage housing development.²⁷ Part III analyzes a variety of more recent interventions, highlighting ways in which these interventions go further than earlier efforts in displacing local authority.²⁸ Finally, Part IV compares these two generations of laws before arguing that these new state zoning initiatives have the potential to better succeed at constraining local exclusionary tendencies, building support for denser development, and increasing housing supply.²⁹

I. LOCALISM AND LAND USE

In the seminal 1926 case of *Village of Euclid v. Ambler Realty Co.*, which upheld local zoning as a permissible exercise of the police power, the Supreme Court of the United States declared apartment houses situated near single-family homes “a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.”³⁰ In the nearly a century since *Euclid*, numerous articles in the economics³¹ and legal literature³² have decried the pernicious effects that restrictive land use regulations—which prohibit denser development, including multi-family apartment buildings—have on housing supply and affordability. Nonetheless, such restrictions remain the norm.³³ This is true not only in wealthy suburban communities—where zoning makes the purchase of a house of a particular size or value “a prerequisite for entry into the jurisdiction” and

²⁶ See *infra* notes 30–57 and accompanying text.

²⁷ See *infra* notes 58–120 and accompanying text.

²⁸ See *infra* notes 121–315 and accompanying text.

²⁹ See *infra* notes 316–372 and accompanying text.

³⁰ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394, 397 (1926).

³¹ See generally, e.g., Vanessa Brown Calder, *Zoning, Land-Use Planning, and Housing Affordability*, CATO INST. POL’Y ANALYSIS, no. 823, Oct. 18, 2017, at 1, 4, <https://object.cato.org/sites/cato.org/files/pubs/pdf/pa-823.pdf> [<https://perma.cc/859V-HA5P>] (discussing empirical research suggesting that zoning regulations—including minimum lot size requirements—“reduce supply, which in turn increases prices”); Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AMER. ECON. REV. 329 (2005); Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, FRBNY ECON. POL’Y REV. 21 (2003); Joseph Gyourko et al., *A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index*, 45 URB. STUD. 693 (2008) (analyzing regulations on housing markets in different U.S. jurisdictions); Andrew D. Paciorek, *Supply Constraints and Housing Market Dynamics* (Fed. Reserve Bd., Fin. & Econ. Discussion Series Working Paper No. 2012-01, 2012), <https://www.federalreserve.gov/pubs/feds/2012/201201/201201pap.pdf> [<https://perma.cc/N7N6-5ZWF>] (exploring housing market dynamics).

³² See generally, e.g., Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91 (2015); Roderick M. Hills, Jr. & David Schleicher, *Balancing the “Zoning Budget,”* 62 CASE W. RES. L. REV. 81 (2011).

³³ Cf. William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317, 318 (2004) (discussing the privileged position of single-family owner-occupied homes in almost every zoning ordinance).

access to local public goods, such as better schools.³⁴ Even in urban neighborhoods, residents often stifle housing development and champion zoning that severely restricts supply.³⁵ Existing residents fiercely resist both changes to zoning that will permit increased density as well as individual developments they believe will alter neighborhood character, be out-of-scale with their surroundings, or create competition for street parking over which they assert quasi-ownership rights.³⁶

The result is significantly less housing in desirable metropolitan areas and individual neighborhoods than the market would likely otherwise supply. But zoning regulations affect more than housing supply and affordability in a particular community. In recent years scholars have examined the negative effects of restrictive land use regulations on a range of issues that cross jurisdictional boundaries, such as economic and social mobility,³⁷ racial integration,³⁸ eco-

³⁴ Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1829 (2003). See generally Paul Boudreaux, *Lotting Large: The Phenomenon of Minimum Lot Size Laws*, 68 ME. L. REV. 1 (2016) (explaining restrictions on minimum lot sizes).

³⁵ See John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 92 (2014) ("As in the suburbs, cities began to employ land use restrictions to limit the density of housing, impose lengthy approvals processes that provide ample hooks for NIMBYs, and mandate expensive forms of housing."); see also Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Over-taking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227 (2014) (exploring the power of home voters in urban cities). See generally David Schleicher, *City Unplanning*, 122 YALE L.J. 1670 (2013) (discussing how laws governing land use decision making constrain efforts to allow more development).

³⁶ See Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1068 (2017) ("Although [land use] is often considered a 'traditional' local concern, the record of local governments using their authority therein to exclude 'undesirable' uses, like low-income housing, is legion."); Shelia R. Foster, *The Limits of Mobility and the Persistence of Urban Inequality*, 127 YALE L.J. F. 481, 485 (2017), https://www.yalelawjournal.org/pdf/Foster_styrp4.pdf [<https://perma.cc/J8CU-U9SV>] ("Part of the reason for such restrictive land policies . . . is the vested interest of existing homeowners who favor policies that preserve the status quo and minimize the negative externalities of urban agglomeration, thus maintaining their home values.").

³⁷ See, e.g., David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78, 114 (2017) (noting that land use regulations are the best understood limits on mobility); Alana Semuels, *The Barriers Stopping Poor People from Moving to Better Jobs*, THE ATLANTIC (Oct. 12, 2017), <https://www.theatlantic.com/business/archive/2017/10/geographic-mobility-and-housing/542439/> [<https://perma.cc/PF47-F2KC>].

³⁸ See, e.g., Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6, 12 (2016) (finding that "particular types of regulation, such as density restrictions, more independent reviews for project approval and zoning changes, and a greater level of involvement by local government and citizenry in the permitting process, are significantly associated with segregation overall and of the affluent, specifically when we control for a range of metropolitan areas characteristics"); Jonathan T. Rothwell, *Racial Enclaves and Density Zoning: The Institutionalized Segregation of Racial Minorities in the United States*, 13 AM. L. & ECON. REV. 290, 291 (2011) ("Using two datasets of land regulation for the largest metropolitan areas, the results indicate that anti-density regulations are responsible for a large share of the observed patterns in segregation between 1990 and 2000."). See generally RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED*

conomic growth³⁹ and equality,⁴⁰ urban sprawl,⁴¹ and a variety of environmental concerns.⁴²

Confronting these challenges systematically has long been rendered difficult by the fragmented nature of land use policy and zoning regulations in the United States, which are set primarily at the local level.⁴³ The extent of local

AMERICA (2017) (examining the role of land use regulations, among other government policies, in establishing and exacerbating segregation).

³⁹ See, e.g., Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation* (Nat'l Bureau of Econ. Research, Working Paper No. 21154, 2015) (finding land use restrictions that reduce new housing supply lowered aggregate U.S. economic growth by more than fifty percent between 1964 and 2009); see also *Space and the City*, THE ECONOMIST (Apr. 4, 2015), <https://www.economist.com/leaders/2015/04/04/space-and-the-city> [<https://perma.cc/XR6G-24M2>] (noting that “[l]ifting all the barriers to urban growth in America could raise the country’s GDP by between 6.5% and 13.5%, or by about \$1–2 trillion. It is difficult to think of many other policies that would yield anything like that”). See generally Wendell Pritchett & Shitong Qiao, *Exclusionary Megacities*, 91 S. CAL. L. REV. 467 (2018).

⁴⁰ See Schleicher, *supra* note 37, at 115 (stating that “[b]ecause these restrictions raise the cost of housing, they disproportionately prevent poor and working-class people from taking advantage of high-wage job markets”).

⁴¹ See William A. Fischel, *The Evolution of Homeownership*, 77 U. CHI. L. REV. 1503, 1516 (2010) (arguing that restrictive zoning “probably encourages metropolitan-area sprawl”); R. Pendall, *Do Land-Use Controls Cause Sprawl?*, 26 ENV’T & PLAN. B: PLAN. & DESIGN 555, 555 (1999) (finding land use regulations that mandate low densities lead to increased sprawl).

⁴² See Edward Glaeser, *Reforming Land Use Regulations*, BROOKINGS INST. 1, 5–6 (Apr. 24, 2017), <https://www.brookings.edu/research/reforming-land-use-regulations/> [<https://perma.cc/3853-HK9R>] (arguing that—because “[c]arbon emissions per household are lower in coastal California than elsewhere in the country”—regulations that prevent development simply push it elsewhere, leading to increased carbon emissions). See generally Reid Ewing & Robert Cervero, *Travel and the Built Environment*, 76 J. AM. PLAN. ASS’N 265 (2010) (reviewing the literature regarding the environmental effects of denser development on automobile emissions and residential energy usage). There has recently been some debate over the lessons to be drawn from these studies. Compare Mark R. Stevens, *Does Compact Development Make People Drive Less?*, 83 J. AM. PLAN. ASS’N 7, 7 (2017) (finding that compact development does cause people to drive less, but impact is relatively small), with Reid Ewing & Robert Cervero, *“Does Compact Development Make People Drive Less?” The Answer Is Yes*, 83 J. AM. PLAN. ASS’N 19, 20 (2017) (disputing results and conclusions in Stevens’ article). See generally Hossein Estiri, *Differences in Residential Energy Use Between US City and Suburban Households*, 50 REGIONAL STUD. 1919 (2016) (discussing analyses of household energy consumption indicating that the average suburban residences consume more energy than urban households); Reid Ewing & Fang Rong, *The Impact of Urban Form on U.S. Residential Energy Use*, 19 HOUSING POL’Y DEBATE 1 (2008) (finding lower residential energy use among residents of more compact counties relative to otherwise comparable residents of sprawling counties). In addition, studies have shown the threat sprawl causes for wildlife habitats and water quality. See REID EWING & JOHN KOSTYACK, NAT’L WILDLIFE FED’N, *ENDANGERED BY SPRAWL: HOW RUNAWAY DEVELOPMENT THREATENS AMERICA’S WILDLIFE*, at vi–vii (2005), <https://www.nwf.org/~media/PDFs/Wildlife/EndangeredbySprawl.pdf> [<https://perma.cc/3266-AGS6>]; John S. Jacob & Ricardo Lopez, *Is Denser Greener? An Evaluation of Higher Density Development as an Urban Stormwater-Quality Best Management Practice*, 45 J. AM. WATER RESOURCES ASS’N 687, 688 (2009) (finding that higher density development might be best method for mitigating water quality damage attributable to increased development).

⁴³ Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 233 (2008) (“Currently, much of what can be called traditional land use regulation—zoning ordinances and design controls, but not environmental management, building code, endangered species, or housing laws—occurs at the local level.”).

control over land use regulation in the United States is quite unique in comparison with other nations.⁴⁴ This generates some potential benefits. The distribution of regulatory authority across multiple local jurisdictions enables individuals, as Charles Tiebout famously articulated, to sort themselves based on preferences for a particular package of taxation, regulation, and amenities as localities compete for residents.⁴⁵ But those individuals are then motivated to use land use regulations to restrict entry into the community so that those who desire better services, such as schools, but cannot pay the full cost of their share of those goods are prevented from obtaining them at a reduced rate by buying smaller units of housing in these desirable neighborhoods.⁴⁶

Accordingly, while interjurisdictional competition may produce certain efficiency gains, by allowing (some) individuals to sort based on their preferences, it also enables local governments to impose exclusionary land use policies, which can exacerbate inequalities across a metropolitan region.⁴⁷ As William Fischel's influential "homevoter hypothesis" posits, "homeowners, who

⁴⁴ See generally SONIA HIRT, *ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN-USE REGULATION* (2014) (discussing land use regulations in the United States). Tokyo provides a particularly dramatic example of minimal local control and largely national decision making on city planning and building law. See Robin Harding, *Why Tokyo Is the Land of Rising Home Construction but Not Prices*, FIN. TIMES (Aug. 3, 2016), <https://www.ft.com/content/023562e2-54a6-11e6-befd-2fc0c26b3c60> [<https://perma.cc/JAU2-5WZX>]. Although this has its costs in terms of design and open space, among other things, the pace of development has contributed to significantly smaller increases in price. *Id.* ("Here is a startling fact: in 2014 there were 142,417 housing starts in the city of Tokyo (population 13.3m, no empty land), more than the 83,657 housing permits issued in the state of California (population 38.7m), or the 137,010 houses started in the entire country of England (population 54.3m).").

⁴⁵ See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (discussing that general thesis).

⁴⁶ Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 624 (2002) (citing Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205 (1975)); see also Schragger, *supra* note 34, at 1828 ("So-called 'fiscal zoning'—minimum acreage requirements, minimum square footage requirements, and outright limitations on multi-family housing—is a common (and much condemned) suburban strategy to limit development and ensure that newcomers purchase a minimum level of housing."); Stahl, *supra* note 13, at 497 ("[M]any communities seek not only to limit the number of residents but also to ensure that homes are sufficiently expensive so that poor people (defined as anyone poorer than existing residents) cannot afford to live there."). This is not simply a recent phenomenon. See HIRT, *supra* note 44, at 110–11 (discussing how desire "to protect the housing enclaves of the elite from invasion by working-class and poor people, including racial and ethnic minorities" was often cited explicitly as justification for zoning in early 1900s).

⁴⁷ Nicole Stelle Garnett, *Unbundling Homeownership: Regional Reforms from the Inside Out*, 119 YALE L.J. 904, 907, 922 (2010) ("[T]here is no question that regulatory barriers to entry into the suburbs are a primary cause of interjurisdictional inequality within our metropolitan regions . . ."); see also Kenneth A. Stahl, *Local Home Rule in the Time of Globalization*, 2016 BYU L. REV. 177, 183 ("The ability of local governments to regulate land use without regard to extraterritorial impacts encourages municipalities to act in narrowly self-interested ways and often prevents them from cooperating to address global concerns."); Luther L. McDougal III, *Contemporary Authoritative Conceptions of Federalism and Exclusionary Land Use Planning: A Critique*, 21 B.C. L. REV. 301, 305–07 (1980) (discussing the social and economic impacts of exclusionary zoning).

are the most numerous and politically influential group within most localities, are guided by their concern for the value of their homes” when making decisions about matters including local zoning.⁴⁸ Given this paramount concern and the potentially adverse effects of new development, “[a] nation of homeowners is likely to be a nation of NIMBYs, and their anxieties are likely to be manifest[ed] in zoning laws.”⁴⁹

Commentators have long debated the ideal vertical allocation of power between state and local governments.⁵⁰ Local government autonomy, it is argued, facilitates democratic participation⁵¹ and the satisfaction of local preferences.⁵² But it can also lead to significant inefficiencies, in the form of externalities that spread beyond a particular jurisdiction’s boundaries, as well as exclusionary policies that disadvantage particular groups.⁵³ In an essay, Nestor Davidson argues that a state’s normative commitments should inform the allocation of power between state and local governments. Davidson identifies “the individual-rights provisions of state constitutions and the general-welfare constraint operative when the state delegates its plenary power to a geographically bounded local government” as potential sources for these normative commitments.⁵⁴ The latter is a particularly vital source in the context of land use regulation. On Davidson’s account, consideration of the general welfare of the state provides a mechanism “for limiting the most pernicious externalities” and setting boundaries on local power.⁵⁵

Restrictive local land use regulations that reduce housing supply can generate significant externalities that are detrimental to the welfare of states, regions, and the nation. States have referenced these effects in justifying inter-

⁴⁸ WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 4 (2001).

⁴⁹ *Id.* at 232; see also Fennell, *supra* note 46, at 624 (“[T]he fact remains that zoning laws typically enable homeowners to mitigate . . . home-investment risks rather successfully by giving them power to behave as NIMBYs.”).

⁵⁰ See RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 16–51 (7th ed. 2009) (assembling material on the “vertical distribution of power question” from the founding period to the present).

⁵¹ See, e.g., Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1072–73 (1980) (discussing potential of cities as source of participatory democracy).

⁵² See, e.g., Tiebout, *supra* note 45.

⁵³ See, e.g., Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1124–36 (1996) (examining arguments for efficiency of local governance and potential exclusionary consequences). Focusing on regional governance, Briffault argues that the “optimal metropolitan area government” should possess “authority to adopt regional land use plans that will bind future land development throughout the region and the power to displace local land use actions that have regional significance.” *Id.* at 1166.

⁵⁴ Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 986 (2019).

⁵⁵ *Id.* at 992.

ventions in local land use policy.⁵⁶ At the same time, there are reasons why zoning remains a traditional local government power.

Zoning determines what can be done with specific parcels of land within the boundaries of particular jurisdictions or neighborhoods. It allows local residents to shape the community in which they live. Restrictive zoning across multiple jurisdictions may reduce housing supply and exacerbate costs statewide, but new development can generate heavily localized externalities. Although in many cases the fears of neighbors are exaggerated, a large multi-family apartment building may produce more traffic, more pressure on often inadequate and underfunded local infrastructure, and more shadows on neighboring parcels. Local residents often possess greater awareness of and sensitivity to these distinctly local concerns.⁵⁷

Given these tensions, when should states intervene and what form should these interventions take? One way to evaluate potential state interventions would be to consider how well they further a set of identifiable goals, such as increasing housing supply and affordability. However, focusing solely on a particular empirical question—to the extent the effects of a specific intervention can be adequately isolated and measured—poses the risk of ignoring countervailing interests, including the value of enabling the exercise of local power over those distinctly local concerns that do exist. As such, the existence of extra-jurisdictional externalities does not necessarily lead to the conclusion that states rather than local governments should control all aspects of land use regulation that generate such externalities.

⁵⁶ See, e.g., A.B. 2923, 2017–2018 Leg., Reg. Sess. (Cal. 2018), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB2923 [<https://perma.cc/8W7C-H34V>]. A.B. 2923 states in its findings:

The state's economic health is significantly tied to the regional economic health of the San Francisco Bay Area. The growth and success of the Bay Area's economy is threatened by several challenges, including inadequate and unaffordable housing and excessive and increasing roadway congestion. In the state-mandated sustainable communities strategy for the Bay Area, locating affordable and market-rate housing near high-capacity transit is a primary tool with which to address these challenges and will keep the Bay Area on track to meet its state-mandated greenhouse gas emissions reduction targets.

Id.

⁵⁷ See Eric T. Freyfogle, *The Particulars of Owning*, 25 *ECOLOGY L.Q.* 574, 580 (1999) ("Sensible land use decisions require knowledge of the land itself, in its many variations Local people typically know the land better than outsiders. For land planning to prove successful, their knowledge is needed just as much as their cooperation."); see also Bronin, *supra* note 43, at 238 (stating that "[s]cholars have argued that localities should have sole decision-making powers over land use because local individuals understand the unique characteristics of their land better than outsiders do and can therefore make fairer or more competent decisions. By the same logic, outsiders lack an understanding of how decisions about land use could impact the aesthetic character, property values, and demographic makeup of the local community").

The current housing crisis, its broader implications, and the systemic factors that render local governments incapable (or unwilling) to address it justify aggressive forms of state intervention in local land use regulation. The question then becomes whether and how local concerns can still be addressed and what weight these concerns should be given. With these considerations in mind, the next two Parts evaluate state interventions with particular attention to how they allocate authority between the state and local government. Although increasing housing supply is clearly an interest of statewide importance, such interventions can and should provide a mechanism for consideration of legitimate countervailing local concerns.

II. THE FIRST GENERATION OF STATE LAND USE INTERVENTIONS

Local control of zoning is the historical norm in the United States, but in the early 1970s observers perceived a shift towards a more prominent state role. Most notably, a 1971 report entitled *The Quiet Revolution in Land Use Control* studied how states were exercising their regulatory authority to address a range of complex land use issues that had state-wide or regional effects.⁵⁸ While recognizing that “[s]tates were attempting to address truly statewide and regional issues rather than merely create another layer of land development control,” the authors concluded that this effort ultimately resulted in significant duplication and an explosion in the number of required permits.⁵⁹ In fact, the 1970s marks the time when zoning regulations became increasingly restrictive, resulting in “a sharp break with the past.”⁶⁰

In a follow up article, *The Quiet Revolution Revisited: A Quarter Century of Progress*, David Callies remarked that in the more than two decades since its publication “[l]ocal zoning has not withered away (nor did we anticipate that it would)” and that “[t]here has been precious little permit simplification.”⁶¹ Sara Bronin put the point more bluntly, noting that in the last few decades local control and discretion has only expanded, including in the area of environmental

⁵⁸ See generally BOSSELMAN & CALLIES, *supra* note 17. The report’s nine case studies of state land use laws focused on environmental concerns, but it includes the Massachusetts Zoning Appeals Law. See *id.* at 164–86.

⁵⁹ David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 26 URB. L. 197, 197–98 (1994).

⁶⁰ William A. Fischel, *The Rise of the Homevoters: How the Growth Machine Was Subverted by OPEC and Earth Day*, in EVIDENCE AND INNOVATION IN HOUSING POLICY 13, 13 (Lee Anne Fennell & Benjamin J. Keys eds., 2017); see also HOUSING DEVELOPMENT TOOLKIT, *supra* note 6, at 5 (“Over the past three decades, local barriers to housing development have intensified, particularly in the high-growth metropolitan areas increasingly fueling the national economy.”).

⁶¹ Callies, *supra* note 59, at 197.

protection specifically, and “the quiet revolution failed to materialize.”⁶² This failure is not surprising, given the history of deference to local control over zoning as well as the perception that local governments are better able to give voice to local expertise regarding the appropriate use of a particular parcel of land.⁶³ In the housing realm, a normative commitment to local control is often reinforced by opposition on the ground from homeowners resistant to greater density, more lower-income families, or a sense that state politicians are enabling greedy developers to ride roughshod over local resident taxpayers.

Nonetheless, three prominent state-level efforts to push local communities to permit more new housing, particularly affordable and multi-family housing, developed during the 1970s and remain in effect: Massachusetts’s Chapter 40B,⁶⁴ New Jersey’s *Mount Laurel* doctrine,⁶⁵ and California’s Housing Element Law.⁶⁶ Understanding these earlier efforts, and the methods by which they reshaped the allocation of zoning authority between state and local governments, will inform our evaluation of more recent interventions.

A. Massachusetts: A Focus on Streamlining Development Approvals and Encouraging Zoning Reform

Passed into law in 1972, the Massachusetts Comprehensive Permit Act streamlines the approval process for affordable housing developments in the Commonwealth.⁶⁷ Chapter 40B allows developers to apply for a “comprehensive permit” from a local Zoning Board of Appeals (“ZBA”) to build a new development that contains a certain percentage of affordable units.⁶⁸ The comprehensive permit process enables the local ZBA to waive certain land use regulations and coordinate the various permits required for a development,

⁶² See Bronin, *supra* note 43 at 232; see also SELMI ET AL., *supra* note 1, at 477 (stating that “[n]ow, many decades later, it is apparent that the fundamental change in the governmental level of regulatory control detected in the early 1970s has proceeded more slowly than anticipated”).

⁶³ SELMI ET AL., *supra* note 1, at 478 (“One powerful reason [for resistance to shifting control of land use to higher level of argument] is the pervasive conviction that, because land use decisions have an important impact on living conditions in local communities, those elected representatives who are closest to the community should decide them.”).

⁶⁴ See *infra* notes 67–78 and accompanying text.

⁶⁵ See *infra* notes 79–95 and accompanying text.

⁶⁶ See *infra* notes 96–116 and accompanying text.

⁶⁷ MASS. GEN. LAWS ch. 40B (2016); see Carolina K. Reid et al., *Addressing California’s Housing Shortage: Lessons from Massachusetts Chapter 40B*, 25 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 241, 245 (2017). The Massachusetts Comprehensive Permit Act is often referred to as “Chapter 40B” after its provision of the Massachusetts General Laws.

⁶⁸ MASS. GEN. LAWS ch. 40B, § 21. To qualify for a comprehensive permit, a proposed rental development must ensure that at least 20% of units are affordable to households earning under 50% of the area median income (“AMI”), and a development of ownership units must have at least 25% of units at prices affordable to households earning under 80% of the AMI. Reid et al., *supra* note 67, at 248, 265 nn.115–16.

avoiding the need for a developer to go before multiple boards.⁶⁹ A developer whose permit is denied can appeal the local ZBA's decision to a state-level Housing Appeals Committee ("HAC").⁷⁰ In communities where at least ten percent of housing units are affordable to low- and moderate-income households, the local ZBA's decision will not be overturned.⁷¹ In other communities, the state HAC may overturn a local ZBA decision and grant a comprehensive permit upon a finding that the regional need for housing is not outweighed by local concerns.⁷²

Although Chapter 40B institutes a streamlined development approval process, the review of a proposed development occurs in the first instance at the local level. The threat of state intervention in local zoning (via the HAC) serves in part to motivate local zoning changes. Even when the HAC does intervene, it will grant a comprehensive permit only upon a showing that local concerns do not outweigh the regional need for housing. In these ways, Chapter 40B channels, rather than displaces, local decision making.⁷³

Chapter 40B has been relatively successful in increasing the number of communities in which more than ten percent of housing is affordable to low- and moderate-income households by increasing it from only 4 of Massachusetts's 351 cities and towns in 1972 to 40 in 2012⁷⁴ and 44 in 2014.⁷⁵ The Act is credited with producing 70,000 housing units, 35,000 of which are low- to moderate-income.⁷⁶

⁶⁹ Rachel G. Bratt & Abigail Vladeck, *Addressing Restrictive Zoning for Affordable Housing: Experiences in Four States*, 24 HOUSING POL'Y DEBATE 594, 600 (2014).

⁷⁰ MASS. GEN. LAWS ch. 40B, § 22.

⁷¹ *Id.* § 20 ("Requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after comprehensive hearing in a city or town where (1) low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest federal decennial census of the city or town or on sites comprising one and one half per cent or more of the total land area zoned for residential, commercial or industrial use."); 760 MASS. CODE REGS. 56.07(2)(b) (LexisNexis 2018) ("In any case, the Board may show conclusively that its decision was Consistent with Local Needs by proving that one or more of the grounds described in 760 CMR 56.03(1) has been satisfied . . .").

⁷² Bratt & Vladeck, *supra* note 69, at 600.

⁷³ Cf. Michael C. Pollack, *Land Use Federalism's False Choice*, 68 ALA. L. REV. 707, 712 (2017) (examining federal interventions in land use decision making). Pollack distinguishes between "decision-channeling constraints that require localities to take certain deliberative steps before making certain decisions, [and] . . . decision-displacing rules that limit the set of decisions localities may make in the first place." *Id.*

⁷⁴ Reid et al., *supra* note 67, at 251.

⁷⁵ CITIZENS' HOUSING & PLAN. ASS'N, CHAPTER 40B: THE STATE'S AFFORDABLE HOUSING LAW 1 (2014), https://www.chapa.org/sites/default/files/40%20B%20fact%20sheet_0.pdf [<https://perma.cc/AW2A-A92N>].

⁷⁶ *MassHousing Planning and Programs Department*, MASSHOUSING, https://www.masshousing.com/portal/server.pt/community/planning_programs/207/masshousing%27s_planning_programs_department [<https://perma.cc/HRN4-P6ZP>]. Low- to moderate-income is considered households that make less than eighty percent of the area median income. *See id.*

Although Chapter 40B is the most famous zoning override or “antisnob zoning” legislation, six other states have procedures through which either an administrative agency or the judiciary can review a local land use decision involving an affordable housing proposal.⁷⁷ Although these processes vary, in each of these states the burden of proof is shifted to local governments, which must “establish valid reasons for rejecting or restricting such proposals.”⁷⁸

B. New Jersey: A Focus on Planning and Development Approvals

Starting in 1975 the Supreme Court of New Jersey decided a series of cases that have collectively framed what is known as the *Mount Laurel* doctrine.⁷⁹ The first decision, *Southern Burlington County N.A.A.C.P. v. Mount Laurel Township* (“*Mount Laurel I*”), required municipalities to take steps, through their land use regulations, to make the development of low- and moderate-income housing “realistically possible . . . at least to the extent of the municipality’s fair share of the present and prospective regional need[s].”⁸⁰ The court’s decision emphasized that zoning regulations, as an exercise of the police power, must further the general welfare.⁸¹ Because the zoning power is delegated by the state to local authorities, it remains subject to the same restrictions that bind the state.⁸² As such, “when regulation does have a substan-

⁷⁷ Peter Salsich, *State and Local Regulation Promoting Affordable Housing*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 83, 89 (Tim Iglesias & Rochelle E. Lento eds., 2011) (discussing procedures for land use decision making in Illinois, New Jersey, Rhode Island, California, Connecticut, and New Hampshire).

⁷⁸ *Id.* The Rhode Island Low and Moderate Income Housing Act of 1991 is similar to Chapter 40B in many respects, including setting a goal of having ten percent of the total housing in each municipality affordable to low- and moderate-income households, establishing a comprehensive permit process, and creating a State Housing Appeals Board. R.I. GEN. LAWS ANN. §§ 45-53-1 to -9 (Supp. 2018). Connecticut and Illinois also have an appeals process similar to Massachusetts and an affordable housing goal for each municipality, set as a percentage of the overall housing stock. Affordable Housing Land Use Appeals Act, CONN. GEN. STAT. § 8-30G (2013); Illinois Housing Planning and Appeal Act, 310 ILL. COMP. STAT. 67/1-50 (Supp. 2003). See generally NAT’L ASS’N OF HOME BUILDERS, STATE SURVEY OF HOUSING APPEALS STATUTES 1, 18 (2017), <http://www.hbact.org/resources/Documents/GA-Legislative%20Affairs/state-survey-of-housing-appeals-statutes-201706.pdf> [<https://perma.cc/4JPU-U78V>] (discussing process in Massachusetts, Rhode Island, Connecticut and Illinois, as well as California’s Housing Accountability Act, “which does not provide for an independent appeals process”).

⁷⁹ See John M. Payne, *Fairly Sharing Affordable Housing Obligations: The Mount Laurel Matrix*, 22 W. NEW ENG. L. REV. 365, 365 (2001) (describing the *Mount Laurel* doctrine as “probably the best known affordable-housing initiative of our time, and without a doubt the most ambitious judicial ruling in the field of land use controls since World War II”). For a detailed description of the initial *Mount Laurel* litigation, see Briffault, *supra* note 1, 48–56.

⁸⁰ *S. Burlington Cty. NAACP v. Mount Laurel Twp.* (“*Mount Laurel I*”), 336 A.2d 713, 724 (N.J. 1975).

⁸¹ *Id.* at 725 (“Conversely, a zoning enactment which is contrary to the general welfare is invalid.”).

⁸² *Id.* at 726.

tial external impact, the welfare of the state's citizens *beyond the borders of the particular municipality* cannot be disregarded and must be recognized and served.”⁸³ Although *Mount Laurel I* was focused on low- and moderate-income housing, given the effects of restrictive zoning on the supply of housing affordable at all income levels, the same assessment of the external effects of certain zoning regulations on the general welfare of the state should apply.⁸⁴

In a subsequent decision eight years later, in *Southern Burlington County N.A.A.C.P. v. Mount Laurel Township* (“*Mount Laurel II*”),⁸⁵ the Supreme Court of New Jersey recognized a “builder’s remedy,” which enabled developers to build “at a higher density than would otherwise be provided so long as the builder also provided a portion of affordable housing in its construction.”⁸⁶ Once again the court emphasized the external effects of zoning on the general welfare, albeit this time, the court focused on the general welfare on a regional level rather than the state level.⁸⁷

Following these decisions, in 1985, the New Jersey Legislature enacted the Fair Housing Act, which established the Council on Affordable Housing (“COAH”) and purported to codify the mandates of *Mount Laurel I & II*.⁸⁸ COAH was tasked with enforcing the municipal fair-share guidelines and was

⁸³ *Id.* (emphasis added); see also Davidson, *supra* note 54 (discussing *Mount Laurel I*).

⁸⁴ Although it focuses on the variety of housing available and on low- and moderate-income specifically, passages in *Mount Laurel I* might be read as an implicit critique of broader restrictions on housing supply. Consider, for instance:

It is plain beyond dispute that proper provision for adequate housing of *all categories of people* is certainly an absolute essential in promotion of the general welfare required in all local land use regulation. Further the universal and constant need for such housing is so important and of such broad public interest that the general welfare which developing municipalities like Mount Laurel must consider extends beyond their boundaries and cannot be parochially confined to the claimed good of the particular municipality.

Mount Laurel I, 336 A.2d at 727–28 (emphasis added).

⁸⁵ *S. Burlington Cty. NAACP v. Mount Laurel Twp.* (“*Mount Laurel II*”), 456 A.2d 390 (N.J. 1983).

⁸⁶ Daniel Meyler, *Is Growth Share Working for New Jersey?*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 219, 227 (2010). In order for developers to build, the builders would first have to establish that the municipality’s zoning was exclusionary. See *id.*

⁸⁷ *Mount Laurel II*, 456 A.2d at 415 (emphasizing that “[w]hen the exercise of [the police] power by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare—in this case the housing needs—of those residing outside of the municipality but within the region that contributes to the housing demand within the municipality”). A state court in New York has similarly assessed local zoning in relation to its regional effects. See *In re Cty. of Monroe*, 530 N.E.2d 202, 203–04 (N.Y. 1988) (noting that a county may challenge a municipality’s restrictive zoning on grounds that county’s public interest in proceeding with development outweighs municipality’s interest in restricting such development); *Berenson v. Town of New Castle*, 341 N.E.2d 236, 242–43 (N.Y. 1975) (stating that any party that owns or controls land may challenge municipality’s restrictive zoning on grounds that such zoning does not take sufficient account of regional housing needs for multi-family housing).

⁸⁸ See Robert C. Holmes, *The Clash of Home Rule and Affordable Housing: The Mount Laurel Story Continues*, 12 CONN. PUB. INT. L.J. 325, 349–50 (2013).

responsible for allocating affordable housing obligations among the state's municipalities every six years.⁸⁹ Localities that completed a voluntary housing element and a fair share plan could petition COAH for certification of the plan, which if granted, rendered a municipality's housing element and ordinances presumptively valid in any exclusionary zoning litigation for a finite period.⁹⁰ Critics argued that COAH still granted "inappropriate deference to local discretion and control."⁹¹ Frustrated by COAH's failure to enforce the obligations of local governments under the *Mount Laurel* doctrine, the Supreme Court of New Jersey recently held that it would enforce those obligations itself.⁹²

Mount Laurel emphasizes local planning more than Chapter 40B.⁹³ The requirement that municipalities take steps to plan and zone in a way that provides for their respective "fair share" of affordable housing arguably requires local governments to take more proactive steps than are required in Massachusetts. More than 60,000 new affordable units had been built and nearly 15,000 rehabilitated in New Jersey as of 2011 due to *Mount Laurel*.⁹⁴ Nonetheless, housing prices in New Jersey generally remain high, which some attribute in part to communities imposing growth control measures and resisting any new development in the face of *Mount Laurel*.⁹⁵

C. California: A Focus on Planning and Procedure

Nine of the ten least affordable large metro areas and eight of the ten least affordable small metro areas (with populations under 500,000) are in Califor-

⁸⁹ *Id.* at 354.

⁹⁰ *In re Adoption of N.J.A.C. 5:96 & 5:97* N.J. Council on Affordable Hous., 110 A.3d 31, 35 (N.J. 2015). A housing element is a required part of each municipality's master plan and specifies plans for housing development sufficient to meet current and expected needs. N.J. STAT. ANN. § 52:27D-310 (West 2010). A fair share plan provides a "realistic opportunity" for the development of low- and moderate-income housing within a municipality. See *About the Council*, N.J. DEP'T OF CMTY. AFFAIRS, <https://www.state.nj.us/dca/affiliates/coah/about/> [<https://perma.cc/238F-PY5K>].

⁹¹ Holmes, *supra* note 88, at 350.

⁹² See *In re Adoption of N.J.A.C. 5:96 & 5:97*, 110 A.3d at 42 ("[T]he administrative forum is not capable of functioning as intended by the FHA due to the lack of lawful Third Round Rules assigning constitutional obligations to municipalities . . . Accordingly, we conclude that towns must subject themselves to judicial review for constitutional compliance, as was the case before the FHA was enacted.").

⁹³ Massachusetts recently provided a mechanism through which municipalities with an approved "housing production plan" can be shielded from appeals to the HAC, but few jurisdictions have obtained such approval and comprehensive planning more generally receives little emphasis in Massachusetts. See *Chapter 40 B Housing Production Plan*, MASS.GOV, <https://www.mass.gov/service-details/chapter-40-b-housing-production-plan> [<https://perma.cc/SJY7-GLQA>].

⁹⁴ See PROPOSED AND COMPLETED AFFORDABLE UNITS, N.J. DEP'T OF CMTY. AFFAIRS, <http://www.nj.gov/dca/services/lps/hss/transinfo/reports/units.pdf> [<https://perma.cc/92JN-7CZY>].

⁹⁵ WILLIAM A. FISCHER, ZONING RULES! THE ECONOMICS OF LAND USE REGULATION 361 (2015); see *infra* notes 316–320 and accompanying text.

nia.⁹⁶ Unaffordable housing persists throughout the state, even outside coastal urban areas.⁹⁷ A 2015 report by the state's Legislative Analyst's Office noted that a lack of supply has helped drive up housing costs, causing problems for individual households and the state's economy.⁹⁸ This is not the first time concerns regarding housing supply and affordability have received statewide attention in California. In 1980, the California State Legislature declared "[t]he availability of housing" an issue of "vital statewide importance"⁹⁹ and required localities to adopt "a comprehensive, long term general plan," which included a "housing element," a specific plan for meeting local housing needs.¹⁰⁰ The housing-element requirement was first introduced in 1969, but the 1980 law strengthened the earlier version and required that local housing elements be updated every five years.¹⁰¹

Under current California law, a municipality's "housing element" must include "[a]n assessment of housing needs and an inventory of resources and constraints"¹⁰² It must include a specified analysis of population and employment trends, land prices, construction costs, the availability of financing, and constraints, including zoning, on the development of housing at all income levels.¹⁰³ Additionally, local governments must provide an inventory of suitable land for residential development and "[a] statement of the community's goals, quantified objectives, and policies relative to the maintenance, preservation, improvement, and development of housing" as well as a timeline for taking specific actions to implement the localities' policies and achieve its goals

⁹⁶ John McManus, *9 of 10 of US's Least Affordable Housing [Large] Markets Are California's Metros*, BUILDER (Nov. 13, 2017), https://www.builderonline.com/building/regulation-policy/9-of-10-of-uss-least-affordable-housing-large-markets-are-california-metros_o [<https://perma.cc/VSP8-WPJH>].

⁹⁷ See Sara Kimberlin, *Californians in All Parts of the State Pay More Than They Can Afford for Housing*, CAL. BUDGET & POL'Y CTR. (2017), <https://calbudgetcenter.org/resources/californians-parts-state-pay-can-afford-housing/> [<https://perma.cc/PS9K-TCCH>] (explaining that "while housing costs vary across California, housing affordability is clearly a problem throughout the state when housing costs are compared to incomes"); see also Matt Levin, *How Sky-high Housing Costs Make California the Poorest State*, S.F. CHRON. (Oct. 1, 2017), <https://www.sfchronicle.com/bayarea/article/How-sky-high-housing-costs-make-California-the-12244924.php> [<https://perma.cc/9B84-4SNQ>] ("When the cost of living is factored in, the Golden State has the highest poverty rate in the country.").

⁹⁸ MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 1, 3 (2015), <http://www.lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf> [<https://perma.cc/TH85-5ZX7>].

⁹⁹ CAL. GOV'T CODE § 65580 (West 2018).

¹⁰⁰ ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS: CASES AND MATERIALS 779 (4th ed. 2013) (quoting CAL. GOV'T CODE § 65300 (2013)).

¹⁰¹ PAUL G. LEWIS, PUB. POL'Y INST. OF CAL., CALIFORNIA'S HOUSING ELEMENT LAW: THE ISSUE OF LOCAL NONCOMPLIANCE 11, 16 (2003). Other states that require a housing element in local comprehensive plans include Vermont, Illinois, Nebraska, Minnesota, Rhode Island, Florida, Arizona, and Maine. See Ngai Pindell, *Planning for Housing Requirements*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 21, 24 n.15 (Tim Iglesias & Rochelle E. Lento eds., 2d ed. 2011).

¹⁰² CAL. GOV'T CODE § 65583 (West 2019).

¹⁰³ See *id.*

through means including “the administration of land use and development controls”¹⁰⁴ The actions required of local governments include making sites available—if necessary by means of rezoning specific sites to allow greater density—with the zoning and services necessary to help accommodate the community’s “share of the regional housing need for each income level”¹⁰⁵ In consultation with the state’s Department of Housing and Community Development, regional councils determine and allocate among local jurisdictions their “fair share” of regional housing needs.”¹⁰⁶

California lacks a builder’s remedy or appeal to a state board similar to those in New Jersey and Massachusetts.¹⁰⁷ As Ngai Pindell observed, “[t]he strength of the California statute is its focus on procedure.”¹⁰⁸ Its effect on housing supply is more ambiguous. As of 2007, the last year in which California published the overall compliance rate, eighty percent of local governments had adopted housing elements in compliance with state law.¹⁰⁹ However, a subsequent independent tally found, as of July 2010, a compliance rate of only forty-two percent, which did grow to sixty-seven percent thirteen months later.¹¹⁰

California does not maintain a database tracking each municipality’s affordable housing production.¹¹¹ One analysis of California municipalities

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* § 65583(c)(1); see also Pindell, *supra* note 101, at 26 n.28 (“Where the inventory analysis falls short of identifying sufficient sites to satisfy a jurisdiction’s share of regional housing needs, the jurisdiction’s schedule of actions must provide sufficient sites developable ‘by right’ to make up the shortfall in low- and very low-income sites demonstrated in the inventory.”) (citing CAL. GOV’T CODE § 65583.2(c) (West 2019)).

¹⁰⁶ Pindell, *supra* note 101, at 25.

¹⁰⁷ As Chris Elmendorf notes in a forthcoming article, California has recently taken steps in the direction of a builder’s remedy. Christopher S. Elmendorf, *Beyond the Double Veto: Land Use Plans as Preemptive Intergovernmental Contracts* 28 (Feb. 9, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3256857> [<https://perma.cc/UL4H-W573>]. Elmendorf examines many of the same legal developments discussed in this paper, but he focuses in more detail on a broader set of reforms to California’s housing element law, arguing they have the greatest potential for easing restrictions of new housing development. His nuanced account frames California’s evolving regulatory framework as a form of “preemption by intergovernmental contract” and suggests ways to further strengthen it. See *id.* at 79.

¹⁰⁸ Pindell, *supra* note 101, at 25; see also Steven J. Eagle, “Affordable Housing” as Metaphor, 44 FORDHAM URB. L.J. 301, 336 (2017) (“The California provisions are a complex and top-down array of nested plans and requirements.”).

¹⁰⁹ RACHEL G. BRATT, CITIZEN’S HOUS. & PLANNING ASS’N, OVERCOMING RESTRICTIVE ZONING FOR AFFORDABLE HOUSING IN FIVE STATES: OBSERVATIONS FOR MASSACHUSETTS 137 (2012) (citing CAL. DEP’T OF HOUS. & CMY. DEV., STATUS OF HOUSING ELEMENTS IN CALIFORNIA: 2007 REPORT TO THE LEGISLATURE), https://www.chapa.org/sites/default/files/BrattOvercomingRestrictiveZoning112012_0.pdf [<https://perma.cc/EQ7U-FLYZ>].

¹¹⁰ *Id.* at 138.

¹¹¹ Bratt & Vladeck, *supra* note 69, at 633 n.26 (“Perceptions concerning the effectiveness of the California statute must be tempered by the lack of a centralized housing production database that

found that compliance with the housing element law as of 1994 did not predict the number of permits for single-family or multi-family housing issued during the period of 1994 through 2000.¹¹² Implementation challenges include significant local noncompliance.¹¹³ As Jonathan Zasloff has observed: “the law has suffered from substantive gaps that the Legislature has been slow to close, most importantly, the lack of any requirement that cities actually hit their RHNA [Regional Housing Needs Assessment] number.”¹¹⁴ More generally, despite the complex set of laws in California requiring local governments to plan for their share of future housing needs, attorneys and housing advocates contend the laws are rarely enforced.¹¹⁵ Parts of California’s 2017 housing package seek to address these and other critiques of the state’s Housing Accountability Act and housing element law.¹¹⁶

D. Some Trends

Chapter 40B, the *Mount Laurel* doctrine, and California’s Housing Element adopt different approaches to pushing local governments to allow more housing development. Massachusetts provides affordable housing developers with a streamlined approval process and the opportunity to appeal adverse decisions to the state. It encourages local governments to plan and zone for more housing through the promise of a safe harbor from state intervention. New Jersey also provides a mechanism for developers to seek relief at the state level when a local government rejects a proposed development. The *Mount Laurel* doctrine shields municipalities from exclusionary zoning litigation if they take steps to plan for their fair share of the regional housing need. Massachusetts

would provide information on each jurisdiction’s housing needs, as specified in the housing elements, compared with housing production outcomes.”).

¹¹² Paul G. Lewis, *Can State Review of Local Planning Increase Housing Production?*, 16 HOUSING POL’Y DEBATE 173, 192 (2005) (“[California’s] method for overseeing local housing elements did not appear to result in a faster pace of residential development among municipalities that were seen as meeting their planning requirements, at least for the mid- to late 1990s.”).

¹¹³ See generally LEWIS, *supra* note 101 (discussing implementation challenges).

¹¹⁴ See *id.*; Jonathan Zasloff, *The Price of Equality: Fair Housing, Land Use, and Disparate Impact*, 48 COLUM. HUM. RTS. L. REV. 98, 150 (2017).

¹¹⁵ See Irvin Dawid, *Putting Teeth into the California Housing Accountability Act*, PLANETIZEN (Aug. 22, 2017), <https://www.planetizen.com/node/94377/putting-teeth-california-housing-accountability-act> [<https://perma.cc/C76F-CYGB>]; Angela Hart, ‘Yes in My Backyard.’ *Silicon Valley Money Fuels Fight Against State’s Housing Crisis*, SACRAMENTO BEE (July 17, 2017), <https://www.sacbee.com/news/politics-government/capitol-alert/article161525828.html> [<https://perma.cc/C68Q-Y22X>]; see also Elmendorf, *supra* note 107, at 36–37 (discussing critiques of California’s enforcement of state planning requirements). Although as this Article was about to be published, California’s new governor was taking new steps to enforce these laws. See *supra* note 4 (discussing lawsuit filed by state against Huntington Beach).

¹¹⁶ See *California’s 2017 Housing Package*, CAL. DEP’T OF HOUS. & CMTY. DEV., <http://www.hcd.ca.gov/policy-research/lhp.shtml> (summarizing six pieces of legislation); see also Elmendorf, *supra* note 107, at 38–48 (discussing California’s legislation and related housing reforms).

recently provided a mechanism through which municipalities with an approved “housing production plan” can be shielded from appeals to the HAC, but few jurisdictions have obtained such approval and comprehensive planning more generally receives little emphasis in Massachusetts.¹¹⁷ California differs from these two models as, at least until recently, it has not provided a specific mechanism for appealing adverse local decisions, instead emphasizing planning and procedural requirements. As noted, California appears to be the least effective of the three regimes, although recent legislation may change this.

These state programs focus on planning requirements and procedural reforms and, in the case of New Jersey and Massachusetts (and now, to a limited degree, California), use the threat of state intervention in the review of a particular project to push local governments towards zoning reform. The appeal of an adverse local decision to a state entity can generate significant uncertainty for both developers and the local government subject to the decision. Such uncertainty can, in turn, create significant information costs for potential developers. As Rick Hills and David Schleicher have argued in the context of discretionary, piecemeal zoning, high information costs tend to reduce the marketability of land and the desirability of development in a particular jurisdiction.¹¹⁸ The uncertainty generated by a potential appeal to the state might also indirectly constrain the exercise of local authority.¹¹⁹ For example, developers in Massachusetts have been known to threaten using Chapter 40B for an affordable housing development in order to obtain concessions from a local government for a proposed development without affordable housing.¹²⁰ To avoid the uncertain outcome of a potential appeal, local governments might grant more con-

¹¹⁷ See *Chapter 40 B Housing Production Plan*, *supra* note 93. Although this provision creates an incentive for localities to develop a housing plan—in that doing so would allow it to avoid state intervention—only approximately one-third of Massachusetts jurisdictions have done so and an even smaller number of plans have received a certificate of compliance. See MASS. DEP’T OF HOUS. & CMTY. DEV., CERTIFIED COMMUNITIES (revised Aug. 2, 2018), <https://www.mass.gov/files/documents/2018/08/02/CertComm.pdf> [<https://perma.cc/L5C4-FCQK>] (identifying ten municipalities certified compliant); MASS. DEP’T OF HOUS. & CMTY. DEV., HOUSING PRODUCTION PLANS 760 CMR 56.03(4) FREQUENTLY ASKED QUESTIONS (2013), <https://www.mass.gov/files/documents/2018/09/18/hpfaq.pdf> [<https://perma.cc/M9N7-7P2R>] (stating that “[i]f a community has a DHCD approved HPP and is granted a DHCD certification of compliance with the plan, a decision by the Zoning Board Appeals (ZBA) to deny a Comprehensive Permit application will be deemed ‘Consistent with Local Needs’ under MGL Chapter 40B. ‘Consistent with Local Needs’ means the ZBA’s decision will be upheld by the Housing Appeals Committee (HAC)”). This may be due to the fact that in many municipalities there are few if any comprehensive permit applications. Bratt & Vladeck, *supra* note 69, at 600.

¹¹⁸ Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 116 (2015).

¹¹⁹ Cf. DAVID J. BARRON ET AL., RAPPAPORT INST. FOR GREATER BOS., DISPELLING THE MYTH OF HOME RULE: LOCAL POWER IN GREATER BOSTON 9, 41 (discussing how uncertainty regarding scope of local authority can lead local governments to “exercise caution” in invoking that power).

¹²⁰ Theodore C. Regnante & Paul J. Haverty, *Compelling Reasons Why the Legislature Should Resist the Call to Repeal Chapter 40B*, 88 MASS. L. REV. 77, 83 (2003).

cessions than they otherwise would. In addition, the fairly open-ended balancing inquiry under Chapter 40B—which weighs local concerns against regional housing needs—can create further uncertainty for local governments with regards to what local concerns are sufficiently compelling in a given instance. As the next Part explores in detail, more recent interventions reduce this uncertainty because they tend instead to directly displace specific aspects of local zoning.

III. A NEW GENERATION OF STATE LAND USE INTERVENTIONS

States preempt local government land use and housing policies in a number of areas. As Anika Singh Lemar carefully documents in a recent article, many of these interventions, which limit local regulation of specific land uses, are not new.¹²¹ They include measures in the realms of family day cares, group homes, manufactured housing, and small-scale alternative energy infrastructure.¹²² In addition, thirty-one states prohibit rent control statewide and many of these restrictions have been in place for decades.¹²³

In more recent years, states have increasingly prohibited local mandatory inclusionary zoning programs, starting with Virginia (in 1997)¹²⁴ and Texas (in 2005).¹²⁵ More recently, Arizona (in 2015),¹²⁶ Tennessee (in 2016),¹²⁷ Kansas (in 2016),¹²⁸ and Wisconsin (in 2018)¹²⁹ have imposed their own restrictions. As the “sharing economy” has grown in prominence over the past few years, a number of states have constrained and in some cases essentially prohibited local efforts to regulate short-term rentals, including Arizona,¹³⁰ Florida,¹³¹

¹²¹ Lemar, *supra* note 2, at 2–3.

¹²² *Id.* at 3.

¹²³ *Rent Control Laws by State*, NAT’L MULTIFAMILY HOUS. COUNCIL (Aug. 29, 2018), <https://www.nmhc.org/research-insight/analysis-and-guidance/rent-control-laws-by-state/> [https://perma.cc/5QMD-YHMA].

¹²⁴ H 2156, Ch. 607, 1997 Gen. Assemb., Reg. Sess. (Va. 1997) (codified at VA. CODE ANN. § 15.2-2305 (2016)). A separate, more permissive, provision applies to certain parts of the state. *Id.* § 15.2-2304.

¹²⁵ H.B. 2266, 79th Leg., Reg. Sess. (Tex. 2005) (codified at TEX. LOC. GOV’T CODE ANN. § 214.905 (West 2016)).

¹²⁶ S.B. 1072, 52nd Leg., Reg. Sess. (Ariz. 2015) (codified at ARIZ. REV. STAT. ANN. § 9-461.16 (2015)).

¹²⁷ S.B. 1636, 110th Gen. Assemb., Reg. Sess. (Tenn. 2016) (codified at TENN. CODE ANN. § 66-35-102 (2007 & Supp. 2018)).

¹²⁸ S.B. 366, 2015–2016 Leg., Reg. Sess. (Kan. 2016) (codified at KAN. STAT. ANN. § 12-16,120 (West 2018)).

¹²⁹ 2017 A.B. 770, 2017–2018 Leg., Reg. Sess. (Wis. 2017) (codified at WIS. STAT. ANN. § 66.1015(3) (West 2018)).

¹³⁰ ARIZ. REV. STAT. ANN. § 9-500.39 (2018) (“A city or town may not prohibit vacation rentals or short-term rentals.”).

¹³¹ FLA. STAT. ANN. § 509.032(7)(b) (West 2016) (“A local law, ordinance, or regulation may not prohibit vacation rentals or regulate the duration or frequency of rental of vacation rentals.”).

New York,¹³² Utah,¹³³ Tennessee,¹³⁴ Idaho,¹³⁵ and Indiana.¹³⁶ Although the motivations for and practical effects of these particular interventions differ, collectively they suggest an increased willingness of state governments to displace local regulation in a range of contexts related to housing and land use.

This Part analyzes a particular set of recent states' interventions focused on increasing housing supply by mandating streamlined local development approval processes, constraining local discretion, or directly displacing local zoning. The discussion focuses on legal developments and proposals on the West Coast (particularly in California) and the Northeast (particularly in Massachusetts). These areas of the country are marked by high housing prices as well as particularly onerous land use regulations, so it is not surprising that they are also where reform efforts have first begun.¹³⁷ Part III then shifts to a closer examination of one specific trend: state laws allowing single-family homeowners to develop accessory dwelling units. Although narrow in scope, these laws are particularly intrusive, displacing local zoning regulations that would restrict or impede certain forms of housing development. Debates over accessory dwelling units ("ADUs") also provide unique insights on the tension between a state interest in increased housing production and countervailing interests of local control.

¹³² N.Y. MULT. DWELL. LAW § 121 (McKinney 2016 & Supp. 2019) (prohibiting advertising of a dwelling unit for term of less than thirty consecutive days).

¹³³ UTAH CODE ANN. §§ 10-8-85.4, 17-50-338 (LexisNexis 2018) ("[A] legislative body may not . . . enact or enforce an ordinance that prohibits an individual from listing or offering a short-term rental on a short-term rental website.").

¹³⁴ S.B. 1086, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018) (to be codified at TENN. CODE ANN. § 66-38-104) ("[A] local governing body shall not . . . [p]rohibit the use of property as a short-term rental unit.").

¹³⁵ H.B. 216, 64th Leg., Reg. Sess. (Idaho 2017) (codified at IDAHO CODE ANN. § 67-6539 (2018)) ("Neither a county nor a city may enact or enforce any ordinance that has the express or practical effect of prohibiting short-term rentals or vacation rentals in the county or city.").

¹³⁶ H.E.A. 1035, 120th Gen. Assemb., 2d Reg. Sess. (Ind. 2018) (codified at IND. CODE ANN. § 36-1-24-8 (2018)) ("A short term rental of owner occupied short term rental property is a permitted residential use under any applicable zoning ordinance of a unit and may not be disallowed by any zoning ordinance . . . in a zoning district or classification of a unit that permits residential use.").

¹³⁷ See Fischel, *supra* note 60, at 13 ("It is now well established that in certain areas of the nation—the Northeast and West Coast especially—local land use regulation is associated with unusually high housing prices."); see also S.B. 2144, 189th Gen. Court, Reg. Sess. (Mass. 2017) ("Whereas, credible studies and reports have documented that Massachusetts' antiquated and confusing framework of municipal, zoning, subdivision control, and planning laws promotes inefficient land use practices that are contrary to smart growth."). State-level zoning reform efforts are, however, starting to spread to non-coastal and more conservative states, including Utah. See Nolan Gray & Brandon Fuller, *A Red-State Take on a YIMBY Housing Bill*, CITYLAB (Feb. 20, 2019), <https://www.citylab.com/perspective/2019/02/affordable-housing-bill-utah-california-zoning-reform-sb34/583075/> [<https://perma.cc/4CZV-DX2A>] (discussing Utah State Senate Bill 34, which would require local governments to plan and take steps to encourage development of more affordable housing).

A. The New Housing Preemption

1. California

The past three years have seen a flurry of state-wide housing and land use reform bills in California. California's Assembly Bill 2501, passed into law in 2016, amended the state's density bonus law, which was first introduced in 1979. The density bonus law requires local governments in California to grant developers a density bonus—enabling them to build a larger project—for any development with a minimum share of affordable housing.¹³⁸ The law, however, was rarely invoked by developers.¹³⁹ Assembly Bill 2501 mandated that localities adopt more streamlined and simplified approval processes for such developments, making the program more attractive to developers.¹⁴⁰ This followed a 2015 amendment to the density bonus law, which limited the number of parking spaces a city or county could require in a development with affordable units and located near public transit.¹⁴¹ By reducing the minimum parking requirements local governments could impose, that law sought to reduce development costs and “[a]llow for more effective use of the density bonus law.”¹⁴²

These laws were merely the prelude to fifteen bills related to housing passed into law in 2017.¹⁴³ Collectively these bills, in the words of one com-

¹³⁸ See Jenny Schuetz et al., *31 Flavors of Inclusionary Zoning: Comparing Policies from San Francisco, Washington, DC, and Suburban Boston*, 75 J. AM. PLAN. ASS'N 441, 442 (2009) (“Since 1979, [California] state law has required that each city and county provide density bonuses to developers seeking to build affordable or age-restricted housing.”) (citing CAL. GOV'T CODE § 65915 (2019)). The law “essentially creates a voluntary IZ [inclusionary zoning] program in jurisdictions without local IZ.” *Id.* at 443. Inclusionary zoning programs, which typically are adopted at the local level, “either require developers to make a certain percentage of the units within their market rate residential developments available at prices or rents that are affordable to specified income groups, or offer incentives that encourage them to do so.” *Id.* at 441.

¹³⁹ *Id.* at 443 (citing interviews with local officials).

¹⁴⁰ A.B. 2501, 2015–2016 Leg., Reg. Sess. (Cal. 2016) (amending CAL. GOV'T CODE § 65915).

¹⁴¹ A.B. 744, 2015–2016 Leg., Reg. Sess. (Cal. 2015) (amending CAL. GOV'T CODE § 65915(q)(2)) (“[I]f a development includes the maximum percentage of low- or very low income units provided for in paragraphs (1) and (2) of subdivision (f) and is located within one-half mile of a major transit stop, as defined in subdivision (b) of Section 21155 of the Public Resources Code, and there is unobstructed access to the major transit stop from the development, then, upon the request of the developer, a city, county, or city and county shall not impose a vehicular parking ratio, inclusive of handicapped and guest parking, that exceeds 0.5 spaces per bedroom.”).

¹⁴² See Cal. A.B. 744 (amending CAL. GOV'T CODE § 65915(q)(3)).

¹⁴³ *California's 2017 Housing Package*, *supra* note 116; see Jeff Collins, *Housing Crisis: See How State Lawmakers Are Putting More Teeth—and More Money—into Reform*, ORANGE CTY. REG. (Sept. 24, 2017), <https://www.ocregister.com/2017/09/24/housing-crisis-see-how-state-lawmakers-are-putting-more-teeth-and-more-money-into-reform/> [<https://perma.cc/5DBW-RT78>]; Antonio Pacheco, *California Moves to Relieve Housing Crisis with Key Legislative Wins*, ARCHITECT'S NEWSPAPER (Sept. 15, 2017), <https://archpaper.com/2017/09/california-affordable-housing-reform-bills/> [<https://perma.cc/AC5H-Z4CT>]; Press Release, Office of Governor Edmund G. Brown, Governor Brown Signs Comprehensive

mentator, “amounted to the first key win for state-led housing reform efforts.”¹⁴⁴ In addition to providing new funding for affordable housing, the legislation aimed at reducing regulations, streamlining approval processes, and strengthening the obligations of local governments under existing state housing laws and the mechanisms for enforcing these obligations.¹⁴⁵ In what follows, I focus specifically on measures that constrain local discretion to reject new development or take steps to liberalize local zoning.

Among the most notable of these laws, Senate Bill 35 streamlined the approval process for certain new housing—particularly urban infill development—in municipalities that failed to satisfy their obligations, under the housing element law, to provide for regional housing needs.¹⁴⁶ In early 2018, the California Department of Housing and Community Development released a list that showed ninety-eight percent of local jurisdictions were not meeting their goals with regards to the regional housing need.¹⁴⁷ In jurisdictions that have issued fewer building permits than necessary to satisfy their share of the regional housing need,¹⁴⁸ S.B. 35 allows developers of multi-family housing on infill sites¹⁴⁹ to obtain streamlined approvals, via a ministerial process and not subject to a conditional use permit, if they satisfy certain “objective planning standards” and provide a certain percentage of affordable units.¹⁵⁰ These

Legislative Package to Increase State’s Housing Supply and Affordability (Sept. 29, 2017), <https://www.ca.gov/archive/gov39/2017/09/29/news19979/index.html> [https://perma.cc/UJ8W-624E].

¹⁴⁴ Antonio Pacheco, *A Wave of Affordable and Market-rate Housing Could Soon Wash Ashore in California*, ARCHITECT’S NEWSPAPER (Jan. 31, 2018), <https://archpaper.com/2018/01/wave-affordable-housing-soon-wash-ashore-california/> [https://perma.cc/6DWC-E8GW].

¹⁴⁵ See, e.g., S.B. 167, 2017–2018 Leg., Reg. Sess. (Cal. 2017) (amending CAL. GOV’T CODE, § 65589.5 (2019)) (strengthening state’s Housing Accountability Act, in part by raising burden of proof for denials of certain affordable housing projects and imposing automatic fines for violations); A.B. 1397, 2017–2018 Leg., Reg. Sess. (Cal. 2017) (amending CAL. GOV’T CODE, §§ 65580, 65583, 65583.2) (requiring that land included in inventory under housing element must be not only suitable for development, but also available).

¹⁴⁶ S.B. 35, 2017–2018 Leg., Reg. Sess. (Cal. 2017) (codified at CAL. GOV’T CODE, § 65913.4 (2019)).

¹⁴⁷ See CAL. DEP’T OF HOUS. & CMTY. DEV., SB 35 STATEWIDE DETERMINATION SURVEY (Jan. 31, 2018), http://www.hcd.ca.gov/community-development/housing-element/docs/SB35_StatewideDeterminationSummary01312018.pdf [https://perma.cc/XVE2-6DHB]; see also Jeff Collins, *98% of California Jurisdictions Fail to Approve Adequate Housing, State Report Finds*, ORANGE CTY. REG. (Feb. 2, 2018), <https://www.ocregister.com/2018/02/01/98-of-calif-jurisdictions-fail-to-approve-adequate-housing-state-report-finds/> [https://perma.cc/6K9D-R3PH].

¹⁴⁸ Specifically, S.B. 35 provides for “streamlined, ministerial approval” of projects “located in a locality that the department has determined is subject to this subparagraph on the basis that the number of units that have been issued building permits is less than the locality’s share of the regional housing needs, by income category, for that reporting period.” Cal. S.B. 35 § 3(a)(4)(A).

¹⁴⁹ *Id.* More specifically the site must be one “in which at least 75 percent of the perimeter of the site adjoins parcels that are developed with urban uses.” *Id.* § 3(a)(2)(B).

¹⁵⁰ *Id.* As of January 2018 only thirteen cities and counties had satisfied their Regional Housing Needs Assessment and as such were not subject to the streamlined approval process provided for by SB 35. See SB 35 STATEWIDE DETERMINATION SURVEY, *supra* note 147, at 1. Separate legislation,

objective standards must “involve no personal or subjective judgment by a public official and [be] uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official prior to submittal.”¹⁵¹ If it denies approval, a local government must document which of the specified objective planning standards a proposed development violates.¹⁵²

Assembly Bill 73 took a different approach to the state’s housing crisis. It provides local governments with incentives to establish “housing sustainability districts” in areas within one-half mile of public transit.¹⁵³ Environmental and planning reviews are completed in advance for the district, the approval process for individual housing developments is streamlined, and those developments are not subject to a project-specific legal challenge under the California Environmental Quality Act.¹⁵⁴ At least twenty percent of units in the district must be subject to affordability restrictions and ten percent of units in any individual development must be affordable to lower-income households.¹⁵⁵ Establishing such a district entitles a local government to receive incentive payments from the state, based upon the number of new units constructed within the district.¹⁵⁶ A.B. 73 functions similarly to Massachusetts’s Chapter 40R.¹⁵⁷ Under these systems, as Edward Glaeser observed, communities that are too restrictive with regard to new development pay a transfer fee to the state that is then passed on to communities that allow more development.¹⁵⁸ The effectiveness of such incentives is dependent on the state’s commitment to funding

Senate Bill 166, further strengthened the housing element law by requiring local governments, if they reduced the residential density of a parcel, to make written findings that “the reduction is consistent” with their housing element and the remaining sites in the housing element are adequate “to accommodate the jurisdiction’s share of the regional housing need.” S.B. 166, 2017 Leg., 2017–2018 Reg. Sess. (Cal. 2017) (amending CAL. GOV’T CODE, § 65863). If the jurisdiction’s reduction of a parcel’s density would result in the remaining sites being inadequate to meet that need, the jurisdiction must “identify sufficient additional, adequate, and available sites with an equal or greater residential density in the jurisdiction so that there is no net loss of residential unit capacity.” *Id.*

¹⁵¹ Cal. S.B. 35 § 3(a)(5).

¹⁵² *Id.* § 3(b)(1).

¹⁵³ A.B. 73, 2017–2018 Leg., Reg. Sess. (Cal. 2017) (amending CAL. GOV’T CODE, § 65582.1 (2018) and adding additional sections).

¹⁵⁴ *Id.*

¹⁵⁵ *See id.* § 2.

¹⁵⁶ *See id.* A separate bill, Senate Bill 540, allows local governments to create Workforce Housing Opportunity Zones. *See* S.B. 540, 2017 Leg., 2017–2018 Reg. Sess. (Cal. 2017). Similar to Housing Sustainability Districts, environmental and planning reviews (which are eligible for financial support from the state) are completed when the zone is designated, allowing for expedited review of qualified housing developments (without a new environmental review). Half of the units in a development must be affordable to moderate- or low-income households.

¹⁵⁷ *See infra* notes 188–190 and accompanying text (describing Chapter 40R).

¹⁵⁸ Glaeser, *supra* note 42.

them.¹⁵⁹ Funding for Massachusetts 40R and for a related provision that reimburses school costs has run short at times.¹⁶⁰

The most controversial and high profile recent housing bill in California, Senate Bill 827, was introduced in 2018 but failed to even make it out of committee.¹⁶¹ S.B. 827 would have altered the applicable zoning for any “transit-rich housing project,” defined as a residential development “the parcels of which are all within a [one-half] mile radius of a major transit stop or a [one-quarter] mile radius of a high-quality [transit] bus corridor.”¹⁶² Such projects would have received a “transit-rich housing bonus,” exempting them from local density controls, minimum parking requirements, design standards that hinder the ability to construct the maximum number of units that can be developed, and height restrictions of less than fifty-five feet, depending on the project’s distance from a “high-quality transit corridor” or “major transit stop.”¹⁶³ The bill, as one commentator summed it up, “would ensure that all new housing construction within a half-mile of a train station or a quarter-mile of a frequent bus route would not be subject to local regulations concerning size, height, number of apartments, restrictive design standards, or the provision of parking spaces.”¹⁶⁴

Although it signified a radical break with the American tradition of local control over zoning, S.B. 827 would not have led to high-rise construction. Rather it would have allowed for more mid-size development in the form of “side-by-side duplexes, eight-unit apartment buildings, [and] six-story buildings”¹⁶⁵ In recent years housing advocates, architects, developers, and elected officials have sought to ease the development of these and other mid-size housing typologies, sometimes collectively referred to as “missing mid-

¹⁵⁹ I am grateful to Chris Elmendorf for raising this point.

¹⁶⁰ CITIZENS’ HOUS. & PLANNING ASS’N, *supra* note 75, at 24.

¹⁶¹ S.B. 827, 2018 Leg., 2017–2018 Reg. Sess. (Cal. 2018).

¹⁶² Cal. S.B. 827 § 2.

¹⁶³ *Id.* A “high-quality transit corridor” was defined as “a corridor with fixed route bus service that . . . has service intervals of no more than 15 minutes” during peak commute hours. *Id.* The original version of the bill would have permitted builds as high as 85 feet in certain areas, but a subsequent amendment removed that maximum height allowance. See Scott Wiener, *SB 827 Amendments: Affordability, Transit Lines, Height, Ellis Act Protections & More*, MEDIUM (Apr. 9, 2018), https://medium.com/@Scott_Wiener/sb-827-amendments-affordability-transit-lines-height-ellis-act-protections-more-fae09ee3f897 [<https://perma.cc/3QNJ-36TZ>]. The amendment also “limit[ed] the bill’s height increases to rail, subway, and ferry stops (with bus stops still triggering density increases, though not height increases).” *Id.*

¹⁶⁴ Henry Graber, *California Bill Would Allow Unrestricted Housing by Transit, Solve State Housing Crisis*, SLATE (Jan. 5, 2018), <https://slate.com/business/2018/01/california-bill-sb827-residential-zoning-transit-awesome.html> [<https://perma.cc/NR9G-K7YQ>].

¹⁶⁵ Adam Rogers, *A Bid to Solve California’s Housing Crisis Could Redraw How Cities Grow*, WIRED (Feb. 7, 2018), <https://www.wired.com/story/scott-weiner-california-housing-bill-cities/> [<https://perma.cc/GFB9-APAE>].

dle” housing.¹⁶⁶ These housing types—which fall between large-lot single-family detached homes and large multi-family apartment complexes—are championed as a form of “gentle density.”¹⁶⁷ They frequently take the form of infill developments that proponents contend will have minimal effects on neighborhood character, but that collectively hold promise for alleviating regional housing needs and enabling entry into more desirable neighborhoods.

S.B. 827 sparked considerable opposition from, among others, those who feared a loss of local control,¹⁶⁸ suggested it would have adverse environmental effects,¹⁶⁹ and cautioned it could lead to significant displacement of existing residents.¹⁷⁰ The bill’s advocates disputed the former and amended the measure to address the latter.¹⁷¹ Although S.B. 827 ultimately failed to get out of committee, it did raise the profile of zoning reform nationwide and arguably helped move the conversation forward on more modest housing reform efforts.¹⁷² As Ilya Somin observed, S.B. 827’s most significant contribution may have been

¹⁶⁶ Robert Steuteville, *Great Idea: Missing Middle Housing*, PUB. SQUARE (Mar. 22, 2017), <https://www.cnu.org/publicsquare/2017/03/22/great-idea-missing-middle-housing> [<https://perma.cc/6MKB-6JDY>]; see also Katherine Shaver, *Cities Turn to ‘Missing Middle’ Housing to Keep Older Millennials from Leaving*, WASH. POST (Dec. 9, 2017), https://www.washingtonpost.com/local/traffic-andcommuting/cities-turn-to-missing-middle-housing-to-keep-older-millennials-from-leaving/2017/12/09/3a129bc8-d54a-11e7-95bf-df7c19270879_story.html?utm_term=.5bb7dfd14930 [<https://perma.cc/8ENM-JEBH>] (discussing efforts by local governments to revise zoning laws to allow development of small multi-unit housing). See generally MISSING MIDDLE HOUSING, <http://missingmiddlehousing.com/> [<https://perma.cc/77BJ-D38D>] (for further discussion of missing middle housing).

¹⁶⁷ See, e.g., Alex Bozickovic, *The Missing Middle in Toronto’s Housing Debate*, GLOBE & MAIL (Oct. 17, 2018), <https://www.theglobeandmail.com/arts/art-and-architecture/article-the-missing-middle-in-torontos-housing-debate/> [<https://perma.cc/Q2PE-SXCK>] (discussing a candidate for Toronto mayor who championed “gentle density” in form of duplexes, triplexes, and small apartment buildings).

¹⁶⁸ See Jane Kim, *SB 827 Postmortem: Let’s Build More Housing the Right Way*, S.F. EXAMINER (Apr. 25, 2018), <http://www.sfexaminer.com/sb-827-postmortem-lets-build-housing-right-way/> [<https://perma.cc/6XMT-7ZND>] (explaining that “this bill proposed to take away our ability to negotiate and have a conversation about what works in our neighborhoods and communities”). But see Scott Wiener, *SB 827 Retains an Awful Lot of Local Control and Community Planning*, MEDIUM (Apr. 8, 2018), https://medium.com/@Scott_Wiener/sb-827-retains-an-awful-lot-of-local-control-and-community-planning-b1d11fc1007 [<https://perma.cc/ZB9G-6ENS>].

¹⁶⁹ See *infra* notes 325–326 and accompanying text.

¹⁷⁰ David Roberts, *The Future of Housing Policy Is Being Decided in California*, VOX (Apr. 4, 2018), <https://www.vox.com/cities-and-urbanism/2018/2/23/17011154/sb827-california-housing-crisis> [<https://perma.cc/Z86G-TWT3>].

¹⁷¹ Scott Wiener, *SB 827 Amendments: Strengthening Demolition & Displacement Protections*, MEDIUM (Feb. 27, 2018), https://medium.com/@Scott_Wiener/sb-827-amendments-strengthening-demolition-displacement-protections-4ced4c942ac9 [<https://perma.cc/MQ9A-PUBK>].

¹⁷² See Nolan Gray, *The YIMBYs Lost in California. But They’re Just Getting Started*, CITYLAB (Apr. 26, 2018) (discussing multiple bills in California to strengthen “fair share” housing requirements and ease restrictions on new housing); see also Graber, *supra* note 164 (describing S.B. 827 as representative of “a reassuring trend in California politics: the rising tide in the statehouse to overwhelm local restrictions on housing construction”).

to “expand[] the ‘Overton Window’ of policy options that become a part of mainstream discourse.”¹⁷³

In December 2018, California State Senator Scott Weiner, who sponsored S.B. 827, introduced a number of new measures, including Senate Bill 50, the More HOMES (Housing, Opportunity, Mobility, Equity, and Stability) Act.¹⁷⁴ Like S.B. 827, the new bill would override local zoning to promote greater housing density near transit.¹⁷⁵ But it responds to criticisms of the earlier bill by providing stronger protections from displacement in lower-income communities¹⁷⁶ and by enabling denser development not only near transit, but also in those areas that are close to jobs.¹⁷⁷ The latter addition is designed in part to address concerns that higher opportunity neighborhoods would resist new public transportation so as to avoid being subject to the law. Senate Bill 50 also delays implementation, and provides for greater local control in “sensitive communities” that are “vulnerable to displacement pressures.”¹⁷⁸ The new bill has garnered support from groups that opposed S.B. 827, including the state Building Trades Council and some tenant’s rights groups.¹⁷⁹ At the same time, Wiener separately introduced a Constitutional Amendment, to be placed on the ballot in 2020.¹⁸⁰ That Amendment would, if it passed, pull back on local con-

¹⁷³ Ilya Somin, *California Bill Cutting Back Zoning Could Increase Access to Housing and Jobs for Millions*, VOLOKH CONSPIRACY (Jan. 9, 2018), <https://reason.com/volokh/2018/01/09/california-bill-cutting-back-on-zoning-c/print> [<https://perma.cc/8Y2S-QGFB>].

¹⁷⁴ S.B. 50, 2019–2020 Leg., Reg. Sess. (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB50 [<https://perma.cc/4EPM-5Y5Z>]; see also Scott Wiener, *Senator Wiener Introduces Zoning Reform Bill to Allow More Housing Near Public Transportation and Job Centers*, MEDIUM (Dec. 4, 2018), https://medium.com/@Scott_Wiener/senator-wiener-introduces-zoning-reform-bill-to-allows-more-housing-near-public-transportation-and-3fb77b794004 [<https://perma.cc/Y3Q2-PE4B>].

¹⁷⁵ Wiener, *supra* note 174. Specifically, the More HOMES Act “eliminates density restrictions” at “sites within ½ mile of fixed rail and ¼ mile of high-frequency bus stops and in job-rich areas,” allowing for construction of apartment buildings. *Id.*

¹⁷⁶ *Id.* (“Since SB 827’s demise, Senator Wiener has worked with a broad coalition of stakeholders to recraft the bill, in order to protect vulnerable communities.”). Among other things, the new legislation would not apply to housing occupied by renters within the previous seven years. See Cal. S.B. 50.

¹⁷⁷ Cal. S.B. 50. The bill allows for denser development in “either a job-rich housing project or transit-rich housing project.” It defines the former as “an area identified by the Department of Housing and Community Development and the Office of Planning and Research, based on indicators such as proximity to jobs, high area median income relative to the relevant region, and high-quality public schools, as an area of high opportunity close to jobs.” *Id.*

¹⁷⁸ *Id.* Such communities would be able to develop, through a “community-led planning process” their own plans for increasing housing development. *Id.* The precise details of the alternatives available to such communities are to be provided in subsequent legislation. *Id.*; see also Liam Dillon, *California Legislator Revives Bill to Boost Apartment Complexes Near Transit*, L.A. TIMES (Dec. 4, 2018), <https://www.latimes.com/politics/la-pol-ca-housing-transit-bill-20181204-story.html> [<https://perma.cc/WWC9-P7MQ>] (reporting that “key details . . . remain unresolved”).

¹⁷⁹ See Randy Shaw, *Momentum Builds for SB 50*, BEYONDCHRON (Dec. 11, 2018), <http://beyondchron.org/momentum-builds-for-ca-sb-50-and-morehomes/> [<https://perma.cc/R4WT-VDAG>].

¹⁸⁰ Sen. Const. Amend. 1, Leg., 2019–2020 Reg. Sess. (Cal. 2018).

trol by repealing a provision of the state constitution that requires local voters to approve low-income housing that receives public funding.¹⁸¹

In 2018, California did enact separate measures to strengthen the state's housing element law and further promote new development.¹⁸² These include Assembly Bill 2923, which requires the Bay Area Rapid Transit system to adopt new transit-oriented development zoning standards for land around stations and requires local governments to adopt zoning that conforms to those standards.¹⁸³

California's ongoing debates over state-wide zoning interventions are shaped, to a significant degree, by questions of how to best calibrate the balance of state and local power. Senate Bill 827 generated significant opposition among communities concerned about the displacement of lower-income residents. Senate Bill 50 attempts to address this concern both by not providing zoning relief to properties occupied by renters within the previous seven years and by granting greater local control to communities with significant displacement risks.¹⁸⁴ At the same time, the new bill, by applying to both "transit-rich" and "job-rich" areas, would limit the ability of more affluent communities to undermine the goal of greater density by resisting public transportation.¹⁸⁵ Some environmental groups opposed to S.B. 827 emphasized this potential secondary effect of deterring investment in new public transportation.¹⁸⁶ These differing responses suggest a calibration of state and local power based, in significant part, on an initial determination, by the state, of what local concerns merit consideration and justify a degree of local control.

¹⁸¹ Diego Aguilar-Canabal, *Senator Wiener Launches Three Big Bills to Tackle Housing Woes*, BAY CITY BEACON (Dec. 9, 2018), https://www.thebaycitybeacon.com/politics/senator-wiener-launches-three-big-bills-to-tackle-housing-woes/article_879ff8aa-fbf4-11e8-8528-bf6da5ef84bc.html [https://perma.cc/ES57-5GNQ].

¹⁸² See Melanie Curry, *Legislative Update: Governor Brown's Last Bills*, STREETS BLOG CAL. (Oct. 1, 2018), <https://cal.streetsblog.org/2018/10/01/legislative-update-governor-browns-last-bills/> [https://perma.cc/6M9Z-VUAW].

¹⁸³ A.B. 2923, 2017–2018 Leg., Reg. Sess. (Cal. 2018), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB2923 [https://perma.cc/6LGH-J5EG]. These standards would promote density within one-half mile of transit stops by imposing minimum height, density, and floor area ratios and maximum parking requirements. *Id.* The legislative findings for A.B. 2923 acknowledge that the law diminishes the land use authority of cities and continues, but note that the San Francisco Bay Area Rapid Transit District, which oversees the transit system, "is unique as a transit agency in that it is governed by an elected board of directors, granting the people of the San Francisco Bay Area a greater measure of input on the district's decisions than the constituents of other agencies have on their agencies." *Id.*

¹⁸⁴ See Cal. S.B. 50.

¹⁸⁵ See *id.*

¹⁸⁶ See *infra* notes 325–327 and accompanying text.

2. Massachusetts

Zoning reform has garnered significant attention but far less action at the state level in Massachusetts, another state with high housing prices and notably restrictive zoning. According to a March 2016 report by a Special Senate Committee on Housing, despite significant demand, 207 of Massachusetts's 351 cities and towns "have permitted no multifamily housing with more than 5 units in over a decade and over a third of our communities have permitted only single family housing."¹⁸⁷ In addition to the stick of an appeal to the state's HAC under Chapter 40B, Massachusetts uses carrots, in the form of financial incentives, to encourage municipal governments to end exclusionary zoning practices. In 2004 Massachusetts passed the Smart Growth Zoning Overlay District Act, colloquially known as "Chapter 40R".¹⁸⁸ Chapter 40R encourages localities to create dense, transit-oriented residential and mixed-use zoning districts, allowing development to proceed either as-of-right or following a limited review process.¹⁸⁹ These "smart growth zoning districts," following review and approval by the state, render communities eligible for payments from a state Smart Growth Housing Trust Fund, in addition to other financial incentives.¹⁹⁰

In December 2017, Massachusetts Governor Charlie Baker announced an initiative to increase statewide housing production. It includes, among other measures, "a new system of incentives and rewards for municipalities that deliver sustainable housing growth."¹⁹¹ In a letter to the state legislature, the governor emphasized that "[b]y providing incentives and tools rather than mandates, the Housing Choice Initiative respects local decision making."¹⁹² Communities that receive a Housing Choice Designation—by "producing new housing and . . . adopt[ing] best practices to promote sustainable housing de-

¹⁸⁷ SPECIAL SENATE COMM. ON HOUS., FACING MASSACHUSETTS' HOUSING CRISIS 22 (2016), https://ma-smartgrowth.org/wp-content/uploads/Final_Housing_Report_3-1-6.pdf [<https://perma.cc/K4DJ-JG3A>]; see also Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 266 (2009) (noting significant increase in land use regulation in eastern Massachusetts since 1980).

¹⁸⁸ Chapter 40R, MASS.GOV, <https://www.mass.gov/service-details/chapter-40r> [<https://perma.cc/8689-MCNP>]. See generally CITIZENS' HOUS. AND PLANNING ASS'N, THE USE OF CHAPTER 40R IN MASSACHUSETTS: 2018 UPDATE (2018), https://www.chapa.org/sites/default/files/TheUseofCh40R_2018.pdf [<https://perma.cc/JY7U-YPNQ>].

¹⁸⁹ See CITIZENS' HOUS. AND PLANNING ASS'N, *supra* note 188.

¹⁹⁰ *Id.* at 24; see also Salsich, *supra* note 77, at 89.

¹⁹¹ Press Release, Office of Governor Charlie Baker, *Baker-Polito Administration Announces New Housing Choice Initiative* (Dec. 11, 2017), <https://www.mass.gov/news/baker-polito-administration-announces-new-housing-choice-initiative> [<https://perma.cc/QS9J-9YS6>].

¹⁹² Letter from Governor Charlie Baker to Mass. House of Representatives regarding H.B. No. 4075 (Dec. 11, 2017), <https://malegislature.gov/Bills/190/H4075.pdf> [<https://perma.cc/T49N-6T7V>]. A new draft of the legislation is identified as H. 4290. See H. 4290, 190th Gen. Court, Reg. Sess. (Mass. 2017).

velopment”—will have access to new Housing Choice Capital Grants as well as priority access to other state funding.¹⁹³

In addition to this new incentive program, Governor Baker proposed legislation that would have allowed cities and towns to adopt specific zoning measures by a majority vote (the norm in most states), rather than the two-thirds vote currently required by state law.¹⁹⁴ The measures local governments would be permitted to approve with a simple majority include reduced minimum lot sizes, adoption of smart growth zoning districts, permitting multi-family and mixed-use developments in certain areas, and allowing ADUs—all measures directed towards increasing housing supply and density.

Two separate bills, House Bill 4397, *An Act Building for the Future of the Commonwealth*,¹⁹⁵ and Senate Bill 81, *An Act Promoting Housing and Sustainable Development*,¹⁹⁶ would have gone further, directly displacing elements of local zoning. The legislation, an earlier version of which passed the state Senate, was championed by the Massachusetts Smart Growth Alliance and a broad array of community organizations.¹⁹⁷ Among other measures to promote or mandate denser development, the bills proposed allowing property owners statewide to add an internal ADU on any lot of five thousand square feet or more.¹⁹⁸ The Senate version required local ordinances to “provide at least 1 district of reasonable size in which multi-family housing is a permitted use as of right”.¹⁹⁹ The legislation faced opposition from the Massachusetts Municipal Association on the grounds that it would, by mandating by-right

¹⁹³ *Housing Choice Initiative*, COMMONWEALTH OF MASS., <https://www.mass.gov/housing-choice-initiative> [https://perma.cc/W7KS-AY2U].

¹⁹⁴ Baker, *supra* note 4. As of December 2018, the bill was still being considered in the informal session of the state legislature, during which a bill can be defeated by a single “no” vote. Tim Logan, *A Year After Baker’s Push for More Housing, It’s Still in Limbo*, BOS. GLOBE (Dec. 4, 2018), <https://www.bostonglobe.com/business/2018/12/03/there-housing-stalemate-beacon-hill/5n7umBjRHTrMRA3HJAP1bK/story.html> [https://perma.cc/B5QE-KAVA].

¹⁹⁵ *An Act Building for the Future of the Commonwealth*, H. 4397, 190th Gen. Court, Reg. Sess. (Mass. 2018). The original bill, No. 2420, was reported out of the committee on Municipalities and Regional Government as No. 4397. *See Bill H.2420*, COMMONWEALTH OF MASS., <https://malegislature.gov/Bills/190/H2420> [https://perma.cc/9RCZ-FZP2] (“Accompanied a new draft, see H4397.”).

¹⁹⁶ *An Act Promoting Housing and Sustainable Development*, S. 81, 190th Gen. Court, Reg. Sess. (Mass. 2017).

¹⁹⁷ *Great Neighborhoods Legislation*, GREAT NEIGHBORHOODS, <https://www.great-neighborhoods.org/legislation> [https://perma.cc/W59B-68Q3] (listing campaign supporters).

¹⁹⁸ Mass. H. 4397, § 5; Mass. S. 81, § 5.

¹⁹⁹ Mass. S. 81, § 6. The district would be required to “have a minimum gross density of 8 units per acre in rural towns and a minimum gross density of 14 units per acre in all other municipalities.” In 2016 the Senate passed a bill that included this requirement. *See An Act Promoting Housing and Sustainable Development*, S. 2311, 189th Gen. Court, Reg. Sess. (Mass. 2016). The original House bill is less categorical on this point, requiring that zoning ordinances “provide reasonable and realistic opportunities for the development of multi-family housing.” *See H. 2420*, 190th Gen. Court, Reg. Sess. § 6 (Mass. 2017). However, the subsequent house version, H. 4397, removes this provision entirely. *See Mass. H.B. 4397*.

ADU development and multi-family districts, “override[] basic zoning and permitting authority at the local level.”²⁰⁰ Ultimately, neither Governor Baker’s bill nor the other bills were brought to the floor of the state House of Representatives for a vote.²⁰¹ Nonetheless, these efforts suggest a growing willingness to consider statewide action to ease local zoning and an openness to, in addition to providing incentives for denser development, displacing specific local restrictions or mandating particular forms of local zoning.

The next section explores a growing trend of state laws mandating that local governments permit development of ADUs on single-family properties. Although small in scale, these interventions directly displace a specific element of local zoning.

B. *Yes in My (Own) Backyard*

1. Accessory Dwelling Units

In different forms, ADUs, both legally and illegally built, have long been a part of the housing landscape.²⁰² In addition to the acute need for more housing in high-demand areas, recent interest in ADUs is fueled by changing demographics, which have increased demand for a variety of non-traditional housing typologies.²⁰³ The number of multigenerational households is rising and the share of Americans sixty-five and over is expected to increase from thirteen percent of the population in 2010 to nineteen percent in 2030.²⁰⁴ In addition, more individuals are living alone and the average household size is shrinking, resulting in a mismatch in many places between available housing and the needs of potential residents.²⁰⁵

Proponents argue that ADUs increase housing supply incrementally with minimal effect on neighborhood character, potentially blunting opposition to

²⁰⁰ Geoff Beckwith, *Legislature Should Protect Local Decision-Making Over Zoning, Land Use*, MASS. MUN. ASS’N (Nov. 2017), <https://www.mma.org/advocacy/legislature-should-protect-local-decision-making-over-zoning-land-use/> [<https://perma.cc/E5PZ-6XV6>].

²⁰¹ Katie Lannan, *Muni Officials Reflect on Demise of Housing Production Bill*, STATE HOUSE NEWS SERV. (Sept. 11, 2018), <https://www.statehousenews.com/?login=yes&trial=yes&path=cms/news.aspx&yr=2018&select=20181691> [<https://perma.cc/H4GQ-TNLQ>].

²⁰² See Tom Daniels, *Zoning for Accessory Housing*, 7 ZONING PRAC. 1, 7 (2012) (“The accessory housing concept is an old idea, but has seen renewed interest over the past 30 years and especially since the rise in real estate prices in the late 1990s.”).

²⁰³ See Infranca, *supra* note 21, at 56–61 (discussing demographic changes); Patrick Sisson, *How a Return to Multigenerational Living Is Shifting the Housing Market*, CURBED (Nov. 21, 2017), <https://www.curbed.com/2017/11/21/16682850/multigenerational-homes-millennials-immigration-family> [<https://perma.cc/254T-64D4>].

²⁰⁴ Arthur C. Nelson, *The New Urbanity: The Rise of a New America*, 626 ANNALS AM. ACAD. POL. & SOC. SCI. 192, 193 (2009).

²⁰⁵ See Infranca, *supra* note 21, at 58.

increased density.²⁰⁶ These units can make housing more affordable for existing residents by providing a property owner with income to maintain the primary residence, sustain a mortgage, or pay rising property taxes.²⁰⁷ ADUs may also enable moderate-income households to live in higher opportunity single-family neighborhoods, neighborhoods that may have few rentals and where housing prices may be too high for ownership to be a realistic option.²⁰⁸

Even in jurisdictions that permit ADUs, property owners who wish to build one often confront a myriad of regulatory and financial barriers. These include regulations that prohibit an ADU on lots below a certain size or set a maximum unit size that is too small for the ADU to provide a viable housing option.²⁰⁹ Other regulatory challenges include building separation and setback requirements and parking requirements (which collectively can make it impossible to situate a unit on a lot); requirements that the property owner live on site or that the unit be rented to a relative; and costly permitting processes and required fees.²¹⁰ Navigating these regulations can prove daunting, especially for homeowners who are not professional developers. Moreover, building an ADU, especially one detached from the main house, can be quite expensive, particularly on a per-square-foot basis,²¹¹ and homeowners may find it difficult to obtain financing. Finally, ADUs frequently confront local opposition based on the three-legged stool of NIMBYism: concerns about increased density, a shortage of parking, and a change in neighborhood character.²¹²

²⁰⁶ In the words of one developer, ADUs “can be a great, low impact way to bring new ‘stealth density’ into existing neighborhoods.” Bryn Davidson, *How Cities Get ‘Granny Flats’ Wrong*, CITYLAB (Nov. 22, 2017), <https://www.citylab.com/design/2017/11/how-cities-get-granny-flats-wrong/546392/> [<https://perma.cc/GY83-73A8>].

²⁰⁷ See Kathleen Pender, *New California Housing Laws Make Granny Units Easier to Build*, S.F. CHRON. (Dec. 3, 2016), <https://www.sfchronicle.com/news/article/New-California-housing-laws-make-granny-units-10688483.php> [<https://perma.cc/S4GH-72W3>] (discussing potential benefits for homeowners); see also Infranca, *supra* note 21, at 65.

²⁰⁸ See Keith Ihlanfeldt & Tom Mayock, *Affordable Housing and the Socioeconomic Integration of Elementary Schools* (July 9, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2838401 (finding, based on a study of the housing market in Florida, that an increase in the stock of affordable housing units in middle- and high-income neighborhoods can have an effect on the number of low-income students in local schools). Ihlanfeldt and Mayock do not discuss ADUs specifically, but they find that mobile homes and apartments are particularly likely to make a difference. *Id.* at 25.

²⁰⁹ See Infranca, *supra* note 21, at 70–85 (discussing regulatory and other barriers to ADU development).

²¹⁰ *Id.*

²¹¹ See KAREN CHAPPLE ET AL., S.F. URBAN LAND INST., JUMPSTARTING THE MARKET FOR ACCESSORY DWELLING UNITS: LESSONS LEARNED FROM PORTLAND, SEATTLE AND VANCOUVER 16, http://ternercenter.berkeley.edu/uploads/ADU_report_4.18.pdf [<https://perma.cc/P253-447J>] (finding an average cost of \$156,000 based on a sample of 192 ADUs in Portland, Seattle, and Vancouver).

²¹² See, e.g., Katie McKellar, *Salt Lake City Pumps Brakes on Mother-in-law Apartments, OKs \$17.6M Plan for Affordable Housing*, DESERET NEWS (Dec. 5, 2017), <https://www.deseretnews.com/article/900005220/salt-lake-city-pumps-brakes-on-mother-in-law-apartments-oks-dollar176m-plan-for-affordable-housing.html> [<https://perma.cc/G9DR-34TH>] (discussing fears of Salt Lake City resident that ADUs “would cause issues in single-family neighborhoods”). The studies that have been done of ADUs

Some municipalities have taken steps to loosen regulatory restrictions, while others offer revolving loan funds to homeowners or provide other forms of assistance to encourage development.²¹³ Portland, Oregon has recently taken the lead in ADU development in the United States.²¹⁴ The city initially sought to encourage construction by eliminating the requirements of dedicated off-street parking and that owners live on the property. These initial efforts had minimal effect on the pace of development.²¹⁵ The City Council subsequently agreed to waive systems development charges, and the fee waiver, which can save homeowners up to \$16,000, was later made permanent.²¹⁶ After Portland waived these charges it saw a significant and steady increase in the number of ADUs built.²¹⁷ In 2016, 615 new ADUs were permitted, up from 86 in 2010.²¹⁸ In December 2015, the City eliminated the setback requirement for ADUs and loosened design restrictions that required the ADU resemble the main house, making it easier for homeowners to add a “pre-fab[ricated]” ADU and potentially cutting costs.²¹⁹

The level of demand in Portland has even given rise to a local startup that will install a prefabricated ADU at no cost, with the company retaining owner-

suggest these concerns are unfounded. See CITY OF SEATTLE, ACCESSORY DWELLING UNITS: DRAFT ENVIRONMENTAL IMPACT STATEMENT 1–11 (2018), http://www.seattle.gov/Documents/Departments/Council/ADU_DEIS_2018.pdf (finding that a proposal to liberalize ADU laws would have no significant adverse impacts on building and population density, parking, public services, and utilities).

²¹³ See Infranca, *supra* note 21, at 54; Margaret Brinig & Nicole Stelle Garnett, *A Room of One's Own? Accessory Dwelling Unit Reforms and Local Parochialism*, 45 THE URB. LAW. 519, 535–38 (2013) (discussing local and state efforts to enable or encourage ADU development).

²¹⁴ Laura Bliss, *Portland's 'Granny Flats' Get an Affordable Boost*, CITYLAB (Mar. 12, 2018), <https://www.citylab.com/equity/2018/03/portlands-granny-flats-get-an-affordable-boost/555083/> [<https://perma.cc/AZY9-8GDN>] (reporting that “Portland has set about creating the most ADU-friendly policies in the country”).

²¹⁵ Bob Young, *Big Interest in Little Backyard Houses: Will Seattle Ease the Rules?*, SEATTLE TIMES (Dec. 19, 2015), <https://www.seattletimes.com/seattle-news/politics/city-rules-among-big-obstacles-for-little-houses/> [<https://perma.cc/BG6U-LEKS>].

²¹⁶ Portland City Council, Resolution No. Substitute 37353 (adopted May 2, 2018), <https://www.portlandoregon.gov/auditor/article/682997> [<https://perma.cc/YJ2N-QQ58>]; see also Steve Law, *Fee Waiver for New Accessory Dwelling Units Fixed into Law, but There's a Fee to Get It*, PORTLAND TRIB. (June 27, 2018), <https://pamplinmedia.com/sl/399497-294774-fee-waiver-for-new-accessory-dwelling-units-fixed-into-law-but-theres-a-fee-to-get-it> [<https://perma.cc/9LZ3-BWAC>] (noting that homeowners must pay a \$400 fee to receive a waiver of system development charges and must enter into a restrictive covenant specifying they will not use the unit for short-term rentals for 10 years).

²¹⁷ See Kim Moore, *By the Numbers: Portland's Residential Housing Boom*, OR. BUS. (Nov. 14, 2017), <https://www.oregonbusiness.com/article/real-estate/item/18092-by-the-numbers-portlands-residential-housing-boom> [<https://perma.cc/8SR6-C2KD>].

²¹⁸ *The Ascent of ADUs in Portland*, ACCESSORYDWELLINGS.ORG (Feb. 27, 2017), <https://accessorydwellings.org/2017/02/27/the-ascent-of-adus-in-portland/> [<https://perma.cc/T4RC-JK9X>]. In 2016, the city also issued 957 permits for single-family dwellings and permits for 4,194 multi-family units. Law, *supra* note 216.

²¹⁹ Steve Law, *Portland Makes It Easier to Site and Design Granny Flats*, PORTLAND TRIB. (Dec. 2, 2015), <http://www.pamplinmedia.com/pt/9-news/283838-160384-portland-makes-it-easier-to-site-and-design-granny-flats> [<https://perma.cc/4VEE-JHKY>].

ship, renting the unit out (with a percentage of rent paid to the homeowner), and then transferring ownership to the property owner after twenty-five years.²²⁰ In addition, Multnomah County, which includes Portland, instituted a pilot program that placed a small ADU in the backyards of four homeowners on condition that they provide the space to a currently homeless family for five years.²²¹ After five years, homeowners would have the opportunity to purchase the ADU from the county.²²²

Portland's success in increasing ADU production provides a model for other municipalities with regards to the specific policies most likely to encourage ADU development. Still, many municipalities remain resistant to ADUs, fearing their effect on neighborhood character, among other concerns. Partly in response, a number of states have required that local governments permit the as-of-right construction of ADUs. The next subsection examines these legal developments and situates them within the context of the broader trend of state land use interventions.

2. State Efforts to Encourage ADU Development

a. California

California passed a series of laws, over the past two decades, to ease local restrictions on ADUs. In 2002 the state passed legislation requiring local governments to impose a "ministerial" review process for ADUs (termed "second units"), which would "apply predictable, objective, fixed, quantifiable and clear standards."²²³ Subsequent research by Nicole Garnett and Margaret

²²⁰ Steve Law, *ADUs Out of Your Price Range? Think Again*, PORTLAND TRIB. (June 5, 2018), <https://portlandtribune.com/pt/9-news/397505-290432-adus-out-of-your-price-range-think-again> [<https://perma.cc/A9W8-23CU>]. The units are only 448 square feet, but still less expensive than comparably-sized ADUs. *Id.*; see also *Our ADUs*, DWELLER, <http://www.dweller.com/adus> [<https://perma.cc/9359-KMMC>].

²²¹ Janet Eastman, *'Backdoor Revolution:' Little Houses Are Coming to Your Street*, THE OREGONIAN (Jan. 31, 2018), https://www.oregonlive.com/hg/index.ssf/2018/01/adu_backdoor_revolution_pdx_pe.html [<https://perma.cc/2LUN-747T>] ("Multnomah County and energy-efficient home advisors at nonprofit Enhabit have proposed a program, called A Place For You, where ADUs would be installed at no cost to owners of private yards to shelter a homeless family for five years. After that time, the landowners would own the dwelling."); see also Michael French, *Wrapping Up 'A Place for You' ADU Pilot*, ENHABIT (June 4, 2018), <https://enhabit.org/adus/wrapping-up-a-place-for-you-adu-pilot/> [<https://perma.cc/F9GN-SDC2>].

²²² Gabrielle Karol, *Portland's Backyard ADU Program Quietly Launches*, KOIN6 (Sept. 7, 2018), <https://www.koin.com/news/civic-affairs/portland-s-backyard-adu-program-quietly-launches/1426016381> [<https://perma.cc/C59H-4MUB>].

²²³ See Memorandum from Cathy E. Creswell, Deputy Dir., Div. of Hous. Pol'y Dev., Cal. Dep't of Hous. & Cmty. Dev. to Planning Directors and Interested Parties 4-5 (Aug. 6, 2003), <http://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/hpd-memo-ab1866.pdf> [<https://perma.cc/2CBK-X9YV>] (noting that these standards "must be administratively applied to the application and not subject to discretionary decision-making by a legislative body . . ."); see also CAL

Brinig, examining local implementation of the 2002 law, raised questions regarding its effectiveness.²²⁴ Their analysis suggested that the “seeming deregulatory success story masks hidden barriers that dramatically suppress the number of ADUs constructed and the value of ADUs as a means of increasing affordable housing options.”²²⁵ These barriers were often imposed by local governments in response to political pressure.²²⁶

In an effort to strengthen the earlier legislation (and address locally-imposed roadblocks), the California legislature passed two new laws in 2016, Senate Bill 1069²²⁷ and Assembly Bill 2299.²²⁸ These laws, which replace the term “second unit” with “accessory dwelling unit,”²²⁹ impose more specific limitations on the extent to which localities may regulate ADUs.²³⁰ Although they are allowed to enact limited restrictions, local governments must approve, through a ministerial process, one ADU “per single-family lot if the unit is contained *within the existing space of a single-family residence or accessory structure*, has independent exterior access from the existing residence, and the side and rear setbacks are sufficient for fire safety.”²³¹ Although municipalities may impose minimum and maximum unit sizes and size restrictions based upon a percentage of the existing dwelling on a lot, they must allow for at least “an efficiency unit to be constructed in compliance with local development standards.”²³² Each community also must designate areas within their bounda-

GOV'T CODE § 65852.150 (West 2013); *id.* § 65852.2 (West 2018). See generally Jane Cho, *Second Units in the Silicon Valley*, 48 URB. LAW. 459, 461 (2016) (discussing the 2002 law).

²²⁴ See Brinig & Garnett, *supra* note 213, at 541–45.

²²⁵ *Id.* at 523.

²²⁶ Local governments “responded to local political pressures by delaying the enactment of ADU legislation (and, in a few cases, simply refusing to do so despite the state mandate), imposing burdensome procedural requirements that are contrary to the spirit, if not the letter, of the state-law requirement that ADUs be permitted ‘as of right,’ requiring multiple off-street parking spaces, and imposing substantive and procedural design requirements.” *Id.* at 523–24; see also Jason Islas, *Santa Monica Lawmaker Takes Aim at California’s Housing Shortage*, STREETS BLOG (Mar. 16, 2016), <https://cal.streetsblog.org/2016/03/16/santa-monica-lawmaker-takes-aim-at-californias-housing-shortage/> [<https://perma.cc/4HHZ-PMYG>] (contending that, despite the 2002 state law, “local jurisdictions have been able to impose onerous design and parking standards that have made the prospect of building ADUs prohibitively expensive”).

²²⁷ S.B. 1069, 2015–2016 Leg., Reg. Sess. (Cal. 2016).

²²⁸ A.B. 2299, 2015–2016 Leg., Reg. Sess. (Cal. 2016).

²²⁹ They defined an ADU as: “[A]n attached or a detached residential dwelling unit which provides complete independent living facilities for one or more persons. It shall include permanent provisions for living, sleeping, eating, cooking, and sanitation on the same parcel as the single-family dwelling is situated.” Cal. S.B. 1069 § 5.

²³⁰ See Pender, *supra* note 207 (“About two-thirds of California’s cities and counties have their own second-unit ordinances, but the state law is more permissive than most of them. Jurisdictions that have not adopted or amended a local ordinance that complies with the new state law by Jan. 1 will have to follow the state law until they approve a compliant one.”).

²³¹ Cal. S.B. 1069 (codified at CAL. GOV'T CODE § 65852.2(f)) (emphasis added).

²³² *Id.* (codified at CAL. GOV'T CODE § 65852.2(c)). An efficiency unit, as defined in § 17958.1 of the California Health and Safety Code, must “have a minimum floor area of 150 square feet.” Mu-

ries where *detached* accessory dwellings located within a newly constructed structure (such as a backyard cottage) are allowed.²³³ If a municipality fails to adopt its own ordinance, default standards govern; permitting ADUs up to 1,200 square feet in size (but not more than fifty percent of the existing living area on a lot), on any lots lot zoned for single-family or multi-family use and containing a single-family dwelling.²³⁴

The law significantly limits the ability of local governments to impose off-street parking requirements, which can drive up the cost of constructing an ADU or make it difficult to situate the unit on a lot. Local governments may not require more than one parking space per unit or per bedroom and those spaces may be provided in the form of tandem parking, which is significantly easier to situate on many lots.²³⁵ Municipalities are expressly forbidden from requiring any parking for an ADU that is located within one half-mile of public transit or one block from a car share vehicle, part of the existing primary residence or an existing accessory structure, located in a historic district, or if on-street parking permits are required but not offered to the occupant of the ADU.²³⁶ Collectively the state requires a local government to allow any single-family homeowner to add an ADU—without additional off-street parking—if it is placed within the primary residence or an existing accessory building on the property.

Although the courts have not yet interpreted the scope of local discretion to impose restrictions, the legislative findings for S.B. 1069 reveal a desire to significantly limit this local discretion, expressing the Legislature's intent to prevent local government from imposing "arbitrary, excessive, or burdensome" restrictions on the ability of homeowners to add an ADU.²³⁷ A memorandum from the California Department of Housing and Community Development reinforces this point, noting that local governments may impose standards with regards to parking, lot coverage and size, maximum unit size, and height, but that "standards and allowable areas must not be designed or applied in a man-

nicipalities are also free to impose standards "that include, but are not limited to, parking, height, setback, lot coverage, architectural review, maximum size of a unit, and standards that prevent adverse impacts on any real property that is listed in the California Register of Historic Places." *Id.* (codified at CAL. GOV'T CODE § 65852.2(a)(1)(B)). They also retain discretion to require that the property owner live on the property and that rentals be limited to terms of 30 days or longer—a potential mechanism for banning short-term rentals of an ADU via sites such as Airbnb. *Id.* (codified at CAL. GOV'T CODE § 65852.2(b)(3)).

²³³ *Id.* (codified at CAL. GOV'T CODE § 65852.2(a)(1)(A)). In designating such areas, a local government can consider criteria "that may include, but are not limited to, the adequacy of water and sewer services and the impact of accessory dwelling units on traffic flow and public safety." *Id.*; see also *infra* notes 245–246 and accompanying text (discussing proposed changes to this provision).

²³⁴ *Id.* (codified at CAL. GOV'T CODE § 65852.2(a)(D)(iv)).

²³⁵ *Id.* (codified at CAL. GOV'T CODE § 65852.2(d)).

²³⁶ *Id.* (codified at CAL. GOV'T CODE § 65852.2(e)).

²³⁷ Cal. S.B. 1069.

ner that burdens the development of ADUs and should maximize the potential for ADU development.”²³⁸

The City of Pasadena’s recent zoning amendments related to ADUs reveal how one jurisdiction has interpreted its obligations under state law. A 2017 staff report by the city’s Planning & Community Development Department recommended reducing the minimum lot size required for development of a detached or exterior ADU from 15,000 square feet to 7,200 square feet, the minimum lot size for single-family residential properties in the city’s RS-6 zoning district.²³⁹ The department first analyzed the effect of a reduction to a 10,000 square-foot minimum, but concluded that because only thirty-four percent of residentially zoned properties in the city satisfied that minimum size it would not be consistent with the state law’s intent to encourage ADU development. Noting that, in contrast, seventy-three percent of residentially-zoned properties are 7,200 square feet or larger, the report concluded that setting the minimum at this level “would provide sufficient opportunity for homeowners to construct Exterior Accessory Dwelling units.”²⁴⁰ The 7,000 square foot minimum lot size was subsequently approved unanimously by the Pasadena City Council.²⁴¹

In the short time since the 2016 laws took effect, the state has taken additional steps to further ease development and reduce or prohibit local fees. This includes a 2017 law, which clarified that an ADU shall not be considered a new residential use for the purposes of sewer and water connection fees and capacity charges.²⁴² In January 2018, Senator Bob Wieckowski, sponsor of the earlier ADU laws, introduced Senate Bill 831, which would have further cut fees on accessory dwelling units, prohibiting impact fees, connection fees and

²³⁸ CAL. DEP’T OF HOUS. & CMTY. DEV., ACCESSORY DWELLING UNIT MEMORANDUM 8 (2016), <http://www.hcd.ca.gov/policy-research/docs/2016-12-12-ADU-TA-Memo.docx.pdf> [<https://perma.cc/629T-A9LG>].

²³⁹ PLANNING COMM’N, CITY OF PASADENA, ZONING CODE AMENDMENTS: ACCESSORY DWELLING UNITS 6 (2017), https://ww5.cityofpasadena.net/wp-content/uploads/sites/28/2017/05/2017-05-24-Planning-Commission-Item-4_Zoning-Code-Amendment-Staff-Report.pdf [<https://perma.cc/FKG4-9EL6>].

²⁴⁰ *See id.*

²⁴¹ Eddie Rivera, *Council Approves ‘Granny Flat’ Amendments After Hours of Public Comment, Discussion*, PASADENA NOW (Dec. 12, 2017), <http://www.pasadenanow.com/main/council-approves-granny-flat-amendments-after-hours-of-public-comment-discussion/> [<https://perma.cc/3MYZ-XT33>]; City of Pasadena, City Council Minutes for Dec. 11, 2017, http://ww2.cityofpasadena.net/council/agendas/2017%20Agendas/Dec_11_17/Agendarecap.asp [<https://perma.cc/8LKV-5FVT>].

²⁴² S.B. 229, 2017–2018 Leg., Reg. Sess. (Cal. 2017) (codified at CAL. GOV’T CODE § 65852.2); *see also* REPORT OF ASSEMBLY COMMITTEE ON LOCAL GOVERNMENT REGARDING SB 229, at 3 (July 12, 2017), https://alcl.assembly.ca.gov/sites/alcl.assembly.ca.gov/files/SB_229_analysis.pdf [<https://perma.cc/BAT2-8JN2>] (noting that the bill “clarifies that the limits on connection fees and capacity charges apply to special districts and water corporations, as well as cities and counties”).

second water meters.²⁴³ The bill, which ultimately died in committee, would have further constrained local discretion.²⁴⁴ The state's current ADU law declares that a local ordinance shall:

[d]esignate areas within the jurisdiction of the local agency where accessory dwelling units *may be permitted*. The designation of areas may be based on criteria, that may include, but are not limited to, the adequacy of water and sewer services and the impact of accessory dwelling units on traffic flow and public safety.²⁴⁵

S.B. 831 would have amended this language, requiring a local ordinance to instead:

[d]esignate areas within the jurisdiction of the local agency where accessory dwelling units *may be excluded* for health and safety, including fire safety, purposes, *based on clear findings that are supported by substantial evidence*. The designation of areas shall be based on criteria that may include, but are not limited to, the adequacy of water and sewer services and other health and safety, including fire safety, issues.²⁴⁶

In addition to a shift towards a presumption that ADUs are permitted unless expressly excluded, the failed bill required findings “supported by substantial evidence” and eliminates reference to “traffic flow” as a specified criterion. Among other changes, S.B. 831 also would have prohibited local governments from imposing a minimum lot size requirement, a maximum ADU unit size of less than eight hundred square feet (up significantly from 150 square feet under current law), or a requirement of owner occupancy of the primary unit or the ADU.²⁴⁷ Finally, it would have created an amnesty program providing homeowners with an existing, but unpermitted, ADU up to ten years to make it compliant.²⁴⁸ Although S.B. 831 failed, its primary sponsor expressed plans to return with a similar bill in the next year. Separate legislation, Senate Bill

²⁴³ Jondi Gumz, *Santa Cruz County ADU Rules to Be Reconsidered*, SANTA CRUZ SENTINEL (Sept. 11, 2018), <https://www.santacruzsentinel.com/2018/01/10/santa-cruz-county-adu-rules-to-be-reconsidered/> [https://perma.cc/G4T3-32RM]; see S.B. 831, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

²⁴⁴ See Katy Murphy, *Granny Flats: More Popular Than Ever, but Still Mired in Bureaucracy*, MERCURY NEWS (July 12, 2018), <https://www.mercurynews.com/2018/07/11/granny-flats-more-popular-than-ever-but-still-mired-in-bureaucracy/> [https://perma.cc/Q4YR-3D24] (declaring the bill's failure “a victory for cities and counties that protested the proposal as yet another Sacramento attack on local control”).

²⁴⁵ CAL. GOV'T CODE § 65852.2(a)(1)(A) (emphasis added).

²⁴⁶ Cal. S.B. 831 (emphasis added).

²⁴⁷ See *id.*

²⁴⁸ *Id.* See generally Jake Wegmann & Sarah Mawhorter, *Measuring Informal Housing Production in California Cities*, 83 J. AM. PLAN. ASS'N 119 (2017) (analyzing the prevalence of unpermitted housing in California).

1226, will take effect at the start of 2019 and allows for the permitting of existing unpermitted ADUs based on the codes in effect at the time the unit was constructed.²⁴⁹

The reforms in California quickly led to a significant increase in ADU applications and permits, as detailed in a 2017 report by the Turner Center at the University of California at Berkeley.²⁵⁰ Oakland received 247 permit applications on the year through November 1, 2017, up from thirty-three in 2015.²⁵¹ The most dramatic increase was in Los Angeles, where the number of permits issued in 2017 was nearly twenty-five times the number in 2016.²⁵² ADU construction applications in Los Angeles rose to 1,980 on the year through November 1, 2017, from only eighty on 2016.²⁵³ It is unclear to what degree this increase in Los Angeles is attributable to new construction or to the legalization of existing units that were built without a permit.²⁵⁴ Nonetheless, the growth in ADU construction in California has been significant enough to create a niche business for architects and builders, akin to that developing in Portland, Oregon.²⁵⁵ In addition, recognizing the interest in ADUs, the Los

²⁴⁹ S.B. 1226, 2017–2018 Leg., Reg. Sess. (Cal. 2018) (codified at CAL. HEALTH & SAFETY CODE § 17958.12). Other legislation pending as of October 2018 would shorten the amount of time local governments have to consider ADU permits and would prohibit minimum unit sizes of less than eight hundred square feet and minimum-lot-size requirements. See A.B. 2890, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

²⁵⁰ David Garcia, *ADU Update: Early Lessons and Impacts of California's State and Local Policy Changes*, TURNER CTR. FOR HOUS. INNOVATION AT U.C. BERKELEY (Dec. 21, 2017), <https://turnercenter.berkeley.edu/blog/adu-update-early-lessons-and-impacts-of-californias-state-and-local-policy> [<https://perma.cc/8HDZ-LV9F>].

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ See Garcia, *supra* note 250; see also Josh Cohen, *California ADU Applications Skyrocket After Regulatory Reform*, NEXT CITY (Jan. 4, 2018), <https://nextcity.org/daily/entry/california-adu-applications-skyrocket-after-regulatory-reform> [<https://perma.cc/G6PT-ECKT>]; Virginia Postrel, *California Turns to Homeowners to Help Solve a Crisis*, BLOOMBERG (May 21, 2018), <https://www.bloomberg.com/view/articles/2018-05-21/california-turns-to-homeowners-to-solve-its-housing-crisis> [<https://perma.cc/TG44-HKE4>] (finding that “[t]he city of Los Angeles issued 1,684 ADU permits in 2017, compared with just 80 the previous year”).

²⁵⁴ Andrew Khouri, *Could Granny Flats Help Ease the State's Housing Crisis? Some Advocates Think So*, L.A. TIMES (Apr. 13, 2018), <https://www.latimes.com/business/la-fi-backyard-homes-20180413-story.html> [<https://perma.cc/T5HU-UXQL>]. According to the *Los Angeles Times*, the number of ADU permits issued in Los Angeles rose from 120 in 2016 to 2,342 in 2017. *Id.* Granny flats is another term used for ADUs. See Elijah Chiland, *LA County Will Pay Homeowners to Build Granny Flats for the Homeless*, CURBED (Aug. 16, 2017), <https://la.curbed.com/2017/8/16/16157282/los-angeles-homeless-housing-accessory-dwelling-granny-flat> [<https://perma.cc/PP3G-KURR>].

²⁵⁵ See Khouri, *supra* note 254; Josie Huang, *Popular Granny Flats Create a Niche Industry in LA*, 89.3 KPCC (Dec. 25, 2017), <http://www.scpr.org/news/2017/12/25/79179/la-embracing-granny-flats-more-than-anywhere-else/> [<https://perma.cc/AQB2-3APB>]; see, e.g., COVER, <https://www.cover.build/> [<https://perma.cc/B286-NTNN>] (providing an online portal where homeowners can enter an address and determine whether an ADU is permitted on the property). Cover also builds and installs prefabricated ADUs. *Id.* A similar company operates in Palo Alto. See *About*, ADU BUILDER, INC., <https://www.adu->

Angeles County Board of Supervisors approved a pilot program that would enable homeowners seeking to develop an ADU on their property to receive up to \$75,000 in funding as well as an expedited permitting process, in exchange for renting the unit to a formerly homeless individual.²⁵⁶ The City of Los Angeles also received funding from Bloomberg Philanthropies to provide financial assistance to homeowners willing to add an ADU that would be rented to a formerly homeless individual.²⁵⁷ J.P. Morgan Chase also introduced its own pilot program to offer homeowners a low-cost loan for ADU development if they agree to rent the unit to low- and middle-income individuals.²⁵⁸

Significant obstacles do remain in some jurisdictions, including lengthy permitting processes and significant fees, which sometimes do not comply with the new state laws.²⁵⁹ At the same time, some cities have pursued local regulations that go further than the state law in allowing ADU development. For example, in Newport Beach, California, the city Planning Commission recommended allowing both detached and attached ADUs at single-family homes in any residential zoning district.²⁶⁰

In the course of just three years California has steadily and increasingly displaced local authority to regulate ADUs and to impose fees on their development. This reflects in part an iterative process through which state lawmakers have sought to address individual obstacles to development as they become more salient.²⁶¹ It also suggests that, in the absence of any significant revolt against the

builder.com/about [https://perma.cc/MQ44-4CGK] (stating that ADU Builder is a real-estate development company in Palo Alto that aids with the financing, construction, and rental of ADUs).

²⁵⁶ Chiland, *supra* note 254; *see also* Memorandum from Richard J. Bruncker, Dir., L.A. Cty. Dep't of Reg'l Planning, on Recommendation to Approve Second Dwelling Unit Pilot Project Under Homeless Initiative Strategy F4 to The Board of Supervisors of the County of Los Angeles 4 (Aug. 15, 2017), <https://cbsla.files.wordpress.com/2017/08/dwell.pdf> [https://perma.cc/Q47L-KUAE]. The Pilot Project has a modest amount of funding, sufficient for at most 2–3 new ADUs and the preservation of an additional 2–3 existing unpermitted ADUs. *See id.*

²⁵⁷ Elijah Chiland, *Could ADUs Help Solve LA's Homelessness Crisis?*, CURBED (Oct. 29, 2018), <https://la.curbed.com/2018/10/29/17485508/adu-homelessness-los-angeles-affordable-housing> [https://perma.cc/G9H6-JQUF].

²⁵⁸ Richard Scheinin, *Bank Funds 'Granny' Units Project in Affordable Housing Experiment for San Jose, L.A.*, MERCURY NEWS (Oct. 10, 2017), <https://www.mercurynews.com/2017/10/09/an-affordable-housing-experiment-for-san-jose-and-los-angeles-bank-funds-pilot-project-to-help-build-granny-units/> [https://perma.cc/V63G-7TG3].

²⁵⁹ *See* Murphy, *supra* note 244.

²⁶⁰ *See* Hillary Davis, *Newport May Expand the Reach of 'Granny Flats,'* L.A. TIMES (Aug. 10, 2018), <https://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-adu-zoning-20180810-story.html> [https://perma.cc/RC7W-KLTY] (“The Newport amendment would take the recent state zoning update a step further by allowing the units to accompany single-family houses as unattached dwellings or as attached units with a separate exterior entrance, also in any residential district.”).

²⁶¹ *See* Louis Hansen, *Building a Bay Area Granny Flat Still Challenging*, MERCURY NEWS (Jan. 18, 2019), <https://www.mercurynews.com/2019/01/17/building-a-bay-area-granny-flat-still-challenging/> [https://perma.cc/9ZED-PBAB] (discussing plans by the author of the original ADU law to introduce further legislation to reduce local restrictions and fees).

state's actions to ease ADU development, in part by curtailing local authority, state lawmakers have felt empowered to take increasingly intrusive steps.

b. Oregon

California's neighbor to the north has also taken steps to push ADU development at the state level. Senate Bill 1051, which took effect on July 1, 2018, declares that "[a] city with a population greater than 2,500 or a county with a population greater than 15,000 shall allow in areas zoned for detached single-family dwellings the development of at least one accessory dwelling unit for each detached single-family dwelling, subject to reasonable local regulations relating to siting and design."²⁶² Oregon goes further than California in that the basic definition of an ADU includes a detached structure or backyard cottage and not just an ADU within the primary dwelling.²⁶³ Subsequent guidance issued by the Oregon Department of Land Conservation and Development encourages local governments to allow two ADUs on a property, avoid any minimum lot size requirements, and not impose parking or owner-occupancy requirements.²⁶⁴ The Oregon legislature initially considered, but ultimately rejected, a separate bill during the same session that would have prevented any city or county from prohibiting not only ADUs, but also a duplex on any single-family lot.²⁶⁵

c. Washington

Moving up the coast (and back in time), Washington State's 1993 Housing Policy Act included a provision requiring cities and counties above a certain population to adopt ordinances that encourage ADU development in sin-

²⁶² S.B. 1051, 79th Cong., Reg. Sess. (Or. 2017).

²⁶³ *Id.* (declaring that "accessory dwelling unit" means an interior, attached or detached residential structure that is used in connection with or that is accessory to a single-family dwelling").

²⁶⁴ OREGON DEP'T OF LAND CONSERVATION & DEV., GUIDANCE ON IMPLEMENTING THE ACCESSORY DWELLING UNITS (ADU) REQUIREMENT UNDER OREGON SENATE BILL 1051, at 2–3 (2018), https://www.oregon.gov/lcd/Publications/ADU_Guidance_SB1051_2018.pdf [<https://perma.cc/W6PY-6LCA>]; see also Steve Law, *New Law Could Pave Path for More ADUs*, PORTLAND TRIB. (May 17, 2018), <https://pamplinmedia.com/sl/395683-289256-new-law-could-pave-path-for-more-adus> [<https://perma.cc/4UBF-AYZ3>] (noting that state land use agency's model ADU code suggests allowing two ADUs per parcel). One community, the City of Tigard, which prohibited detached ADUs prior to the state legislation, is now considering a city task force's recommendation to allow up to two ADUs on a property. Editorial Board, *Track Accessory Dwelling Unit Law for Effectiveness*, PORTLAND TRIB. (May 23, 2018), <https://pamplinmedia.com/fngt/37-opinion/396302-289154-track-accessory-dwelling-unit-law-for-effectiveness> [<https://perma.cc/BRU5-AKFZ>].

²⁶⁵ See *supra* note 168 and accompanying text; see also Kriston Capps, *Oregon May Strip Portland of Its NIMBY Powers*, CITYLAB (June 19, 2017), <https://www.citylab.com/design/2017/06/oregons-hb-2007-would-preempt-cities-zoning-rights/528612/> [<https://perma.cc/CWM7-JSL5>].

gle-family zoning districts.²⁶⁶ The statute, which predates California's first statewide ADU law, directs a state agency to develop "recommendations to the legislature designed to encourage the development and placement of accessory apartments in areas zoned for single-family residential use."²⁶⁷ It mandates that local governments subject to the law incorporate these recommendations into their local regulations.²⁶⁸ However, "[t]o allow local flexibility, the recommendations shall be subject to such regulations, conditions, procedures, and limitations as determined by the local legislative authority."²⁶⁹ This language leaves some uncertainty as to how much flexibility local officials possess.²⁷⁰

Washington State's law does not go as far as the more recent legislation in California and Oregon, which mandate that local governments allow ADUs to be developed as-of-right. Nonetheless, a significant number of communities in Washington do allow them.²⁷¹ Researchers have attributed the broad adoption of local ADU ordinances to the fact that ADUs can assist municipalities in satisfying the state's Growth Management Act goals of encouraging affordable housing and providing for a variety of housing types.²⁷²

d. Other States

As of September 2005, Vermont requires that homeowners be allowed to add one ADU unit as a permitted use, so long as certain conditions are satis-

²⁶⁶ See WASH. REV. CODE § 43.63A.215 (1993); see also *id.* § 36.70A.400 (noting that Washington's Housing Policy Act also requires cities and counties that plan under the State's Growth Management Act to adopt ordinances that encourage ADU development in single-family zoning); *Accessory Dwelling Units*, MUN. RESEARCH & SERVS. CTR. OF WASH., <http://mrsc.org/Home/Explore-Topics/Planning/General-Planning-and-Growth-Management/Accessory-Dwelling-Units-in-Plain-English.aspx> [<https://perma.cc/J6K4-GSTX>]. Washington Code requires local housing elements to include consideration of accessory dwelling units. WASH. ADMIN. CODE § 365-196-410(2)(f)(i)(A) (2017).

²⁶⁷ See WASH. REV. CODE § 43.63A.215(1)(b).

²⁶⁸ *Id.* § 43.63A.215(3) ("The accessory apartment provisions shall be part of the local government's development regulation, zoning regulation, or official control.").

²⁶⁹ *Id.*

²⁷⁰ See *Accessory Dwelling Units*, *supra* note 266 (explaining how "[i]t is still unclear how far cities may depart from [the state Department of Community, Trade, and Economic Development's] recommendations and remain in compliance with the intent of the Act"). The Department of Community, Trade, and Economic Development issued a model ADU ordinance in January 1994. See *generally* WASH. STATE DEP'T OF CMTY., TRADE, AND ECON. DEV., MODEL ACCESSORY DWELLING UNIT ORDINANCE RECOMMENDATIONS (1994), <http://mrsc.org/getmedia/3ccc6c5e-0cc9-43c1-8936-b0017c7c161e/ADUordrecommendations.pdf.aspx> [<https://perma.cc/UE3K-9D59>].

²⁷¹ See *Accessory Dwelling Units*, *supra* note 266.

²⁷² See *id.* As this Article neared publication, legislators in Washington introduced ambitious new statewide ADU legislation. See Margaret Morales, *Can Washington Pass the Country's Most Ambitious Statewide ADU Reform?*, SIGHTLINE INST. (Jan. 30, 2019), <https://www.sightline.org/2019/01/30/can-washington-pass-the-countrys-most-ambitious-statewide-adu-reform/> [<https://perma.cc/9APR-K52Q>] (describing legislation as "the most progressive accessory dwelling unit (ADU) bill legislators from any state have ever had the opportunity to vote on").

fied.²⁷³ These conditions include: (1) the property has “sufficient wastewater capacity,” (2) the ADU is no larger in size than thirty percent of the total habitable square footage of the house (municipalities remain free to adopt less restrictive laws permitting larger ADUs), and (3) the property satisfies applicable setback, coverage, and parking requirements in town zoning bylaws.²⁷⁴

New Hampshire’s Senate Bill 146, which took effect on June 1, 2017,²⁷⁵ requires municipal zoning ordinances to permit the development of one attached ADU, either by right, special exception, or conditional use permit, in all districts that permit single-family residences.²⁷⁶ The law expressly links the mandate to allow ADUs to the state’s grant of zoning authority to municipalities: “[a] municipality that adopts a zoning ordinance pursuant to the authority granted in this chapter shall allow accessory dwelling units”²⁷⁷ Although municipalities can establish minimum and maximum unit sizes for the ADU, they cannot restrict the size of any ADU to less than 750 square feet.²⁷⁸ The law is still quite new and as of February 2018 there had not been a significant surge in ADU construction in the Granite State.²⁷⁹

²⁷³ See VT. STAT. ANN. tit.24, § 4412(1)(E) (West 2017) (“[N]o bylaw shall have the effect of excluding as a permitted use one accessory dwelling unit that is located within or appurtenant to an owner-occupied single-family dwelling. An accessory dwelling unit means an efficiency or one-bedroom apartment that is clearly subordinate to a single-family dwelling, and has facilities and provisions for independent living, including sleeping, food preparation, and sanitation”); see also VT. DEP’T OF HOUS. & CMTY. DEV., ACCESSORY DWELLING UNITS: A GUIDE FOR HOMEOWNERS (2013), <https://accd.vermont.gov/sites/accdnew/files/documents/H-Instructions-2013EditionAccessoryAptsBrochure.pdf> [<https://perma.cc/8WV2-KHYQ>].

²⁷⁴ See VT. STAT. ANN. tit. 24, § 4412(1)(E)(1)(2)(3).

²⁷⁵ S.B. 146, Gen. Court, 2017 Sess. (codified in N.H. REV. STAT. ANN. § 674:72) (2017). See also *Planning for Accessory Dwellings*, OFF. OF STRATEGIC INITIATIVES, <https://www.nh.gov/osi/planning/resources/accessory-dwellings.htm> [<https://perma.cc/R8DV-UDNA>].

²⁷⁶ N.H. REV. STAT. ANN. § 674:72.

²⁷⁷ *Id.* An “accessory dwelling unit” is defined as “a residential living unit that is within or attached to a single-family dwelling, and that provides independent living facilities for one or more persons, including provisions for sleeping, eating, cooking, and sanitation on the same parcel of land as the principal dwelling unit it accompanies.” *Id.* § 674:71. Municipalities are granted discretion to permit detached ADUs as well. See *id.* § 674:73. Local governments are free to “require adequate parking to accommodate an accessory dwelling unit” and owner occupancy of one of the two units on the property, but may not require separate water and sewage systems or a familial relationship between the occupant of the primary dwelling and the ADU. *Id.* § 674:72.

²⁷⁸ *Id.* § 674:72.

²⁷⁹ David Brooks, *Despite Ease in Guidelines, Officials See No Surge of New In-law Apartments*, CONCORD MONITOR (Feb. 17, 2018), <https://www.concordmonitor.com/accessory-units-in-law-apartments-nh-15216366> [<https://perma.cc/Q8WP-TEMA>]. The New Hampshire Municipal Association drafted an explanation of the new state law and a proposed zoning amendment, which many local governments chose to adopt. See LEGAL SERVS. DEP’T, N.H. MUN. ASSOC., THE NEW LAW ON ACCESSORY DWELLING UNITS (Sept. 2016), <https://www.nhmunicipal.org/Resources/ViewDocument/741> [<https://perma.cc/6SSY-JHVE>]; David Brooks, *Town Meeting Voters Tweak New Laws Allowing ‘In-law Apartments’ Across N.H.*, CONCORD MONITOR (Mar. 20, 2017), <https://www.concordmonitor.com/accessory-unit-town-meeting-8692225> [<https://perma.cc/CCU3-GG8P>].

Other states, while taking less significant steps, have recognized the potential for ADUs to ease housing shortages and affordability concerns and have sought to encourage ADU development.²⁸⁰ As of January 1, 2017, a state law in Rhode Island allows owner-occupants of single-family homes to build an ADU, within an existing structure, as-of-right for a relative age sixty-two or older.²⁸¹ A 2004 Florida law enables, but does not require, local governments to adopt an ordinance permitting ADUs in any single-family residential zone, “[u]pon a finding . . . that there is a shortage of affordable rentals within its jurisdiction.”²⁸² Should a local government adopt an ordinance pursuant to the law, the property owner seeking to develop an ADU must sign an affidavit stating “that the unit will be rented at an affordable rate to an extremely-low-income, very-low-income, low-income, or moderate-income person or persons.”²⁸³ To provide an incentive for localities to allow ADU development, the law states that ADUs “shall apply toward satisfying the affordable housing component of the housing element in the local government’s comprehensive plan”²⁸⁴ In addition, Florida allows property owners who add living quarters for a parent or grandparent to obtain a reduction of their assessment for all or part of the value of the new construction.²⁸⁵

3. A Drop in the Affordability Bucket or the Opening of a Spigot?

State-level ADU laws that displace local regulations may have a significant effect given the large percentage of land throughout the United States,

²⁸⁰ See, e.g., 42 R.I. GEN. L. § 42-128-8.1 (2006 & Supp. 2018) (“Innovative community planning tools, including, but not limited to, density bonuses and permitted accessory dwelling units, are needed to offset escalating land costs and project financing costs that contribute to the overall cost of housing and tend to restrict the development and preservation of housing affordable to very low income, low income and moderate income persons.”).

²⁸¹ Christine Dunn, *R.I. Allowance for “In-law” Units Is Little Known*, PROVIDENCE J. (Apr. 19, 2018), <https://www.providencejournal.com/news/20180419/ri-allowance-for-in-law-units-is-little-known> [<https://perma.cc/QKP8-4KTL>].

²⁸² FLA. STAT. ANN. § 163.31771 (West 2011). See generally Sarah A. Gottlieb, *Florida’s Accessory Dwelling Unit Laws: Mitigating Florida’s Housing Woes Through State-Encouraged Expansion of ADU Permitting*, 46 STETSON L. REV. 627 (2017) (arguing that legislation has fallen short of its goals).

²⁸³ FLA. STAT. ANN. § 163.31771 (“[T]he Legislature finds that it serves an important public purpose to encourage the permitting of accessory dwelling units in single-family residential areas in order to increase the availability of affordable rentals for extremely-low-income, very-low-income, low-income, or moderate-income persons.”).

²⁸⁴ *Id.* Connecticut does not mandate that localities permit ADUs, but under state law an ADU that is attached to the main house and subject to a covenant that requires it to remain affordable for at least ten years can be counted towards the threshold percentage of affordable housing units that renders a municipality not subject to the state’s affordable housing appeals procedure. CONN. GEN. STAT. ANN. § 8-30g (West 2017).

²⁸⁵ FLA. STAT. ANN. § 193.703 (West 2013); *Granny Flat Assessment Reduction*, MIAMI-DADE PROP. APPRAISER, http://www.miamidade.gov/pa/exemptions_granny_flat.asp [<https://perma.cc/WQW3-V3YE>].

including in major cities, that is zoned single-family residential. In both Los Angeles and San Francisco, “well over three quarters of the total land area is comprised of neighborhoods where single-family homes make up at least 60% of the community’s housing stock.”²⁸⁶ In Seattle, 54% percent of the city’s land area is zoned single-family.²⁸⁷ Seattle’s Department of Planning and Development has estimated that if just 5% of eligible single-family homes added detached accessory dwelling units, it would provide about 4,000 additional dwellings in the city.²⁸⁸ According to the Bay Area Council in San Francisco, if 10% of the 1.5 million single-family properties in the Bay Area added an ADU it would add 150,000 new units.²⁸⁹ Although this may appear unlikely, roughly one-quarter of owners in the Bay Area, according to a recent survey, stated that they would be open to adding an ADU.²⁹⁰ In Vancouver, British Columbia, which, in 2004, legalized ADUs within an existing house,²⁹¹ more than one-third of the city’s single-family homes now have an ADU.²⁹² In addition, in 2009, the city started to allow “laneway houses,” detached ADUs facing an alley, which rent for an average of approximately \$1,250 a month.²⁹³ The city now has more than 2,000 laneway houses.²⁹⁴

²⁸⁶ Garcia, *supra* note 250; see also BACKYARD HOMES LA 8 (Dana Cuff et al. eds., 2010) (“By June 2010, the single-family residential zones consisted of 457,610 lots scattered across [Los Angeles].”).

²⁸⁷ *About Seattle*, CITY OF SEATTLE, OFFICE OF PLANNING & CMTY. DEV., <https://www.seattle.gov/opcd/population-and-demographics/about-seattle/#landuse> [<https://perma.cc/9MAM-PK6T>].

²⁸⁸ SEATTLE CITY COUNCIL & SEATTLE DEP’T OF PLANNING & DEV., BACKYARD COTTAGES: PRELIMINARY SURVEY FINDINGS FROM OWNERS 1, <https://www.seattle.gov/Documents/Departments/Council/Members/OBrien/Backyard-Cottages-Handout.pdf> [<https://perma.cc/4S2Q-YBL2>].

²⁸⁹ Queenie Wong, *California Eases Restrictions on ‘Granny Units,’* MERCURY NEWS (Sept. 28, 2016), <https://www.mercurynews.com/2016/09/27/california-eases-restrictions-on-granny-units/> [<https://perma.cc/YWS2-VTNW>]. But see Spencer Brown, *Our View: Why San Francisco Can’t Get Along with Its In-laws*, S.F. BUS. TIMES (Mar. 1, 2018), <https://www.bizjournals.com/sanfrancisco/news/2018/03/01/our-view-why-san-francisco-cant-get-along-with-its.html> [<https://perma.cc/JA6K-DLLH>] (noting that, even given increases in ADU applications, at current rates it would take 50 years to permit 30,000 new in-law homes in San Francisco).

²⁹⁰ *New Poll Finds That 25% of Homeowners Would Add an In-law Unit, Creating 400,000 New and Affordable Housing Units*, BAYAREA COUNCIL (Apr. 12, 2017), http://www.bayareacouncil.org/community_engagement/new-poll-finds-that-25-of-homeowners-would-add-an-in-%C2%ADlaw-unit-creating-400000-new-and-affordable-housing-units/ [<https://perma.cc/86WH-5SVY>]; see also KAREN CHAPPLE ET AL., CTR. FOR CMTY. INNOVATION AT THE INST. OF URBAN & REG’L DEV., YES IN MY BACKYARD: MOBILIZING THE MARKET FOR SECONDARY UNITS 3 (2012) (finding that under then-existing zoning regulations in five East Bay cities (Berkeley, El Cerrito, Oakland, Richmond, and Albany) “about one out of five of the single family resident parcels . . . can accommodate a detached secondary unit”).

²⁹¹ CHAPPLE ET AL., *supra* note 211, at 12.

²⁹² Dan Bertolet, *Why Vancouver Trounces the Rest of Cascadia in Building ADUs*, SIGHTLINE INST. (Feb. 17, 2016), <https://www.sightline.org/2016/02/17/why-vancouver-trounces-the-rest-of-cascadia-in-building-adus/> [<https://perma.cc/EY5A-WKZZ>].

²⁹³ Mimi Kirk, *The Push to Build More ‘Granny Flats,’* CITYLAB (Mar. 27, 2017), <https://www.citylab.com/equity/2017/03/the-push-for-granny-flats-in-pricey-neighborhoods/520866/> [<https://perma.cc/86WH-5SVY>].

Absent the rezoning of single-family parcels and subsequent tear down of existing houses, ADUs provide the most plausible mechanism for increasing density and housing supply in these neighborhoods and thus in a significant portion of most major cities.²⁹⁵ As local residents become accustomed to a gradual increase in density, or see the potential financial benefits of being able to add an additional housing unit to their property, regulations allowing ADUs may, in time, lead to even more permissive regulations allowing for multiple ADUs, duplexes, and triplexes on single-family lots. This is particularly likely to occur if, as the limited evidence to date suggests, an influx of ADUs does not significantly alter neighborhood character, or does so in a fairly gradual and imperceptible manner.²⁹⁶ There has already been some movement in this direction within individual cities and some consideration of such reforms at the state level.²⁹⁷

There is limited empirical research on the question of whether ADUs rent at more affordable levels than comparably sized housing units.²⁹⁸ ADUs may prove more affordable because owners make them available to family and friends at a discounted rent. One researcher, who studied accessory dwellings in Edmonton, Alberta, found that forty-eight percent of units were rented to family and friends, on average for lower rent than might otherwise be

cc/YWS8-QJFZ]. For further discussion, see generally NATHANAE LAUSTER, *THE DEATH AND LIFE OF THE SINGLE FAMILY HOUSE: LESSONS FROM VANCOUVER ON BUILDING A LIVABLE CITY* (2016).

²⁹⁴ Selma Nurmohamed, *Vancouver's Laneway Love-in: Little Homes, Big Success*, CBC NEWS (Nov. 05, 2016), <https://www.cbc.ca/news/canada/british-columbia/laneway-vancouver-coachhouse-density-1.3835335> [<https://perma.cc/CK5V-AYXS>]; Kirk, *supra* note 293.

²⁹⁵ Cf. Jake Wegmann & Karen Chapple, *Hidden Density in Single-Family Neighborhoods: Backyard Cottages as an Equitable Smart Growth Strategy*, 7 J. URBANISM 307, 308 (2014) (“Secondary units, or apartments added to low-density residential properties via either micro-infill or the partitioning of existing structures, can potentially add as much or more density, at a fraction of the cost, as large-scale development.”).

²⁹⁶ With regards to the effect of ADUs on neighborhood character and related concerns, one small study compared two adjacent neighborhoods in Pasadena, California, one in which there were 50 ADUs in addition to 236 primary dwelling units and the other in which there were 3 ADUs in addition to 133 primary dwellings. The study concluded that the ADUs had little effect on “neighborhood character, property values, traffic and parking.” See Memorandum from Philip Burns, Greater Pasadena Affordable Housing Group regarding Comparative Study of Impacts of Existing ADUs in Pasadena to Pasadena City Council 1, 8 (June 14, 2017), <https://makinghousinghappendotnet1.files.wordpress.com/2017/07/adu-comparative-study.pdf> [<https://perma.cc/PUK5-FG7Q>].

²⁹⁷ See *infra* notes 347–359 and accompanying text.

²⁹⁸ California’s 2016 legislation regarding ADUs expressly declares in its legislative findings that ADUs provide housing “at below market rates within existing neighborhoods” and that “offer lower cost housing to meet the needs of existing and future residents within existing neighborhoods.” Cal. S.B. 1069 (codified at CAL. GOV’T CODE § 65852.150(a)(2) & (7)); see also Amelia Templeton, ‘Granny Pods’ Help Keep Portland Affordable, NPR.ORG (Aug. 15, 2017), <https://www.npr.org/2017/08/15/543481719/-granny-pods-help-keep-portland-affordable> [<https://perma.cc/K8KK-J7ZK>] (quoting developer of ADUs in Portland, Oregon, who emphasized their potential to “a neighborhood to have people with a wide range of incomes living with each other”).

charged.²⁹⁹ A survey of homeowners in Portland, Seattle, and Vancouver with an ADU on their property found “the majority of ADUs rent for below market rates whether rented at arm’s length or not”³⁰⁰ These and earlier studies suggest that ADUs may rent at more affordable levels than comparably-sized units.³⁰¹ As the volume of ADUs in cities like Portland and Los Angeles increases, researchers will be better positioned to determine the direct effects on affordability. In addition, a number of small pilot programs have been introduced in recent years with the specific goal of developing detached accessory dwelling units that would be rented at affordable rates for a defined period of time.³⁰²

Of equal importance, ADUs, which typically are built in existing single-family neighborhoods, may provide low and moderate-income households with a more affordable housing option within particularly desirable neighborhoods where smaller units would otherwise not be available.³⁰³ One key dimension of the broader housing crisis is the lack of affordable housing in higher opportunity neighborhoods: safer communities with stronger schools and better employment prospects.³⁰⁴ Researchers have found that “[m]etropolitan areas with suburbs that restrict the density of residential construction are more segregated on the basis of income than those with more permissive density zoning regimes.”³⁰⁵ The 2016 White House Housing Toolkit emphasized that

²⁹⁹ Dave Soutar, *Garage Suites Create ‘Voluntary Affordability’ in Edmonton*, GLOBE & MAIL (Nov. 12, 2017) <https://www.theglobeandmail.com/real-estate/calgary-and-edmonton/edmonton-garage-suites-create-affordable-housingopportunities/article35064225> [<https://perma.cc/AM5R-245L>] (noting a woman “found that the average rent charged to family members is just \$504 a month, compared to units rented to tenants previously unconnected to the owners which are rented at an average of \$1,154 a month. In total, 25% of garage suites in Edmonton are considered affordable (that is, dwelling units which rent for less than \$700 a month)”; see also Amelia Templeton, *After Rent Doubled, This Portland Family Found a New Home in Their Neighbor’s Backyard*, OR. PUB. BROAD. (May 11, 2017), <http://www.opb.org/news/article/portland-accessory-dwelling-unit-adu-housing-homeless-rent-tiny-home/> [<https://perma.cc/224F-EXHY>].

³⁰⁰ CHAPLE ET AL., *supra* note 211, at 18.

³⁰¹ Infranca, *supra* note 21, at 64 n.44 (discussing limited studies of the effects of ADUs on affordability).

³⁰² See Margaret Morales, *Could Your Backyard Cottage Help Ease the Affordable Housing Crisis?*, SIGHTLINE INST. (Oct. 22, 2018), <https://www.sightline.org/2018/10/22/could-your-backyard-help-ease-the-affordable-housing-crisis/> [<https://perma.cc/M8XR-LURJ>] (stating that “[t]hese programs aim to pepper small, affordable homes in leafy neighborhoods that already boast great schools, parks, and transit service”).

³⁰³ See Janet Eastman, *supra* note 221 (quoting Phil Nameny of Portland [Oregon’s] Bureau of Planning and Sustainability, who remarked: “ADUs provide infill housing opportunities in great neighborhoods, taking advantage of existing utilities and services . . . [and] allowing more people to live in amenity-rich areas”).

³⁰⁴ See Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1123 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3632084/> [<https://perma.cc/MR38-5B2W>].

³⁰⁵ *Id.* (“This arrangement perpetuates and exacerbates racial and class inequality in the United States.”).

ADUs can “expand the available rental housing stock in areas zoned largely for single-family housing” and thereby promote “healthy, responsive, affordable, high-opportunity housing markets”³⁰⁶ Along these lines, a number of municipalities identified ADUs as a mechanism for providing fair housing—and access to opportunity—in documents that local governments, until recently, were required to file with HUD pursuant to their legal obligation to “affirmatively further fair housing.”³⁰⁷ The likelihood of ADUs providing housing options for lower-income households in more desirable neighborhoods may be limited to the extent that ADUs are rented to family or through informal social networks and by the fact that the Fair Housing Act’s prohibition on discrimination would not apply to ADU rentals (although local fair housing laws may apply).³⁰⁸ It is possible that in the growing number of jurisdictions that provide homeowners with financial assistance for developing an ADU, in exchange for a commitment to rent the unit to a lower-income household, regulations prohibiting discrimination might be imposed on such rentals. However, such programs have, to date, been quite small in size given funding limitations. In sum, while ADUs may play some part in directly promoting more affordable housing options, particularly in more desirable neighborhoods, this should not be overstated. Rather the most significant effect that more liberal ADU laws are likely to have on housing affordability is as one component of a broader effort to expand housing supply.

Finally, even where state and local laws liberalize ADU regulations, homeowners may be barred from developing an ADU by a homeowners association.³⁰⁹ This issue has not received significant attention in states that have liberalized ADU laws. Some authorities assume that a state ADU law would apply only to local governments and not override private agreements such as a homeowner’s associations’ covenants.³¹⁰ However, it is possible that—in light

³⁰⁶ HOUSING DEVELOPMENT TOOLKIT, *supra* note 6, at 3, 17.

³⁰⁷ 24 C.F.R. § 91.225(a)(1) (2018).

³⁰⁸ See Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1149–50 (2012).

³⁰⁹ See Kevin Fixler, *Santa Rosa-Area HOA’s ‘Granny Unit’ Ban Makes Wildfire Survivor Consider Lawsuit*, PRESS DEMOCRAT (May 25, 2018), <https://www.northbaybusinessjournal.com/northbay/sonomacounty/8365353-181/santa-rosa-hoa-adu-housing-law> [<https://perma.cc/X6NW-9UUQ>] (noting that “[h]is case could have broader implications across the state, as homeowners seek to leverage elected officials’ push for more housing against the limits proposed by HOAs, which set rules that apply to an estimated 6 million Californians”).

³¹⁰ See *Accessory Dwelling Unit Ordinance*, CITY OF NEWPORT BEACH, <https://www.newportbeachca.gov/trending/projects-issues/accessory-dwelling-unit-ordinance> [<https://perma.cc/G7ML-J3GW>] (noting that “[s]tate law does not prohibit Homeowner’s Associations abilities to regulate ADUs and does not override Covenants, Conditions, and Restrictions (CC&Rs)”; N.H. HOUS., *ACCESSORY DWELLING UNITS IN NEW HAMPSHIRE: A GUIDE FOR MUNICIPALITIES* 24 (2017), https://www.nhhfa.org/assets/pdf/NHHFA_ADU_Guide_final_web.pdf [<https://perma.cc/H6U8-HC55>] (noting that “[w]hile the municipality cannot prohibit ADUs, a developer can create a new housing development that has covenants banning ADUs”).

of a strong state interest in encouraging housing development in the form of ADUs—a court might strike a covenant for public policy reasons or a legislature might pass a statute prohibiting covenants that restrict ADUs.

IV. A NOT-SO-QUIET REVOLUTION

By stymieing new housing development, overly restrictive local zoning has exacerbated the housing crisis in communities throughout the United States. The significant negative externalities generated by these limits on new housing supply and the persistence of local resistance to new development justify bold new state land use interventions. A similar call for state intervention was made in the 1970s, and while it gave rise to Massachusetts's Chapter 40B, *Mount Laurel*, and California's Housing Element law, the impact of these interventions remains limited. This Part delineates what is different about the current set of state interventions and the context in which they have arisen. It then argues that going forward such interventions should be targeted at preempting specific elements of local zoning, while also providing some mechanisms for addressing countervailing concerns.

A. From Channeling to Displacing Local Discretion

Comparing recent state-level land use and housing interventions with those of the 1970s reveals a few substantive distinctions. To varying degrees the earlier set of programs, which emphasized planning and procedural reforms, focused on channeling local discretion. These procedures sought to ensure the distribution of affordable housing across municipalities, based on either a set percentage of total housing in a jurisdiction or some measure of its "fair share." In the case of New Jersey and Massachusetts, they relied in part upon private enforcement through developers invoking a "builder's remedy."³¹¹

The interventions examined in Part III differ in two key ways.³¹² First, they expressly preempt or displace specific elements of local land use regulation. This is true of laws mandating that local governments allow ADUs on any single-family lot, imposing restrictions on parking requirements at certain new developments, or specifying the "objective planning standards" that local governments must consider when reviewing infill developments.³¹³ Massachusetts's failed Great Neighborhoods Legislation would have required multifamily zoning in some part of each community. California's S.B. 827 would have gone even further, overriding local zoning in a significant portion of the

³¹¹ See *supra* note 86 and accompanying text.

³¹² See *supra* notes 121–315 and accompanying text.

³¹³ See *supra* note 150 and accompanying text.

state. In each of these examples state standards are imposed in place of local regulations or local government discretion is carefully circumscribed. Although some of these efforts have failed, they have also generated significant public attention, highlighting the role that restrictive zoning plays in reducing housing supply and driving up costs.

Second, recent interventions tend to streamline local development approval processes, rather than add planning and procedural requirements or additional layers of review. Chapter 40B's comprehensive permit process also streamlined the approval of certain housing, but recent laws are broader in application.³¹⁴ Of course, in some cases these laws, such as those limiting the application of state environmental review, only serve to remove requirements previously imposed by the state. But in other cases, these laws demand quicker decisions by local governments or significantly limit the grounds upon which a local government can reject new development.

Beyond these differences in how these two generations of state interventions function and relate to local zoning, debates around these laws reveal changing political dynamics. In the remainder of this Part, I draw out these dynamics before arguing that they suggest we are in the early stages of a new movement towards greater state-level intervention in land use law generally and housing development in particular.³¹⁵

B. The (Increasingly Apparent) Costs of Low-Density Zoning

William Fischel argued that suburban communities responded to the *Mount Laurel* decisions by seeking to thwart all new development in the name of "growth management."³¹⁶ This served not only to maintain low-density suburban neighborhoods but also to keep out low-income housing and minority residents by simply allowing no new housing in the aftermath of *Mount Laurel* and Chapter 40B.³¹⁷ The exclusion of any development was justified in part, during the 1970s, by environmental concerns and the desire to preserve open space.³¹⁸ At the same time, state and federal environmental laws gave rise to a "double veto" that imposed additional obstacles for new development.³¹⁹ Fischel contends that homeowners worked with and within the environmental movement to add layers of review and stymie new development in their neigh-

³¹⁴ See *supra* notes 58–120 and accompanying text.

³¹⁵ See *infra* notes 316–372 and accompanying text.

³¹⁶ Fischel, *supra* note 33, at 331.

³¹⁷ Fischel, *supra* note 60, at 27 (stating "[t]he thinking by homevoters might have been, if we have to take blacks and the poor along with everyone else, maybe we would prefer to have no growth at all").

³¹⁸ See Fischel, *supra* note 33, at 332.

³¹⁹ *Id.* at 333.

borhoods.³²⁰ Supporting this point, a California lawyer who compiled and studied two datasets of California Environmental Quality Act (“CEQA”) litigation concluded that “CEQA has evolved into a legal tool most often used against the higher density urban housing, transit, and renewable energy projects, which are all critical components of California’s climate priorities and California’s ongoing efforts to remain a global leader on climate policy.”³²¹

In recent years, the positive effects of denser, transit-oriented development have begun to play a more significant role in debates over land use, environmental policy and housing development.³²² Although California has not directly reformed CEQA, A.B. 73, discussed above, precludes project-specific CEQA lawsuits within designated housing sustainability districts.³²³ At the same time, there are growing tensions within the environmental community between older advocates, who may have championed the slow or no-growth initiatives that started in the 1970s, and newer advocates who emphasize denser development and public transportation as, in part, a means of addressing climate change.³²⁴ This split played out in the debate over S.B. 827 in California, which the California chapter of the Sierra Club opposed on a number of grounds, including the potential side effect of less new transit development (as, they argued, outlying communities would resist new transit so as to avoid an

³²⁰ See Fischel, *supra* note 60, at 19.

³²¹ Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California’s Housing Crisis*, 24 HASTINGS ENV’T L.J. 21, 24 (2018); see also Benjamin Schneider, *In California, Momentum Builds for Radical Action on Housing*, CITYLAB (Mar. 5 2018), <https://www.citylab.com/equity/2018/03/in-california-momentum-builds-for-radical-action-on-housing/554768/> [<https://perma.cc/SQM6-2AT2>] (commenting that “[p]olitically powerful homeowners used the broad scope of the state’s environmental review process to invoke aesthetic and quality-of-life concerns about new housing, which often served as a pretext for race and class-based exclusion”). But see Ethan Elkind, *CEQA: With the Passing of Its Legislative Author, What’s the Status?* (May 23, 2017), <http://www.ethanelkind.com/ceqa-with-the-passing-of-its-legislative-author-whats-the-status/> [<https://perma.cc/H56K-TSEW>] (discussing reports that find CEQA has a less significant effect on California’s housing shortage than critics contend).

³²² See Baker, *supra* note 4 (“The [Massachusetts] bill also reflects a belief that policies encouraging housing growth should align with other values our Administration has championed, such as our commitment to encourage good stewardship of our environment and reduce greenhouse gases.”).

³²³ See *supra* note 154 and accompanying text.

³²⁴ See Scott Lucas, *A Green House Divided*, S.F. MAG. (Apr. 27, 2018), <https://www.modernluxury.com/san-francisco/story/green-house-divided> [<https://perma.cc/54ZR-RVFL>] (discussing a rift between older and younger generations of environmentalists); Nathanael Johnson, *Enviros and Developers: A Love Story*, GRIST (Oct. 30, 2017), <https://grist.org/article/san-francisco-environmentalists-housing-development-fight/> [<https://perma.cc/SB4P-XFSU>] (describing San Francisco’s pro-development YIMBYs as “part of a national trend, as millennial environmentalists embrace a different shade of green from their predecessors”); see also David Roberts, *The Future of Housing Policy Is Being Decided in California*, VOX (Apr. 4, 2018), <https://www.vox.com/cities-and-urbanism/2018/2/23/17011154/sb827-california-housing-crisis> [<https://perma.cc/2MGE-AEV9>] (stating that “[a]mong other things, SB 827 is exposing a deep split in the state’s environmental community between those focused on climate change and urban density (generally younger) and those focused on old-school preservation and population limits (generally older)”).

automatic upzoning under S.B. 827).³²⁵ This opposition “raised some eyebrows, given the environmental impact of transit-oriented development.”³²⁶ Although the Sierra Club’s opposition received significant attention, other environmental groups, including the Natural Resources Defense Council, Climate Resolve, and Environmental California, supported S.B. 827.³²⁷

The embrace of denser and more transit-oriented development by younger environmentalists overlaps with the efforts of the burgeoning YIMBY movement, which urges increased development primarily as a means to lower housing prices through increased supply.³²⁸ Survey data suggests an increasing preference more generally for denser living, particularly in recent years³²⁹ among younger individuals.³³⁰ The confluence of these trends: a growing awareness of the environmental benefits of density, a preference for denser living, and an informed cohort of young professionals pushing for increased housing supply in urban areas, augurs growing support for interventions that displace restrictions on or create incentives for such development.³³¹

³²⁵ See Letter from Kyle Jones, Pol’y Advocate, Sierra Club Cal., to Cal. State Sen. Scott Weiner (Jan. 18, 2018), <http://www.ethanelkind.com/wp-content/uploads/2018/01/SB-827-Wiener-Oppose-Final.pdf> [<https://perma.cc/9HR6-VFLE>] (“[SB 827] will increase pollution, discourage transit, and potentially displace disadvantaged residents.”).

³²⁶ Josh Cohen, *California Is Considering a ‘Radical’ Statewide Upzone*, NEXT CITY (Feb. 8, 2018), <https://nextcity.org/daily/entry/california-is-considering-a-radical-statewide-upzone> [<https://perma.cc/8UTL-T598>]. The Sierra Club was not alone. A particularly alarmist op-ed in opposition to S.B. 827, which appeared in the *Berkeley Daily Planet*, went so far as to declare that the law will cause “massive damage to the global environment for thousands of years. Possibly enough to tip the balance to the extinction of the entire human race.” Russ Tilleman, *No Science but Plenty of Money Behind Greenwashed SB 827*, BERKELEY DAILY PLANET (Jan. 29, 2018), <http://berkeleydailyplanet.com/issue/2018-01-26/article/46428?headline=No-Science-but-Plenty-of-Money-Behind-Greenwashed-SB-827> [<https://perma.cc/B22E-NBVW>].

³²⁷ Letter from Amanda Eaken, Dir. of Transp. & Climate, Nat. Res. Def. Council, Ann Notthoff, W. Advocacy Dir., Nat. Res. Def. Council, Bryn Lindband, Assoc. Dir., Climate Resolve, and Dan Jacobson, State Dir., Env’t Cal., to Sen. Scott Weiner (Mar. 23, 2018), https://sd11.senate.ca.gov/sites/sd11.senate.ca.gov/files/sb_827_letter_-_3-23-18.pdf [<https://perma.cc/VY6H-A93X>] (arguing that “housing development near public transportation can be a key element in achieving California’s climate goals, by offering more people the opportunity to use transit for their daily trips”).

³²⁸ See generally NATHANIEL DECKER ET AL., RIGHT TYPE RIGHT PLACE: ASSESSING THE ENVIRONMENTAL AND ECONOMIC IMPACTS OF INFILL DEVELOPMENT THROUGH 2030 (2017), <https://www.law.berkeley.edu/wp-content/uploads/2017/03/Right-Type-Right-Place.pdf> [<https://perma.cc/KG7Y-EEG2>] (providing an analysis of the potential effects of infill development on greenhouse gas emissions in California).

³²⁹ HIRT, *supra* note 44 (citing sources discussing Americans interest in living in denser and more urban settings).

³³⁰ See Richard Florida, *Is Your Neighborhood Changing? It Might Be Youthification, Not Gentrification*, CITYLAB (Feb. 5, 2015), <http://www.citylab.com/housing/2015/02/is-your-neighborhood-changing-it-might-be-youthification-not-gentrification/385193/> [<https://perma.cc/U27J-6MFG>] (discussing a study of the three largest metros in Canada, which found the “connection between density and age of residents has increased substantially over time”).

³³¹ See Chris Kirkham, *California Housing Crunch Prompts Push to Allow Building*, WALL ST. J. (Jan. 25, 2017), <https://www.wsj.com/articles/california-housing-crunch-prompts-push-to-allow-building->

It also marks an important contrast with *Mount Laurel I* and Chapter 40B, which focused narrowly on the availability of housing for low- and moderate-income households, emphasizing the obligation of individual municipalities to meet this need.³³² In *Mount Laurel I* the municipality defended its one-half acre minimum lot size in part on environmental grounds (specifically sewage and water supply).³³³ In the over forty decades since, public awareness of the broader costs of restrictive zoning for the environment and economic growth has increased significantly. The result is the potential for an increasing convergence of interests among housing advocates, environmentalists, the business community, and young professionals across the political spectrum. Admittedly, there are obstacles to this convergence. YIMBYs face skepticism if not downright opposition from anti-gentrification activists.³³⁴ “Supply-skeptics” in the affordable housing community question the academic consensus that a greater supply of market rate housing will lead to more affordability.³³⁵ Yet even given these challenges the nature of the discourse has clearly changed, as has the breadth and depth of reforms receiving real consideration.

C. Homeowners as Developers

California’s Building Industry Association pushed for the state’s original 1969 housing element law, persuading then-Assemblyman (and later Governor) Pete Wilson to address what it deemed excessive local regulation of land use and development and insufficient recognition of the costs of regulation.³³⁶ *Mount Laurel* and Massachusetts’s 40B, which enable developers to appeal local rejections of a proposed development, are often criticized by local residents as nothing more than a gift to developers, delivered at the expense of local communities.³³⁷ These programs are also criticized on the grounds that by

1485340200 [<https://perma.cc/RVY3-M972>] (stating that YIMBYs in California “are fighting back against antidevelopment campaigns, filing lawsuits, attending public hearings and organizing in support of much more building”).

³³² See MASS. GEN. LAWS ANN. ch. 40B, § 21 (West 2018); *S. Burlington Cty. NAACP v. Mount Laurel Twp. (Mount Laurel I)*, 336 A.2d 713, 723 (N.J. 1975).

³³³ *Mount Laurel I*, 336 A.2d at 731.

³³⁴ See Stahl, *supra* note 12, at 8 (“YIMBY is already facing powerful opposition from homeowners, antigentrification activists, hostile local governments, and others who are eager to find proof that YIMBY is simply a front for moneyed interests.”).

³³⁵ See Vicki Been et al., *Supply Skepticism: Housing Supply & Affordability*, 29 HOUSING POL’Y DEBATE 1, 25 (2018).

³³⁶ See Jessie Agatstein, *The Suburbs’ Fair Share: How California’s Housing Element Law (and Facebook) Can Set a Housing Production Floor*, 44 REAL EST. L.J. 219, 225 (2015) (citing William C. Baer, *California’s Fair Share Housing 1967–2004: The Planning Approach*, 7 J. PLAN. HIST. 48 (2008)).

³³⁷ Adam J. Sulkowski, *From the Environment*, 39 REAL EST. L.J. 352, 356 (2010) (noting that critics of Chapter 40B argue, among other things, that it has unfairly enriched developers who exploit the appeals system); see also Lance Freeman & Jenny Schuetz, *Producing Affordable Housing in Rising Markets: What Works?*, 19 CITYSCAPE 217, 222 (2017) (“Both the New Jersey and Massachu-

usurping local control they reject local expertise and ignore the effects of new development.

It is difficult for opponents to similarly criticize state laws mandating that local governments allow ADUs. Although property owners tend to prefer local control of land use issues, they also frequently find themselves frustrated by onerous requirements, delays, and outright rejections at the hands of local officials. Nonetheless, the League of California Cities, in a letter to Senator Bob Wieckowski, the chief sponsor of the state's ADU legislation, criticized the new law's removal of local control³³⁸ as have certain local officials.³³⁹ Wieckowski responded by arguing that the statute serves the goal of "re-turn[ing] [] power to the homeowner."³⁴⁰ Local officials have voiced similar sentiments.³⁴¹

setts laws are frequently invoked by developers seeking to build higher-density housing in wealthy suburban areas, although these efforts often face fierce resistance from local governments and residents."); *id.* (citing sources).

³³⁸ Letter from Kendra Harris, Leg. Rep., League of Cal. Cities, to Sen. Bob Wieckowski (Apr. 15, 2016), as reproduced in Memorandum from Sharon M. Tso, Chief Legal Analyst, to Honorable Members of the Rules, Elections & Intergovernmental Relations Comm. Regarding Resolution (Martinez-Buscaino) to Oppose SB 1069 (Wieckowski), Which Would Replace the Term 'Second Unit' with 'Accessory Dwelling Units, (ADU)' and Prescribes the Maximum Standards of an ADU (July 20, 2016), http://clkrep.lacity.org/online/docs/2015/15-0002-S189_rpt_CLA_07-27-2016.pdf [<https://perma.cc/JEX6-U8ZJ>].

³³⁹ See, e.g., April Charlton, *Santa Barbara County Planning Commission Tackles New Rules for Granny Flats*, SANTA YNEZ VALLEY NEWS (June 7, 2017), http://syvnews.com/news/local/santa-barbara-county-planning-commission-tackles-new-rules-for-granny/article_0ab3f387-ad29-55fc-b350-21d3e8a0baf7.html [<https://perma.cc/6BQ8-L2AQ>] (quoting Santa Barbara County Planning Commissioner Dan Blough who declared "the state is forcing this program on us"); Cameron Kiszla, *Few New Units from Granny Flats*, CAMARILLO ACORN (Dec. 29, 2017), <https://www.thecamarilloacorn.com/articles/few-new-units-from-granny-flats/> [<https://perma.cc/YBU4-A2H7>] (quoting City Councilmember Charlotte Craven who, before voting for new ADUs ordinance, remarked: "I realize that I'm going to have to vote for this because when I took my oath of office I said I would uphold the laws of the state of California, and I will, but I don't like it").

³⁴⁰ Joshua Molina, *Santa Barbara Inundated with Granny Unit Applications as City Develops Local Regulations*, NOOZHAWK (Aug. 15, 2017), https://www.noozhawk.com/article/santa_barbara_inundated_granny_unit_applications [<https://perma.cc/HTS3-DWRW>]; see also Patrick Sisson, *Why Tiny ADUs May Be a Big Answer to the Urban Housing Crisis*, CURBED (Jan. 16, 2018), <https://www.curbed.com/2018/1/16/16897014/adus-development-us> [<https://perma.cc/Q44D-ZJER>] (quoting Wickowski, who argued that "power should go to the homeowner, not the government, if they want to help with the housing crisis").

³⁴¹ See, e.g., Ramona Giwargis, *San Jose Eases Rules to Build Granny Units to Increase Housing Stock*, MERCURY NEWS (Nov. 22, 2016) (updated Nov. 23, 2016), <https://www.mercurynews.com/2016/11/22/san-jose-eases-rules-to-build-granny-units-a-new-source-of-affordable-housing/> [<https://perma.cc/LF6N-RWSD>] (quoting Vice Mayor of San Jose, who declared that relaxed ADU policy "empowers people by allowing single family homes to be part of the solution"); Gennady Sheyner, *City Eases Rules for 'Accessory' Housing*, PALO ALTO ONLINE (Mar. 8, 2017), <https://www.paloaltoonline.com/news/2017/03/08/palo-alto-eases-rules-for-accessory-dwelling-units> [<https://perma.cc/PF78-WFMU>] (quoting a Palo Alto councilman who remarked, in reference to local ADU ordinance, "[w]e're leaving the choice of growth up to each resident in Palo Alto and I think that's really important").

These responses suggest an effort to undermine a traditional argument for local control—that the local government is closer to individual citizens and a better vehicle for channeling local preferences. In the case of ADUs, the argument goes, local governments have for too long prevented homeowners from using their property as they see fit. As Wieckowski contends: “If [a homeowner] decided they wanted to get rid of their garage and convert their unit, or build a unit over the garage, or convert their master bedroom into another unit, that’s their prerogative and if that’s how they want to live—why not?”³⁴²

For this reason, laws that enable the development of ADUs on single-family lots add a layer of complexity to the traditional image of NIMBY homeowners who seek to exercise local control and stymie new development.³⁴³ It is the very same homeowners who often desire to develop an ADU as a means of providing housing for a relative, downsizing and aging in place,³⁴⁴ or helping to pay rising property taxes and a mortgage.³⁴⁵ In this respect, homeowners’ attitudes towards loosened regulation of ADUs may prove akin to the attitudes of urban workers towards new development during the period when most urban residents walked to work. As William Fischel observed, those who live close to work are likely to have mixed feelings about new development as it may both disrupt their lives and provide new financial opportunities.³⁴⁶ It is possible that the increased prevalence of state laws mandating that local governments allow single-family homeowners to add an ADU may make those same homeowners, who yield significant power over zoning more generally, more open to broader reforms.

³⁴² Tanza Loudenback, *Crazy-High Rent, Record-Low Homeownership and Overcrowding: California Has a Plan to Solve the Housing Crisis, But Not Without a Fight*, BUS. INSIDER (Mar. 12, 2017), <http://www.businessinsider.com/granny-flat-law-solution-california-affordable-housing-shortage-2017-3> [<https://perma.cc/3EBE-9EMP>].

³⁴³ Cf. BACKYARD HOMES LA, *supra* note 286, at 5 (explaining that instead of large-scale development, homeowners can slowly make their homes more affordable).

³⁴⁴ DEL. STATE HOUSING AUTH., ACCESSORY DWELLING UNITS: A PRACTICAL OPTION TO PROMOTE AFFORDABILITY 1 (2010) (noting “movement for aging in place” as one indicator of “the need for accessory dwelling units”).

³⁴⁵ See Postrel, *supra* note 252 (discussing how ADUs provide multiple benefits for “the single-family homeowners who drive the state’s housing policy”).

³⁴⁶ Fischel, *supra* note 316, at 327. Fischel explains:

When people walked to work, they had to live close to work. This usually meant that their homes were within the same municipality as their jobs and businesses. In this respect, most urban workers in the walking cities were like most farmers, who still live where they work. *Both would be of two minds about prospective development: it disrupts their home and business life, but it also provides opportunities for financial gain.*

Id. (emphasis added).

D. Opening the Door to Further Reform

Perhaps more importantly than their direct impact on housing supply and affordability, recent state laws permitting gentle density—both ADUs and other forms of infill development—may open the door to more significant reforms as residents become accustomed to greater density. At the city level, the success of Portland’s ADU reforms in encouraging housing production throughout the city’s residential neighborhoods led directly to Portland’s Residential Infill Project, which initially proposed rezoning approximately forty percent of the city’s single-family neighborhoods to allow duplexes, triplexes, and multiple ADUs.³⁴⁷ In September 2018, Portland’s Planning and Sustainability Commission tentatively approved an even more radical policy, which would rezone ninety-six percent of the city’s single-family neighborhoods and permit “any combination of up to four homes on a single lot”³⁴⁸ The effort seeks to implement the city’s updated Comprehensive Plan, which calls for more “missing-middle housing.”³⁴⁹ Vancouver, British Columbia, which has allowed ADUs, termed “laneway homes,” on alleyways for a number of years, now allows laneway apartment buildings as tall as six stories.³⁵⁰ The Minneapolis City Council recently eliminated single-family zoning, allowing duplexes and triplexes in every neighborhood.³⁵¹ The City Council President described the move to allow triplexes in single-family neighborhoods as an incremental change given the city’s previous legalization of ADUs.³⁵² Similar efforts to

³⁴⁷ BUREAU OF PLAN. & SUSTAINABILITY, CITY OF PORTLAND, RESIDENTIAL INFILL PROJECT (May 16, 2017), <https://www.portlandoregon.gov/bps/article/533961> [<https://perma.cc/4VGH-W5UA>]. The effort has been framed in part as an attempt to prevent the construction of “McMansions” by providing property owners with other options. See Tim Steele, *Plain Aims to Block New McMansions in Portland*, KOIN6 (Nov. 29, 2017), <http://koin.com/2017/11/29/plan-aims-to-block-new-mcmansions-in-portland/> [<https://perma.cc/9HBP-T5SV>]. As of July 2018, a vote on the program has been delayed until 2019. Rachel Monahan, *A Plan to Increase Number of Homes Allowed in Portland’s Single-Family Neighborhoods Delayed*, WILLAMETTE WEEK (July 20, 2018), <http://www.wweek.com/news/city/2018/07/20/a-plan-to-increase-number-of-homes-allowed-in-portlands-single-family-neighborhoods-delayed/> [<https://perma.cc/N7EN-Z3ZW>].

³⁴⁸ Jim Redden, *Commission Wants More Housing in Infill Plan*, PORTLAND TRIB. (Sept. 13, 2018), <https://portlandtribune.com/pt/9-news/406223-304417-commission-wants-more-housing-in-infill-plan> [<https://perma.cc/2W8X-KK5C>].

³⁴⁹ Jim Redden, *City Asks, Hundreds Respond on Infill Plan*, PORTLAND TRIB. (Feb. 8, 2018), <https://portlandtribune.com/pt/9-news/386043-273892-city-asks-hundreds-respond-on-infill-plan> [<https://perma.cc/459F-RWRE>]; see also *Residential Infill Project, Planning and Sustainability*, CITY OF PORTLAND, <https://www.portlandoregon.gov/bps/67728> [<https://perma.cc/7W75-JWMQ>].

³⁵⁰ Kevin Griffin, *Small All-Rental Apartment Building Plans to Densify West End Vancouver Lanes*, VANCOUVER SUN (Feb. 3, 2017), <https://vancouversun.com/news/local-news/small-all-rental-apartment-building-plans-to-densify-west-end-vancouver-lanes> [<https://perma.cc/U9KS-PY7C>].

³⁵¹ Sarah Mervosh, *Minneapolis Ends Zoning That Became Proxy for Race*, N.Y. TIMES, Dec. 14, 2018, at A12.

³⁵² See Henry Grabar, *Minneapolis Confronts Its History of Housing Segregation*, SLATE (Dec. 7, 2018), <https://slate.com/business/2018/12/minneapolis-single-family-zoning-housing-racism.html> [<https://perma.cc/9HGE-2EDS>]. One city councilor also remarked that the plan’s approval was eased by the fact

gradually increase density in residential neighborhoods are underway in other cities.³⁵³

These developments suggest that more permissive ADU laws, by enabling a gentle increase in density, might open the door to more significant changes and even greater increases in density and housing development.³⁵⁴ One might ask why state action is necessary and why homeowners who favor ADU development have not pushed local officials to liberalize local ordinances. One possibility is that in any given jurisdiction, the number of homeowners interested in adding an ADU might be small and their interest in expending the energy necessary to lobby for a change in local laws might be insufficient.³⁵⁵ At the state level, a critical mass of support for ADUs is easier to achieve with support from affordable housing advocates, legislators concerned more generally with restrictions on housing production, national groups like the American Association of Retired Persons (AARP), and a burgeoning industry of businesses that design and install ADUs.³⁵⁶ AARP in particular has long advocated

that smaller single-family homes were being replaced by larger “McMansions” in certain neighborhoods. *Id.* The new plan will allow for up to three separate housing units in a building of the same size as these larger single-family homes. *Id.* The Chair of Seattle’s Planning Commission, which recently recommended allowing more duplexes, triplexes, and fourplexes in single-family zones expressed a similar sentiment:

People are building three-story, single-family houses right now next to the cute 1940s and ‘50s Craftsman, but only one family is living [in the larger homes]. We’re saying: Wouldn’t it be great if that big modern box of three stories at least accommodated three families instead of just one so that more people could have access to all the reasons why you like your neighborhood?

Mike Rosenberg, *Seattle’s Housing Crunch Could Be Eased by Changes to Single-family Zoning*, *City Report Says*, SEATTLE TIMES (Dec. 7, 2018), <https://www.seattletimes.com/business/real-estate/city-report-widespread-single-family-zoning-is-damaging-seattle-and-needs-changing/> [<https://perma.cc/F59A-MSZA>].

³⁵³ See, e.g., Julia Shumway, *Bend Officials Wrestle with Rules to Boost Neighborhood Housing Density*, THE BULLETIN (May 2, 2018), <https://www.bendbulletin.com/localstate/6207769-151/bend-officials-wrestle-with-rules-to-boost-neighborhood> [<https://perma.cc/WH3V-GN2Y>] (reporting discussions in Bend, Oregon regarding easing development of duplexes, triplexes, and fourplexes on smaller lots).

³⁵⁴ Cf. Grabar, *supra* note 352 (reporting that, according to Minneapolis City Council President, the move to allow triplexes in single-family neighborhoods was an incremental change given city’s previous legalization of ADUs).

³⁵⁵ There appears to be some effort to organize ADU owners in Los Angeles. See Loudenback, *supra* note 342 (discussing efforts of ADU owner in Los Angeles to establish an advocacy group for ADU landlords).

³⁵⁶ Anecdotally, there are indications that once state law allows ADU development, subject to some local regulation, homeowners will come out in support of minimal local restrictions. See Nick Welsh, *Santa Barbara’s Granny Flat Avalanche*, SANTA BARBARA INDEP. (Sept. 28, 2017), <https://www.independent.com/news/2017/sep/28/santa-barbaras-granny-flat-avalanche/> [<https://perma.cc/ZKV2-RENX>] (discussing initial debate over proposed ADU ordinance before Santa Barbara Planning Commission and noting that “[t]he council chambers were packed, and the meeting ran five hours long; [and] all but two speakers blistered the first draft for being way too restrictive”).

for ADUs, commissioning a report by the American Planning Association in 2010 that included a model local ordinance and state act.³⁵⁷ The model state act establishes a state policy of encouraging ADUs, authorizes localities to adopt an ADU ordinance, and “sets the terms for what communities can and cannot do in regulating ADUs”³⁵⁸ The model state act would also require municipalities that choose to prohibit ADUs outright to provide findings to support this decision and receive certification from the state’s housing office that their ordinance conforms to the model act’s intentions.³⁵⁹ Although it had less immediate effect at the state level, as the next section will detail, many of these elements are reflected in the recent spate of state-level ADU laws.³⁶⁰

E. Positive Preemption?

In the past few years, a number of scholars and commentators have critiqued trends along the lines of what Richard Briffault termed “the ‘new preemption’—sweeping state laws that clearly, intentionally, extensively, and at times punitively, bar local efforts to address a host of problems.”³⁶¹ Such laws frequently seek to prohibit any regulation, rather than coordinate regulation so as to address regional or state-wide concerns.³⁶² Briffault’s new preemption would appear to not include the laws highlighted in this article, as he emphasizes laws that “frequently displace local action without replacing it with substantive state requirements.”³⁶³ The laws discussed in Part III³⁶⁴ instead either limit the scope of acceptable local regulation in a particular area or

³⁵⁷ RODNEY L. COBB & SCOTT DVORAK, PUB. POL’Y INST., ACCESSORY DWELLING UNITS: MODEL STATE ACT AND LOCAL ORDINANCE 5 (2000), https://assets.aarp.org/rgcenter/consume/d17158_dwll.pdf [<https://perma.cc/L5E9-P232>]; Wendy Koch, *In-law Units Help Homeowners Pay Bills, Care for Relatives*, USA TODAY (Aug. 17, 2011), (noting that many local ADU laws “are modeled after one advocated by the AARP and passed by Santa Cruz, Calif., in 2003 that prompted other cities in California and the Pacific Northwest to follow”).

³⁵⁸ COBB & DVORAK, *supra* note 357, at 11.

³⁵⁹ *Id.* at 21.

³⁶⁰ See *infra* notes 361–372 and accompanying text.

³⁶¹ Richard Briffault, *The Challenge of the New Preemption* 1 (Colum. Pub. L. Research Paper No 14-580, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3119888 [<https://perma.cc/4REZ-2UK5>] (contrasting “old preemption,” defined as “judicial determination of whether a new local law is inconsistent with pre-existing state law”). For additional criticisms of this new wave of state preemption, see, for example, Richard Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018); Kenneth A. Stahl, *Preemption, Federalism and Local Democracy*, 44 FORD. URB. L.J. 133, 134 (2017).

³⁶² Although there are examples of these preemptive laws that cut across different ideological lines, including cases where Democratic states preempt Democratic cities, the most common such actions are taken by Republican-dominated state governments seeking to preempt more progressive regulation at the local level. Briffault, *supra* note 361, at 2.

³⁶³ *Id.* at 1.

³⁶⁴ See *infra* notes 121–310 and accompanying text.

directly displace existing local regulation with a statewide standard.³⁶⁵ Nor do these laws reflect the anti-urbanism inclinations that, as Richard Schragger has noted, inform a significant portion of recent state preemption of local initiatives.³⁶⁶ Instead, as one commentator has argued, they might be framed as a positive example of state preemption invoked to confront local “anti-development NIMBY interests” and address state-wide housing concerns.³⁶⁷

At the same time, there are potential dangers in embracing state-level intervention as a means to liberalize local zoning. As Schragger points out, a number of states have taken action to preempt local inclusionary zoning statutes or affordable housing requirements.³⁶⁸ Such preemption may be justified, to the extent that a state can establish it addresses a negative externality and serves the general welfare. There are arguments and empirical evidence that certain forms of inclusionary zoning and affordable housing requirements can reduce overall development, restrict supply, and drive up costs.³⁶⁹ But that is not always true and while this Article calls for more significant state intervention to confront restrictive local zoning, it does not contend that all land use regulation should occur at the state level.

In the case of local zoning that restricts housing supply to levels well below demand, the evidence is clear that such regulations drive up costs and that most cities are not moving to liberalize local zoning.³⁷⁰ Given these realities, state governments are justified in preempting overly restrictive local zoning.

³⁶⁵ In a recent article Anika Singh Lemar helpfully distinguishes between “clawback interventions”—through which states tack back a certain degree of land use authority—and “deregulatory interventions”—which simply prohibit certain regulation. Lemar, *supra* note 2, at 9–10. The laws discussed in Part II are better described as the former as they do not simply bar regulation. *See infra* notes 58–120 and accompanying text.

³⁶⁶ Schragger, *supra* note 361, at 1165–67.

³⁶⁷ *See* Nolan Gray, *The Positive Power of Preemption*, CITYLAB (Aug. 13, 2017), <https://www.citylab.com/equity/2017/08/the-positive-power-of-preemption/536241/> [<https://perma.cc/GE24-GR5W>] (noting that “[t]he affordable-housing crisis offers an instructive opportunity to witness the positive powers of preemption”). In addition to addressing state-wide housing supply concerns, a greater state role in setting land use policy may lead to a reduction in income segregation. *See* Lens & Monkkonen, *supra* note 38, at 7 (concluding that “income segregation is lower when state governments have more power over land use decision-making process”). Lens and Monkkonen assess the degree of state involvement based on two variables: “one ranking the extent to which the state legislature is involved in residential development and growth management, and another that measures the level of activity on the part of state legislatures and executives in regards to land use and growth management.” *Id.* at 11.

³⁶⁸ Schragger, *supra* note 361, at 1179; *see also supra* notes 99–114 and accompanying text (discussing state preemption of local laws regarding rent control, inclusionary zoning, and short-term rentals).

³⁶⁹ *See generally* Schuetz et al., *supra* note 138 (examining how certain forms of inclusionary zoning can deter new development and reduce housing supply).

³⁷⁰ *See generally, e.g.,* C.J. Gabbe, *Local Regulatory Responses During a Regional Housing Shortage: An Analysis of Rezonings in Silicon Valley*, 80 LAND USE POL’Y 79 (2019) (analyzing the cities of San Jose, Santa Clara, and Sunnyvale and finding that allowable residential densities increased on few parcels of property).

Rather than impose new procedural steps, planning requirements, or the uncertainty of a potential appeal, states would be better served by directly displacing specific elements of local zoning, as more recent interventions have increasingly done. These interventions have not ignored local concerns, rather they have specified the types of concerns local governments can continue to address, and in some instances have required local governments to substantiate those concerns. The proposed amendments to California's ADU law vividly illustrate this, imposing a presumption in favor of detached ADUs, allowing local jurisdictions to exclude them from certain areas for specified reasons, but limiting those reasons to traditional zoning concerns of health and safety.³⁷¹

Interventions that displace, rather than simply channel, local land use decision-making can, perhaps paradoxically, better serve to vindicate valid local interests. Although these interventions limit the discretion and range of options afforded local governments, they do so through legislative action setting clearly defined parameters for local zoning and acceptable deviations from state regulation, rather than leaving local decisions subject to an uncertain administrative appeal process or a vague standard. Of course, the extent to which this occurs depends upon how and to what extent the relevant state law permits local deviation and what it identifies as a valid local interest that justifies such deviation. Ideally the state's legislative process will consider local concerns and local differences even as it focuses primarily on addressing matters of state-wide concern.³⁷²

CONCLUSION

Amid housing shortages, surging prices, and increasing public recognition of the broader importance of zoning, state governments are intervening in local land use regulation in new ways. This Article provides a detailed analysis of the most significant recent interventions. It reveals that, in contrast with prior state efforts to push local communities to allow more housing development, the new state zoning is trending towards expressly preempting and displacing specific elements of local zoning. A variety of factors—including the salience of housing affordability for a broader swath of the population, a changing discourse regarding the economic and environmental benefits of dense development, and an increasing willingness of state governments to preempt local regulation generally—suggest that these state interventions will have more significant effects than their predecessors.

³⁷¹ See *supra* notes 243–249 and accompanying text.

³⁷² In the case of state interventions that provide incentives for local land use reform, concerns regarding adequate representation of local interests are less salient. Of course, the effectiveness of such laws in achieving the state's goals significantly depends upon the strength of the incentives offered for adopting them.

These recent interventions are justified by the extent of the current housing crisis; the broader effects of local zoning on housing supply, affordability, and other pressing state-wide concerns; and the exclusionary tendencies of local governments. By targeting and expressly preempting specific local laws that stymie more and denser development, rather than imposing new procedural and planning requirements, these interventions are less likely to be thwarted by local resistance. Simultaneously, by setting clear parameters for permissible local regulation, these measures are more likely to calibrate the balance of state and local power in a way that addresses both state-wide interests and significant countervailing local concerns.

