

# Is California's Assault on Exclusionary Zoning at War with Itself?

---

**Christopher S. Elmendorf**

Martin Luther King, Jr., Professor of Law  
University of California, Davis

AALS Panel: Land Use Reform and the Housing Crisis: Is 100  
Years of Exclusionary Zoning Enough?

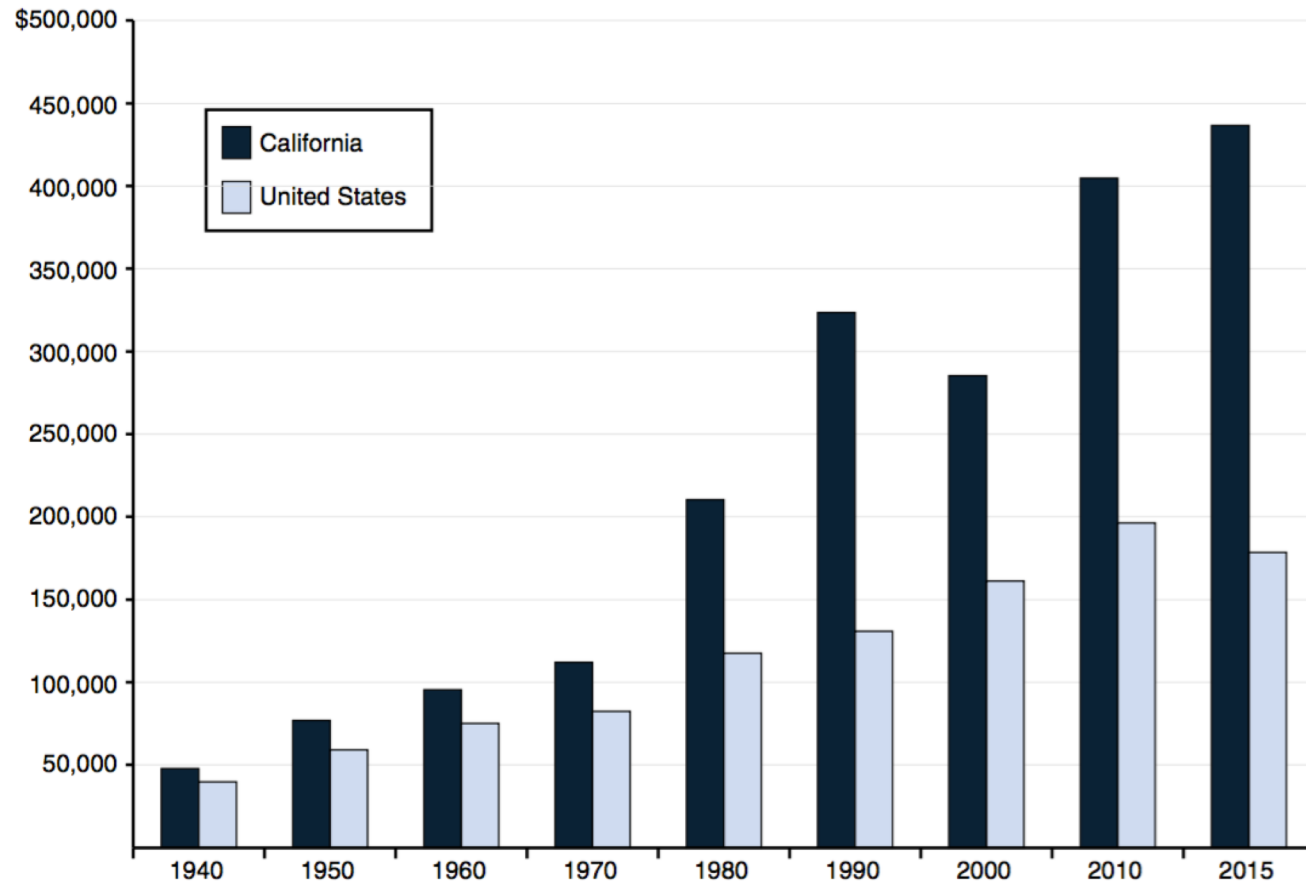
Jan. 4, 2020

# The California Story

**Figure 3**

## **California Home Prices Have Grown Much Faster Than U.S. Prices**

*Inflation-Adjusted Median Home Prices in 2015 Dollars*



Source: LAO Report, Mar. 17, 2015

# What California Has Tried to Do About It

## **RHNA / HOUSING-ELEMENT FRAMEWORK (1980)**

- A state agency (HCD) makes “regional housing need assessments” (RHNA) every 8 years, partitioning need into four income bands
- Regional “councils of government” allocate the RHNA quotas to member governments
- Local governments then revise “housing element” of general plan to accommodate their share of the RHNA, which HCD reviews / approves
- The housing element, as a component of the general plan, nominally supersedes contrary local ordinances

# What the RHNA / Housing Element Framework Achieved

## NOT MUCH (?)

- Lewis (2005) found that jurisdictions with an approved housing element produced no more housing than jurisdictions without one (controlling for other observable characteristics of the jurisdictions)
- Ramsey-Musolf (2016) found that jurisdictions with an approved housing element produced more subsidized housing--but less market-rate housing—than jurisdictions without one

These studies should be taken with several grains of salt (they rest on very strong assumptions), but California's housing-supply problem has clearly gotten worse, not better, since 1980.

# The New Initiatives (2016-onward)

## **ACTION IN SIX AREAS**

### **1. RHNA Reform**

- Better methods for setting targets (account for share of cost-burdened and “overcrowded” households, not just projected population growth)
- Strict requirements for “site inventory” of housing element—push local governments to assign lower-income RHNA share (about 40% of total) to vacant sites
- Penalties for noncompliance

### **2. Direct State Upzoning**

- Single-family zoning --> “triplex zoning,” as a matter of state law
- SB 50 (pending). Not only 4-5 story building near transit, but “density decontrol” in all jobs-rich neighborhoods statewide. Builds on state density bonus law.

# The New Initiatives (2016-onward)

## ACTION IN SIX AREAS

### 3. Legibility of Local Land-Use Regulations

- A local standard may not be used to deny or reduce density of a project if any reasonable person could deem the project compliant
- Within 30-60 days of receiving complete project application, local government must notify developer of which standard(s) the project violates; else project is deemed compliant (there's a health / safety exception).

### 4. Agency Authority (HCD)

- State housing agency was traditionally a weakling: it could only issue “advisory” guidelines, and courts gave essentially no weight to its judgment of whether a housing element complied with state law
- But now HCD has authority to issue binding rules about housing elements (in part), ADU law, and local governments' annual reporting obligations. Leg has also authorized HCD to decertify housing elements mid-cycle for failures of implementation.

# The New Initiatives (2016-onward)

## **ACTION IN SIX AREAS**

### **5. Baby Steps Toward By-Right Zoning**

- Local governments that are not on track to meet their RHNA target must permit certain zoning-compliant projects ministerially [s/t big prevailing-wage and affordability conditions]
- ADUs must be permitted ministerially
- Local governments that need to rezone to accommodate their RHNA target must allow 20% BMR projects to be built as of right in the rezoned areas
- A nonvacant site designated in a housing element as capable of accommodating a portion of the local government's lower-income RHNA share may not be so designated in the next housing element (assuming it was not redeveloped during the preceding cycle) unless it is rezoned for by-right development of 20% BMR projects.

# The New Initiatives (2016-onward)

## **ACTION IN SIX AREAS**

### **6. Affirmatively Furthering Fair Housing**

- A 2018 statute expressly incorporates the 2015 HUD rule into state law
- Regional councils of government must affirmatively further fair housing when allocating their region's housing quota to local governments within the region
- Starting in 2021, housing elements must affirmatively further fair housing by, for example, “enhancing mobility strategies and encouraging development of new affordable housing in areas of opportunity”

[AFFH norms also reflected in SB 50 and the triplex statutes]



# The Pending Conflict

## VACANT SITES VS. AFFH (ACCOMMODATING THE RHNA SHARE)

### The state is pushing local governments to accommodate their lower-income RHNA share through vacant sites

- If > 50% of lower-income RHNA share is assigned to nonvacant sites, local gov't must make findings that existing uses on each such site are "likely to be discontinued" during the planning period. (Into the weeds of lease terms, etc.)
- If a nonvacant site to which local gov't assigned a portion of its lower-income RHNA share goes undeveloped, the site cannot be counted toward lower income RHNA share in next cycle unless it's rezoned for by-right development of 20% BMR units at statutory minimum densities

**Yet vacant sites are rare in high-opportunity / high-demand neighborhoods.** That a site in such a neighborhood happens to be vacant probably indicates that there's a significant barrier to developing it...

# A Partial Resolution

## DEFINE “CAPACITY” OF A SITE AS ITS EXPECTED YIELD IN NEW UNITS OVER THE PLANNING PERIOD

- By convention, sites have been “counted” toward a local government’s RHNA share based on their expected density conditional on development or redevelopment
- I argue in a [forthcoming paper](#) that HCD could use its new authority to redefine site capacity as expected yield: **(probability of redevelopment) \* (density conditional on redevelopment) – existing units.**
- Even if HCD doesn’t impose this definition uniformly, it could deem local governments that discount site capacity by the probability of redevelopment to have satisfied the “findings” requirement for assigning > 50% of lower-income RHNA to nonvacant sites. (The existing use is “likely to be discontinued” *relative to* the likelihood of redevelopment claimed for the site.)

But the “rezoning penalty” would remain, and will encourage local governments to assign their lower-income RHNA shares to sites where by-right development would be tolerated (poorer communities).