SCOCA Symposium 2020: California's Battle Over Housing

Overview

On January
30, Hastings Law Journal hosted a Supreme Court of California symposium at UC
Hastings College of the Law on the topic of state and local control over
housing in California. The symposium happened to fall the day after the vote on
Senate Bill 50 vote (and the day of the vote on reconsideration). SB 50 would
have effectively upzoned large swaths of land near transit, and increased
density in residential neighborhoods, even when zoned for single family homes. The
symposium included a practitioner panel and an academic panel, followed by a
keynote address from State Senator Scott Wiener. The event focused on several
key questions. What is the current balance of state and local control over
housing? How that balance has changed in the wake of recent state legislation?
What
is working, and what isn't? What more legislation is needed, if any?

**Practitioner Viewpoints: Housing
Legislation Since 2017 and the Impact Today**

The first panel
explored recent housing legislation from the perspective of attorneys
representing local governments and developers, including affordable housing
developers. Hastings Professor Dave Owen moderated and introduced the speakers.

First up
was Dan Golub (Holland & Knight), who presented an overview of housing law.
Golub's presentation focused on lack of supply as a primary driver of the
housing crisis: California needs roughly half a million new homes a year, but
is only adding about 100,000. Golub covered the basics
of California's system, which he separated into two parts: zoning and
permitting. Cities are presumptively in control of both. Permits

are distributed under two kinds of systems. In the ministerial or as-of-right model, permits are granted if the project conforms with the zoning requirements. In the discretionary model, a locality has discretion to approve permits even when the project meets requirements.

Golub emphasized that, although cities are presumptively responsible for zoning and permitting, California has attempted to pass laws to encourage or require higher density requirements. These include SB 35 (streamlining projects that meet zoning and affordability requirements in cities that have not met Regional Housing Needs Allocation requirements), density bonus law reforms, Housing Accountability Act reforms, Assembly Bill 168 (Accessory Dwelling Unit legislation requiring ministerial, rather than discretionary, approval for a wider range of ADUs), and proposed SB 50.

The panel considered how implementing these state laws proceeds from the perspective of cities and developers? Barbara Kautz (Goldfarb Lipman), who primarily represents cities, criticized how complex state laws are; to this point, a later audience question asking if state laws are "self-executing" was met with laughter. Dan added in the perspective he has seen from developers, who question why they have to face discretionary review even if their projects meet zoning requirements. He also noted that while developers and cities formerly were co-defendants, now developers are going on offense and suing to enforce their projects (for example, by invoking SB 35 to force approval). Kevin Siegel (Burke, Williams & Sorenson) argued that housing is not a supply and demand issue, pointing out that cities get more expensive and gentrified as more housing goes in. Maureen Sedonaen (Habitat for Humanity) described her challenges with a recent CEQA challenge to a 20-unit nonprofit housing project. She argued that when her nonprofit can't build 20 units — not 2,000 — there is something seriously wrong with our system.

Finally, the panel considered why cities, with their ministerial power, have not been

more engaged. Panelists offered several explanations. One is that people who vote are older, whiter homeowners — who largely oppose new development and especially automatically approving it. And, from Golub's perspective from having worked with California and New York planners is that California has grown accustomed to its complicated system.

If there was any point of agreement in this panel, it was that California's system of housing laws is extremely complicated — and both cities and developers share frustration at navigating within it.

Analyzing Housing Growth, Structural Politics, and Results in California

The second panel applied an academic perspective to the state's housing issues. Ethan Elkind, Director of CLEE at Berkeley Law, used environmental policy as a critical lens for viewing housing policy. Citing how land use patterns exacerbate carbon emissions, Elkind proposed building housing within a three mile "buffer zone" from certain metropolitan areas, greatly decreasing carbon emissions by reducing vehicle miles traveled. Elkind also proposed included imposing Vehicle Miles Traveled ("VMT") and wildfire fees on high-risk area construction, while in low-risk areas relaxing zoning, allowing ministerial permitting, and investing in transportation.

Moira O'Neill, of Berkeley Law and Columbia University, discussed her research on entitlement rates and their impact on affordability. Using geocoding to map entitlement rates in high quality transit areas and historically redlined areas, O'Neill found that density tends to be concentrated in areas that have been redlined — a trend we should flip. The implications of this study are that local control appears to be the most significant constraint over infill development, and that local control tends to concentrate development almost entirely into

neighborhoods that were historically burdened by redlining and disinvestment.

Professor
Eric Biber of Berkeley Law built on O'Neill's presentation to highlight how
local governments tend to ignore the spillover effects of their land use
decisions. Smaller jurisdictions have been historically motivated to build less
housing, and are more likely to have restrictive zoning. Surveying the
audience, Biber asked whether Silicon Valley, Austin, or New Haven has the most
restrictive zoning. The answer? Not Silicon Valley — as most audience members
guessed — but New Haven, the product of a highly fragmented New England
government system. The best solution would be a regional government, but
recognizing that proposal's difficulties, Biber recommended a regional body
that oversees local governments' implementation of housing development.

Lastly, Professor Chris Elmendorf of UC Davis Law explained how the structural
politics of local government influence housing decisions. Electoral processes play a
big part. The California Voting Rights Act required many local governments to
switch from at-large to district elections. One effect of this legislation has been the
rise of aldermanic privilege, whereby members of a legislative body defer to one
another on a matter particularly affecting one member's district. As multifamily
housing permitting is often discretionary, this means city councils tend to vote down
housing based on that district member's opposition to it. Local elections timing (low
turnout in off years), distribution of land use authority between the mayor and city
council, and the impact of voter-adopted growth controls have all influenced limited
housing production as well. Elmendorf's recommendation to mitigate these issues is
reform at the state level — not under the guise of housing, but "integrity of electoral
process."

State Senator Scott Wiener's
Keynote Address

The
keynote address for the evening was delivered by State Senator Scott Wiener
(D-11), author of SB 50. Wiener first joked about the sympathetic treatment he
had received all day due to the SB 50 vote (18–15, three votes short of

passage). He pointed out the enormous gap between population growth and housing growth over the past several decades, and specific barriers to building in San Francisco, where 70% of the land is zoned for single family housing, and exactions for new development are $165,000 per unit. Wiener criticized the attitude of NIMBYs, which he summed up as "My ability to park my car in front of my house is more important to me than someone who has to live in their car because
of the policies I support."

On the
question of control, Wiener argued that in the wake of extreme local control, we need to move more toward the middle. He compared housing with education. Describing
a hypothetical system where cities can choose to have credentialed or non-credentialed teachers, teach math or science (or neither), Wiener made the point that local control should not exclude state involvement or standard-setting. Housing should be no different. Wiener concluded his speech with a note of optimism, revealing that he was already planning to introduce two new bills on housing — news that should come to no surprise to those who have followed SB 50 and its predecessors.

Conclusion

The
symposium offered varied viewpoints on the causes possible solutions to the state's housing crisis. While disagreement existed on how best to solve California's housing challenges, certain themes and points of agreement did emerge. The practitioner panel largely agreed that state laws need to be simpler if they are going to be effective. And at least one "city"-focused attorney expressed support for state-level "by-right" legislation, but something with wider reach than SB 35, which only affects a small number of projects. The academic panel found stronger support for state or regional intervention, but still recognized many of the structural, practical, and political barriers to effectuating
such change. Finally, as a prominent advocate for state intervention, Senator

Wiener argued for state-level legislation to solve the housing deficit, overcome local control's limitations, and counter local housing opponents.

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