BRINGING HOME, HOME: IS THERE A HOME RULE ARGUMENT FOR AFFORDABLE HOUSING?

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I. INTRODUCTION: "A PRIORITY OF THE HIGHEST ORDER."[1]

Adequate housing is an essential element of human physical and social existence; it is "central to the social and economic needs of all people."[2] Access to housing is integral to sustaining healthy neighborhoods and communities, and is vitally entwined with a host of other factors that bear on human health and longevity.[3] In addition to "provid[ing] shelter, security, recreation, and wealth,"[4] housing is a broader concept that forms the basis of community development and civic engagement.

In the United States, there is a serious shortage of affordable housing.[5] Today, roughly half of all renters in the United States (46.1%)[6] are

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[1] CAL. GOV'T CODE § 65580(a) (West 2009) ("The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian, including farmworkers, is a priority of the highest order.").

[2] J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 527 (2007).

[3] *See generally* Ctr. for Hous. Policy, *Vital Links: Housing's Contributions to the Nation's Health and Education Objectives*, NHC.ORG (last visited Feb. 22, 2011), http://www.nhc.org/housing/intersections (offering research summaries on the positive benefits of affordable housing, including reducing health problems, increasing residential stability, and decreasing residential crowding).

[4] Byrne & Diamond, *supra* note 2, at 527.

[5] "Affordable housing" is defined as housing that costs no more than 30% of household income. Cmty. Planning & Dev., *Affordable Housing*, HUD.GOV, http://www.hud.gov/offices/cpd/affordablehousing/ [hereinafter *Affordable Housing*] (last modified Jan. 14, 2011).

[6] U.S. Census Bureau, *Percent of Renter-Occupied Units Spending 30 Percent or More of*

living in conditions that are considered "not affordable." The housing situation is so dire that state governments have declared the creation of affordable housing stock "a priority of the highest order."[7] The crisis is most salient among the working poor.[8] While rental construction has held steady for the past five years,[9] and the national vacancy rate has actually increased,[10] affordable housing for low-income households remains scarce.[11] The number of renter households in the United States is also increasing dramatically: while the number of owner-occupied households decreased by 255,000 between 2006 and 2008, the number of renter households increased by 2.2 million in the same period.[12]

In examining the pervasive problems associated with the lack of affordable housing, it is useful to consider the cost of rent as a proportion of total household income. When the cost of housing consumes too high a proportion of a household's income, that household may have difficulty affording necessities such as food, clothing, transportation, and medical care, which threatens the household's present and future stability.[13] This threat is especially real in California. In 2008, over half of California households (52.1%) spent 30% or more of their household income on rent and utilities,[14] compared to 46.1%[15] nationally.

Household Income on Rent and Utilities, CENSUS.GOV (2008) [hereinafter *Percent of Renter-Occupied Units*], http://factfinder.census.gov/servlet/GRTTable?_bm=y&-geo_id=01000US&-_box_head_nbr=R2515&-ds_name=ACS_2008_1YR_G00_&-redoLog=false&-format=US-30&-mt_name=ACS_2007_1YR_G00_R2515_US30&-CONTEXT=grt.

[7] GOV'T § 65580(a).

[8] *See* NON-PROFIT HOUS. ASS'N OF N. CAL., AFFORDABLE BY CHOICE: TRENDS IN CALIFORNIA INCLUSIONARY HOUSING PROGRAMS 8 (2007) [hereinafter AFFORDABLE BY CHOICE].

[9] JOINT CTR. FOR HOUS. STUDIES OF HARVARD UNIV., STATE OF THE NATION'S HOUSING 2009 21 (2009), http://www.manausa.com/wp-content/uploads/2009/06/TheStateOfTheNations Housing2009.pdf. [hereinafter STATE OF THE NATION'S HOUSING].

[10] STATE OF THE NATION'S HOUSING, *supra* note 9, at 21. In 2008, the national rental vacancy rate increased 10%, just below the record of 10.2% (in 2004). *Id*. at 23. This increase is due to an overall increase in rental supply, with conversion of condominiums into rentals being a likely contributor. *Id*.

[11] NATIONAL LOW INCOME HOUSING COALITION, OUT OF REACH 2009: PERSISTENT PROBLEMS, NEW CHALLENGES FOR RENTERS 3 (2009) [hereinafter OUT OF REACH 2009], *available at* www.nlihc.org/oor/oor2009/oor2009pub.pdf.

[12] OUT OF REACH 2009, *supra* note 11, at 3.

[13] *See, e.g*., Byrne & Diamond, *supra* note 2.

[14] *Percent of Renter-Occupied Units, supra* note 6. California was second only to Florida in the proportion of its residents spending 30% or more of household income on rent and utilities. *Id*.

[15] *Id*.

The National Low Income Housing Coalition (NLIHC) uses an indicator of affordability called the "housing wage."[16] The housing wage is the amount of money that a full-time worker would have to earn in order to afford the Fair Market Rent (FMR) for an apartment,[17] with housing costs comprising no more than 30% of that income.[18] By this standard, the NLIHC calculated the national housing wage in 2009 to be $17.84 per hour for a full-time, year-round[19] worker.[20] In California, the housing wage in 2009 for a modest two-bedroom apartment was even higher at $24.83.[21] This represents a 50.6% increase between 2000 and 2009[22] and far exceeds California's minimum wage of $8.00 per hour.[23] Although the minimum wage in California is greater than the national minimum wage of $6.55, the high cost of living in California effectively requires an average of 3.1 full-time, year-round minimum wage jobs per household to meet the NLIHC's "affordable" standard.[24] The housing wage in 2009 was even higher in the Los Angeles-Long Beach HUD[25] Metropolitan Fair Market Rent Area (HMFA) at $26.17, a 69% increase over the wage for the same region in 2000.[26] Given that the average hourly wage of renters in the Los Angeles-Long Beach HMFA[27] is $17.61, the average renter household needs 1.5 full-time jobs to meet the housing wage.[28]

Government housing programs use a region's Area Median Income (AMI) to determine whether a household within that region qualifies for

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[16] OUT OF REACH 2009, *supra* note 11, at 3, 4.

[17] As estimated by the U.S. Department of Housing and Urban Development, assuming a modest rental unit and including the cost of utilities. OUT OF REACH 2009, *supra* note 11, at 6, 208.

[18] *Id*. at 4.

[19] *Id*. The authors of the report remind readers that "Not all employees have the opportunity to translate an hourly wage into full-time, year-round employment." *Id*. at 205.

[20] *Id*. at 4.

[21] *Id*. at 7, 28.

[22] *Id*. at 8.

[23] Dep't of Indus. Relations, *History of California Minimum Wage*, CA.GOV, http://www.dir.ca.gov/iwc/MinimumWageHistory.htm (last visited Feb. 22, 2011) [hereinafter *History of California Minimum Wage*].

[24] OUT OF REACH 2009, *supra* note 11, at 11, 28.

[25] United States Department of Housing and Urban Development (HUD). For an explanation of how HUD defines their Fair Market Rent Areas, see OUT OF REACH 2009, *supra* note 11, at 199.

[26] OUT OF REACH 2009, *supra* note 11, at 29.

[27] For a description of how the NLIHC calculates average renter wage, see *id*. at 203.

[28] *Id*. at 29.

particular housing programs.[29] Based on a region's AMI, needy households are categorized as "very low income," "lower income," and "moderate income."[30] California statutes defines "very low income" as household income that is less than 50% of the AMI and "extremely low income" as less than 30% of the AMI.[31] In 2009, a "very low income" household in Los Angeles County earned $39,650 and an "extremely low income" household earned $23,800.[32]

The California State Legislature has adopted several provisions in the Government Code to address the state's affordable housing needs.[33] These include policies that ease procedural burdens on actions and applications brought in furtherance of affordable housing[34] as well as state laws regarding density bonuses[35] and second dwelling units.[36] California has also explicitly acknowledged the need for cooperation between state and local government and the private sector to meet these important goals.[37]

Since the 1970s, there has been a growing sense that local governments are responsible for ensuring that affordable housing is available.[38] Local governments have responded to state mandates for affordable hous-

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[29] The AMI is a yearly figure determined by the Federal Housing Finance Agency. *2009-2010 Area Median Incomes*, EFANNIEMAE.COM (last visited Feb. 22, 2011), https://www.efanniemae.com/sf/refmaterials/hudmedinc/ (select "California," select "MSA," and search "Los Angeles").

[30] In California, the limits for extremely low, very low, and low income households are the same as the limits for the U.S. Department of Housing and Urban Development's Section 8 program. *See* CAL. HEALTH & SAFETY CODE §§ 50106, 50105, 50079.5 (West 2009).

[31] CAL. HEALTH & SAFETY CODE §§ 50079.5, 50105 (West 2003). "[The term] '[l]ower income households' includes very low income households, as defined in Section 50105, and extremely low income households, as defined in Section 50106." CAL. HEALTH & SAFETY CODE § 50079.5.

[32] Memorandum from Cathy E. Creswell, Deputy Dir., Div. of Hous. Policy Dev., Cal. Dep't of Hous. & Cmty. Dev., to Interested Parties (April 2, 2009), *available at* http://www.hcd.ca.gov/hpd/hrc/rep/state/inc2k9.pdf (based on a family of four).

[33] CAL. GOV'T CODE § 65582.1 (West 2009).

[34] *See id*. § 65582.1(b), (c), (h), (j), (k).

[35] *Id*. § 65582.1(f).

[36] *Id*. § 65582.1(g).

[37] *Id*. § 65580(b) ("The early attainment of this goal requires the cooperative participation of government and the private sector in an effort to expand housing opportunities and accommodate the housing needs of Californians of all economic levels."); *id*. § 65580(d) ("Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.").

[38] *See infra* Part II for discussion of Mount Laurel doctrine.

ing by creating inclusionary zoning programs,[39] which either mandate or incentivize developers to set aside a certain percentage of "affordable" units in conjunction with a new development.[40] In exchange for providing inclusionary units, a city may offer developers incentives such as expedited permit review or zoning variances. These variances may include density bonuses, which allow a developer to include more units than would otherwise be permitted under zoning laws. A city may also offer an in-lieu fee provision[41] which gives a developer the opportunity to pay a per-unit fee in place of including affordable units.[42] Local governments generally use the proceeds from these fees to fund their affordable housing programs.[43]

Inclusionary zoning programs have been successful in creating affordable housing stock, but their future with respect to rental housing in California is uncertain. In a recent California Court of Appeals decision, *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*,[44] the court found direct conflict between a state "vacancy decontrol" law and a Los Angeles inclusionary zoning ordinance, and held that the city's ordinance was preempted by state law and was thus invalid. The *Palmer* decision could have serious consequences for California's affordable housing.

This Note argues that reliance on the *Palmer* court's preemption analysis is questionable because the decision failed to consider whether the state's affordable housing legislative scheme was reasonably related and narrowly tailored to its goal of mitigating the affordable housing crisis.[45] Part II provides an overview of the history and current state of inclusionary housing programs, with particular attention to the *Mt. Laurel* line of cases, which solidified inclusionary housing's place in affordable housing plans.

Part III introduces California's statutory scheme for providing affordable housing and the distribution of authority between the state and its cit-

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[39] *See infra* discussion in Part II.

[40] AFFORDABLE BY CHOICE, *supra* note 8, at 9.

[41] *See Glossary*, HOUSINGPOLICY, http://www.housingpolicy.org/glossary.html#I (definition of "in-lieu fee") (last visited May 6, 2011).

[42] While in-lieu fees are offered in some jurisdictions, a 2007 study showed that most developers opt to build instead. AFFORDABLE BY CHOICE, *supra* note 8, at 17.

[43] *Id*. at 9.

[44] Palmer/Sixth St. Props., L.P. v. City of L.A., 96 Cal. Rptr. 3d 875, *reh'g denied*, 2009 Cal. App. LEXIS 1450 (Cal. Aug. 12, 2009), *cert. denied*, 2009 Cal. LEXIS 911307338 (Sept. 10, 2009).

[45] As required in Johnson v. Bradley, 841 P.2d 990 (1992), discussed *infra* Part IV.B.

ies. Part IV then describes general preemption principles in California and introduces some of the ambiguities in state and local preemption laws with respect to charter cities. With this foundation in place, Part V discusses the *Palmer* decision, its underlying preemption analysis, and the implications of the decision for future affordable housing efforts. Here, this Note argues that the *Palmer* decision creates an irrational framework for California's affordable housing goals. Part VI suggests solutions for clarifying the extent of local authority to enact programs to meet state mandates, and Part VII concludes.

II. INCLUSIONARY ZONING: A POWERFUL TOOL FOR CREATING AND MAINTAINING AFFORDABLE HOUSING[46]

Inclusionary zoning has become a major tool for local governments to provide affordable housing. Broadly, the goal of inclusionary housing policies is to create and maintain affordable housing stock,[47] often by way of an agreement with a developer to include a certain number of "affordable" units within a new development.[48] In this way, the immediate cost of providing affordable rental units is shifted to the developer.[49] To meet the greater integration goals of inclusionary zoning, some policies require that affordable units be mixed in with market-rate units.[50] Inclusionary zoning ordinances also contain provisions relevant to those developers who choose not to incorporate inclusionary units; for instance, a developer may build inclusionary units off-site, pay a fee (an "in-lieu fee") instead of building inclusionary units, or donate land.[51] In the case of the latter two

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[46] Although there are several means for localities to provide affordable housing, such as non-profit housing developments and municipally owned housing, this Note focuses on inclusionary zoning programs as they apply to market-rate developers.

[47] AFFORDABLE BY CHOICE, *supra* note 8, at 9.

[48] *Id*. at 9.

[49] *Why Use it?*, POLICYLINK, http://www.policylink.org/site/c.lkIXLbMNJrE/b.5137029/k.2B2E/Why_Use_it.htm ("As federal cutbacks reduce the resources available to non-profit developers and public agencies for producing affordable housing, jurisdictions have used inclusionary zoning to bring private residential developers into efforts to solve the problem.") (last visited Aug. 26, 2010). *But see* Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. Rev. 971, 985–87 (2002) (citing analyses that find that the long-term cost of inclusionary zoning is borne by landowners, who face lower land prices as inclusionary policies drive down demand for their land).

[50] AFFORDABLE BY CHOICE, *supra* note 8, at 9.

[51] Kautz, *supra* note 49, at 980–81; AFFORDABLE BY CHOICE, *supra* note 8, at 9.

options, municipalities use the money and land to fund their affordable housing programs.[52]

The country's first inclusionary zoning ordinance was enacted in 1971 in Fairfax County, Virginia[53] as a land use tool to counter the effects of exclusionary zoning.[54] Zoning has been upheld as a valid exercise of local government police power and receives deference from the judiciary.[55] But zoning power has been used for nefarious purposes, including the practice of exclusionary zoning,[56] which is defined generally as "the improper use of zoning to exclude certain groups from a location such as a city or a neighborhood."[57] Exclusionary zoning is often accomplished through seemingly innocuous requirements such as minimum household sizes and prohibitions against multi-family residential developments.[58] The effect of exclusionary zoning, however, is to reduce the availability of housing for low-income individuals, families, and senior citizens.[59] It can also lead to greater social and economic ills, including de facto segregation and disparities in public resources,[60] and in the longer term, cause irreversible civic blight.[61]

Change came in the 1970s when the New Jersey Supreme Court invalidated a local exclusionary zoning ordinance in *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel* (*Mt. Laurel I*).[62] The Township's zoning scheme had "effectively prevented anything but low-density residential development,"[63] which generally excluded affordable low-income housing. The court invalidated the ordinance and articulated a requirement that local governments must meet their "fair share" of the low-

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[52] AFFORDABLE BY CHOICE, *supra* note 8, at 9.

[53] Kautz, *supra* note 49, at 977.

[54] Nadia I. El Mallakh, *Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs?*, 89 CAL. L. REV. 1847, 1850 (2001).

[55] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

[56] *See* El Mallakh, *supra* note 54, at 1849, 1852–54.

[57] *Id*. at 1849.

[58] *Id*.

[59] *Id*. at 1853.

[60] *See id*. at 1853–54.

[61] *See id*.

[62] S. Burlington Cnty. NAACP v. Twp. of Mt. Laurel (*Mt. Laurel I*), 336 A.2d 713 (N.J. 1975).

[63] *See id*.

income regional housing need.[64] The court subsequently upheld the requirement in *Mt. Laurel II*, a decision involving the same parties.[65]

In response to the decisions in *Mt. Laurel I* and *II*, the New Jersey legislature enacted the New Jersey Fair Housing Act, which the New Jersey Supreme Court upheld as constitutional in *Mt. Laurel III*, the final case in the series.[66] The *Mount Laurel* doctrine has had widespread influence in shaping the responsibilities of local governments with respect to the supply of locally available affordable housing.[67] Today, inclusionary zoning programs are employed in hundreds of jurisdictions nationwide and have become a pragmatic tool for local governments to meet state-mandated affordable housing requirements and the needs of their communities.

Since Palo Alto enacted California's first inclusionary zoning ordinance in 1973, the number of local jurisdictions in California with some form of inclusionary housing policy has increased dramatically. As of 2007, there were at least 170 localities with an inclusionary policy in place.[68] The most rapid increase in inclusionary zoning policies has occurred in recent years, with sixty-three cities and counties adopting programs between 2003 and 2007.[69] Inclusionary zoning programs have been very successful in California[70]: it is estimated that such programs have created at least 29,000 affordable units since the 1970s.[71]

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[64] *Id*.

[65] S. Burlington NAACP v. Twp. of Mt. Laurel (*Mt. Laurel II*), 456 A.2d 390 (N.J. 1983).

[66] Hills Dev. Co. v. Twp. of Benards, 510 A.2d 621, 631 (N.J. 1986); El Mallakh, *supra* note 54, at 1855–56.

[67] El Mallakh, *supra* note 54, at 1859 ("The Mount Laurel cases brought national attention to the problem of exclusionary zoning and the unique remedies offered by inclusionary zoning."); *see also* Kautz, *supra* note 49, at 978–79 ("The intervention of the courts in New Jersey and the passage of state legislation in California were the 'central elements' in the two states' widespread use of the program.").

[68] AFFORDABLE BY CHOICE, *supra* note 8, at 9. The California Inclusionary Housing Policy Database lists 145 California inclusionary housing policies. *See Inclusionary Housing Database*, CALIFORNIA COALITION FOR RURAL HOUSING, http://www.calruralhousing.org/?page_id=110 (last visited Apr. 6, 2011).

[69] AFFORDABLE BY CHOICE, *supra* note 8, at 3.

[70] *Id*. at 10, 11.

[71] *Id*. at 11.

III. CALIFORNIA'S STATUTORY FRAMEWORK FOR AFFORDABLE HOUSING: STATE MANDATES AND LOCAL POWERS

The California Constitution grants local governments the authority to make and enforce ordinances and regulations pursuant to its police power.[72] With this grant of power, cities enjoy wide latitude to fashion legislation that meets the city's particular needs and priorities, so long as these local laws are not in conflict with existing state law.[73]

California requires each city's local government to adopt a "general plan" that describes the city's long-term scheme for physical development.[74] The general plan serves as controlling authority for the city's future development.[75] A general plan must contain seven elements, including a housing element[76] that details the city's current and projected housing needs and the city's goals and policies with respect to meeting those needs.[77] The housing element must also include affordable housing provisions[78] that account for the city's share of the state-defined "regional housing need"[79] while remaining within the guidelines established by state law.[80]

A. CALIFORNIA'S DENSITY BONUS LAW

California's density bonus law controls incentives local governments may offer to developers to meet affordable housing goals. In a density

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[72] CAL. CONST. art. XI § 7 ("A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.").

[73] *Id*.

[74] El Mallakh, *supra* note 54, at 1859; CAL. GOV'T CODE § 65300 (West 2009).

[75] El Mallakh, *supra* note 54, at 1859 ("In 1990, the California Supreme Court declared that a city's general plan was its constitution for all future developments.").

[76] *Id*. at 1859; GOV'T § 65302.

[77] GOV'T § 65583.

[78] *Id*. §§ 65302(c), 65580–65589.

[79] In California's regional housing needs system, the state's Department of Housing and Community Development allocates projected housing needs by region. Each regional government, in turn, assigns housing needs among their local governments, who must modify their housing elements to meet the assigned housing need. TOM ADAMS ET AL., COMMUNITIES TACKLE GLOBAL WARMING: A GUIDE TO CALIFORNIA'S SB 375 28 (2009), *available at* http://www.nrdc.org/globalwarming/sb375/files/sb375.pdf.

[80] GOV'T § 65583(a)(1). For a more detailed explanation of the relevant concepts, see *id*. § 65584.

bonus program, a city grants a developer permission to build units in excess of the particular parcel's zoning limitations,[81] and in exchange, the developer agrees to designate and maintain a certain percentage of affordable units.[82] For instance, in a zoning area that would limit a building's construction to 100 units, a developer who meets the requirements for a 25% density bonus would be permitted to build 125 units. Although increased housing density has its objectors,[83] density bonuses are commonly employed by local governments to meet state-mandated affordable housing requirements.

The past decade has seen increasing pressure placed on local governments to provide more incentives for affordable-housing developers while reducing the threshold developers must meet to earn those incentives. The California State Legislature's amendments to the state's density-bonus law over the past ten years illustrate this movement.[84] In 2002, Assembly Bill 1866[85] (AB 1866) amended the density bonus law in ways that effectively "imposed a state-mandated local [density bonus] program."[86] The amendment increased the duties of local public officials;

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[81] *Id*. § 65915(f) ("For the purposes of this chapter, 'density bonus' means a density increase over the otherwise maximum allowable residential density as of the date of application by the applicant to the [local government].").

[82] The number of required affordable units is calculated as a percentage of units, not including bonus units. *Id*. § 65915(b)(3), 65815(b)(1)–(3). Although the state density bonus law also provides density bonuses and incentives for non-rental units (e.g., condominiums), this Note focuses specifically on affordable *rental* housing. Affordable units may be built as part of a partnership between market-rate developers and non-profit organizations, or by agreement between market-rate developers and local governments. 78% of the affordable units in California were built with market-rate developer involvement. AFFORDABLE BY CHOICE, *supra* note 8, at 16. There are approximately 15,547 affordable rental units currently registered with the City of Los Angeles's Housing Department. LOS ANGELES HOUSING DEPARTMENT (last visited Feb 23, 2011), http://hims.lacity.org/HOPWA/HS/OM/HSOMAffHsgRosterSearch.aspx (click, "find affordable housing," then search "all" zip codes). These units are *registered* with the City and not necessarily vacant or available. *Id*.

[83] *See, e.g*., CAL. DEP'T OF HOUS. & CMTY., DEVELOPMENT MYTHS AND FACTS ABOUT AFFORDABLE & HIGH DENSITY HOUSING (2002) (providing common arguments for and against high density housing, including that high density housing increases traffic and crime while decreasing property values); *see also* BENJAMIN POWELL & EDWARD STRINGHAM, REASON FOUND., POLICY STUDY 318, HOUSING SUPPLY AND AFFORDABILITY: DO AFFORDABLE HOUSING MANDATES WORK? (2004) (arguing that inclusionary housing programs fail to effectively address affordability because they cost too much and produce too few units).

[84] GOV'T § 65915.

[85] An Act to Amend Sections 65583.1, 65852.2, and 65915 of the Government Code, Relating to Housing (AB 1866), 2002 Cal. Legis. Serv. Ch. 1062 (West).

[86] *Id*.

lowered the incentive threshold for developers by increasing the procedural burdens required of local governments seeking to deny concessions or incentives[87]; and gave density bonus applicants standing to challenge a decision if the municipality denied their application.[88]

In 2005, Senate Bill 1818[89] (SB 1818) made even more changes to the state law by reducing the number of affordable units required before developers can receive density bonuses.[90] For example, where the law previously granted a flat 25% density bonus, SB 1818 amended the law to create a sliding-scale density-bonus rubric that begins at a 20% bonus and increases incrementally as more affordable housing units are added.[91] Both iterations of the law also granted additional statutorily defined incentives. The following two tables summarize the relevant changes that SB 1818 made to the state's density bonus law.[92]

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[87] *See id*.

[88] *Id*.

[89] An Act to Amend Section 65915 of the Government Code, Relating to Housing (SB 1818), 2004 Cal. Legis. Serv. Ch. 928 (West) (filed Sept. 30, 2004).

[90] *Compare id*. (requiring 10% of units for "lower income" designation and 5% for "very low income" designation), *with* A.B. 1866, 2002 Cal. Legis. Serv. Ch. 1062 (requiring twenty 20% of units for "lower income" designation and 10% of units for "very low income" designation).

[91] SB 1818, 2004 Cal. Legis. Serv. Ch. 928.

[92] California's Government Code also includes provisions for "for-sale" condominium units. *See* CAL. GOV'T CODE § 65915 (West 2009). These types of units are beyond the scope of this Note.

Table 1. California Government Code § 65915, as Amended by AB 1866 in 2002.

Income Category	**Developer Requirement**	**Density Bonus Granted**	**Plus**
Lower income[93]	20% of total[94] units must be affordable[95]	25% flat bonus[96]	One incentive[97]
Very low[98] income	10% of total units must be affordable[99]	25% flat bonus[100]	One incentive[101]
Senior citizens[102]	50% of total units must be affordable[103]	25% flat bonus[104]	One incentive[105]

[93] "'Lower income households' means persons and families whose income does not exceed the qualifying limits for lower income families as established and amended from time to time pursuant to Section 8 of the United States Housing Act of 1937... In the event the federal standards are discontinued, the department shall ... establish income limits for lower income households ... at 80 percent of area median income." CAL. HEALTH & SAFETY CODE § 50079.5 (West 2003).

[94] In calculating unit designation percentages, exclude bonus density. CAL. GOV'T CODE § 65915(f) (West 2002).

[95] *Id*.

[96] *Id*.

[97] *Id*. § 65915(b)(3) The following are the incentives listed in subsection (h):

> (1) A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards . . . including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required.
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> (2) Approval of mixed use zoning in conjunction with the housing project if . . . other land uses will reduce the cost of the housing development and if the . . . other land uses are compatible with the housing project and the existing or planned development in the area where the proposed housing project will be located.
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> (3) Other regulatory incentives or concessions proposed by the developer or the city, county, or city and county that result in identifiable, financially sufficient and actual cost reductions.

Id. § 65915(h).

[98] "'Extremely low income households' means persons and families whose incomes do not exceed the qualifying limits for extremely low income families as established and amended from time to time by the Secretary of Housing and Urban Development and defined in Section 5.603(b) of Title 24 of the Code of Federal Regulations. ... In the event the federal standards are discontinued, the department shall, by regulation, establish income limits for extremely low income households for all geographic areas of the state at 30 percent of area median income." CAL. HEALTH & SAFETY CODE § 50105 (West 2003).

[99] CAL. GOV'T CODE § 65915(b)(2) (West 2002).

[100] *Id*. § 65915(f).

[101] *Id*. § 65915(b).

[102] CAL. CIV. CODE § 51.3 (Deering 2009).

Table 2. California Government Code § 65915, as Amended by SB 1818 in 2008.

Income Category	**Developer Requirement**	**Density Bonus Granted**	**Incentive**
Lower income[106]	At least 10% of total units must be affordable[107]	20% bonus with additional 1.5% for every 1% increase over threshold 10%.[108] Maximum 35%	One incentive,[109] plus an additional incentive for each additional 10%[110]
Very low income[111]	At least 5% of total units must be affordable[112]	20% bonus with additional 2.5% for every 1% over development requirement. [113] Maximum 35%	One incentive,[114] plus an additional incentive for each additional 5%[115]
Senior citizens[116]	Senior housing, as defined in CAL. CIV. CODE § 51.12[117]	20% flat bonus[118]	None
For-sale units: Moderate income[119]	10% of total units must be affordable[120]	5% bonus with additional 1% for every 1% increase over threshold 5%.[121] Maximum 35%	One incentive[122], plus an additional incentive for each additional 10%[123]

[103] CAL. GOV'T CODE § 65915(b)(3) (West 2002).
[104] *Id*. § 65915(f).
[105] *Id*. § 65915(b).
[106] CAL. HEALTH & SAFETY CODE § 50079.5 (West 2003).
[107] CAL. GOV'T CODE § 65915(b)(1)(A) (Deering 2010).
[108] *Id*. § 65915(f)(1).
[109] *Id*. § 65915(d)(2)(A).
[110] *Id*. § 65915(d)(2)(B).
[111] CAL. HEALTH & SAFETY CODE § 50105 (West 2003).
[112] CAL. GOV'T CODE § 65915(b)(1)(B) (Deering 2010).
[113] *Id*. § 65915(f)(2).
[114] *Id*. § 65915(d)(2)(A).
[115] *Id*. § 65915(d)(2)(B), (C).
[116] CAL. CIV. CODE §§ 51.3 (Deering 2009).
[117] CAL. GOV'T CODE § 65915(b)(1)(C) (Deering 2010).
[118] *Id*. § 65915(f)(3).
[119] CAL. HEALTH & SAFETY CODE § 50093 (West 2009).
[120] CAL. GOV'T CODE § 65915(b)(4) (Deering 2008).
[121] *Id*. § 65915(g)(2).
[122] *Id*. § 65915(d)(2)(A).
[123] *Id*. § 65915(d)(2)(B), (C).

As Tables 1 and 2 illustrate, SB 1818 allows developers to receive a density bonus while providing only half the number of affordable units that would have been required under AB 1866. For example, a developer electing to designate 20% of the units for "lower income" household, which was previously the threshold for receiving a 25% flat bonus, would now be entitled to a 35% bonus. In addition, under SB 1818, a developer could qualify for—and a local government would be required to provide—up to three additional incentives, two more than the city was required to provide under AB 1866.

Following the enactment of SB 1818, local governments were required to revisit their inclusionary zoning programs and bring their housing ordinances in line with the revised state mandates.[124] Accordingly, the City of Los Angeles promulgated Ordinance 179681 in 2008, which amended the relevant sections of the Los Angeles Municipal Code[125] and closely followed the new state mandates, sometimes using the same language.

B. STATE VACANCY DECONTROL: THE COSTA-HAWKINS ACT

In 1995, the California State Legislature passed the Costa-Hawkins Act,[126] a vacancy decontrol[127] law aimed at combating the negative effects of strict rent control policies.[128] According to a statement by the bill's sponsor, strict rent control policies in cities such as Berkeley, Santa Monica, and West Hollywood had reduced the stock of housing units available for low-income households.[129] With respect to rental units, the Costa-Hawkins Act allows owners of rental properties to charge higher rents for units that were previously subject to rent controls:

> (a) Not withstanding any other provision of law, an owner of residential real property may establish the initial and all subsequent rental rates for a dwelling or unit about which any of the following is true:

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[124] AM. PLANNING ASS'N, CAL. CH., *CCAPA's Answers to Frequently Asked Questions Regarding SB 1818 (Hollingsworth)–Changes to Density Bonus Law–2005* (Jan. 26, 2005), *available at* http://www.calapa.org/attachments/articles/15/SB-1818-Q-A-Final-1-26-05.pdf.

[125] L.A., CAL., MUNICIPAL. CODE §§ 12.22, 12.24, 14.00, 19.01.

[126] CAL. CIV. CODE §§ 1954.50–1954.535 (Deering 2009).

[127] Vacancy decontrol removes rent control restrictions from a unit when the unit is voluntarily vacated.

[128] El Mallakh, *supra* note 54, at 1869.

[129] *See* El Mallakh, *supra* note 54, at 1869–70 (quoting Sen. Hawkins).

> (1) It has a certificate of occupancy issued after February 1, 1995.
>
> (2) It has already been exempt from the residential rent con-trol or-dinance of a public entity on or before February 1, 1995, pursuant to a local exemption for newly constructed units.[130]

Thus the Costa-Hawkins Act generally allows landlords to set the initial rate for rental units.[131] However, once rent for a unit has been established, it is then subject to local rent controls until a new tenancy is established.[132] In addition, the Act specifies the manner of phasing in vacancy decontrol for units that were already subject to local rent control.[133] Recognizing that the Act may incentivize landlords to force current tenants out so that they can re-rent units at market rate, the California State Legislature reserved authority for local entities "to regulate or monitor the grounds for eviction."[134]

The Act contains an important exception, however: vacancy decontrol does not apply to owners who contract with local public entities to receive assistance, such as direct financial contributions or density bonuses.[135] In short, if a development receives certain types of assistance from a local entity—whether in the form of money, zoning exceptions, or any other incentive—the Act does not prohibit the local entity from imposing rent restrictions on those units.[136]

On its face, vacancy decontrol as described in Costa-Hawkins appears to conflict with the primary mechanism for maintaining the affordability of rental units designated for low-income households. Ordinarily, vacancy decontrol would grant the owner-landlord the right to establish a new rental rate if a tenant voluntarily vacated. However, under the state's density bonus law, rent for inclusionary units must be kept affordable for at least thirty years,[137] regardless of whether tenants voluntarily vacate during that period. In this way, the owner-landlord's general right to set

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[130] CAL. CIV. CODE § 1954.52(a) (Deering 2009).

[131] *Id.* §§ 1954.50–1954.5235(a)(3)(C)(i).

[132] *Id.*

[133] *Id.* § 1954.52 (a)(3)(C)(i)–(iii).

[134] Apartment Ass'n of L.A. Cnty. v. City of L.A., 92 Cal. Rptr. 3d 441, 443 (Ct. App. 2009) (internal quotation marks omitted) (reconciling part of the Ellis Act with the Costa-Hawkins Act).

[135] CAL. CIV. CODE § 1954.52(a) (Deering 2009).

[136] *Id.*

[137] CAL. GOV'T CODE § 65915(c)(1) (Deering 2010).

initial rents comes into direct conflict with the rent restrictions necessary to enforce the continued affordability requirement.

IV. PRINCIPLES OF PREEMPTION IN CALIFORNIA

Under the traditional view, cities are creatures of the state.[138] Provisions for local power do not appear in the United States Constitution; rather, local power comes into existence from a state constitutional grant. Most state constitutions grant cities a general "police" power to regulate the health, safety, and morals of their residents, subject to state preemption.

In California, a city is a municipal corporation that is either a "general law" city or a "home rule" (charter) city.[139] General law cities rely on either their police power or a specific grant of authority from the state. These cities tend to have less latitude with respect to local legislation because the state reserves the power to introduce legislation that preempts local authority on a particular matter.

To become a home rule city in California, a city must adopt a charter,[140] which effectively becomes its city constitution. By becoming chartered, a city gains a degree of autonomy over its local government; charter cities are granted the authority to "make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters."[141] With respect to non-municipal affairs, charter cities remain subject to state general laws.[142]

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[138] Hunter v. Pittsburgh, 207 U.S. 161, 178–179 (1907) ("Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations . . . shall be exercised rests in the absolute discretion of the State . . . . All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest."); *see* Baldwin v. City of Winston-Salem, 710 F.2d 132 (4th Cir. N.C. 1983).

[139] CAL. CONST. art. XI, § 5.

[140] *Id*. § 5(b).

[141] *Id*. § 5(a). In addition to the general power over "municipal affairs," the California Constitution enumerates four specific areas where a charter city's legislation may supersede that of the state: its city police force; city government; city elections; and the appointment, compensation, and removal of specific municipal employees. *Id*. § 5(b). As of 2009, there are 116 charter cities in California. Charter cities with inclusionary zoning policies comprise 39 of the 144 inclusionary zoning policies on file with the California Inclusionary Housing Policy Database. *Inclusionary Housing Database*, *supra* note 68.

[142] CAL. CONST. art. XI, § 5(a).

A. PREEMPTION ANALYSIS FOR CALIFORNIA CHARTER CITIES

Sherwin-Williams Company v. City of Los Angeles describes the general principles of state preemption.[143] The 1993 case examined an alleged conflict between a Los Angeles city ordinance and the state penal code.[144] The city ordinance required that aerosol spray paint cans be displayed in a manner that made them inaccessible to the public.[145] Plaintiff spray paint manufacturers argued that the ordinance was preempted by a section of the California Penal Code that specified how spray paint could be sold.[146] In deciding the case, the court enumerated what has come to be the basic test for state preemption for charter cities.[147]

For charter cities, the preemption test involves three inquiries. The first inquiry is whether there is a conflict between state and local legislation.[148] An actual conflict exists "if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'"[149] Charter cities are granted the power to legislate over matters of municipal concern; accordingly, the second inquiry is whether the state law concerns a municipal affair or a legitimate statewide interest.[150] Because cities have plenary power over their municipal affairs, state laws cannot encroach on those affairs without demon-

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[143] 844 P.2d 534, 536–37 (Cal. 1993).

[144] *Id*. at 535.

[145] *Id*.

[146] *Id*.

[147] *Id*. at 536–37.

[148] *Id*. at 536.

[149] *Id*. (quoting Candid Enters., Inc. v. Grossmont Union High Sch. Dist., 705 P.2d 876, 892 (Cal. 1985)). The court elaborated on each of these concepts:

> Local legislation is 'duplicative' of general law when it is coextensive therewith. Similarly, local legislation is 'contradictory' when it is inimical thereto. (citation omitted)
> Finally, local legislation enters in an area that is 'fully occupied' by general law when the Legislature has expressly manifested its intent to 'fully occupy' the area, or when it has impliedly done so in light of one of the following indicia of intent:
> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern;
> (2) the subject matter has been partially covered by general law couched in such terms as to indicate that a paramount state concern will not tolerate further or additional local action; or
> (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality.

Id. at 536–37 (citations omitted).

[150] Johnson v. Bradley, 841 P.2d 990, 995–97 (Cal. 1992).

strating that the state law is narrowly tailored to achieve a legitimate statewide interest. The final preemption inquiry concerns this last question. While the first preemption inquiry is relatively straightforward, the question of what constitutes a municipal affair and the guidelines for determining whether a state law is narrowly tailored to a legitimate statewide interest are less than clear.

B. WHAT IS A MUNICIPAL AFFAIR, AND WHEN CAN STATE LAWS INTERVENE?

The California Supreme Court has examined a number of preemption cases and found that a municipal affair is a fluid concept that exists in relation to the concept of "statewide concern,"[151] and may extend beyond the categories enumerated in the California Constitution.[152] If a matter qualifies as a municipal affair, the state law cannot preempt the city ordinance unless the law is "reasonably related" to the state's interest and "narrowly tailored" to achieve that interest.[153]

In *Johnson v. Bradley*, plaintiffs challenged a charter city's election and ethics reform plan that allowed the city to provide public funds to finance city-level political campaigns, claiming that the city's plan conflicted with a state law that prohibited the use of public funds for state and local political campaigns.[154] The California Supreme Court reasoned that even if the integrity of the electoral process were read to be a legitimate statewide concern, the state law was not reasonably related to that concern.[155] The state's interest in the integrity of the electoral process did not reach so far as to prohibit Los Angeles, a charter city, from spending local public funds on local elections.[156] There was nothing in the state legislative materials that indicated an intention to establish a uniform rule and no asserted statewide interest in how local taxes would be spent.[157] Because it did not find the state law to be reasonably related to the statewide goal,

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[151] *Id*. at 995–96 (citing Cal. Fed. Sav. & Loan Ass'n v. City of L.A., 812 P.2d 916, 925 (Cal. 1991)).

[152] CAL. CONST. art. 11 § 5(b).

[153] *Johnson*, 841 P.2d at 997.

[154] *Id*. at 992.

[155] *Id*. at 1004.

[156] *Id*. at 1003–04.

[157] *Id*. at 1001–03.

the court did not reach the question of whether the law was narrowly tailored to reach that goal.[158]

Courts have taken varying approaches to framing what constitutes a municipal affair. In *Fisher v. County of Alameda*, the court of appeals considered the actual effect of a piece of local legislation in determining whether it was a municipal affair.[159] The *Fisher* court weighed the fact that the property tax in question would affect only city residents as a factor in favor of finding the tax to be a matter of municipal concern and thus not preempted by state law.[160] On the other hand, the high level of expertise required to effect a regulation regarding a resource common to the entire state has been weighed against a city's authority.[161] In *City of Watsonville v. State Department of Health Services*, the City of Watsonville's ordinance prohibiting water fluoridation conflicted with the State Department of Health Services' law requiring municipalities to fluoridate their water.[162] Following the reasoning of previous opinion dealing with similar facts,[163] the court found that "[s]etting permissible levels for fluoride in the drinking water . . . requires scientific expertise that applies generally to all users and does not require local flexibility."[164]

Some decisions have looked to multiple laws within California's legislative scheme in examining the concept of a municipal affair. In *Fiscal v. City and County of San Francisco*, the court considered whether a suite

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[158] *Id*. at 1004. Since the "reasonably related" and "narrowly tailored" standards were articulated in *California Federal Savings & Loan Ass'n v. City of Los Angeles*, 812 P.2d 916, 930 (Cal. 1991), and later in *Johnson*, 841 P.2d at 999–1000, subsequent outcomes have been inconsistent, with some courts considering the statewide interest questions and others not reaching the issue. Treatment of the test from *Johnson* has been inconsistent. Many courts have followed *Sherwin-Williams*, which articulates the test for conflict and express and implied preemption but not the statewide interest component. *Compare* Action Apartment Ass'n, Inc. v. City of Santa Monica, 163 P.3d 89 (Cal. 2007) (finding that a litigation based in state law preempted a city ordinance to the extent the two conflicted, without considering the statewide interest question) *with* O'Connell v. City of Stockton, 162 P.3d 582 (Cal. 2007) (finding a city's forfeiture ordinance was preempted by state law because there was a legitimate statewide interest in curtailing illegal drug sales and acts of prostitution).

[159] Fisher v. Cnty. of Alameda, 24 Cal. Rptr. 2d 384, 388–89 (Cal. Ct. App. 1993) (finding that a city-imposed property tax did not implicate a statewide concern because its effects were purely local).

[160] *Id*.

[161] Watsonville v. State Dep. of Health Servs. 35 Cal. Rptr. 3d 216, 218–19 (Cal. Ct. App. 2005).

[162] *Id*.

[163] Paredes v. Cnty. of Fresno, 249 Cal. Rptr. 593 (Cal. Ct. App. 1988).

[164] *Watsonville*, 35 Cal. Rptr. 3d at 223.

of state laws preempted a local ordinance that placed strict limitations on the possession of handguns and prohibited the sale and manufacture of firearms and ammunition among city residents.[165] A California Supreme Court decision on a similar issue had noted that matters that are "'comprehensively addressed through various provisions of the state's . . . [c]odes, leaving no room for further regulation at the local level,' . . . [are] 'matters of statewide concern.'"[166] Following that reasoning, the *Fiscal* court found that San Francisco's gun control ordinance covered areas already legislated in the state's government and penal codes.[167] Further, the court stated, "[i]f every city and county were able to opt out of the statutory regime simply by passing a local ordinance, the statewide goal of uniform regulation of handgun possession, licensing, and sales would surely be frustrated."[168]

Turning to the final question in the preemption analysis, the narrow tailoring requirement appears equally undefined. In order to show a state law was narrowly tailored, the state need not show that the law is the narrowest means of achieving its interest.[169] In fact, some courts merely acknowledge the requirement in passing. In *Cobb v. O'Connell*, for instance, the court upheld a state-mandated temporary administrative takeover of a failing school district after finding the mandate "seem[ed] narrowly tailored" to the school district's fiscal crisis.[170]

The inconsistencies and uncertainty in determining what a municipal concern is—and what statewide interest could justify encroaching on that concern—may, as Daniel B. Rodriguez argues, be due to the more immediate concerns of the state's judiciary branch:

> The reluctance of state courts to expand local power, especially with regard to immunity from state regulation, is understandable for a number of reasons. First, the boundaries between local and statewide affairs are notoriously difficult to define. Some courts have eschewed altogether their responsibility to define these categories, instead deferring to the

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[165] Fiscal v. City & Cnty. of S.F., 70 Cal. Rptr. 3d 324, 327–28 (Cal. Ct. App. 2008).

[166] *Id*. (quoting O'Connell v. City of Stockton, 162 P.3d 583 (Cal. 2007)).

[167] *Id*. The court stated that the state's penal code "presents a comprehensive montage of firearms possession, sale, licensing, and registration laws complete with detailed exceptions and exemptions. These laws of statewide application reflect the Legislature's balancing of interests." *Id*.

[168] *Id*.

[169] Cobb v. O'Connell, 36 Cal. Rptr. 3d 170, 175–76 (Cal. Ct. App. 2005) (declining to assess whether the proffered narrower option was more effective than the state's law).

[170] *Id*. at 175.

> legislature's judgment of what is or is not a matter of statewide concern. More intrepid courts have endeavored to define these categories, but such efforts have yielded little real local autonomy. Second, state courts are most frequently made up of state judges who stand for election or re-election; they are beholden to state voters, and not local governments, for their decisions. Without overstating the political constraints on state judges, there are reasons to expect that state judges might be reluctant to interpose their views regarding the proper scope of state legislative power in cases of state and local conflict.[171]

According to Rodriguez, the ambiguity in state and local preemption questions is not so much an accident as a conscious decision by judges to defer to the California legislature and avoid upsetting their own electorate.[172] Thus, the implications of expanding or contracting local power are subject to the social and political realities of the state courts deciding the issue. These realities will no doubt continue to have some degree of influence on state and local preemption decisions.

V. THE *PALMER* DECISION: FURTHER BLURRING THE LINE BETWEEN STATE AND LOCAL AUTHORITY

In 1991, the City of Los Angeles adopted a specific low-income housing plan for an area known as Central City West (CCW Plan).[173] The CCW Plan applied to an area on the northeastern edge of downtown Los Angeles, just west of the 110 freeway and south of the 101 freeway.[174] Section 11 of the CCW Plan detailed housing requirements for the area and requirements for new construction; these provisions sought to maintain the then-existing level of low-income units and incorporate additional low-income units into new property developments. The CCW Plan called for either one-for-one replacement of low and/or very low income units that had existed on the site, if construction was proposed on a lot that had contained affordable housing demolished on or after February 14, 1988; or

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[171] Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 639 (2001).

[172] *Id*.

[173] CITY OF L.A., CENTRAL CITY WEST SPECIFIC PLAN 1 (1991), *available at*, http://cityplanning.lacity.org/complan/specplan/pdf/ccwest.pdf.

[174] *See* DEP'T OF CITY PLANNING, *Central City West Specific Plan map*, LACITY.ORG (last visited Feb. 24, 2011), *available at* http://cityplanning.lacity.org/complan/specplan/spmaps/Detail/CCW1AREA.PDF; Palmer/Sixth St. Prop., L.P. v. City of L.A., 96 Cal. Rptr. 3d 875, 878 (Cal. Ct. App.), *reh'g denied*, 2009 Cal. App. LEXIS 1450, *cert. denied*, 2009 Cal. LEXIS 9338 (2009).

15% of total new construction units reserved for low income units, if no such units had been demolished on that lot on or after February 14, 1988.

Developers were required to implement whichever option produced the greatest number of affordable units.[175] The CCW Plan required that units designated as affordable remain as such "for the life of the dwelling units or for 30 years, whichever is greater."[176] This requirement was to be recorded as a deed restriction.[177] The applicable rent restrictions were defined as a percentage of monthly median income for the Los Angeles Standard Metropolitan Statistical Area.[178] For developers who chose not to provide affordable housing, the CCW Plan also contained an in-lieu fee option[179] whereby, instead of constructing the required units, developers could opt to pay a certain amount of money per unit.[180]

In 2006, Geoffrey Palmer and Palmer/Sixth Street Properties, L.P. (collectively "Palmer") filed for approval of a new development called the Piero II.[181] The proposal called for "350 residential units and 9,705 square feet of commercial space on 2.84 acres, consisting of 11 separate, contiguous lots."[182] Because a sixty-unit low-income dwelling unit had stood on the lot before it was demolished in 1990, Section 11.C of the CCW Plan required the development to include affordable housing units.[183] The planning commission approved the project subject to compliance with the CCW Plan's affordable housing requirement,[184] which required Palmer to provide sixty replacement affordable units and execute a covenant to

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[175] CITY OF L.A., CENTRAL CITY WEST SPECIFIC PLAN 37–39, § (C)(2)(a)(1)–(2) (1991), *available at* http://cityplanning.lacity.org/complan/specplan/pdf/ccwest.pdf.

[176] *Id*. at 41, § 11(E)(4).

[177] *Id*.

[178] *Id*. at 40–41, § 11(E)(1), (2).

[179] *Id*. at 39, § 11(C)(2)(d). The in-lieu fee per unit is revised annually by the Department of City Planning.

[180] *Id*.

[181] Palmer/Sixth St. Prop., L.P. v. City of L.A., 96 Cal. Rptr. 3d 875, 878 (Cal. Ct. App.), *reh'g denied*, 2009 Cal. App. LEXIS 1450, *cert. denied*, 2009 Cal. LEXIS 9338 (2009). The Piero II is the sequel to The Piero, a 225-unit residential development advertising "gracious, European living in the heart of downtown Los Angeles." *See Los Angeles California Apartments*, THE PIERO, http://www.thepiero.com/ (last visited Feb. 24, 2011).

[182] *Palmer*, 96 Cal. Rptr. 3d at 879–80 (quoting Palmer's project application).

[183] *Id*. at 879–80.

[184] *Palmer*, 96 Cal. Rptr. 3d at 881.

maintain the rent restrictions, or pay an in-lieu fee of $5,770,930.20, an amount equal to $96,182.17 per unit.[185]

Palmer filed for a waiver of the requirement, citing economic infeasibility and violation of the Costa-Hawkins Act.[186] Because he had not contracted to receive any assistance, financial or otherwise, from the City, and thus did not fall under the vacancy decontrol exemption of the Costa-Hawkins Act, Palmer argued that Costa-Hawkins prevented the City from imposing an affordable housing requirement on his proposed rental units.[187] Palmer's request was reviewed at three administrative levels[188] and was denied at each level.[189] The city council denied Palmer's administrative appeal, and he brought an action against the City for writ of mandate, damages, and declaratory and injunctive relief.[190]

A. PREEMPTION IN *PALMER*: THE CALIFORNIA COURT OF APPEALS CREATES AN INTRACTABLE PRECEDENT

The Los Angeles Superior Court agreed with Palmer and held that the CCW Plan's requirement was preempted by the Costa-Hawkins Act.[191] The California Court of Appeals for the Second Appellate District affirmed, concluding that "Palmer's involuntary compliance with section 11.C's affordable housing requirements is hostile or inimical to Palmer's right under the Costa-Hawkins Act to establish the initial rental rates for the project's dwelling units."[192]

The court of appeals found that the meaning of Costa-Hawkins was plain on its face, and following the plain meaning rule,[193] did not consider

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[185] *Id*.

[186] *Id*. at 880.

[187] *Id*.

[188] "[T]he local planning commission, the planning and land use management committee, and the city council." *Id*. at 881.

[189] *Id*. at 880.

[190] *Id*.

[191] *Id*. at 882.

[192] *Id*. at 886.

[193] "Under the plain meaning rule of statutory construction, if the language of the statute 'is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it. If there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statute governs.'" *Id*. at 886–87 (quoting El Dorado Palm Springs, Ltd. v. City of Palm Springs, 118 Cal. Rptr. 2d 15 (Cal. Ct. App. 2002)).

the legislative intent behind the Act.[194] Looking to the language of the Act, the court of appeals analyzed it under general preemption principles.[195] The City argued that the two pieces of legislation did not conflict because the Costa-Hawkins Act was aimed at strict rent control, and not at inclusionary zoning programs like the CCW Plan.[196] The court disagreed, however, and found that section 11.C of the CCW Plan necessarily implicated section 11.E, which detailed rent restrictions on affordable units.[197] Because Palmer was not free to set initial rents on all the units he constructed and owned, the requirements of 11.E conflicted with the language of Costa-Hawkins, and the CCW Plan was therefore preempted.[198]

The court also invalidated the City's in-lieu fee option because it was "inextricably intertwined" with the affordable housing provisions of the CCW Plan.[199] Because the in-lieu fee existed only as an alternative to the affordable housing requirement, the court reasoned that it was unseverable and thus also invalid.[200] The court of appeals' analysis ended with this determination of conflict and preemption; it did not consider whether the state law implicated a legitimate statewide interest or whether it was reasonably related and narrowly tailored to that interest.[201] The court of appeals subsequently denied the City's petition for rehearing,[202] and the California Supreme Court denied review.[203]

The future of inclusionary zoning programs with respect to affordable rental housing is uncertain after *Palmer*. As a result of the *Palmer* decision, inclusionary zoning programs similar to those found in the CCW Plan may find their provisions for rental units subject to challenge and invalidation.[204] However, the gap in the *Palmer* court's analysis suggests

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[194] *Id*. at 886–87.

[195] *Id*. at 883–84, 886.

[196] *Id*. at 887.

[197] *Id*.

[198] *Id*. at 886, 887.

[199] *Id*. at 887.

[200] *Id*. at 887–88.

[201] *See id*.

[202] Palmer/Sixth St. Prop., LP v. City of L.A., 2009 Cal. App. LEXIS 1450 B206102, *cert. denied*, 2009 Cal. LEXIS 9338 (2009).

[203] Palmer/Sixth St. Prop., LP v. City of L.A., 2009 Cal. LEXIS 9338 (2009).

[204] Though outside the scope of this Note, the *Palmer* decision does not implicate certain other forms of housing because the Costa-Hawkins Act pertains only to rent control and rent restrictions; thus, the decision left the affordability provisions for "for-sale" (condominium) units untouched.

that, while there is a clear conflict between state rent control laws and local inclusionary housing legislation, there remains a colorable argument that the Costa-Hawkins Act is anything but narrowly tailored to the goal of creating affordable housing and actually undermines affordable housing efforts on a statewide level.

B. THE *PALMER* COURT'S INTERPRETATION OF THE COSTA-HAWKINS ACT CREATES AN IRRATIONAL STATEWIDE STATUTORY SCHEME FOR AFFORDABLE HOUSING

The *Palmer* conflict arose because the legislative intent of Costa-Hawkins is not reflected in its statutory language. While the plain meaning rule dictates that the plain meaning, if clear, should be followed, courts have also looked to congressional intent if the plain meaning would lead to an odd result.[205] The statutory language of Costa-Hawkins is unclear at best.[206] While the result here is not "odd" in the sense that it contradicts the language of the Act, it is odd in that it effectively does away with the major mechanism for effecting inclusionary zoning programs for rental housing.

Inclusionary zoning is distinct from rent control in its history, rationale, and purpose.[207] Rent control found its beginnings in the early twentieth century as a temporary local effort to *prevent* the eviction of World War I service members.[208] Later forms of rent control were "imposed to equalize rents in the private housing market."[209] By contrast, inclusionary zoning is a more recent development designed as means of curbing exclusionary zoning[210] and is now widely employed by local governments to meet state-mandated affordable housing requirements and to create integrated housing communities.[211]

The legislative intent behind the Costa-Hawkins Act clearly shows that it was intended to target strict rent control programs.[212] There is no

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[205] *See, e.g.*, Public Citizen v. U.S. Dep't of Justice, 491 U.S. 440 (1989) (noting that where a plausible alternative construction exists to avoid construing language in a contradictory way, a court will adopt such an alternative).

[206] El Mallakh, *supra* note 54, at 1876.

[207] *Id*. at 1872–74.

[208] *Id*. at 1873.

[209] *Id*.

[210] *Id*. at 1872–73.

[211] See earlier discussion in Part II.

[212] El Mallakh *supra* note 54, at 1869–72.

mention of inclusionary zoning anywhere in the bill's supporting documents, including its sponsors' statements.[213] One of the bill's sponsors, Assembly Member Phil Hawkins, specifically stated that only five local jurisdictions with rent control would see their programs implicated by the new vacancy decontrol law.[214]

Despite the fact that inclusionary zoning is distinct from rent control, and despite the legislative history of Costa-Hawkins—which clearly indicates that it was aimed at extreme rent control programs[215]—the *Palmer* court, like other California courts facing preemption questions, did not consider the legislative intent in its analysis because the meaning of the legislation appeared to be clear on its face.[216] Inclusionary units are kept affordable by way of rent restrictions, and such restrictions facially conflict with the operation of vacancy decontrol. It was improper for the court to end its analysis there, however. Los Angeles is a home rule city, and the Costa-Hawkins Act should not preempt the city's authority over municipal concerns without a showing that the Act, under the court's interpretation, is reasonably related and narrowly tailored to a legitimate statewide concern.

While it is clear that housing is a statewide concern,[217] the state also has an interest in creating a legislative scheme that allows local governments to meet the state's housing goals. *Fiscal*, in articulating California's interest in firearms control, had also articulated a statewide interest in creating a uniform legislative scheme.[218] If this reasoning were followed, California's legislative scheme with respect to affordable housing would fail to meet *Johnson v. Bradley*'s requirement that it be reasonably related and narrowly tailored to meet that interest. The result of *Palmer*—in which a local ordinance that was passed in compliance with a state mandate was invalidated by a state law that was intended to serve a differ-

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[213] *Id*. at 1871.

[214] *Id*. at 1870.

[215] *Id*. at 1869–74.

[216] *See* Johnson v. Bradley, 841 P.2d 990, 1003 (Cal. 1992). As the *Fisher* court explained, "[t]hough the city present[ed] an elaborate argument based on legislative history, it c[ould]not manufacture an ambiguity where none is apparent on the face of the language." Fisher v. Cnty. of Alameda, 24 Cal. Rptr. 2d. 384, 387 (Cal. Ct. App. 1993).

[217] As evidenced by the state's numerous housing laws, including its housing element requirement. *See generally* CAL. GOV'T CODE §§ 65580–89 (West 2009).

[218] Fiscal v. City & Cnty. of S.F., 70 Cal. Rptr. 3d 324, 341 (Cal. Ct. App. 2008) ("The creation of a *uniform* regulatory scheme is a matter of statewide concern, which should not be disrupted by permitting this type of contradictory local action.").

ent purpose—reveals that the state's affordable housing scheme is neither uniform nor effectively applicable by local governments.

In addition to the difficulties *Palmer* creates, the decision also highlights the tension between existing state laws that mandate affordable housing efforts and the Costa-Hawkins Act, which has come to limit a city's means of creating affordable housing. The California Community Redevelopment Law, for instance, which requires 15% of new construction to be affordable, [219] is a state law that appears to be in tension with Costa-Hawkins. While municipalities still have other options, such as municipally owned housing and partnerships with non-profit housing providers, these options are arguably less feasible because they place the cost of affordable housing developments on the city, rather than on the developer.

Palmer also results in inconsistent treatment of inclusionary zoning for rental and for for-sale units. If a developer receives approval for for-sale units, the developer could theoretically take whatever incentive the city provides and then rent out the newly constructed units at market rate until the for-sale market improves. The developer might not ever return those units to for-sale units, thus thwarting any inclusionary mechanism. Once a developer receives the required Certificate of Occupancy and tenants move in, there is little incentive for a developer to sell units at below-market prices. If the developer is not held to some affordable housing requirement, the incentive then becomes a windfall.

Inconsistent treatment of rental units and for-sale units conflicts with the state's goal of providing affordable housing for groups that need it most. In the state density bonus law, the legislature enumerates distinct groups and qualifying income levels for both rental and for-sale housing.[220] Rental housing is arguably the higher priority; the law articulates more discrete qualifying income levels for rental housing assistance than it does for the for-sale units.[221] Further, rental housing is more accessible and more immediately necessary than for-sale housing, especially for those households with modest incomes that meet the state-defined criteria. Thus, by knocking down one leg of local inclusionary zoning programs, the *Palmer* decision creates an inconsistency that subverts the state's intent in creating affordable housing. This inconsistency cannot persist.

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[219] CAL. HEALTH & SAFETY CODE § 33413 (West 2009).

[220] GOV'T § 65915; *see also* Tables I and II, *supra* Part III.A.

[221] The for-sale-unit provisions list only one target group: "moderate income" households. GOV'T § 65589.5.

VI. RECOMMENDATIONS

In the aftermath of *Palmer*, local governments are left in a difficult position; this is particularly true in light of an anti-NIMBY[222] statute recently passed by the California legislature. In introducing its anti-NIMBY law, the legislature declared that local government "activities and policies" that "[l]imit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing,"[223] were a partial cause of the state's housing crisis.[224] "Among the consequences of those [local] actions," the legislature claimed, "are discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration."[225] The legislature also found that "[m]any local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing projects, reduction in density of housing projects, and excessive standards for local projects."[226] Now that *Palmer* has invalidated a popular program for producing affordable rental housing, it will be significantly more difficult for local governments to comply with state mandates for affordable housing.

A. THE CALIFORNIA STATE LEGISLATURE SHOULD AMEND THE STATUTORY TEXT OF THE COSTA-HAWKINS ACT[227]

The most direct way to resolve this incongruous statutory scheme is to amend Costa-Hawkins to expressly exclude inclusionary housing.[228] Amending the statutory text would make the legislative intent clear and would lead to easier administration of affordability and vacancy decontrol requirements in ways that reflect the intent of the state legislature. In light

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[222] "NIMBY" is a common acronym for "Not in My Backyard," a shorthand way of describing the tendency to segregate undesirable social elements away from established communities.

[223] GOV'T § 65589.5(a)(2).

[224] *Id*. § 65589.5.

[225] *Id*. § 65589.5 (a)(3).

[226] *Id*.

[227] *See* El Mallakh, *supra* note 54, at 1852 (advancing this argument even before *Palmer* was decided).

[228] *Id*.

of *Palmer*, it is vital that the legislature's intent in Costa-Hawkins be made clear.

B. CALIFORNIA'S LOCAL GOVERNMENTS SHOULD TAKE STEPS TO ERODE THE RULE OF *PALMER*

Barring an express amendment to the Costa-Hawkins Act to exempt inclusionary zoning, California's local governments should take steps to erode the rule of *Palmer*. Charter cities should pursue the argument that their inclusionary zoning ordinances are not preempted by Costa-Hawkins by enacting inclusionary housing ordinances similar to the one invalidated in *Palmer* and raising the home rule argument under *Johnson v. Bradley*.

Local governments might also find support in the state's acknowledgement that cities are in a better position to monitor local needs and conditions due to their unique physical and economic characteristics.[229] Because the zoning and land use decisions of a local entity are typically given deference, cities have further reason to explore a municipal affair argument (for charter cities) or a police power argument (for general law cities).

One way to meet the state's affordable housing goal without per se rent restrictions would be to require higher impact fees upon a finding of a development's impact on affordable housing in the neighborhood. Impact fees generally require a developer to pay an amount to offset the impact of a particular development in the surrounding area. In this case, such an exaction could be permissible provided there is a showing of a "nexus" between the fee and the impact, and the fee is "roughly proportional" to the severity of the impact.[230] Cities should undertake studies that define "impact" to include the projected social costs of building developments that include no affordable units. One potential nexus is the connection between new job creation and the need for affordable housing nearby. New residential construction generates, among other things, new jobs, and the needs of new workers stimulate the local economy. This includes the need for affordable housing within a reasonable commuting distance from these

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[229] *See e.g.*, GOV'T § 65581(c) ("Each locality is best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal, provided such a determination is compatible with the state housing goal and regional housing needs.").

[230] An exaction must bear a rough proportionality and essential nexus to the problem to be solved. Dolan v. City of Tigard, 512 U.S. 374 (1994).

jobs. Cities should use this clear nexus to derive a proportional impact fee to use in assessing exactions from developers.

Cities should also re-examine their in-lieu fee provisions so that these provisions are severable from the rest of their inclusionary zoning ordinances.[231] The court in *Palmer* found the in-lieu fee "inextricably intertwined" with the Los Angeles CCW Plan's affordable housing requirement and invalidated it on that basis. Other courts, however, have upheld in-lieu fee provisions in housing plans that require the fee, but allow developers to opt-out of the fee by building affordable units.[232] Cities should look to this model in reformulating their in-lieu fee provisions.

If cities are able to implement some of these measures, they may succeed in combating the immobilizing effect of *Palmer*'s interpretation of Costa-Hawkins. However, if these measures are unsuccessful, cities will need to implement other plans for achieving California's affordable housing goals.

C. CITIES SHOULD EXPLORE ALTERNATIVES TO SUPPLEMENT OR SUPPLANT INCLUSIONARY HOUSING PROGRAMS

If California's cities are unsuccessful in amending the language of Costa-Hawkins in a way that saves inclusionary zoning programs for rental housing, they should examine alternative ways to meet state mandates and foster integrated communities.

One alternative is to promote specific goals while also maintaining more realistic state mandates. For example, one such goal may be to encourage the construction of more housing near public transit hubs. Michael Pyatok, in describing why inclusionary zoning might not be a one-size-fits-all program, notes that groups with historically limited incomes have persisted and adapted by living close to where they work.[233] He suggests that "planning more mixed-use neighborhoods with a wide variety of work opportunities along with good public transportation, may be the single most important contribution to making housing more affordable."[234] There is legislative support for this idea in the recently passed Senate Bill

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[231] El Mallakh, *supra* note 54, at 1852.

[232] *See, e.g.*, Santa Monica Hous. Council v. City of Santa Monica, No. BC184061 (Cal. Super. Ct. Jan. 20, 1999).

[233] Michael Pyatok, *Design of Affordable Housing: The Return of the Homestead*, PYATOK ARCHITECTS, INC. (Dec. 2000), *available at* http://www.pyatok.com/writingsarticle4.html.

[234] *Id*.

375 (SB 375), which aims to curb sprawl by providing limits on work-to-home distances.[235]

Although legislative attention to this aspect of housing costs indicates that lawmakers are brainstorming new ways to make housing more affordable, this new state mandate notably places increased pressure on local governments to update their housing plans to conform to the state's policies. Additionally, while transit-oriented mixed-use developments are certainly a desirable improvement, SB 375 may frustrate local goals of inclusionary zoning because the bill does not require mixed-income integration and thus may lead to concentrated areas of low-income households.

VII. CONCLUSION

California's legislative scheme puts local governments in a difficult position with respect to affordable housing. State statutes mandate that affordable housing be created at the local level, but the *Palmer* decision demonstrates the difficulty of creating feasible, sustainable programs to meet this goal.

However, in failing to discuss whether the Costa-Hawkins Act is reasonably related and narrowly tailored to a legitimate state interest, the *Palmer* court left open potential avenues for charter cities to challenge the scope of the court's ruling. Previous cases have taken different approaches to defining the concepts of a "statewide interest" and a "municipal affair," and courts also differ on what it means for a state law or legislative scheme to be "reasonably related" and "narrowly tailored" to such a state interest. On the one hand, depending on the aperture used to frame these terms, charter cities may have a plausible argument for home rule authority, especially in light of the inconsistent decisions since *Johnson v. Bradley*. Charter cities are supposed to have plenary authority over matters that fall within the scope of a municipal concern, and the state is supposed to bear the burden of justifying its encroachment upon that authority. On the other hand, factors contributing to the state judiciary's resistance to dilate local power may mean that local governments will always face an uphill

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[235] Senate Bill 375 (SB 375), 2008 Cal. Legis. Serv. Ch. 728 (West). The legislation generally draws a stricter link between housing- and transportation planning at the regional and local levels. ADAMS, *supra* note 79, at 28–29. It also requires that the regional housing need be allocated "to achieve a jobs-housing balance within a region to the extent feasible using the employment projections contained in the regional transportation plans." *Id*. at 29.

battle in expanding the scope of municipal governance outside those specifically enumerated in the California constitution.

Housing is an essential component of modern existence. Beyond providing residents with basic housing needs, and the associated physical health benefits,[236] affordable housing programs bring wider municipal benefits, including jobs, social and economic integration, and opportunities for urban renewal.[237] Given the need and importance of affordable housing and the success of inclusionary zoning programs, it is imperative that state and local governments cooperate to ensure these programs remain effective. In light of the uncertainty surrounding state and local preemption questions, perhaps the best starting point in achieving a workable system is to recognize both the exigency of the housing crisis and that it is in the state's interest to create a regulatory scheme that allows cities to achieve state-mandated goals.

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[236] *Ideas for Action*, INST. FOR LOCAL GOV., http://www.ca-ilg.org/node/1877 (last visited Feb. 24, 2011) ("Lack of adequate affordable housing can result in overcrowding, overpayment, infestation, mold, and longer work commutes, all of which can further compromise residents' health and well-being.").

[237] *Affordable Housing 101*, NON-PROFIT HOUS., http://www.nonprofithousing.org/pages/what-is-affordable-housing/affordable-housing-101.html (last visited Feb. 24, 2011).