

Comment on Paul G. Lewis's "Can State Review of Local Planning Increase Housing Production?"

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Abstract

Many are looking to California and its state housing law for advice on how to deal with the affordability challenges affecting many metropolitan areas throughout the nation. It is thus critically important to go beyond the laws themselves and examine how state and municipal governance structure affects affordability, supply, and production. Some states give broad freedom to localities to develop policies that can potentially meet a range of goals and objectives. Others directly undermine those efforts by limiting local ability to pursue policy reforms while simultaneously failing to engage on the state level.

The redefinition of federalism on the national level, coupled with continued resistance to growth from some localities, establishes the state as at least an equal partner in dealing with housing supply and affordability issues. Understanding these distinctions is important, and the housing community needs to take them into account as it moves on the state front.

Keywords: Affordability; Housing policy; State and local governments

Introduction

Paul G. Lewis addresses a very important question with respect to California's housing element law, arguably the nation's most advanced state law designed to encourage the production of affordable housing. Lewis examines the law's requirement that the state review local planning and land use policies to determine whether they are enabling the production of more housing units than would otherwise occur.

This is an important question for a variety of reasons. It is widely understood that local plans that limit or restrict housing construction are one of the primary culprits responsible for escalating housing prices (U.S. Department of

Housing and Urban Development 2005). Many are concerned that NIMBY (“not in my backyard”) growth controls, moratoriums, and other impediments are limiting the overall supply, thereby raising prices and preventing housing from being affordable for a wide range of American households. Work by Pendall on the chain of exclusion (2000) confirmed the connection between local low-density land use plans and the reduction of rental housing and racial and ethnic minorities. Evaluating the primary means of enforcing the California law is thus critically important.

As Lewis points out, the philosophy behind policies that require state review of local plans for housing generally assumes that localities resist most affordable and multifamily residential development and that, by reviewing local plans, the state can somehow compel localities to become good actors. State review of local plans is intended specifically to ensure that localities adhere to statewide assessments of regional housing needs. Unfortunately, in his article, Lewis finds that California’s state review of local planning did *not* increase housing production. Rather, to a great extent, variations in local housing production are the result of housing market and socioeconomic factors.

But as Lewis indicates, this does not mean that state review of local plans should be discarded or that it is wholly ineffective. He briefly acknowledges that state review may improve local planning in general since it may force local officials to deal with regional housing needs that they otherwise would ignore. The requirement that localities go through the process of updating their local plan may direct more attention to statewide and regional housing needs, although some localities may continue to shirk their responsibilities. However, Lewis does make a compelling case that, as Fulton and Shigley (2003) assert, “even though California’s system looks good on paper, it does not work well in real life” (38).

One problem is that communities may have other policies in place that work at cross purposes to the housing element law. Lewis and Neiman (2000) found that very few California municipalities actually have overt restrictions on residential growth rates “such as growth caps or zoning changes that remove land from the residential zoning categories” (5). However, they also found that although only 8 percent of the California municipalities they surveyed have policies that limit the total number of annual building permits, 13 percent have formally established population ceilings, 27 percent limit growth by requiring minimum traffic standards, and 30 percent have issued moratoriums on building permits, water, and/or sewer connections. It is not clear to what extent the housing law captures these subtle distinctions between outright growth restrictions and policies that simply make it more difficult to build.

Another issue that is often cited, especially by the localities themselves, is that the California law is far too cumbersome and compliance is difficult because it places more of an emphasis on planning and process than on production (Housing Element Working Group 2004; Warner et al. 1997). As a result, the state has been working for years to try to streamline the law and make it more valuable and effective. Many attempts to amend it have been made, and changes have been enacted over time. So it is important to note that although the law has been in place for decades, it has gone through a number of iterations.

Related to that point, one of the more interesting elements of Lewis's article is the discussion of the civil rights origins of the various state fair share housing laws and how they have been adapted to respond to the housing affordability and construction challenges of today. However, this discussion gives rise to speculation that the alleged ineffectiveness of California's law is due to the fact that it was designed to perform a very different role than the one it has today. Is the purpose to eliminate the concentration of very poor or subsidized housing in metropolitan areas? Is it to reduce suburban exclusion of minorities?¹ Is it to increase the supply of housing statewide or within regions? Is the focus on housing in general or on affordable housing in particular? Clearly defining the purpose of the law, especially given its circuitous history, is critically important.

Context of the crisis

Nelson (2004) recently found that this nation will need to build nearly 60 million housing units to accommodate existing and projected growth by 2030. California alone will need to add 4.7 million units in addition to the 2.3 million that will be lost because of replacement. This will certainly be a tremendous challenge in a state that has built only about 3.5 million units since 1980. In terms of costs, national median housing prices have risen 43 percent in current dollars from 1999 to 2004. During this same period, California prices have increased 123 percent (Downs 2004).

Along the coasts, and especially in California and New England, high housing prices have given credence to the idea that production is insufficient and that the shortfall is contributing to rising prices and limited choices. An analysis by Bier and Post (2003) examined building permits and household changes in 74 of the country's largest metropolitan areas. In the aggregate, they

¹ Frey (2003) found that 11 of the top 20 metropolitan areas ranked by percentage of suburban minority shares are located in California.

found that from 1980 to 2000, new building permits exceeded the number of new households by nearly 19 percent. All but 20 of these 74 metropolitan areas saw the number of building permits outpace the growth in households. (See table 1.) Of those where production outpaced households by the widest margins—Pittsburgh, Buffalo (NY), and Scranton (PA)—housing affordability is not much of a concern on the metropolitan level. Conversely, those places where the issue is most problematic—California, metropolitan Boston, and suburban New Jersey—all saw households outpace construction. This is generally consistent with the National Association of Home Builders indexes of the least and most affordable metropolitan areas (2004).

In addition to the historical attraction and robustness of the housing market in these places, local construction restrictions continue to exacerbate

Table 1. Metropolitan Areas Analyzed Where the Increase in Households Outpaced the Increase in Building Permits from 1990 to 2000

Name	Region	Permits	Household Change	Percent Difference between Permits and Households
Nashville, TN MSA	S	100,012	100,284	-0.27
Newark, NJ PMSA	NE	42,812	43,030	-0.51
Ann Arbor, MI PMSA	MW	41,281	41,591	-0.75
Sacramento, CA PMSA	W	99,150	100,447	-1.29
Monmouth–Ocean, NJ PMSA	NE	58,099	58,921	-1.40
Dallas, TX PMSA	S	250,028	254,711	-1.84
Houston, TX PMSA	S	179,825	183,772	-2.15
Baton Rouge, LA MSA	S	18,361	18,802	-2.35
Riverside–San Bernardino, CA PMSA	W	163,881	168,008	-2.46
Columbia, SC MSA	S	37,670	40,118	-6.10
Phoenix–Mesa, AZ MSA	W	325,990	347,536	-6.20
Oklahoma City, OK MSA	S	40,605	44,150	-8.03
Little Rock–North Little Rock, AR MSA	S	23,956	26,686	-10.23
Providence–Fall River–Warwick, RI–MA MSA	NE	41,559	46,716	-11.04
Boston, MA–NH PMSA	NE	138,245	156,258	-11.53
Oakland, CA PMSA	W	77,057	87,689	-12.12
Denver, CO PMSA	W	150,117	175,887	-14.65
Austin–San Marcos, TX MSA	S	106,422	125,879	-15.46
San Antonio, TX MSA	S	69,238	89,650	-22.77
San Francisco, CA PMSA	W	29,879	41,949	-28.77

Source: Bier and Post 2003.

MSA = metropolitan statistical area; S = South; PMSA = primary metropolitan statistical area; NE = Northeast; MW = Midwest; W = West.

the affordability problem. Glaeser and Gyourko (2002) found that “evidence suggests that zoning and other land use controls play the dominant role in making housing expensive” (1). They cite California as a place where this problem is most acute. Saks (2004) also shows that the 10 most unresponsive metropolitan housing markets, with the exception of San Francisco, are all located in the Northeast. This unresponsiveness is the result of external barriers such as zoning laws, building codes, restrictions on height and lot size, and growth controls.

Lewis does recognize this fact and clearly enumerates the myriad obstacles that local governments place in front of housing development. The problem is that although localities are identified as the primary problem, there seems to be little enthusiasm or optimism that states can be an effective part of the solution. As Lewis and others correctly point out, it is difficult for states to convince localities to plan for the housing needs of the region, especially for affordable housing needs and for future needs. It is particularly difficult in California and the Northeast, where state constitutions and statutes establish a world of little box governments, each one dependent on the property tax and subsequently obsessed with attracting high-end residential, retail, or commercial establishments—or stealing them from neighbors. This situation is a recipe for regional dysfunction and development patterns that are socially, fiscally, and competitively damaging.

Certainly, some localities are progressive and capable enough to address these housing supply and affordability challenges. However, the current system of local government finance, coupled with increasing local opposition to growth, makes it incumbent on the states to work closely with local jurisdictions to boldly develop new approaches for addressing these issues.

Importance of the state role

What is most interesting in Lewis’s analysis and discussion is not the detailed examination of one aspect of the law (the state review of the local plan). Instead, it is his discussion about what can be done on the state level to ensure that localities do not continue to put up barriers to the construction of new housing. And to take it further, what can states and localities do collaboratively and cooperatively to deal with these challenges?

The primary message here is the critical role the state can play in encouraging the production of the right kind of housing, as well as supporting a range of related issues.

States set the rules of governance, determining the geography and powers of a host of government entities ranging from general-purpose local govern-

ments (cities, counties) to special-purpose governments (school districts). States set the rules of the development game in the form of tax, spending, regulatory, and administrative policies that fundamentally shape metropolitan growth and the health and vitality of cities and metropolitan areas. These state policies promote either regional collaboration and balanced growth or intraregional competition, sprawl, and urban decline. With devolution, states are in the driver's seat in implementing large federal block grants—transportation, welfare, workforce, and homeland security, as well as housing. This redefinition of federalism, coupled with some localities' continued resistance to accepting growth, establishes the state as at least an equal partner with localities in dealing with housing supply and affordability issues.

Lewis does mention that many progressive initiatives would be resisted in states “with a stronger tradition of home rule and local autonomy” (195). To some extent this is likely true. But probably the most comprehensive study on the powers of local government illustrates that states with the types of housing laws and state review systems Lewis investigates are actually all over the map in terms of the degree of discretionary authority granted to local governments.

That study, by the now defunct U.S. Advisory Commission on Intergovernmental Relations (1981), found that Oregon's localities enjoy more discretionary authority than those in any other state. This seems counterintuitive, since Oregon has arguably the nation's most effective growth management system and a state housing review system that requires localities in the Portland metropolitan area to plan for all housing. So despite the fact that academic studies assert that local governments in Oregon have more autonomy than in any other state, it is top-down administration that exemplifies the state plan. Lewis illustrates this by pointing out that in and around Portland, the emphasis on the state's role in encouraging a certain type of housing production is the “preemption of certain local land use powers” (195). Similarly, localities in Connecticut have the fourth most discretionary authority in the country, but the state does have an “anti-snob zoning” approach similar to that of Massachusetts (Carroll 2001). Localities in New Jersey and Massachusetts, however, rank near the bottom in terms of their structural, functional, fiscal, and personnel authority.² California's localities rank near the top third (see Richardson, Gough, and Puentes 2003).

² According to the National League of Cities (n.d.), there are four key areas in which home rule powers are carried out by governments: structural (the authority to choose the type and rules of government); functional (the authority to exercise powers of government with varying degrees of autonomy); fiscal (the ability to raise revenues, borrow, tax, etc.); and personnel (the authority to set employment rules).

In some instances where localities are large enough, the state government or legislature may not have to engage in a difficult and acrimonious debate. Instead, the state may address housing goals by working with localities or by creating the right environment for innovative ideas to flourish. In many parts of the country, localities cannot shoulder the entire blame for problems. Often, they are simply operating rationally within a regulatory framework established by the states.

Montgomery County (MD) is well known for its Moderately Priced Dwelling Unit (MPDU) ordinance. Like the housing programs Lewis examines in his article, it was not a recent creation but rather was developed in 1974 around the same time as the other state policies. The MPDU is the oldest and most productive inclusionary zoning program in the country. Since its inception, more than 12,000 units have been created throughout the county to help mitigate its affordable housing challenges (Brown 2001). The state, however, had very little direct role in encouraging or establishing the MPDU.

In Maryland, the legislature created the enabling legislation that allowed the county to develop the MPDU and then has avoided interfering with it.³ Although Maryland counties enjoy a very high level of discretionary authority, it is important to point out that Maryland is a “Dillon Rule” state. That is, localities have only those powers specifically delegated to them by state law or fairly implied from expressly granted powers (Richardson, Gough, and Puentes 2003).

Montgomery County can be contrasted with Fairfax County (VA), which is on the other side of the Potomac River and is similar in size and population. Fairfax County actually established its inclusionary zoning ordinance several years before Montgomery County did. However, Virginia adheres very stringently to the Dillon Rule, and the General Assembly does not give counties the authority to require the accommodation of affordable and workforce housing as land is developed, in the way that Maryland and other states do. Without that authority, Fairfax County cannot apply its ordinance to by-right developments and applies it only where such additional actions as a rezoning or special exception are required. The result is that the ordinance has produced less than 10 percent of the units built in Montgomery County.

Thus, even though a particular state may have its own comprehensive housing policy, as California does, other factors continue to play a primary and critical role. States set the stage by creating enabling authorities or otherwise

³The enabling legislation that specifically authorizes the development of MPDU programs throughout the state was provided in 1992: Md. Land Use Code Ann., 66B, § 10.01(a)(3).

setting the parameters for local powers and, depending on how these are structured, they could have a tremendous impact on local affordable housing policies and production.

Lewis correctly points out that although there are at least a dozen states that have enacted statewide growth management laws, rarely have they been tied to affordable housing or housing affordability goals. Maryland, for example, has a fairly ambitious state law, but most of the activity for affordable housing has come on the local level.

In an analysis of several metropolitan counties that have some type of growth management policies in place, Carlson and Mathur (2004) found that Montgomery County's success in providing an adequate supply of affordable housing is not attributable just to its inclusionary zoning ordinance but also to a full slate of innovative programs. Montgomery County has a transit-oriented development initiative, an agricultural land preservation program, adequate public facilities regulations, and transfer of development rights programs. These tools all work together to help the county address the housing affordability challenge in ways that other local jurisdictions without the requisite authority cannot use.

Because of local governance structures, it is admittedly difficult to compare places in Virginia and Maryland with California, Massachusetts, and New Jersey—the fragmented states Lewis examines. He shows that 90 percent of California's population lives in incorporated areas; moreover, the entire states of New Jersey and Massachusetts are incorporated. But these Maryland and Virginia localities function like incorporated places (albeit very large ones) and provide interesting lessons for communities throughout the country.

Other potential policy approaches

But, clearly, one of the major problems with the state/local relationship over the housing element law in California is that it runs up against the challenges presented by Proposition 13: the legislative embodiment of the property tax revolt of 25 years ago that restricted the ability of local governments to raise revenues. Not only did Proposition 13 cap local property taxes (at only 1 percent of market value with increases of no more than 2 percent per year), it also required voter approval for tax increases and sent 85 percent of property tax revenues to the state. Since Proposition 13 was enacted, 43 other states have passed their own form of property tax limitation (Brunori 2005).

Lewis mentions this very briefly when he points out that residential growth in the state is tempered by the desire for retail development. This is probably an understatement. Localities' overreliance on the property tax and

its effect on zoning out residential development have long been recognized (Krefetz 2001). It is widely understood that since the measure was enacted in 1979, growth and development in California have been driven more by fiscal considerations than by coordinated or proactive planning (Gearin 2004). For California to come to grips with its housing issues, it needs to deal with the challenges presented by Proposition 13. It is difficult to expect localities to accept the range of housing identified for them if they do not receive enough state support to manage the fiscal implications of this range.

Another major problem with the California housing law is that there are no real penalties for noncompliance and, further, that noncompliance must be established in court. As a result, less than half of the state's jurisdictions were in compliance with the law. Lewis is correct that the state must proceed with caution if it is to assess penalties for noncompliance. However, this is potentially one of the most important tools the state has in pursuing its housing goals. Expanding pressure by tying state funding for roads, schools, and other infrastructure to housing needs is one approach (stick). Other sticks, such as restrictions on building moratoriums or other construction limits or the contraction of local government authority, are obviously considerably more contentious. Alternatively, as Lewis suggests, rewards for high-performing jurisdictions (carrots) are more promising in most instances.

Finally, Lewis is correct in asserting that California should be very cautious before embracing the housing policy tools that other states use without carefully considering the range of impacts. In particular, it should be careful in considering a regional contribution agreement (RCA) such as exists in New Jersey. There, municipalities are allowed to transfer up to 50 percent of their fair share units to another municipality. At least half of these are required to be low-income units. In exchange for accepting these units, the receiving jurisdiction gets money from the sending jurisdiction: typically \$15,000 to \$25,000 per unit (Field, Gilbert, and Wheeler 1997). Although RCAs are a way to at least partially compensate cities and older places for the burdens placed on them by suburban exclusionary zoning policies, there is a different point of view. David Rusk (2004) contends that despite the cash contribution, RCAs further concentrate poverty in older communities and hinder long-term revitalization.

Conclusion

As the nation's affordable housing crisis, long entrenched along the coasts, begins to generate serious concerns throughout the nation, many are looking to California and its advanced statewide housing policy to provide some

answers and advice on how to deal with these challenges. For that reason, Lewis's ultimate conclusion that simple state review of local housing programs will not in and of itself boost housing production is a helpful and important finding.

I hope that it will also stimulate further discussion and research on the appropriate and most effective role of the state in encouraging the production of more housing or lowering the barriers to localities' fair share of new building. Each state's housing challenges are unique. But given the current climate for policy responses throughout the nation, the importance of states in shaping growth and development in metropolitan areas and setting the stage for healthy communities and strong families is more important than ever.

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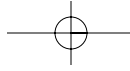
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