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## Too Close to Home?: The Constitutionality of California's S.B. 9

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# **TOO CLOSE TO HOME?: THE CONSTITUTIONALITY OF CALIFORNIA’S S.B. 9**

*Stefan Ecklund\**

*In 2022, Senate Bill 9 went into effect in California. This law allows owners of single-family-zoned parcels to split their lots in two and build at most two units on each parcel, regardless of local land use ordinances, but subject to detailed conditions. This law is one recent attempt to encourage housing development in a state where local opposition to denser housing has been blamed for the state’s current housing affordability problem. This Note will discuss S.B. 9 and the test courts apply to determine when a state law infringes too much on a charter city’s control over “municipal affairs” such as zoning. This Note will offer arguments and counterarguments that S.B. 9 should not preempt charter city zoning decisions. However, in light of recent precedent and the amorphous nature of the home rule doctrine, the law will likely be upheld.*

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## INTRODUCTION

Access to affordable housing is a pressing issue in California, particularly in Los Angeles County.<sup>1</sup> In 2002, the median house price in Los Angeles County was around \$307,000.<sup>2</sup> Twenty years later, the median price was around \$800,000.<sup>3</sup> For decades, the California legislature has attempted to incentivize housing by passing laws pertaining to local governments, which generally set the regulations best suited to facilitate development.<sup>4</sup> The swift rise in housing prices and rent, and the growing unhoused population in the state, have prompted affordability concerns from citizens and legislators. The issue has multiple causes, and while there is no “silver bullet,”<sup>5</sup> the current California legislature has endorsed the viewpoint that one way to ease the housing crisis is to remove construction obstacles, such as environmental and local government review.<sup>6</sup> Senate Bill 9 (“S.B. 9”), which went into effect January 1, 2022, allows owners of a single-family lot to split their lot in two and build at most a duplex on each parcel: creating four units where there was once a single-family house.<sup>7</sup> For charter cities, this law poses a threat to the power they have enjoyed for over a hundred years: to decide where multi-family homes and single-family homes can be located within their jurisdiction.<sup>8</sup> This power derives from the “home rule doctrine” and is enshrined in the California Constitution.<sup>9</sup> This Note will discuss whether S.B. 9 is constitutional

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1. See Liam Dillon & Brittany Mejia, *Why It's So Hard to Fix Housing Overcrowding in Los Angeles*, L.A. TIMES (Oct. 19, 2022, 5:00 AM), <https://www.latimes.com/homeless-housing/story/2022-10-19/overcrowding-los-angeles-housing-fix> [<https://perma.cc/5FWT-8GTA>]; Lara Korte & Jeremy B. White, *Rising Homelessness Is Tearing California Cities Apart*, POLITICO (Sept. 21, 2022, 4:30 AM), <https://www.politico.com/news/2022/09/21/california-authorities-uproot-homeless-people-00057868>.

2. *Median Home Prices: Southern California*, L.A. ALMANAC, <https://www.laalmanac.com/economy/ec37.php> [<https://perma.cc/5HGX-38PL>]. These values reflect the median price in December of the year specified.

3. Travis Schlepp, *L.A. Home Prices Dropped Second-Most in Nation in December; Inventory Remains High*, KTLA 5, <https://ktla.com/news/local-news/l-a-home-prices-dropped-second-most-in-nation-in-2022-inventory-remains-high/> [<https://perma.cc/Z7J4-XZPN>] (stating the median price of a home in Los Angeles was \$810,000).

4. See *infra* Part II.

5. See *infra* note 263 and accompanying text.

6. See David Roberts, *The Future of Housing Policy Is Being Decided in California*, VOX (Apr. 4, 2018, 9:22 AM), <https://www.vox.com/cities-and-urbanism/2018/2/23/17011154/sb827-california-housing-crisis> [<https://perma.cc/N99X-XHHY>].

7. See S.B. 9, 2021 Leg., 2021–2022 Reg. Sess. § 1(a) (Cal. 2021).

8. See *infra* Section I.B.

9. See *infra* Section I.A.

based on the home rule analysis courts have developed.<sup>10</sup> But before that discussion, it is important to briefly introduce the history of housing in California and the current debate surrounding housing density.

Though some think of Los Angeles as a chaotic collection of freeways, congestion, and suburban sprawl, before World War II the county was actually a major producer of agriculture and quite rural.<sup>11</sup> Los Angeles's commerce center was located in present-day downtown and people traveled from the farthest corners of the region, all connected by a series of street cars known as the "Red Cars"—one of the largest public transportation systems in the country.<sup>12</sup> That changed around 1950, when the farmland and old citrus groves were rapidly chopped down in exchange for more suburban tract homes; land was abundant but also more valuable for other uses.<sup>13</sup> This pattern occurred throughout California and illustrates the dynamic between population density and housing demand. In 1950, the population of California was ten million.<sup>14</sup> By 2000, it more than tripled to thirty-four million.<sup>15</sup> As more people moved to California, more housing was developed.<sup>16</sup> During this change, the median house price in the state remained slightly higher than the national average in the 1940s, 50s, and 60s.<sup>17</sup> However, around 1970, the price began sharply increasing, outpacing

10. See *infra* Sections IV.B, IV.C.

11. Zach Behrens, 'Until the 1950s, Los Angeles County Was the Top Agricultural County in the U.S.,' KCET (Feb. 11, 2011), <https://www.kcet.org/socal-focus/until-the-1950s-los-angeles-county-was-the-top-agricultural-county-in-the-u-s> [<https://perma.cc/K4L6-5S88>].

12. The Red Car was not a public system, though. It was financed by the developer Henry Huntington so that people could commute throughout the county from his housing developments. See CAL. DEP'T OF TRANSP., TRACT HOUSING IN CALIFORNIA, 1945–1973: A CONTEXT FOR NATIONAL REGISTER EVALUATION 1–2 (2011), <https://dot.ca.gov/-/media/dot-media/programs/environmental-analysis/documents/ser/tract-housing-in-ca-1945-1973-a11y.pdf> [<https://perma.cc/V3W5-TGHH>]; D.J. Waldie, *L.A.'s Many Moons: The Electrification of Los Angeles*, KCET (Aug. 25, 2022), <https://www.kcet.org/shows/lost-la/the-electrification-of-los-angeles> [<https://perma.cc/3DFL-QUWC>].

13. Jose A. Del Real & Nicholas Bogel-Burroughs, *A Southern California Without Orange Groves? One of the Last Could Soon Be Gone*, N.Y. TIMES (July 11, 2019), <https://www.nytimes.com/2019/07/11/us/southern-california-orange-grove.html> [<https://perma.cc/3CSJ-TCES>]; CAL. DEP'T OF TRANSP., *supra* note 12, at 19 (describing a statewide effort that saw "one million acres of rural or undeveloped land per year . . . converted to housing tracts, shopping centers, and other types of development" at the expense of the surrounding wildlife and landscape).

14. *California's Population*, PUB. POL'Y INST. OF CAL. (Jan. 2023), [https://www.ppic.org/wp-content/uploads/JTF\\_PopulationJTF.pdf](https://www.ppic.org/wp-content/uploads/JTF_PopulationJTF.pdf) [<https://perma.cc/27PH-XSF3>].

15. *Id.*

16. See CAL. DEP'T OF TRANSP., *supra* note 12, at 12–13.

17. CAL. LEGIS. ANALYST'S OFF., CALIFORNIA'S HIGH HOUSING COSTS: CAUSES AND CONSEQUENCES 7, 9 (2015), <https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf> [<https://perma.cc/A687-DTFH>].

even the national rate of increase.<sup>18</sup> As will be described later in this Note, California began enacting housing legislation during this time. In the late 1970s, the Health and Safety Code was amended to pronounce the state's housing goal: "[to] provide a decent home and suitable living environment for every California family."<sup>19</sup> The legislature at the time even remarked that within the state there exists "a serious shortage of decent, safe, and sanitary housing which persons and families of low or moderate income" can afford.<sup>20</sup> They went on to state that the "present and future shortage of supply in relation to demand . . . also creates inflation in the cost of housing, by reason of its scarcity, which tends to decrease the relative affordability of the state's housing supply for all its residents."<sup>21</sup> In the late twentieth century, California passed statutes like the Housing Element Law and the Housing Accountability Act to address this concern but failed to make headway.<sup>22</sup> Instead, these efforts turned the housing system into "an energy- and money-guzzling bureaucratic maze."<sup>23</sup>

By 2015, the "average California home prices were two-and-a-half times higher than average national home prices"<sup>24</sup> and three times higher for houses along the coast.<sup>25</sup> These concerning trends were the subject of a report by the Legislative Analyst's Office in 2015 ("Report").<sup>26</sup> The Report blamed the expensive house prices on a housing shortage, which in turn had pushed people farther from their jobs.<sup>27</sup> The Report particularly focused on the major coastal metros, where two-thirds of the state's population resides, and noted three interrelated factors contributing to high housing costs: less housing being built, the general expensiveness of coastal land, and bloated building

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18. *Id.* at 7.

19. *Anderson v. City of San Jose*, 255 Cal. Rptr. 3d 654, 671 (Ct. App. 2019).

20. *Id.*

21. *Id.*

22. See Liam Dillon, *California Lawmakers Have Tried for 50 Years to Fix the State's Housing Crisis. Here's Why They've Failed*, L.A. TIMES (June 29, 2017, 3:00 AM), <https://www.latimes.com/projects/la-pol-ca-housing-supply/> [<https://perma.cc/R2CC-DNB8>]; *The Housing Accountability Act Is Strong Medicine Against NIMBYISM*, COX CASTLE (SEPT. 30, 2021), <https://www.coxcastle.com/publication-the-housing-accountability-act-is-strong-medicine-against-nimbyism> [<https://perma.cc/2T2S-RLP9>].

23. Dillon, *supra* note 22.

24. CAL. LEGIS. ANALYST'S OFF., *supra* note 17, at 7.

25. *Id.* at 12.

26. *Id.*

27. *Id.* at 7, 10.

fees caused by government regulations.<sup>28</sup> Most notably, the Report identified which government bodies had the most control over development: local cities.<sup>29</sup> Cities pass laws that not only specify where houses can be built but also designate, among other things, their size, density, and how close they can be to the property line.<sup>30</sup> Specifically, the Report identified that local community opposition to housing developments was common, especially along the coasts.<sup>31</sup>

In the years after this Report was published, the state legislature has passed increasingly assertive laws designed to limit local control over housing developments.<sup>32</sup> S.B. 9 is one recent law to come out of California's housing concern and was signed by Governor Gavin Newsom in September 2021.<sup>33</sup> It passed the state senate overwhelmingly, but more narrowly in the assembly, in tandem with another housing density bill.<sup>34</sup> S.B. 9, however, is further reaching and does three main things:<sup>35</sup> (1) requires that local governments approve the splitting of a single-family residential lot into two separate parcels; (2) makes it easier for an owner to build a duplex on his or her lot; and (3) subjects each of these actions to a "ministerial review process"—effectively exempting them from the California Environmental Quality Act (CEQA).<sup>36</sup>

28. *Id.* at 10.

29. *Id.* at 15.

30. *Id.*

31. *Id.* at 16.

32. *See infra* Part II.

33. S.B. 9, 2021 Leg., 2021–2022 Reg. Sess. (Cal. 2021).

34. *See* S.B. 9, 2021 Leg., 2021–2022 Reg. Sess., Votes (Cal. 2021), [https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill\\_id=202120220SB9](https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=202120220SB9) [<https://perma.cc/J9QA-MFQ5>]. S.B. 9 and S.B. 10 were signed on the same day. *See* Press Release, Office of Governor Gavin Newsom, Governor Newsom Signs Historic Legislation to Boost California's Housing Supply and Fight the Housing Crisis (Sept. 16, 2021), <https://www.gov.ca.gov/2021/09/16/governor-newsom-signs-historic-legislation-to-boost-californias-housing-supply-and-fight-the-housing-crisis/> [<https://perma.cc/QJ8B-C9RX>].

35. All subject to nuances and conditions that will be discussed later in this Note. *See infra* Section IV.A.

36. Cal. S.B. 9 § 1(a). CEQA is a 1970 state statute that requires a public agency undergoing or approving any construction "activities" to give "major consideration" to the environmental impacts of that decision. CAL. PUB. RES. CODE § 21000(g) (2022). Basically, any development not subject to legislative carveouts needs to comply with CEQA, which means creating a "Environmental Impact Report" for the proposed project and allowing for public comments. *Cf. id.* § 21080(a) (2002) (stating that CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies"); *id.* § 21080(b)(1) (stating that CEQA does not apply to "ministerial projects proposed to be carried out or approved by public agencies").

The passage of S.B. 9 was certainly newsworthy and generated controversy. Its proponents, often self-described as “YIMBYs”,<sup>37</sup> argue S.B. 9 was a necessary step in the right direction to create affordable housing.<sup>38</sup> The previously mentioned Report outlined many of the premises that proponents of S.B. 9 rely on. For example, the Report described that when land becomes too expensive, developers usually respond by building denser structures, thereby spreading the cost and decreasing the price of each unit for the occupants.<sup>39</sup> The problem with California today, the Report observed, is that laws and regulations make it too expensive to build, and local zoning ordinances severely limit what can be developed to house more people.<sup>40</sup> Gavin Newsom echoed this when he characterized the housing problem as a “simple economic argument” in a 2017 Medium article.<sup>41</sup> In the article, he pledged as Governor to lead an effort to build 3.5 million new housing units by 2025.<sup>42</sup> This figure came from a McKinsey Report that found housing gains could be reached by building around transit hubs, building on vacant land already zoned for multiple families, and adding units to single-family homes.<sup>43</sup>

However, critics of this viewpoint argue supply and demand does not always determine the market and that this stance ignores the reality that the free market may never address the needs of low- and moderate-income consumers.<sup>44</sup> Even if more supply decreases costs, it may take years for prices to filter down to affordable levels for low-income

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37. “YIMBY” stands for “Yes in My Backyard” and is a play on the acronym “NIMBY,” which stands for “Not in My Backyard.” See Christine Mai-Duc, *Yimby Movement Goes Mainstream in Response to High Housing Costs*, WALL ST. J. (Apr. 20, 2022, 12:49 AM), <https://www.wsj.com/articles/yimby-movement-goes-mainstream-in-response-to-high-housing-costs-11650373200> [<https://perma.cc/K9RM-YKCP>]; John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV. 823, 827 (2019).

38. Press Release, Cal. YIMBY, California YIMBY Celebrates the Passage of Senate Bill 9 (Aug. 26, 2021), <https://cayimby.org/california-yimby-celebrates-the-passage-of-senate-bill-9/> [<https://perma.cc/8YRL-S9YQ>].

39. CAL. LEGIS. ANALYST’S OFF., *supra* note 17, at 10, 13.

40. *Id.* at 13, 20.

41. Gavin Newsom, *The California Dream Starts at Home*, MEDIUM (Oct. 20, 2017), <https://medium.com/@GavinNewsom/the-california-dream-starts-at-home-9dbb38c51cae> [<https://perma.cc/2JA5-D8V3>].

42. *Id.*

43. See MCKINSEY & CO., A TOOL KIT TO CLOSE CALIFORNIA’S HOUSING GAP: 3.5 MILLION HOMES BY 2025, at 3, 8 (Oct. 2016), <https://www.mckinsey.com/~media/mckinsey/industries/public%20and%20social%20sector/our%20insights/closing%20californias%20housing%20gap/closing-californias-housing-gap-full-report.pdf> [<https://perma.cc/XG48-ZH38>].

44. Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125, 162–65 (2021).

people.<sup>45</sup> At the same time, many communities in California are already some of the densest regions in the country.<sup>46</sup> Opponents of S.B. 9 also argue the law will change the composition of single-family zones for the worse by exasperating traffic, crowding the streets with more cars, and straining city infrastructure.<sup>47</sup> On the other hand, adding more duplexes to neighborhoods has been championed as a sort of “gentle density” that does not drastically change communities but allows new people to enter neighborhoods they otherwise would be denied from.<sup>48</sup>

There are also environmental concerns. Zoning can exclude potential residents from living closer to their schools and jobs, causing commute times and traffic burdens to increase.<sup>49</sup> By removing zoning rules that determine how many people may live in a neighborhood, new residents would—theoretically—contribute less to pollution by walking or taking public transportation to work.<sup>50</sup> Additionally, this may protect the natural environment surrounding the city from encroaching suburban sprawl.<sup>51</sup> At the same time, this environmental interest may be at odds with the provision in S.B. 9 that allows exemptions from CEQA—preventing locals from raising legitimate environmental concerns about a construction project.<sup>52</sup>

The conflict between these two viewpoints represents the current tension that has magnified after the passage of S.B. 9. There was even an effort to add a measure to the state-wide 2022 election to reverse the effects of S.B. 9.<sup>53</sup> In early 2022, seventy-one percent of

45. *Id.* at 164.

46. *See infra* note 212 and accompanying text.

47. Verified Petition for Writ of Mandate & Complaint for Declaratory and Injunctive Relief ¶¶ 58–60, *City of Redondo Beach v. Bonta*, No. 22STCP01143 (Cal. Super. Ct. Mar. 29, 2022) [hereinafter *Petition*], <https://www.livablecalifornia.org/wp-content/uploads/2022/04/SB9-03.29.2022-RB-Lawsuit-re-SB-9.pdf> [<https://perma.cc/AT4B-DMY2>].

48. *Infranca*, *supra* note 37, at 851–52.

49. *See* Christopher Serkin, *A Case for Zoning*, 96 *NOTRE DAME L. REV.* 749, 775 (2020).

50. Bianca Barragan, *LA Is Encouraging Developers to Put Denser Housing Near Transit. Here's How.*, *L.A. CURBED* (Jan. 22, 2020, 12:49 PM), <https://la.curbed.com/2020/1/22/21055436/transit-oriented-communities-development-dense-housing-explained> [<https://perma.cc/U5T5-ASUY>].

51. *See* Serkin, *supra* note 49, at 763–64 (“[M]ost environmentalists today recognize that the best development patterns from an environmental perspective combine dense urban living with the preservation of large swaths of undeveloped land—the antithesis of sprawling large-lot suburban zones.”).

52. *See* S.B. 9, 2021 Leg., 2021–2022 Reg. Sess. (Cal. 2021).

53. David Wagner, *SoCal Politicians Endorse Campaign to Overturn New State Housing Laws*, *LAIST* (Jan. 7, 2022, 12:49 PM), <https://laist.com/news/housing-homelessness/california>



Californians were opposed to the law.<sup>54</sup> Though the bill was passed by a majority Democratic legislature,<sup>55</sup> its opponents, such as elected city officials, are bipartisan.<sup>56</sup> Indeed, this whole issue has made some strange bedfellows, as some of the proponents include Libertarians who do not believe the government should tell people where and how to build.<sup>57</sup>

This Note will analyze if S.B. 9 unconstitutionally infringes on charter cities' ability to zone their land. Though the analysis is a legal question, it requires courts to review facts about the state's housing crisis and how well-suited the statute is to address it. Some context about California's other housing laws and how courts have treated their constitutionality will be instructive. Part I of this Note will briefly describe the history of zoning laws and the doctrine of "home rule" for charter cities that emerged in the late nineteenth century. Part II will describe key parts of the current statutory scheme that incentivize (or coerce, as some localities might call it) housing development within the state. Part III will summarize how courts have ruled on "home rule" challenges to the housing legislation mentioned in Part II. Part IV will discuss the text of S.B. 9 and analyze a Petition filed by three charter cities arguing that the law infringes on their home rule and should be declared unconstitutional. Opposing views by proponents of

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-housing-ballot-initiative-our-neighborhood-voices-single-family-zoning-scag-sb-9-10 [https://perma.cc/T7FV-T58Z]. While the group "Our Neighborhood Voices" paused its efforts to get a voter initiative on the November 2022 state ballot, the group has promised to resume its efforts to overturn S.B. 9 for the 2024 election. See Press Release, Our Neighborhood Voices, Our Neighborhood Voices Now Focusing on 2024 Ballot to Bring Back a Local Voice in Community Planning (Feb. 18, 2022), <https://ourneighborhoodvoices.com/our-neighborhood-voices-now-focusing-on-2024-ballot/> [https://perma.cc/L54Z-6BEQ].

54. Hadley Meares, *What Supporters and Critics Say About 2022 California Law Permitting More Duplexes*, HOLLYWOOD REP. (June 7, 2022, 1:20 PM), <https://www.hollywoodreporter.com/lifestyle/real-estate/sb9-california-housing-laws-critics-supporters-1235159680/> [https://perma.cc/E58C-WKBS].

55. See *California State Legislature*, BALLOTPEDIA, [https://ballotpedia.org/California\\_State\\_Legislature](https://ballotpedia.org/California_State_Legislature) [https://perma.cc/2TDK-N8B6].

56. See Press Release, League of Cal. Cities, *More Than 240 California Cities of All Sizes, Regions, and Demographics Send Governor Newsom Letter Urging a Veto of Senate Bill 9* (Sept. 10, 2021), <https://www.calcities.org/detail-pages/news/2021/09/10/more-than-240-california-cities-of-all-sizes-regions-and-demographics-send-governor-newsom-letter-urging-a-veto-of-senate-bill-9> [https://perma.cc/K52J-FAM6]. The Los Angeles City Council passed a resolution opposing S.B. 9. Elizabeth Fuller, *City Council Passes Motions Expressing Opposition to SB 9 and SB 10*, LARCHMONT BUZZ (Aug. 18, 2021), <https://www.larchmontbuzz.com/featured-stories-larchmont-village/city-council-passes-motions-expressing-opposition-to-sb-9-and-sb-10/> [https://perma.cc/5SBP-E954].

57. See Noah Smith, *The Left-NIMBY Canon*, NOAHPINION (Jan. 18, 2021), <https://noahpinion.substack.com/p/the-left-nimby-canon> [https://perma.cc/TR9H-XV7G].

S.B. 9 will also be addressed to inform the factual inquiry, and a prediction will be made about which arguments are more compelling and who will likely prevail on this constitutional challenge.

## I. THE HISTORY OF CHARTER CITIES, ZONING, AND HOUSING DEVELOPMENT IN CALIFORNIA

### *A. The “Home Rule” Doctrine and Charter Cities*

The state of California was ceded to the United States by Mexico in 1848 as a result of the Mexican-American War.<sup>58</sup> The first California Constitution was ratified in 1849 and revised in 1879.<sup>59</sup> During this early period, cities were incorporated by special acts of the state legislature.<sup>60</sup> A few others were created by general incorporation laws.<sup>61</sup> But starting in 1879, the revised constitution expressly prohibited the legislature from creating cities by special acts “to prevent the Legislature ‘from singling out a particular town or city and passing legislation affecting it and no other.’”<sup>62</sup> Most importantly, the 1879 Constitution allowed cities holding at least one hundred thousand inhabitants to form their own charter government.<sup>63</sup> This led to the creation of “charter cities” and “general law cities” in California.<sup>64</sup>

General law cities are limited to the powers given to them by the state legislature and state constitution.<sup>65</sup> Charter cities, on the other hand, are cities that have adopted a specific charter by majority vote of its citizens, which supersedes any state law that deals with a “municipal affair.”<sup>66</sup> For these “municipal affairs,” the city charter acts like

58. Treaty of Peace, Friendship, Limits, and Settlement (Treaty of Guadalupe Hidalgo), Mexico-U.S., Feb. 2, 1848, T.S. No. 207.

59. *California State Constitutions*, CAL. SEC’Y OF STATE, <https://www.sos.ca.gov/archives/collections/constitutions> [<https://perma.cc/6PK9-GXDP>].

60. *Ex parte Jackson*, 77 P. 457, 458 (Cal. 1904).

61. CARDINAL GOODWIN, *THE ESTABLISHMENT OF STATE GOVERNMENT IN CALIFORNIA 1846–1850*, at 297–302 (1914). Los Angeles was one of the cities created by a general law. The initial attempt to incorporate Los Angeles by a special act of the legislature was vetoed in 1850 by the then-governor of California. After amendments were added, the bill passed, and the rights of Los Angeles were “declared to be all those exercised by the city under Mexican rule.” *Id.*

62. *Ex parte Jackson*, 77 P. at 458; see CAL. CONST. of 1879, art. XI, § 6 (1880).

63. CAL. CONST. of 1879, art. XI, § 8 (1880).

64. 45 CAL. JUR. 3D *Municipalities* § 12, Westlaw (database updated Nov. 2022). Each city in California today is designated as a general law or charter city. See *id.*

65. *Id.*; see CAL. GOV’T CODE § 34102 (2022).

66. 45 CAL. JUR. 3D, *supra* note 64, at § 13; CAL. CONST. art. XI, §§ 3, 5; see also *Information from the Nonpartisan California League of Cities*, LEAGUE OF CAL. CITIES, <https://>

a mini-constitution, giving the city the power to create regulations, subject only to the limitations expressed in the charter.<sup>67</sup> For everything not a municipal affair, charter cities are subject to “general laws” of the state.<sup>68</sup>

In addition to creating the categories of charter cities and general law cities, the 1879 Constitution dedicated an entire article which recognized the local government’s broad police powers.<sup>69</sup> The state constitution gave local governments the power to make and enforce “local, police, sanitary, and other regulations . . . not in conflict with general laws.”<sup>70</sup> Starting in the late nineteenth century, however, a legal theory developed that cities should be confined to powers granted by the state government because cities were, in a sense, created by the state.<sup>71</sup> But other legal commentators of the era challenged that theory and argued that, historically, “the right to local self-government” existed before the states and therefore could not have been created by them.<sup>72</sup> This spawned a political movement called “home rule” that resulted in the passage of state constitutional amendments that limited state control over local issues.<sup>73</sup> In 1896, voters approved the “home rule doctrine” in California by adding a provision to the state constitution that granted charter cities “supremacy over local matters,” which were also called “municipal affairs.”<sup>74</sup> The California Supreme

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[www.costamesaca.gov/home/showdocument?id=6015](http://www.costamesaca.gov/home/showdocument?id=6015) [https://perma.cc/9L4N-CN57] (listing charter cities located in California).

67. CAL. CONST. art. XI, § 5(a). Charter cities are allowed to set their own rules for local elections and set qualifications for elected officials, regardless of state law. *General Law City v. Charter City*, BERKELEY L., [https://www.law.berkeley.edu/files/Albuquerque4\\_-\\_General\\_Law\\_City\\_v\\_Charter\\_City.pdf](https://www.law.berkeley.edu/files/Albuquerque4_-_General_Law_City_v_Charter_City.pdf) [https://perma.cc/6XJQ-GF95].

68. CAL. CONST. art. XI, § 5(a).

69. CAL. CONST. of 1879, art. XI, § 11 (1880).

70. *Id.* Near identical wording exists in today’s state constitution. See CAL. CONST. art. XI, § 7.

71. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1109–13 (1980); Frank V. Zerunyan, *The Evolution of the Municipal Corporation and the Innovations of Local Governance in California to Preserve Home Rule and Local Control*, 44 FORDHAM URB. L.J. 217, 220 (2017). This idea, known later as “Dillon’s Rule,” was famously proliferated by John Dillon in 1872 when he wrote the first American treatise on American municipal corporations. Frug, *supra*, at 1109.

72. Frug, *supra* note 71, at 1113.

73. See *id.* at 1115–16.

74. See *City & County of San Francisco v. Regents of Univ. of Cal.*, 442 P.3d 671, 675 (Cal. 2019); *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 279 P.3d 1022, 1026–27 (Cal. 2012). Ironically, the adoption of “home rule” conformed with Dillon’s Rule, since it was the state (via the constitution) which secured the rights of charter cities regarding municipal affairs. Today, Dillon’s Rule is the majority approach in the United States and has been upheld by the U.S.

Court at the time stated the doctrine was born out of the principle that the locality knew better than the state what it needed and wanted.<sup>75</sup> But early on, the state Supreme Court acknowledged the vagueness of the term “municipal affairs.” In an early case analyzing the home rule doctrine, a concurring justice wrote that the Constitution “uses the loose, indefinable, wild words ‘municipal affairs,’ and imposes upon the courts the almost impossible duty of saying what they mean.”<sup>76</sup> More recently, the court has again acknowledged this difficulty and has declined to set bright-line rules that denote purely municipal affairs.<sup>77</sup> Instead, the inquiry is ad hoc and “must be answered in light of the facts and circumstances surrounding each case”<sup>78</sup> and “informed by pragmatic common sense.”<sup>79</sup> In line with the home rule provision, California cities are allowed to pass local regulations, including zoning ordinances.

### *B. Zoning Powers*

Cities enact zoning regulations to separate certain buildings and uses from other areas within their jurisdiction.<sup>80</sup> Los Angeles, for example, enacted the first zoning ordinance in the United States in 1904, which separated the city into industrial and residential districts.<sup>81</sup> The goal of zoning ordinances at the time was to separate residential uses from noisy or odorous—often industrial—uses, at a time when people

Supreme Court. Zerunyan, *supra* note 71, at 220–21. The “home rule provision” of the California Constitution is located in article XI, section 5. See CAL. CONST. art. XI, § 5.

75. Fragley v. Phelan, 58 P. 923, 925 (Cal. 1899).

76. *Ex parte Braun*, 74 P. 780, 784 (Cal. 1903) (McFarland, J., concurring).

77. See *Cal. Fed. Sav. & Loan Ass’n. v. City of Los Angeles*, 812 P.2d 916, 925–26 (Cal. 1991) (“[C]ourts should avoid the error of ‘compartmentalization,’ that is, of cordoning off an entire area of governmental activity as either a ‘municipal affair’ or one of statewide concern.”); *Anderson v. City of San Jose*, 255 Cal. Rptr. 3d 654, 663–64 (Ct. App. 2019).

78. *Cal. Fed. Sav. & Loan Ass’n.*, 812 P.2d at 924 (quoting *In re Hubbard*, 396 P.2d 809, 814 (Cal. 1964), *overruled on other grounds by Bishop v. City of San Jose*, 460 P.2d 137 (Cal. 1969)). Courts have indicated that “judicial interpretation is necessary to give [‘municipal affairs’] meaning in each controverted case.” *Id.* at 924–25 (quoting *Butterworth v. Boyd*, 82 P.2d 434, 438 (Cal. 1938)).

79. *Id.* at 931. In practice, determining what is a municipal affair requires policy judgments from the courts. Leon T. David, *California Cities and the Constitution of 1879: General Laws and Municipal Affairs*, 7 HASTINGS CONST. L.Q. 643, 645 (1980).

80. See *Zoning*, UNIV. CAL. L.A. LEWIS CTR. FOR REG’L POL’Y STUD., <https://www.lewis.ucla.edu/programs/housing/housing-supply/zoning/> [<https://perma.cc/L8VM-N7XU>].

81. *New Code*, L.A. CITY PLAN, <https://planning.lacity.org/zoning/new-code> [<https://perma.cc/AB4W-9GWZ>].

were moving into dense cities.<sup>82</sup> Public health and standards of living were major concerns.<sup>83</sup> At the same time, ordinances were used to restrict where non-whites could live or work.<sup>84</sup> The U.S. Supreme Court eventually found explicit race-based zoning ordinances to be unconstitutional under the Equal Protection Clause in 1917.<sup>85</sup> Despite this, zoning still serves as a reminder of racial inequality because exclusionary zoning kept certain neighborhoods more expensive, and thus out of reach for non-whites.<sup>86</sup> For example, in 1919, St. Louis, Missouri's zoning laws preserved homes in neighborhoods that were unaffordable to Black families but also zoned Black neighborhoods for industrial uses if too many Black people moved in.<sup>87</sup> This also contributed to the wealth gap, since white families who could purchase homes in a particular zone benefitted from higher property values for generations.<sup>88</sup>

In the 1920s, the U.S. Supreme Court addressed the constitutionality of the novel zoning ordinances in the landmark case, *Village of Euclid v. Ambler Realty Co.*<sup>89</sup> There, the Court ruled that a city's zoning ordinance did not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment—zoning was here to stay.<sup>90</sup> Today, as previously stated, the power to enact zoning ordinances is

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82. See *Zoning*, *supra* note 80. Before zoning, people relied on the common-law doctrine of nuisance to object to neighbors who were doing activities that lessened the enjoyment of their property. Amanda Erickson, *The Birth of Zoning Codes, a History*, BLOOMBERG (June 19, 2012, 5:02 AM), <https://www.bloomberg.com/news/articles/2012-06-19/the-birth-of-zoning-codes-a-history> [https://perma.cc/EJ6F-HSDX]; see also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386–87 (1926) (referencing the “law of nuisances” as helpful in articulating the boundaries of zoning law and locating the origin of zoning laws in “the great increase and concentration of population, . . . which require[s] . . . additional restrictions in respect of the use and occupation of private lands”).

83. ATLANTA REG'L HEALTH F. & ATLANTA REG'L COMM'N, *LAND USE PLANNING FOR PUBLIC HEALTH: THE ROLE OF LOCAL BOARDS OF HEALTH IN COMMUNITY DESIGN AND DEVELOPMENT* 9–10 (2006).

84. Serkin, *supra* note 49, at 754–55.

85. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

86. Cecilia Rouse et al., *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, WHITE HOUSE (June 17, 2021), <https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/> [https://perma.cc/W58S-CCPG].

87. *Id.*

88. *Id.*

89. 272 U.S. 365, 384 (1926).

90. *Id.* at 384, 397. To this day, local zoning ordinances for single-family houses are referred to as “Euclidian Zoning.” See Schragger, *supra* note 44, at 135. But since *Village of Euclid*, zoning has become much more complex than simply separating industrial and residential uses. See Serkin, *supra* note 49, at 761.

believed to reside with the local government.<sup>91</sup> In recent times, the California Supreme Court has supported that fact by stating the power to enact zoning derives from the locality's police powers, and "not from the delegation of authority by the state."<sup>92</sup> Even though all cities and counties may enact local ordinances "not in conflict with general laws," the state Supreme Court has stated that "preemption by state law is not lightly presumed"—thereby suggesting a policy in favor of allowing localities to control their land use regulations whenever possible.<sup>93</sup>

Even though localities possess the power to enact zoning ordinances, the state constitution does not preclude the state from creating laws to influence that process. This idea is also codified in the state Government Code, in the chapter on zoning regulations, where the legislature stated its purpose "to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters"—subject to two main exceptions.<sup>94</sup> One of those exceptions involves housing.<sup>95</sup> Since 1969, state legislators have gradually passed laws to reign in some of this local power; however, this effort rapidly increased in the past decade as public discourse around the housing shortage and housing crisis intensified. Such state laws included the Housing Element law in 1969, the Housing Accountability Act in 1982,<sup>96</sup> and subsequent amendments after 2016 that have strengthened those laws.

## II. CALIFORNIA LEGISLATES FOR MORE HOUSING: PRE-S.B. 9

### A. *Housing Element Law and RHNA*

According to state law, each charter city in California needs to create what is called a "General Plan for Development": an extensive policy document intended to guide the city as it makes short- and long-

91. See CAL. LEGIS. ANALYST'S OFF., *supra* note 17, at 15.

92. *Big Creek Lumber Co. v. County of Santa Cruz*, 136 P.3d 821, 828 (Cal. 2006) (citing *DeVita v. County of Napa*, 38 Cal. Rptr. 2d 699, 1031 (Ct. App. 1995)).

93. *City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc.*, 300 P.3d 494, 496 (Cal. 2013).

94. CAL. GOV'T CODE § 65800 (2022).

95. *Id.* § 65913.1 (2022) (requiring cities with vacant land to zone enough for residential use within the jurisdiction's general plan to meet all housing needs).

96. *Id.* § 65589.5 (2022); *Ruegg & Ellsworth v. City of Berkeley*, 277 Cal. Rptr. 3d 649, 661–62 (Ct. App. 2021).

term decisions.<sup>97</sup> It has been described as a constitution for land use; local ordinances need to be consistent with it.<sup>98</sup> Among the many elements required in the plan is something known as the “Housing Element,” which requires cities and counties to plan for and prioritize policies that support local housing development.<sup>99</sup> Since localities generally rely on private developers to construct housing, the law keeps cities focused on facilitating development by identifying sites ripe for new housing construction, reporting on the progress of current city housing policies, and creating “goals, objectives, and policies” to further the plan.<sup>100</sup> Next, the California Department of Housing and Community Development (HCD) reviews each locality’s Housing Element, gives feedback, and decides whether the plan complies with state law.<sup>101</sup> Jurisdictions submit their Housing Element every five or eight years and are encouraged to comply in order to avoid penalties, which will be mentioned later in this Note.<sup>102</sup>

A number that is central for cities when developing their Housing Element is the Regional Housing Needs Allocation (RHNA).<sup>103</sup> The RHNA number is calculated using population forecasts and census data to estimate how many additional housing units are needed in the state.<sup>104</sup> Next, this number is handed to a local regional planning agency that divides it among the various cities and jurisdictions under

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97. CAL. GOV’T CODE § 65300 (2022) (stating that planning agencies and county and city legislative bodies “shall adopt a comprehensive, long-term general plan for the physical development of the county or city”); *Long Beach General Plan: Frequently Asked Questions*, CITY OF LONG BEACH, <https://www.longbeach.gov/globalassets/city-news/media-library/documents/lb-general-plan-faq> [<https://perma.cc/D5WZ-BUA6>].

98. Christopher S. Elmendorf et al., “*I Would Only if I Could*”: *How California Cities Can Use State Law to Overcome Neighborhood Resistance to New Housing*, 57 WILLAMETTE L. REV. 221, 228 (2021).

99. CAL. GOV’T CODE § 65302(c) (2022); PAUL G. LEWIS, PUB. POL’Y INST. OF CAL., CALIFORNIA’S HOUSING ELEMENT LAW: THE ISSUE OF LOCAL NONCOMPLIANCE 11–12 (2003), [https://www.ppic.org/wp-content/uploads/content/pubs/report/R\\_203PLR.pdf](https://www.ppic.org/wp-content/uploads/content/pubs/report/R_203PLR.pdf) [<https://perma.cc/6X9M-MY6K>] (“The housing element process is intended to focus the attention of city policymakers on policy actions that they might take to make it easier or less expensive for additional housing units to be built.”).

100. *Housing Element Update: FAQ*, L.A. CITY PLAN., <https://planning.lacity.org/node/133011> [<https://perma.cc/7BMB-3CMC>].

101. *Housing Elements*, CAL. DEP’T OF HOUS. & CMTY. DEV., <https://www.hcd.ca.gov/planning-and-community-development/housing-elements> [<https://perma.cc/6HZC-YJP2>].

102. *Id.*

103. *San Franciscans for Livable Neighborhoods v. City & County of San Francisco*, 236 Cal. Rptr. 3d 893, 901 (Ct. App. 2018) (“The Legislature enacted the regional housing needs assessment procedure . . . to address the state’s shortage of affordable housing.”).

104. Christopher S. Elmendorf et al., *Making It Work: Legal Foundations for Administrative Reform of California’s Housing Framework*, 47 ECOLOGY L.Q. 978, 978–79 (2020).

its control.<sup>105</sup> The number then gets further divided into four affordability categories: “very-low-income, low-income, moderate-income, and above-moderate income households.”<sup>106</sup> In short, each city in California gets four numbers assigned to them. When the city submits its Housing Element for approval, they need to include how they will facilitate the additional housing designated to them for the current period.<sup>107</sup> In 2007, 80 percent of cities completed Housing Elements that complied with state law.<sup>108</sup> That was the last time the state published the compliance rate.<sup>109</sup> In early 2018, HCD reported that 98 percent of localities were not meeting their RHNA goals.<sup>110</sup> The previous year, the legislature passed Senate Bill 35 (“S.B. 35”), which gave the Housing Element more teeth: localities not meeting their housing goals would be forced to grant building permits for multi-family housing if the development met “objective planning standards,” provided a certain amount of affordable units, and was located in an urban “in-fill” site.<sup>111</sup> S.B. 35’s author, State Senator Scott Wiener, signaled the state’s turn to more aggressive housing measures by stating, when S.B. 35 passed the Assembly, “[w]e’re past the point where communities can choose whether to create housing or whether to opt out. \*All\* communities need to participate in creating the housing we so desperately need.”<sup>112</sup>

The Housing Element is currently in its sixth cycle and city plans were due in 2019 for approval.<sup>113</sup> HCD determined that the region which includes all 191 cities in Los Angeles, Orange, Riverside, Ventura, San Bernardino, and Imperial Counties needed to plan for 1.34

105. *San Franciscans for Livable Neighborhoods*, 236 Cal. Rptr. 3d at 901.

106. Elmendorf et al., *supra* note 104, at 979; CAL. GOV’T CODE § 65584(f) (2022).

107. Elmendorf et al., *supra* note 104, at 979. Unsurprisingly, cities challenge the allotments. See Samuel Braslow, *Beverly Hills Challenging RHNA Number*, BEVERLY HILLS COURIER (Dec. 3, 2020), <https://beverlyhillscourier.com/2020/12/03/beverly-hills-challenging-rhna-number/> [https://perma.cc/N7FP-JJQ5].

108. Infranca, *supra* note 37, at 843.

109. *Id.*

110. *Id.* at 849.

111. *Id.* An urban site is defined by the U.S. Census Bureau. CAL. GOV’T CODE § 65913.4 (2022).

112. Press Release, Scott Wiener, Sen., Cal. Legis., Senator Wiener’s Housing Streamlining Bill, SB 35, Approved by Assembly as Part of Broad Housing Package (Sept. 15, 2017), <https://sd11.senate.ca.gov/news/20170914-senator-wiener%E2%80%99s-housing-streamlining-bill-sb-35-approved-assembly-part-broad-housing> [https://perma.cc/QGK2-JBUZ].

113. See REG’L HOUS. NEEDS ALLOCATION, 6TH RHNA CYCLE APPEALS PROCEDURES, <https://scag.ca.gov/sites/main/files/file-attachments/rhna-adopted-appeals-procedures090320.pdf> [https://perma.cc/X5HA-YRMW].



million affordable units by 2029.<sup>114</sup> While the regional planning agency formally objected to the allotment,<sup>115</sup> it chose not to take legal action when its appeal was rejected.<sup>116</sup> Cities that questioned the allotment argued that HCD made a mistake in calculating the RHNA number and cited a Freddie Mac study that determined that California had a shortage of only 820,000 housing units, dramatically smaller than the agency's allotment.<sup>117</sup> This skepticism was also fueled by a letter in early 2022 where the Acting California State Auditor expressed concern at how HCD calculated the RHNA numbers.<sup>118</sup> Still, cities often reluctantly complete their Housing Element and characterize the RHNA requirements as being unrealistic and a state overreach. For example, in 2022, the city of Manhattan Beach, which has a density of nine thousand people per square mile,<sup>119</sup> was required to plan for 774 new units for the next eight years; 487 needed to be low-income units.<sup>120</sup> Adding to the difficulty cities face, courts are precluded from reviewing a city's RHNA allotment.<sup>121</sup>

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114. Letter from Kome Ajise, Exec. Dir., S. Cal. Ass'n of Gov'ts, to Doug McCauley, Acting Dir., Hous. & Cmty. Dev. (HCD) (Sept. 18, 2019), <https://scag.ca.gov/sites/main/files/file-attachments/scag-objection-letter-rhna-regional-determination.pdf?1602190274> [<https://perma.cc/U7YQ-WCGS>] [hereinafter SCAG Letter]; see *Member Profile: Southern California Association of Governments (SCAG)*, CAL. ASS'N OF COUNCILS OF GOV'TS, <https://calcog.org/southern-california-association-of-governments-scag/> [<https://perma.cc/P85A-B274>]; Ben Tansey, *RHNA: City Joins Campaign Pressing Challenge to Massive Housing Demand*, S. PASADENAN (Jan. 4, 2021), <https://southpasadenan.com/rrhna-city-joins-campaign-pressing-challenge-to-massive-housing-demand/> [<https://perma.cc/5Y3E-SZZ9>].

115. SCAG Letter, *supra* note 114.

116. Tansey, *supra* note 114.

117. *Id.*

118. CAL. STATE AUDITOR, REPORT NO. 2021-125, REGIONAL HOUSING NEEDS ASSESSMENT 11 (2022), <https://www.auditor.ca.gov/pdfs/reports/2021-125.pdf> [<https://perma.cc/329R-8KG8>]. It is possible a group of cities may sue HCD over the recent calculation of the RHNA numbers. *RHNA State Audit and Potential Lawsuit by California Cities and Counties*, MARIN POST (July 24, 2022, 7:23 PM), <https://marinpost.org/blog/2022/7/24/rhna-state-audit-and-potential-lawsuit-by-california-cities-and-counties> [<https://perma.cc/4RPG-D5L5>].

119. *City of Manhattan Beach, Los Angeles County*, L.A. ALMANAC, <http://www.laalmanac.com/cities/ci52.php> [<https://perma.cc/T7SX-WDWT>].

120. Jeanne Fratello, *Manhattan Beach City Council Approves State-Mandated Housing Plan, Reluctantly*, MB NEWS (Mar. 23, 2022, 10:51 AM), <https://www.thembnews.com/2022/03/23/393450/manhattan-beach-city-council-approves-state-mandated-housing-plan-reluctantly> [<https://perma.cc/8262-G7YK>]. During the previous eight-year period, the city's RHNA allocation was only thirty-eight new units. *Id.*

121. *City of Coronado v. San Diego Ass'n of Gov'ts*, 295 Cal. Rptr. 3d 384, 398–400 (Ct. App. 2022). Instead, cities have to go through an appeal process. See REG'L HOUS. NEEDS ALLOCATION, *supra* note 113.

### B. California Housing Accountability Act and 2017 Amendment

In 1982, California passed the Housing Accountability Act (HAA) with the stated purpose to “meaningfully and effectively curb[] the capability of local governments to deny, reduce the density for, or render infeasible housing development projects.”<sup>122</sup> The Act mandated that if a proposed housing project complied with “objective” general plan, zoning, and design review standards, then local governments could not deny the application to build.<sup>123</sup> However, localities kept rejecting projects due to subjective standards.<sup>124</sup> So, in 1990, the legislature amended the HAA to explicitly include charter cities and stated that the actions of local governments were limiting the approval of affordable housing and contributing to excessive housing costs.<sup>125</sup> Also in 1990, a mechanism known as the “builder’s remedy” was added to the HAA which allows developers of affordable housing to build regardless of zoning laws if the locality does not comply with the Housing Element law.<sup>126</sup> In 2017, Senate Bill 167 amended the HAA again and issued this standard for determining whether a project complied with the requirements of the HAA: “if there is *substantial evidence* that would allow a reasonable person to conclude” the project “is consistent, compliant, or in conformity.”<sup>127</sup> This amendment lowered the standard of review and shifted the burden of proof required for a project’s approval under the HAA. This is significant because, in the past, courts reviewing a locality’s decision to reject a project looked at whether there was substantial evidence to support that

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122. CAL. GOV’T CODE § 65589.5 (2022); *Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo*, 283 Cal. Rptr. 3d 877, 883 (Ct. App. 2021).

123. CAL. GOV’T CODE § 65589.5(j)(1) (2022); *Cal. Renters Legal Advoc. & Educ. Fund*, 283 Cal. Rptr. 3d at 883.

124. *SB 167*, CAL. YIMBY, <https://cayimby.org/sb-167/> [<https://perma.cc/ACP7-KEA8>].

125. CAL. GOV’T CODE § 65589.5(g) (2022); *Cal. Renters Legal Advoc. & Educ. Fund*, 283 Cal. Rptr. 3d at 898.

126. CHRISTOPHER S. ELMENDORF, UCLA LEWIS CTR. FOR REG’L POL’Y STUD., A PRIMER ON CALIFORNIA’S “BUILDER’S REMEDY” FOR HOUSING-ELEMENT NONCOMPLIANCE 3 (2022), <https://escholarship.org/content/qt38x5760j/qt38x5760j.pdf?t=rb218p> [<https://perma.cc/S552-M9B6>]; CAL. GOV’T CODE § 65589.5(d) (2022). However, the “builder’s remedy” was not widely used after its creation, possibly because such projects are not exempt from CEQA. ELMENDORF, *supra*, at 7. In recent years the remedy was strengthened, and in 2022 a developer was poised to use the “builder’s remedy” to build 4,500 apartments in Santa Monica, along with a fifteen-story high rise with 2,000 units. Santa Monica contains 92,000 residents. Liam Dillon, *Thousands of Apartments May Come to Santa Monica, Other Wealthy Cities Under Little-Known Law*, L.A. TIMES (Oct. 24, 2022, 5:00 AM), <https://www.latimes.com/homeless-housing/story/2022-10-24/santa-monica-housing-apartment-boom> [<https://perma.cc/AN96-C87F>].

127. CAL. GOV’T CODE § 65589.5(f)(4) (2022) (emphasis added).

denial.<sup>128</sup> Now, the standard is whether there is substantial evidence for a reasonable person to conclude the project should be *approved*.<sup>129</sup> The constitutionality of this standard was recently upheld in *California Renters Legal Advocacy & Education Fund v. City of San Mateo*,<sup>130</sup> which will be discussed in Part III.<sup>131</sup>

### C. Ministerial Review and CEQA

The recent laws surrounding housing have increasingly included ways to exempt projects from complying with CEQA by granting them “ministerial review.” This includes S.B. 35 from 2017, which was previously mentioned in Part II.A.<sup>132</sup> The bill, authored by State Senator Scott Wiener, sought to eliminate parts of the development process that made constructing housing more expensive and time-consuming.<sup>133</sup> CEQA requires a full environmental assessment of proposed developments; in Los Angeles this assessment was required for developments with at least fifty units and usually cost developers “\$200,000 to \$300,000 each and add[ed] 18 months to the building process.”<sup>134</sup> Senator Wiener was confident S.B. 35 would remove such roadblocks in localities,<sup>135</sup> and presented an adversarial tone toward cities that did not meet housing production goals.<sup>136</sup>

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128. Memorandum from Megan Kirkeby, Deputy Dir. of Hous. Pol’y Dev. Div., to Plan. Dirs. and Interested Parties 11 (Sept. 15, 2020), <https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/hcd-memo-on-haa-final-sept2020.pdf> [<https://perma.cc/SBA6-HVVH>].

129. *Id.*

130. 283 Cal. Rptr. 3d 877, 895–96 (Ct. App. 2021).

131. *See infra* Section III.B.

132. *See* S.B. 35, 2017 Leg., 2017–2018 Reg. Sess. (Cal. 2017); *see supra* notes 112–113 and accompanying text.

133. Liam Dillon, *How a New California Law Could Kill a 30-Year-Old Rule That Slowed Development in Los Angeles*, L.A. TIMES (Oct. 5, 2017, 12:05 AM), <https://www.latimes.com/politics/la-pol-ca-state-housing-impact-los-angeles-20171005-story.html> [<https://perma.cc/H3K7-BBQ4>]. The thirty-year-old rule referenced in the article’s title comes from the case *Friends of Westwood, Inc. v. City of Los Angeles*, 235 Cal. Rptr. 788 (Ct. App. 1987). In this case, a community nonprofit argued that the developer of a proposed twenty-six-story tower needed to complete an environmental assessment under CEQA. *Friends of Westwood*, 235 Cal. Rptr. at 789. The court agreed with the nonprofit and rejected the developer’s argument that this project was simply a “ministerial” action (not subject to an environmental assessment under CEQA). *Id.* at 789–90.

134. Dillon, *supra* note 133.

135. *Id.*

136. Press Release, Scott Wiener, Sen., Cal. Legis., Senator Wiener Releases Details on SB 35 – The Housing Accountability and Affordability Act (Jan. 23, 2017), <https://sd11.senate.ca.gov/news/20170123-senator-wiener-releases-details-sb-35-%E2%80%93-housing-accountability-and-affordability-act> [<https://perma.cc/NG3J-DBWF>] (“SB 35 will retain local control for those cities that are producing their share of housing, but create a more streamlined path for housing creation

During this time, HCD released a report that most urban cities were not reaching their housing goals.<sup>137</sup> At the same time, other bills were introduced to the legislature to preempt local zoning laws and to allow denser housing in specific circumstances.<sup>138</sup> One of these bills included Senate Bill 1120 in 2020, which was a precursor to S.B. 9.<sup>139</sup> But the idea to focus on single-family residences was forming in other locations. In 2019, Minneapolis became the first large American city to end single-family zoning.<sup>140</sup> Recently, the idea of changing exclusionary zoning to improve housing access has gained more mainstream exposure.<sup>141</sup> At the same time, efforts to create more density in cities has prompted constitutional challenges from localities. Part III will discuss how courts have applied the home rule analysis to various state laws, including the housing laws that were discussed in Part II.

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in those cities that are blocking housing or *ignoring* their responsibility to build.” (emphasis added)).

137. See Elijah Chiland, *State Says LA Isn't Building Enough Housing – Along with 525 Other California Cities*, CURBED L.A. (Feb. 2, 2018, 1:56 PM), <https://la.curbed.com/2018/2/2/16964850/los-angeles-housing-goals-shortage-california> [https://perma.cc/JV3D-4EV6].

138. In 2018, S.B. 827 was introduced and would have allowed denser housing near rapid-transit stations and high-frequency bus stops. Matthew Yglesias, *The Myth of “Forcing People Out of Their Cars,”* VOX (Mar. 19, 2018, 1:30 PM), <https://www.vox.com/policy-and-politics/2018/3/19/17135678/sb-827-cars-california-transit-trains-buses> [https://perma.cc/7C7M-GDBV]. The bill was killed and its idea was broadly discussed, with some arguing it was necessary to reach the state’s environmental goals and others saying it would benefit developers and promote gentrification. Benjamin Schneider, *YIMBYs Defeated as California’s Transit Density Bill Stalls*, BLOOMBERG (Apr. 18, 2018, 9:55 AM), <https://www.bloomberg.com/news/articles/2018-04-18/california-housing-bill-sb-827-dies-an-early-death> [https://perma.cc/QG2X-T426].

139. See *Senate Bill 9 Is the Product of a Multi-Year Effort to Develop Solutions to Address California’s Housing Crisis*, CAL. SENATE DEMOCRATIC CAUCUS [hereinafter *Cal. HOME Act Info.*], <https://focus.senate.ca.gov/sb9> [https://perma.cc/JN7Y-3F7M].

140. Justin Fox, *What Happened When Minneapolis Ended Single-Family Zoning*, BLOOMBERG (Aug. 20, 2022, 5:00 AM), <https://www.bloomberg.com/opinion/articles/2022-08-20/what-happened-when-minneapolis-ended-single-family-zoning> [https://perma.cc/A5QM-UQD4]. Also, in 2019 Oregon passed a law to allow duplexes in areas zoned for single-family houses throughout the state. See Laurel Wamsley, *Oregon Legislature Votes to Essentially Ban Single-Family Zoning*, NPR (July 1, 2019, 7:03 PM), <https://www.npr.org/2019/07/01/737798440/oregon-legislature-votes-to-essentially-ban-single-family-zoning> [https://perma.cc/M25J-WMEW].

141. See Press Release, The White House, President Biden Announces New Actions to Ease the Burden of Housing Costs (May 16, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/president-biden-announces-new-actions-to-ease-the-burden-of-housing-costs/> [https://perma.cc/43NT-PX4R] (“Exclusionary land use and zoning policies constrain land use, artificially inflate prices, perpetuate historical patterns of segregation, keep workers in lower productivity regions, and limit economic growth.”); see also Diana Budds, *AOC Is a YIMBY Now*, CURBED (Jan. 13, 2022), <https://www.curbed.com/2022/01/aoc-2022-pledge-pro-housing-yimby.html> [https://perma.cc/C9GC-B2BH] (“Courage to Change . . . just released its 2022 pledge, which includes a number of policy commitments aimed at making ‘housing permanently affordable, inclusive, and widely available.’”).

### III. CASES THAT APPLY THE “HOME RULE” ANALYSIS

When there is a claim that a California state law has preempted a role or function of a charter city, courts employ a four-part analysis. This is because, as stated previously in Part I.A, the California constitution enshrines the authority of a charter city to establish its own laws, regardless of the state legislature, for things that are “municipal affairs.”<sup>142</sup> The four-part test is: (1) whether the city ordinance regulates a “municipal affair”; (2) whether there is an actual conflict between the state law and local law; (3) whether the state law addresses a matter of “state-wide concern”; and (4) whether the state law is “reasonably related to . . . resolution” of the concern and “narrowly tailored” to avoid unnecessary interference with the city.<sup>143</sup> If all four parts are decided in the affirmative, then the state law can constitutionally govern a charter city’s municipal affair.<sup>144</sup> This inquiry is a legal question for the courts, but still relies on facts.<sup>145</sup> The following cases will be used to predict how S.B. 9 will fare on a home rule objection.

#### A. State Supreme Court “Home Rule” Case

In *State Building & Construction Trades Council of California v. City of Vista*,<sup>146</sup> a recently-formed charter city ignored a state prevailing-wage law when contracting workers for a public works project.<sup>147</sup> After this occurred, a major labor union petitioned the Superior Court for a writ of mandate, arguing that the city still had to comply with the state wage law.<sup>148</sup> The city countered that, as a charter city, it had “fiscal control over local ‘municipal affairs,’” and as such could choose whether to follow the prevailing wage requirements for its public works projects.<sup>149</sup> The court applied the home rule analysis.<sup>150</sup>

At the “statewide concern” inquiry, the union argued that wage levels mandated by the law were set by the Director of the Department of Industrial Relations and not a local body, thereby showing that the

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142. See *supra* notes 72–76 and accompanying text.

143. *Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo*, 283 Cal. Rptr. 3d 877, 895–96 (Ct. App. 2021).

144. See *id.* at 896.

145. See *Anderson v. City of San Jose*, 255 Cal. Rptr. 3d 654, 662 (Ct. App. 2019).

146. 279 P.3d 1022 (Cal. 2012).

147. *Id.* at 1024–25.

148. *Id.* at 1025.

149. *Id.*

150. *Id.* at 1029.

law had a statewide concern.<sup>151</sup> In addition, the union stated that the wage law required contractors to hire apprentices for public work projects and therefore showed a statewide concern to train the next generation of skilled construction workers.<sup>152</sup> The court conceded these points were statewide concerns “in the abstract,” but that the union failed to identify the proper issue.<sup>153</sup> Instead, the correct issue was “whether the state can require a charter city to exercise its purchasing power in the construction market in a way that supports regional wages and subsidizes vocational training, while increasing the charter city’s costs.”<sup>154</sup> The issue was possibly phrased this way because the court stressed the importance of a municipality’s autonomy to spend its own tax dollars.<sup>155</sup> After this, the court cited previous decisions in which prevailing wage laws for *public* employees did not apply to the University of California, charter cities, and counties.<sup>156</sup> In addition, the court found the law to have a narrow application, since it only applied to public works projects by public agencies and put a substantive obligation on charter cities—both of which weakened the argument that this was a statewide concern.<sup>157</sup> Considering all the above, the court found there was no statewide concern for the prevailing wage law and therefore did not address the final prong of the home rule analysis. The union’s petition for writ of mandate was denied.<sup>158</sup>

### *B. “Home Rule” Objections to Recent Housing Laws*

In *California Renters Legal Advocacy & Education Fund v. City of San Mateo*, the city of San Mateo rejected a developer’s application to build a four-story, ten-unit apartment building next to a single-family residence because the proposed building sat more than one story above the neighboring dwellings and, as a result, needed to be “step[ped] back” per the city’s guidelines for multi-family

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151. *Id.* at 1030.

152. *Id.* at 1030–31.

153. *Id.* at 1031.

154. *Id.*

155. *See id.* (“Autonomy with regard to the expenditure of public funds lies at the heart of what it means to be an independent governmental entity.”).

156. *Id.* at 1032.

157. *Id.* at 1033.

158. *Id.* at 1034.

dwellings.<sup>159</sup> After exhausting its remedies, the developer sought a writ of administrative mandamus to compel approval of the project and argued the denial violated the HAA.<sup>160</sup> The City argued that subsection (f)(4) of the HAA violated the state Constitution “by infringing on the City’s right to ‘home rule’—or control of its own municipal affairs as a charter city.”<sup>161</sup> The subsection in question lowered the standard of review courts use to determine whether a project should have been approved under the HAA: “if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity.”<sup>162</sup>

On appeal, the court applied the four-part home rule analysis.<sup>163</sup> The first two prongs were accepted as true by the court.<sup>164</sup> Regarding the third prong, while both parties agreed that “housing” was a statewide concern, the City pointed to high construction costs and shortage of construction labor as other contributors to the housing crisis and argued that, since subsection (f)(4) did not address those factors, it did not regulate a “state-wide concern.”<sup>165</sup> The court disagreed and noted other cases that had found a statewide interest in providing enough housing stock.<sup>166</sup> To conclude this, the court recited the standard from the state Supreme Court: “not whether the Legislature has enacted ‘prudent public policy’ or whether its enactments will be ‘advisable or effective’; rather, it is whether the problem it addresses ‘is of sufficient extramural dimension to support legislative measures reasonably related to its resolution.’”<sup>167</sup> Courts do not automatically approve the Legislature’s finding of a statewide concern. Still, the court

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159. *Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo*, 283 Cal. Rptr. 3d 877, 884 (Ct. App. 2021). The land of the proposed apartment building was properly zoned for multi-family dwellings but was adjacent to single-family zoned houses. *Id.* at 883–84.

160. *Id.* at 884. A writ of administrative mandamus is used to challenge adjudicative or quasi-judicial administrative decisions. Christine Dietrick & Jon Ansolabehere, *LAND USE 101: A FIELD GUIDE 3*, CITY OF SAN LUIS OBISPO (2015), <https://www.cacities.org/resources-documents/member-engagement/professional-departments/city-attorneys/library/2015/land-use-101-webinar-paper.aspx> [https://perma.cc/55CZ-8QAF]; see CAL. CIV. PROC. CODE § 1094.5 (2022); *supra* notes 128–131 and accompanying text.

161. *Cal. Renters Legal Advoc. & Educ. Fund*, 283 Cal. Rptr. 3d at 884–85.

162. CAL. GOV’T CODE § 65589.5(f)(4) (2022); see *supra* notes 128–131.

163. *Cal. Renters Legal Advoc. & Educ. Fund*, 283 Cal. Rptr. 3d at 895–96.

164. *Id.* at 896.

165. *Id.* at 896–97.

166. *Id.* at 897.

167. *Id.* (quoting *Cal. Fed. Sav. & Loan Ass’n. v. City of Los Angeles*, 812 P.2d 916 (Cal. 1991)).

referred to the Legislature's pronouncements in the HAA that localities were not approving enough housing, and were therefore contributing to the high housing costs in the state.<sup>168</sup> The court cited a string of cases that ultimately deferred to "legislative estimates regarding the significance of a given problem and the responsive measures that should be taken toward its resolution."<sup>169</sup> The court also noted that the City did not present any evidence to doubt the legislative findings.<sup>170</sup> This suggests it may be possible for cities to challenge the pronouncement of a statewide concern by the legislature with enough evidence.

Finally, in analyzing the fourth prong, the court held subsection (f)(4) was "reasonably related" to providing new housing because it limited localities from using subjective criteria to deny projects.<sup>171</sup> Lastly, the court concluded the law was narrow enough because: (1) the city was still free to enforce other development policies (as long as they were objective and helped the city reach its RHNA goals); (2) the city could still install other conditions for development (as long as it did not reduce density); and (3) municipalities could deny a project if it had an adverse impact on health and safety.<sup>172</sup>

In *Ruegg & Ellsworth v. City of Berkeley*,<sup>173</sup> the California Court of Appeal took up the issue of whether S.B. 35 unconstitutionally infringed on a city's home rule power to designate historic landmarks.<sup>174</sup> In that case, the City of Berkeley denied a mixed-use project which had sought ministerial approval under S.B. 35.<sup>175</sup> In relevant part, the city argued the law did not apply to this project because the site was believed to be on a historic Native American shellmound—a burial site that, if it existed, was underground.<sup>176</sup> The first three prongs of the home rule analysis were not in dispute.<sup>177</sup> However, the court disagreed with the city that the issue of statewide concern was whether

168. *Id.* at 898 ("When extending the statute to reach charter cities in 1990, the Legislature found that actions and policies of local governments limiting the approval of affordable housing were a partial cause of the 'excessive cost of the state's housing supply.'").

169. *Id.*

170. *Id.*

171. *Id.* Earlier in the opinion, on a separate issue, the court concluded that the City's guidelines were subjective and could not be used to deny projects. *Id.* at 894–95.

172. *Id.* at 898.

173. 277 Cal. Rptr. 3d 649, 660 (Ct. App. 2021).

174. *See supra* notes 112, 133–137 and accompanying text.

175. *Ruegg & Ellsworth*, 277 Cal. Rptr. 3d at 654, 659–60.

176. *Id.* at 654–55, 678 n.24.

177. *Id.* at 674.



there was a state interest to “eliminat[e] local landmark preservation authority.”<sup>178</sup> Instead, the court broadened the framing to be “whether the *purpose* of the ministerial approval statute [was] a matter of statewide concern.”<sup>179</sup>

The court decided the law was “reasonably related” to the statewide concern because its purpose was to increase approval of affordable housing projects by removing some discretion to deny projects.<sup>180</sup> Looking at whether the law was narrowly tailored, the court rejected the city’s argument that affordable housing could be created without interfering with the locality’s authority to preserve historical landmarks.<sup>181</sup> Instead, the court found that historical preservation was “precisely the kind of subjective discretionary land use decision the legislature sought to prevent local government from using to defeat affordable housing development.”<sup>182</sup> Additionally, the court found S.B. 35 to be sufficiently narrow because it only applied to localities that did not meet their RHNA goals, and then only if certain conditions were present on the site.<sup>183</sup>

In *Anderson v. City of San Jose*,<sup>184</sup> San Jose challenged the state Surplus Land Act (“Act”), which requires charter cities selling surplus land to offer it to entities that agree to develop it for low- and moderate-income housing.<sup>185</sup> The law conflicted with a few city policies. For example, a city policy allowed the sale of surplus land to develop housing for low-income rentals *or* to develop moderate-income households.<sup>186</sup> By contrast, the Act “requires *both* rental and for-sale units to be affordable to ‘lower income.’”<sup>187</sup> Since San Jose is a charter city, the Court of Appeal applied the four-pronged home rule analysis and found the first two prongs to be undisputed.<sup>188</sup>

To identify a statewide concern, the court extensively considered the historical context of the Act and the laws the legislature had passed

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178. *Id.* at 676.

179. *Id.* (emphasis added).

180. *Id.* at 677.

181. *Id.*

182. *Id.*

183. *Id.* at 664.

184. 255 Cal. Rptr. 3d 654 (Ct. App. 2019).

185. *Id.* at 659, 669.

186. *Id.* at 659.

187. *Id.* at 664.

188. *Id.* at 663.

for decades to address low-income housing.<sup>189</sup> After this discussion, the court found that the “well-documented shortage of sites for low- and moderate-income housing and the regional spillover effects of insufficient housing demonstrate[d] ‘extramunicipal concerns’” to justify a statewide application of the Act.<sup>190</sup> Citing *City of Vista*, the court stated “a state law of broad general application is more likely to address a statewide concern than one that is narrow and particularized in its application.”<sup>191</sup> Additionally, the court observed how “substantive obligations on charter cities” undermine the assertion that a state law presents a statewide concern, as opposed to “generally applicable procedural standards” which point to a statewide concern.<sup>192</sup>

Here, the City of San Jose argued the Act was a substantive regulation because it mandated specific affordability requirements, reserved a specific amount of units, created income ranges for buyers and renters, and required deed restrictions.<sup>193</sup> The city argued this differed from earlier iterations of the Act which “required only procedural compliance with notice to public entities about available surplus land.”<sup>194</sup> First, the court found the Act had a broad reach because it applied to “‘any’ local government entity” able to hold real property.<sup>195</sup> Second, the court found the application of the law was general because it applied to “all manner of real property owned by local government agencies.”<sup>196</sup> Next, the court found the Act contained both substantive and procedural elements.<sup>197</sup> The court distinguished the state uniform prevailing wage law in *City of Vista* by noting that the substantive requirements of the Act only occurred in select scenarios.<sup>198</sup> These select scenarios included an option for localities to ignore the Act’s requirements if they could not agree to satisfactory terms with the entity buyer, “except in case of residential development of ten

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189. *Id.* at 665–68. The trial court found there was no statewide concern. *Hous. Cal. v. City of San Jose*, No. 16-CV-297950, 2016 WL 6822286, at \*5 (Cal. Super. Ct. Oct. 18, 2016).

190. *Anderson*, 255 Cal. Rptr. 3d at 673.

191. *Id.* at 674.

192. *Id.* (quoting *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 279 P.3d 1022, 1033 (Cal. 2012)).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 675.

198. *Id.*

or more units.”<sup>199</sup> Nowhere did the court consider the practical likelihood of these carveouts—only that they were contained in the Act. To justify the substantive elements of the Act, the court analogized this to another Court of Appeal case,<sup>200</sup> *Marquez v. City of Long Beach*.<sup>201</sup> There, the court ruled that the state minimum wage did not infringe on a city’s home rule because a minimum wage does not effectively set the salary for all, but merely sets the floor.<sup>202</sup> Likewise in *Anderson*, the court reasoned that the Act set a floor to limit the “charter city’s ability to reduce the percentage of units designated for sale or lease.”<sup>203</sup>

Lastly, the court held the Act was reasonably related to the statewide concern and was narrowly tailored.<sup>204</sup> The court noted that the Act was only triggered when the locality designated land “surplus,” and even then, only when it was “offered for the purpose of developing affordable housing.”<sup>205</sup> Most notably, the Act allowed the city to set its own price, even at market value.<sup>206</sup> The court did not consider the practicality of creating affordable housing if the city was allowed to sell land for market value, nor was this argument raised in the city’s brief.<sup>207</sup> The cases in Part III of this Note applied the home rule analysis to some of the housing laws described in Part II. Next, Part IV will describe S.B. 9 in order to apply the home rule analysis to it.

#### IV. IMPLICATIONS OF S.B. 9 BECOMING LAW

##### A. *Requirements of S.B. 9*

S.B. 9 added two sections to the Government Code.<sup>208</sup> The first is section 65852.21, which allows the ministerial review, “without

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199. *Id.*

200. *Id.* at 676–77.

201. 244 Cal. Rptr. 3d 57 (Ct. App. 2018).

202. *Anderson*, 255 Cal. Rptr. 3d at 677.

203. *Id.*

204. *Id.* at 678.

205. *Id.*

206. *Id.*

207. Oddly, instead, the City argued the Act was not reasonably related or narrow enough because it would depress the value of city land and thus limit city funds to invest in housing. *See* Respondents’ Brief at 32, *Anderson v. City of San Jose*, 255 Cal. Rptr. 3d 654 (Ct. App. 2019) (No. H045271).

208. S.B. 9, 2021 Leg., 2021–2022 Reg. Sess. §§ 65852.21, 66411.7 (Cal. 2021).

discretionary review or a hearing,” of a two-unit structure (“duplex”) to be built within a single-family residence zone if certain conditions are met.<sup>209</sup> The conditions are as follows: first, the parcel where the proposed duplex will be built needs to reside in a city that contains “some portion of either an urbanized area or urban cluster, as designated by the U.S. Census Bureau.”<sup>210</sup> Based on the 2010 census, seven out of the top ten most densely populated “urban areas” in the United States were located in California.<sup>211</sup> The top three most densely populated areas in the country were Los Angeles-Long Beach-Anaheim, followed by San Francisco-Oakland, and then San Jose, CA.<sup>212</sup> The New York-Newark region ranked fifth on this list because, though they had about six million more people than the Los Angeles region, they had roughly double the land area—essentially, more space.<sup>213</sup> Therefore, urban areas make up a significant percentage of California’s population, meaning S.B. 9 has on the onset a potential broad application. In unincorporated areas, the target parcel must actually be within the “urbanized area” or “urbanized cluster.”<sup>214</sup>

Second, the development cannot be located on sites that contain certain types of farmland, wetlands, “very high fire hazard severity zone[s],” hazardous waste sites, earthquake fault zones, floodways, or protected species.<sup>215</sup> Third, the proposed construction cannot involve demolishing or altering any of the following: housing that is “subject to a recorded covenant, ordinance, or law” that mandates affordable rents to tenants of “moderate, low, or very low income”; housing subject to rent or price control set by a public entity; or “[h]ousing that has been occupied by a tenant in the last three years.”<sup>216</sup> Fourth, the owner of the parcel cannot have withdrawn accommodations from a rental or lease, pursuant to California Government Code section 7060,

209. CAL. GOV’T CODE § 65852.21(a) (2022).

210. *Id.* “Urban areas” are densely developed territory that can include residential and non-residential uses but has to contain at least 2,000 housing units or at least 5,000 people. *2020 Urban Areas FAQs*, U.S. CENSUS BUREAU, [https://www2.census.gov/geo/pdfs/reference/ua/2020\\_Urban\\_Areas\\_FAQs.pdf](https://www2.census.gov/geo/pdfs/reference/ua/2020_Urban_Areas_FAQs.pdf) [<https://perma.cc/LNP9-5Y4N>] (July 7, 2022, 10:11 AM).

211. *Urban Areas Facts*, U.S. CENSUS BUREAU, <https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/ua-facts.html> [<https://perma.cc/QB55-TUKE>].

212. *Id.*

213. *See id.*

214. CAL. GOV’T CODE § 65852.21(a)(1) (2022).

215. *Id.* §§ 65852.21(a)(2), 65913.4(a)(6)(B)–(K).

216. *Id.* § 65852.21(a)(3).

within fifteen years of applying for the project.<sup>217</sup> Section 7060 and those following, commonly known as the Ellis Act, allows landlords to evict tenants regardless of local rent protections if the landlord is leaving the rental market.<sup>218</sup> This requirement of S.B. 9 was likely included to protect rent-stabilized units from being demolished. Fifth, the proposed development cannot demolish more than 25 percent of the existing exterior walls unless either a local ordinance allows it or a tenant has not lived there in the last three years.<sup>219</sup> Lastly, the proposed development cannot be located in a historic district or designated as a state, city, or county landmark or historic property.<sup>220</sup>

The law also states that the local agency may impose objective zoning, subdivision, and design review standards, so long as those standards do not physically prevent two units from being constructed or preclude one of the units from being at least eight hundred square feet.<sup>221</sup> These “objective standards” cannot involve subjective or personal judgment by a public official and need to be based on verifiable benchmarks.<sup>222</sup> Also, local agencies are allowed to require an onsite parking spot only if the parcel is not located within one-half mile of “a high-quality transit corridor” or a “major transit stop.”<sup>223</sup> Regardless of the above conditions and limitations that must be satisfied in order to build a duplex on a single-family lot, the law gives localities a mechanism to disapprove a project. A project can be denied if the locality submits a written finding based on a preponderance of the evidence . . . that the proposed project will have “a specific, adverse impact . . . upon public health and safety or the physical environment” and there is “no feasible method to satisfactorily mitigate or avoid the specific, adverse impact.”<sup>224</sup> Any projects built pursuant to section 65852.21 will be exempt from CEQA and will be “considered ministerially, without discretionary review or a hearing.”<sup>225</sup>

Next, S.B. 9 also added section 66411.7 to the Government Code, which outlines the conditions and procedures for splitting a single-

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217. *Id.* § 65852.21(a)(4).

218. *New Legislation re Ellis Act Evictions*, CITY & CNTY. OF S.F. RENT BD. (JULY 18, 2022), <https://sfrb.org/article/new-legislation-re-ellis-act-evictions> [<https://perma.cc/GD69-L7RE>].

219. CAL. GOV'T CODE § 65852.21(a)(5) (2022).

220. *Id.* § 65852.21(a)(6).

221. *Id.* § 65852.21(b)(2)(A).

222. *Id.* § 65852.21(i)(2).

223. *Id.* § 65852.21(c).

224. *Id.* § 65852.21(d).

225. *Id.* § 65852.21(a).

family lot in two. Local agencies<sup>226</sup> are forced to “ministerially approve” a “parcel map for an urban lot split” if similar conditions for building a duplex are met: the parcel needs to be in an “urban area” and cannot be in fire zones, wetlands, etc.<sup>227</sup> A lot split cannot occur, however, if the parcel is subject to some rent control ordinance or covenant, making it affordable to people of moderate, low, or very low income.<sup>228</sup> Historic districts and properties are also exempted, and after a lot split occurs additional lot splits cannot be made.<sup>229</sup> Similar to section 65852.21, the parcel cannot be one where the owner used the Ellis Act to evict tenants within the last fifteen years.<sup>230</sup> Also similarly, the locality can deny a project despite these conditions if it imposes objective zoning and subdivision standards that do not conflict with section 66411.7 or effectively prevent two units from being built that are at least eight hundred square feet.<sup>231</sup>

Perhaps anticipating a legal challenge, the drafters of S.B. 9 included a section to declare that access to affordable housing is “a matter of statewide concern and not a municipal affair.”<sup>232</sup> Notably, in this section of S.B. 9, the legislature framed the state’s policy goal to be “ensuring access to affordable housing,” but did not include any specific language mandating affordability in the statute.<sup>233</sup>

### *B. Lawsuit on Behalf of Charter Cities Challenging S.B. 9*

On March 19, 2022, the California cities of Redondo Beach, Carson, Torrance, and Whittier filed a petition for writ of mandate and a complaint for declaratory and injunctive relief (“Petition”) in Los Angeles Superior Court against the State of California.<sup>234</sup> All the petitioners are charter cities.<sup>235</sup> The Petition argues that the land-use decisions made by local governments are “uniquely municipal affair[s],” and therefore are protected by the state constitution.<sup>236</sup>

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226. “Local agency” means any general law city, charter city, or county. *Id.* § 66411.7(m)(2).

227. *Id.* §§ 66411.7(a)(3)(B)–(C).

228. *Id.* § 66411.7(a)(3)(D)(i).

229. *Id.* §§ 66411.7(a)(3)(E)–(F).

230. *Id.* § 66411.7(a)(3)(D)(iii).

231. *Id.* § 66411.7(c).

232. S.B. 9, 2021 Leg., 2021–2022 Reg. Sess. (Cal. 2021).

233. This is unlike S.B. 35, which contained specific affordable housing requirements. Cal. S.B. 35.

234. Petition, *supra* note 47, at 1.

235. *Id.*

236. *Id.* at 2.

The Petition follows the four-part home rule test: (1) whether the city ordinance regulates a “municipal affair”; (2) whether there is an actual conflict between state and local law; (3) whether the state law addresses a matter of statewide concern; and (4) whether the state law is “reasonably related to . . . resolution” of the concern and “narrowly tailored.”<sup>237</sup>

The Petition makes the claim that the first prong is satisfied: the ability for cities to establish land-use and zoning regulations are “municipal affairs” under Article XI, Section Five of the state constitution.<sup>238</sup> Next, the Petition addresses the second prong by mentioning cities where S.B. 9 specifically overrides single-family zoning.<sup>239</sup> In normal single-family zones, property owners are not allowed to build duplexes, absent an exception or variance by the locality. As a result, there is a conflict between the state and local law. The first two prongs will likely not be at issue, since past cases have spent considerably more time analyzing the last two prongs.

Regarding the “statewide concern” prong, the Petition does not argue for or against, but notes that S.B. 9 specifically declared that “ensuring access to *affordable housing* is a matter of statewide concern and not a municipal affair as that term is used in Section 5 of Article XI of the California Constitution”—as opposed to housing in general.<sup>240</sup> The expected argument by the charter cities will be that this inadequately characterizes the statewide concern since, S.B. 9 does not contain explicit affordability requirements. This semantic argument is similar to the argument used by the City in *California Renters*: that since the state law did not address other factors of the housing shortage, it could not be a statewide concern.<sup>241</sup> That argument was rejected by the court.<sup>242</sup> Nevertheless, while statutory declarations are not dispositive,<sup>243</sup> courts can defer to the legislature to describe the gravity of

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237. *Id.*

238. *Id.* at 11.

239. *Id.*

240. *Id.* at 9–10 (emphasis in original).

241. *Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo*, 283 Cal. Rptr. 3d 877, 896–97 (Ct. App. 2021).

242. *Id.* at 897.

243. *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 279 P.3d 1022, 1032 (Cal. 2012) (stating that declarations by the legislature that a matter is of statewide concern are not controlling).

a problem and the steps needed to resolve it.<sup>244</sup> The state Supreme Court has recognized that, in an abstract way, any local issue can be framed as a state interest.<sup>245</sup> Instead, there must be “a convincing basis” to justify the state encroachment on the local affair.<sup>246</sup> Put broadly, however, “state-wide” also means matters that are “more than [a] local concern,” including “matters the impact of which is primarily regional rather than truly statewide.”<sup>247</sup> In *City of Vista*, the prevailing wage law was not a matter of statewide concern, because if the state wanted to bolster wages in the area, it could have used its own resources to do so.<sup>248</sup> Instead, the prevailing wage law would have been borne by the city, and the court seemed uncomfortable forcing local taxpayer money to subsidize the state’s goals.<sup>249</sup> It is unclear if an effective analogy can be made between local fiscal affairs and local land use policies. The Petition does not offer one. In *Ruegg & Ellsworth*, the court broadened this prong to decide whether the *purpose* of the statute was a statewide concern.<sup>250</sup> In *Ruegg & Ellsworth*, that purpose was to increase affordable housing in the state, much like S.B. 9’s stated goal.<sup>251</sup> If the court in *City of Redondo Beach v. Bonta*<sup>252</sup> also frames this issue broadly, it will likely decide there is a statewide concern. In *California Renters*, the Court of Appeal deferred to evidence that the shortage of housing raised housing costs and found that the state had an interest in making sure all its citizens were housed.<sup>253</sup> Additionally, state laws of “broad general application are more likely to address a statewide concern.”<sup>254</sup> The fact that S.B. 9 applies to most single-family residences could be enough of a general application. However, at the same time, procedural obligations mandated by the state infringe

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244. *Cal. Renters Legal Advoc. & Educ. Fund*, 283 Cal. Rptr. 3d at 849–50; see *Ruegg & Ellsworth v. City of Berkeley*, 277 Cal. Rptr. 3d 649, 675 (Ct. App. 2021) (“[C]ourts ‘accord ‘great weight’ to the Legislature’s evaluation’ of what constitutes a matter of statewide concern.”).

245. *State Bldg. & Constr. Trades Council of Cal.*, 279 P.3d at 1030.

246. *Id.*

247. *Comm. of Seven Thousand v. Superior Court*, 754 P.2d 708, 716 (Cal. 1988).

248. 279 P.3d at 1031.

249. *Id.* (“Autonomy with regard to the expenditure of public funds lies at the heart of what it means to be an independent governmental entity.”).

250. *Ruegg & Ellsworth v. City of Berkeley*, 277 Cal. Rptr. 3d 649, 676 (Ct. App. 2021).

251. *Id.*

252. No. 22STCP01143, 2022 WL 1115585 (Cal. Super. Ct. Mar. 29, 2022).

253. *Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo*, 283 Cal. Rptr. 3d 877, 897 (Ct. App. 2021).

254. *State Bldg. & Constr. Trades Council of Cal. v. City of Vista*, 279 P.3d 1022, 1033 (Cal. 2012).



less on charter cities than substantive obligations.<sup>255</sup> This distinction might be relevant if S.B. 9 could be framed as a procedural obligation: proposals to build a duplex on a single-family house, or to split a single-family lot into two, ministerially, without public input, could be considered a procedural change. Exempting these projects from CEQA drastically shortens the procedure for building housing. At the same time, charter cities relying on the history and tradition of land use control will likely frame this issue as a substantive obligation imposed by the state. Still, it is likely S.B. 9 will be considered a matter of “state-wide concern” given the legislature’s history of linking affordability with supply and demand.

If the third prong is decided to be a statewide concern, courts analyze the last prong. The final prong of the four-part test will likely be the most contentious in the S.B. 9 lawsuit and is discussed considerably in the charter cities’ Petition.<sup>256</sup> The fourth prong requires the state law to be “reasonably related to . . . resolution” of the statewide concern and “narrowly tailored.”<sup>257</sup>

### 1. “Reasonably Related” to Affordable Housing

The Petition argues that the scheme implemented in S.B. 9 is not reasonably related to the creation of affordable housing in the state.<sup>258</sup> It first points out that the law contained no state mandate that the units developed on single-family residences be offered at an affordable price or reserved for low-income households.<sup>259</sup> Further, it argues that, in some areas of the state, single-family lots that are split in two will not suddenly be half the cost.<sup>260</sup>

Proponents of S.B. 9 address the affordability argument by relying on supply and demand economics but are vague about the details. The California Senate Democrats website framed this lack-of-

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255. *See id.*

256. *See generally* Petition, *supra* note 47.

257. *State Bldg. & Constr. Trades Council of Cal.*, 279 P.3d at 1027.

258. Petition, *supra* note 47, at 11.

259. *Id.* at 11–12. The lack of affordability requirement distinguishes S.B. 9 from 2017’s S.B. 35 which streamlined development if, among other things, the project has a certain number of affordable units. *See* PATRICIA E. CURTIN & AMARA L. MORRISON, STREAMLINED PROCESSING OF MINISTERIAL PROJECTS UNDER SB 35 1, LEAGUE OF CAL. CITIES (May 9, 2019), <https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2019/Spring-2019/5-2019-Spring;-Curtin-Streamlined-Processing-of-Mi.aspx> [<https://perma.cc/KL5W-BRS8>].

260. Petition, *supra* note 47, at 11–12.

affordability point as a “myth” and responded that more housing units create “more options to maintain and build intergenerational wealth.”<sup>261</sup> It also reminded people that “[t]here is no silver bullet to solv[e] the housing crisis” and that “S.B. 9 is one modest tool in the toolbox.”<sup>262</sup> There is evidence that S.B. 9 alone will not solve the housing crisis.<sup>263</sup> The non-profit Urban Institute, while supportive of the law, acknowledged more needs to be done to achieve its stated purpose.<sup>264</sup> First, because the law relies on homeowners to finance development, barriers will need to be removed for low- to moderate-income people, in order to implement it fully.<sup>265</sup> Secondly, there are fears the law could incentivize developers to purchase houses in low-income areas cheaply, demolish naturally-occurring affordable housing, and replace it with expensive housing that spurs gentrification.<sup>266</sup>

Recent case law suggests the “reasonably related to” inquiry is not intensive. In *Ruegg & Ellsworth*, the court looked at whether there was a “direct, substantial connection” between the state law and the legislature’s purpose.<sup>267</sup> There, the court found the state law was “clearly” reasonably related because it was intended to increase the approval of affordable housing by limiting local delays—and that is exactly what it did.<sup>268</sup> Therefore, S.B. 9 will likely be found to be reasonably related because its purpose is to create more housing stock by preempting zoning laws.

## 2. Narrowly Tailored

In the end, because this analysis is a judicial question, it is unclear whether the court will defer to the record established by the parties or rely on its own “pragmatic common sense” regarding the housing issue in California.<sup>269</sup> The Petition arguably foresees this and tries to

261. *Cal. HOME Act Info.*, *supra* note 139.

262. *Id.*

263. Linna Zhu & Sarah Gerecke, *Will California's New Zoning Promote Racial and Economic Equity in Los Angeles?*, URB. WIRE (Feb. 10, 2022), <https://www.urban.org/urban-wire/will-californias-new-zoning-promote-racial-and-economic-equity-los-angeles> [<https://perma.cc/Z3NU-HTA9>].

264. *Id.*

265. *Id.*

266. *Id.*; *see also* Schneider, *supra* note 138 (noting that opponents of S.B. 9 argued it “imperiled neighborhood character” and would lead to parking and traffic woes, enrich developers, and “exacerbate gentrification in low-income minority neighborhoods”).

267. *Ruegg & Ellsworth v. City of Berkeley*, 277 Cal. Rptr. 3d 649, 677 (Ct. App. 2021).

268. *Id.*

269. *See* Cal. Fed. Sav. & Loan Ass’n v. City of Los Angeles, 812 P.2d 916, 931 (Cal. 1991).

paint a picture of the real issues local governments will face when implementing S.B. 9. First, the Petition argues against the public health and safety concerns the law will create.<sup>270</sup> S.B. 9 allows a city to deny a proposed project if the “preponderance of the evidence” shows that the project would have a “specific, adverse impact . . . upon public health or safety or the physical environment.”<sup>271</sup> The Petition admits that an individual project may not pose a significant public health and safety impact but asserts that, when viewed collectively, there will be a great impact, particularly on parking and overused water and sewer lines.<sup>272</sup> However in *California Renters*, the HAA contained a nearly identical adverse impact “escape valve,” which the court believed supported the law’s narrowness.<sup>273</sup> It seems unlikely that a court like the one in *California Renters* would accept the argument that the potential adverse impact should be viewed collectively because it is too speculative. Additionally, the argument is not administrable because not every owner will apply for a project pursuant to S.B. 9 at the same time; it will be hard to argue an adverse impact until a specific area starts encountering infrastructure problems. Still, the potential issues cities might face due to S.B. 9 are worth mentioning.

Usually, local governments can require developers to provide at least one parking spot per unit.<sup>274</sup> But S.B. 9 removes any parking requirements if the parcel is located one-half mile walking distance from a “high quality transit corridor,” a major transit stop, or within one block of a car share vehicle.<sup>275</sup> The charter cities are concerned that no parking requirement could create demand for four to eight vehicles on the street and create “adverse parking and traffic issues, and hamper[] fire or emergency access.”<sup>276</sup> Additionally, the Petition mentions how sewer and water lines built to support a single family could become

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270. Petition, *supra* note 47, at 13.

271. CAL. GOV’T CODE § 65852.21(d) (2022). A “specific, adverse impact” is defined by Government Code section 65589.5.

272. Petition, *supra* note 47, at 13.

273. Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo, 283 Cal. Rptr. 3d 877, 898 (Ct. App. 2021). Compare CAL. GOV’T CODE § 65589.5(j)(1) (2022), with *id.* § 65852.21(d) (2022) (creating a similar mechanism for a city to deny a building project under HAA and S.B. 9 respectively).

274. Muhammad Alameldin & David Garcia, *State Law, Local Interpretation: How Cities Are Implementing Senate Bill 9*, UNIV. OF CAL. BERKELEY TERNER CTR. FOR HOUS. INNOVATION (June 8, 2022), <https://turnercenter.berkeley.edu/research-and-policy/state-law-local-interpretation-senate-bill-9/> [<https://perma.cc/8PYD-LVVP>].

275. CAL. GOV’T CODE §§ 65852.21(c)(1)(A)–(B) (2022).

276. Petition, *supra* note 47, at 13.

stressed to support potentially quadruple that amount.<sup>277</sup> Yet, because the law does not allow cities to object to the cumulative effects of similar projects, it would be unproductive to raise an individual objection.<sup>278</sup>

In *Ruegg & Ellsworth*, S.B. 35 was found to be narrow enough because it contained specific requirements for where it could be applied—it was not a blanket application.<sup>279</sup> The same Government Code section that *Ruegg & Ellsworth* referenced is explicitly incorporated into S.B. 9.<sup>280</sup> Like S.B. 35, S.B. 9 does not apply to specified farmland, wetlands, high fire hazard zones, etc.<sup>281</sup> Also, like the HAA, S.B. 9 contains a provision that allows cities to still impose objective zoning and subdivision standards that do not conflict with the other obligations of S.B. 9.<sup>282</sup>

### C. S.B. 9 Could Withstand a Constitutional Challenge

Based on the recent case law, it is very possible for a court to conclude that S.B. 9 is narrow enough to comply with the home rule provision. But this result speaks to the amorphous nature of the four-part analysis and what should be defined as “municipal affairs.” Viewed cynically, the case law suggests that a municipal affair is in the eye of the beholder. It is possible a justice who eventually hears the appeal of the Charter Cities’ Writ of Mandate could be sympathetic and apply their own values to the analysis. One cannot help but infer that Justice Sutherland, in *Village of Euclid*, was informed by his own assumptions when he wrote:

With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to

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277. *Id.* at 14.

278. *Id.* at 13.

279. *Ruegg & Ellsworth v. City of Berkeley*, 277 Cal. Rptr. 3d 649, 677 (Ct. App. 2021) (“The many detailed requirements for application of the statute further demonstrate its relatively narrow scope.”).

280. *Compare id.* at 677 n.23, with CAL. GOV’T CODE § 65852.21(a)(2) (2022).

281. *Ruegg & Ellsworth*, 277 Cal. Rptr. 3d at 677 n.23.

282. *See* CAL. GOV’T CODE § 65852.21(b) (2022).

take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles . . . .<sup>283</sup>

S.B. 9 differs from other California housing laws because of its express reach into single-family-zoned residences. Unlike S.B. 35, which targeted localities not meeting their housing quotas, S.B. 9 can be utilized by a homeowner regardless of how much housing their city is already producing. In the “statewide concern” analysis, this could be used to argue the law is not broad enough to warrant state action interfering with municipal zoning.<sup>284</sup> Additionally, the potential that S.B. 9 may only affect around 400,000 houses, when there are 7.5 million single-family parcels in the state, may also show its narrow application.<sup>285</sup> While it would be ironic for charter cities to argue that S.B. 9 affects too little of the state, courts may be persuaded that the effect is not general enough to warrant state preemption.

However, the law’s provision that allows localities to set objective zoning, design, and subdivision standards reserves some power to the local government.<sup>286</sup> Some localities have already drafted ordinances for implementing S.B. 9 projects.<sup>287</sup> For example, Temple City requires new structures to be in a specific architectural style, provides rules for when mature trees can be removed, and mandates

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283. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926); see Serkin, *supra* note 49, at 756–57 (describing how *Village of Euclid*’s ruling was surprising during the *Lochner* era when the court was invalidating laws that interfered with private rights). *Village of Euclid*’s passage analogizing apartment buildings as parasites to single-family houses “reflects naked classism.” Serkin, *supra* note 49, at 757.

284. See *supra* note 157 and accompanying text (describing how a narrow application of a state law weakens the argument that the law has a statewide concern).

285. Alameldin & Garcia, *supra* note 274. That means under 7 percent of single-family parcels could feasibly use S.B. 9.

286. See CAL. GOV’T CODE § 65852.21(b) (2022).

287. Alameldin & Garcia, *supra* note 274.

affordability requirements for occupants.<sup>288</sup> Of course, it is possible in the future, that some may challenge city implementation requirements for objectivity. It is suggested that Temple City's ordinance was intentionally designed to deter people from using S.B. 9.<sup>289</sup> Evidence of these measures by cities could ironically hurt arguments that S.B. 9 takes away too much local control.

There is also a nuanced critique of housing solutions like S.B. 9 that rely on supply-side economics. Increasing housing stock to create low prices may be a “myopic” solution that ignores reasons why certain cities have a higher demand than others—such as jobs and amenities.<sup>290</sup> There is research that shows deregulating zoning in high demand areas—areas that attract highly-skilled labor—will only increase prices for housing at the low and moderate end.<sup>291</sup> Since demand is regional, it may be unwise to employ a statewide approach that is reactive—chasing demand as it appears and building more, without thinking about policy interventions to make unpopular regions more appealing.<sup>292</sup> While there are compelling parts of this argument that should be discussed, the premise of increasing supply to decrease housing prices is so ingrained in the California legislature's understanding of housing affordability that it would be difficult for a court to ignore.<sup>293</sup> That argument is better suited for the political arena.

In the end, it may require a constitutional amendment via a voter initiative to undo the effects of S.B. 9. Though the court has set some standards for the various prongs of the home rule doctrine, the terms “municipal affair” and “statewide concern” are too amorphous for a reliable prediction of how S.B. 9 will fare. After all, in *Anderson*, the trial court ruled there was no statewide concern—showing how reasonable minds can disagree on this topic.<sup>294</sup> Still, in light of the case

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288. See Memorandum from Bryan Cook, City Manager of Temple City, to the City Council of Temple City 9–10, 12–19 (Dec. 21, 2021), [https://www.ci.temple-city.ca.us/DocumentCenter/View/17123/8A\\_SB9\\_Staff-Report-w-attachments](https://www.ci.temple-city.ca.us/DocumentCenter/View/17123/8A_SB9_Staff-Report-w-attachments) [<https://perma.cc/L3YJ-2DC3>].

289. Manuela Tobias, *Duplex Housing Law Met with Fierce Resistance by California Cities*, CALMATTERS (Apr. 11, 2022), <https://calmatters.org/housing/2022/04/duplex-housing-resistance/> [<https://perma.cc/LL68-EN5E>].

290. See Schragger, *supra* note 44, at 170–75.

291. *Id.* at 171.

292. *See id.* at 171–74.

293. *See Anderson v. City of San Jose*, 255 Cal. Rptr. 3d 654, 671 (Ct. App. 2019); *Ruegg & Ellsworth v. City of Berkeley*, 277 Cal. Rptr. 3d 649, 676 (Ct. App. 2021).

294. *Anderson*, 255 Cal. Rptr. 3d at 658.

law created by the recent housing laws, California is in a good position to prevail on the charter cities' writ of mandate.

#### CONCLUSION

In recent years, there has been a concerted push to preempt local land use ordinances in order to promote housing construction. S.B. 9 is a recent law that represents—at least symbolically—the lengths the California legislature is willing to take to meet its housing goals. S.B. 9 outlines a complex procedure that Californians who own single-family parcels may take to split their lot in two and build at most a duplex on each half. Like other state housing laws before, S.B. 9 instigated a legal challenge based on the home rule doctrine that prohibits the state from encroaching upon “municipal affairs”. Recent cases have all upheld the conflicting state housing laws based on this doctrine. Applying this analysis, it is likely S.B. 9 can survive a home rule challenge because it shares similar key provisions from other upheld housing laws.