

**Learning from Land Use Reforms:
Housing Outcomes and Regulatory Change**

How Can Procedural Reform Support Fair Share Housing Production? Assessing the Effects of California's Senate Bill 35

Moira O'Neill, UC Berkeley & University of Virginia

Ivy Wang, UC Berkeley, Institute of Urban and Regional Development

Introduction

Land use regulation that constrains housing production risks exacerbating and perpetuating economic and racial segregation,¹ inhibiting economic growth,² increasing the cost of housing³, and worsening environmental harm.⁴ California's housing law attempts to avoid these outcomes by imposing "fair share housing production" requirements on local zoning and planning.⁵ Despite this planning framework, housing need has outpaced housing demand in many California communities for decades.

Inadequate production, particularly affordable housing production, has galvanized the California legislature to reform state housing law across many dimensions.⁶ This paper discusses just one of these recent reforms, enacted in 2017—Senate Bill 35 (SB 35).⁷ SB 35 builds on the state's existing fair share production law by limiting procedural obstacles to some housing production. SB 35 does this by preempting local power to impose a discretionary approval process on qualifying affordable or mixed-income housing in localities that have failed to approve adequate affordable housing in prior years.⁸ Lawmakers hoped that making affordable housing development faster and more predictable would allow for more housing to be built in more communities, at a lower cost.⁹ This paper provides preliminary empirical support for that theory. We find that, in some cities, SB 35 is in fact speeding up housing approvals.

1. Michael Lens and Paavo Monkkonen, "Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?," *Journal of the American Planning Association* 82, no. 1 (January 2, 2016): 6–21, <https://doi.org/10.1080/01944363.2015.1111163>; Jonathan T. Rothwell and Douglas S. Massey, "The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas," *Urban Affairs Review* 44, no. 6 (July 1, 2009): 779–806, <https://doi.org/10.1177/1078087409334163>; Stewart E. Sterk, "Incentivizing Fair Housing," *Boston University Law Review*, 101, no. 5 (2021): 1607–1665.

2. Chang-Tai Hsieh and Enrico Moretti, "Housing Constraints and Spatial Misallocation," *American Economic Journal: Macroeconomics* 11, no. 2 (April 1, 2019): 1–39, <https://doi.org/10.1257/mac.20170388>.

3. Glaeser, Edward L., Joseph Gyourko, and Raven Saks. "Why is Manhattan so expensive? Regulation and the rise in housing prices." *The Journal of Law and Economics* 48, no. 2 (2005): 331–369.

4. For example, municipal regulation of land use tends to lower housing density and increase sprawl.

Jonathan C. Levine, *Zoned Out: Regulation, Markets, and Choices in Transportation and Metropolitan Land-Use* (RFF Press, 2006). Sprawl, in turn, leads to more resource-intensive households that contribute disproportionately to carbon emissions. Christopher W. Jones and Daniel M. Kammen, "Spatial Distribution of U.S. Household Carbon Footprints Reveals Suburbanization Undermines Greenhouse Gas Benefits of Urban Population Density," *Environmental Science & Technology* 48, no. 2 (January 2, 2014): 895–902, <https://doi.org/10.1021/es4034364>.

5. Christopher S. Elmendorf et al., "Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework," *Ecology Law Quarterly* 47, no. 4 (2020): 979–80, <https://doi.org/10.15779/Z38FF3M128>; "Annual Progress Reports," California Department of Housing and Community Development, accessed January 16, 2023, <https://www.hcd.ca.gov/planning-and-community-development/annual-progress-reports>.

6. Senate Bill 35, 2017–2018 Reg. Sess. Senate Committee on Transportation and Housing Analysis, 4 (February 2, 2017).

7. In addition to SB 35, the 2017–18 California legislature passed 15 pieces of legislation that aimed to, *inter alia*, raise money to finance low-income developments; incentivize cities to plan neighborhoods for new development, allow cities to implement low-income requirements on developments, preserve existing low-income housing, require cities to plan for more housing, and enhance enforcement against cities that deny housing projects. Liam Dillon, "Gov. Brown Just Signed 15 Housing Bills. Here's How They're Supposed to Help the Affordability Crisis - Los Angeles Times," *Los Angeles Times*, November 19, 2017, <https://www.latimes.com/politics/la-pol-ca-housing-legislation-signed-20170929-htm1story.html>. And the legislature has continued to work actively in this area in the intervening years. Perhaps the most prominent changes have been California's allowing duplexes on most single-family lots statewide and under certain conditions, allowing for denser, multi-family housing on commercial corridors.

8. "Senate Bill 35 – Housing For A Growing California: Housing Accountability & Affordability Act [PDF]," Scott Wiener Representing Senate District 11, accessed March 29, 2022, https://sd11.senate.ca.gov/sites/sd11.senate.ca.gov/files/SB%2035%20Fact%20Sheet_1.pdf.

9. *Id.*

Below, we describe the relevant California housing and planning law and then explain SB 35's intervention within that framework. We next summarize our ongoing land use research—and how the data from that work lends itself to exploring the impact of SB 35 in selected cities. We then offer findings from our research on how SB 35 has operated in five important local jurisdictions: Berkeley, Los Angeles, Los Angeles County, Oakland, and San Francisco.

Background

California's Housing Element Law provides the state's legal and planning framework to meet housing demand and to address residential segregation.¹⁰ Housing Element Law in California “took shape in the 1970s in an era in which there was increasing concern with civil rights and the ability of minorities and low-income families to have an opportunity to live in suburbia, not just in inner-city or rural enclaves.”¹¹ Housing Element Law attempts to remedy economic segregation through comprehensive long-term planning processes that theoretically force localities to plan and zone for each jurisdiction's “fair share” of housing for all income levels.

Housing Element Law operates within California's broader comprehensive planning law. Cities and counties must update their Housing Elements every five or eight years.¹² The Housing Element sets forth how the locality will support production of sufficient housing units at each of four income levels (very-low, low, moderate, and above-moderate).¹³ The local government does not determine what is sufficient—production targets come from the state's Regional Housing Needs Assessment (RHNA).¹⁴

The RHNA process begins with the California Department of Housing and Community Development (HCD) first determining the overall housing need for each region of the state based on state demographic data, working with regional planning bodies.¹⁵ Each region then

10. Darrel Ramsey-Musolf, “Evaluating California's Housing Element Law, Housing Equity, and Housing Production (1990–2007),” *Housing Policy Debate* 26, no. 3 (May 13, 2016): 488–516, <https://doi.org/10.1080/10511482.2015.1128960>.

11. Paul Lewis, “California's Housing Element Law: The Issue of Local Noncompliance,” Public Policy Institute of California, February 2003, <https://www.ppic.org/publication/californias-housing-element-law-the-issue-of-local-noncompliance/>.

12. Cal. Gov't. Code Sec. 65585 (e)(3); “Housing Elements,” California Department of Housing and Community Development, accessed January 16, 2023, <https://www.hcd.ca.gov/planning-and-community-development/housing-elements>.

13. Megan Kirkeby, “Housing Element Site Inventory Guidebook Government Code Section 65583.2 [PDF],” California Department of Housing and Community Development, June 10, 2020, accessed January 16, 2023, https://www.hcd.ca.gov/community-development/housing-element/docs/sites_inventory_memo_final06102020.pdf.

14. Elmendorf, et al, *supra* note 5 at 978; California Land Use Practice, General and Specific Plans Sec. 2.13 (Cal CEB).

15. Cal. Gov't. Code Sec. 65584.01(a).

allocates its housing need between all the cities and counties within its region,¹⁶ assigning a number of housing units to each locality for each income level.¹⁷ Localities must then demonstrate that enough parcels in their jurisdiction are zoned to accommodate those targets¹⁸ and identify and correct for regulatory constraints on housing production.¹⁹

Local governments submit their housing elements to HCD for approval. Following approval, localities must also submit annual reports on their progress in implementing the Housing Elements.²⁰ HCD also has enforcement authority when communities fail to meet their obligations under Housing Element law.²¹ If HCD decertifies a Housing Element, state law provides for several potential consequences: a local government may be unable to access state funding for community development, infrastructure, housing, and transportation²² and be exposed to lawsuits (with plaintiffs eligible for attorneys' fees). A court may also mandate the approval of building permits for affordable housing developments or suspend the local government's permitting authority altogether.²³

Despite the ostensible force of Housing Element Law, California communities have failed to meet housing production needs. Indeed, research indicates that between 1994 and 2000, local compliance with Housing Element Law did not result in any more local housing production.²⁴ Scholars offer multiple explanations for local failure to meet production

16. *Id.* at 65584.03.

17. These income categories are prescribed in the California Health and Safety Code, Section 50093, et seq. *See also* Cal. Gov. Code Section 65583. Notably, some argue that the allocations exacerbate existing income and racial segregation; one study found that the regional planning process led to assigning a disproportionate share of very-low and low-income units to jurisdictions with larger minority populations. *See* Heather Bromfield and Eli Moore, "Unfair Shares: Racial Disparities and the Regional Housing Needs Allocation Process in the Bay Area," University of California, Berkeley (Haas Institute, August 2017), https://belonging.berkeley.edu/sites/default/files/haasinstitute_unfairshares_rhnabayarea_publish.pdf.

18. Christopher S. Elmendorf et al., "State Administrative Review of Local Constraints on Housing Development: Improving the California Model," *Arizona Law Review* 63, no. 3 (April 2, 2021): 611, <https://doi.org/10.2139/ssrn.3614085>.

19. *Id.* at 612, discussing Cal. Gov't. Code Sec. 65583(a), (c).

20. California Department of Housing and Community Development. "Annual Progress Reports." Accessed January 16, 2023. <https://www.hcd.ca.gov/planning-and-community-development/annual-progress-reports>.

21. *See*, Cal. Gov't. Code Sec. 65585(i)-(j); Assem. Bill 72, 2017-18 Reg. Sess. (requiring HCD to review to issue written findings about actions inconsistent with an adopted housing element and authorizing HCD to revoke a prior finding of compliance for a housing element) and AB 215 (2021) (expanding HCD's mandate to notify Attorney General to bring action to enforce state law violations in housing element and authorizes HCD to appoint its own counsel if Attorney General declines to represent the department in such an action), including: <https://www.hcd.ca.gov/planning-and-community-development/accountability-and-enforcement>. That enforcement authority has grown over time. Compare Harold A. McDougall, "From Litigation to Legislation in Exclusionary Zoning Law," *Harvard Civil Rights- Civil Liberties Law Review* (CR-CL) 22, no. 2 (1987): 644, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554813. (Following amendments to state law in 1984, the HCD must give prior approval to all local fair-share plans) with Elmendorf, et al, *supra* note 5 ("The legislature has also authorized HCD to decertify housing elements midcycle for failures of implementation, and has backstopped decertification with fiscal penalties and more.")

22. "Housing Elements," California Department of Housing and Community Development, accessed January 16, 2023, <https://www.hcd.ca.gov/planning-and-community-development/housing-elements>; Christopher S. Elmendorf et al., "I Would, If Only I Could' How Cities Can Use California's Housing Element Law to Overcome Neighborhood Resistance to New Housing," *Willamette Law Review* 57 (July 7, 2021): 221-52, <https://doi.org/10.2139/ssrn.3889771>.

23. Cal. Gov't. Code Sec. 65755; California Department of Housing and Community Development, "Housing Elements Compliance Incentives," Association of Bay Area Governments, April 2021, https://abag.ca.gov/sites/default/files/documents/2021-04/HE_Compliance_One-Page.pdf (summarizing).

24. Paul H. Lewis, "Can State Review of Local Planning Increase Housing Production?," *Housing Policy Debate* 16, no. 2 (2005): 190-92, <https://doi.org/10.1080/10511482.2005.9521539>.

targets.²⁵ Of particular interest to our research is the critique that Housing Element Law did not dismantle the procedural obstacles that can block the construction of new housing.²⁶ In theory, the law required localities to identify and mitigate regulatory constraints to housing production—but in practice, local governments offered little to no analysis of local constraints, and doing so led to no consequences.²⁷ Our prior research suggests to us that the systematic failure to identify and correct for procedural obstacles to production may significantly curtail housing production, even in cities that zone a lot of land for dense housing.²⁸

Procedural obstacles in California communities can manifest in different ways. California law allows local governments latitude in how they approve residential development. Many communities use discretionary review processes when approving housing developments, even those that conform to base zoning and planning standards (i.e. the density, use, setback, and other requirements that dictate what type of development can go on a parcel). Discretionary review refers to a local government's ability to impose conditions of approval—or deny approval altogether²⁹—when deciding whether to approve proposed development.³⁰ It is best understood by contrasting it with a ministerial process in which a decisionmaker applies law to fact without using subjective judgment.³¹ A discretionary process allows for uncertainty and delay, which can increase costs; a ministerial process suggests approval is certain if a project proponent meets specified requirements.

25. These factors include that Housing Element Law does not require localities to actually produce additional housing. Lewis, *supra* note 11; Paavo Monkkonen, Michael Manville, and Spike Friedman, "A Flawed Law: Reforming California's Housing Element," UCLA Lewis Center for Regional Policy Studies, May 2019, <https://www.lewis.ucla.edu/research/flawed-law-reforming-california-housing-element/>. Moreover, there are few material consequences for failing to deliver on housing shares, and the planning process bases local housing need on past population growth, perpetuating exclusivity and unaffordability. Christopher S. Elmendorf, "Beyond the Double Veto: Land Use Plans As Preemptive Intergovernmental Contracts," *Hastings Law Journal* 71 (December 1, 2019): 79–105, <https://doi.org/10.2139/ssrn.3256857>; Noah Kazis, "Ending Exclusionary Zoning in New York City's Suburbs," NYU Furman Center, November 9, 2020, <https://furmancenter.org/research/publication/ending-exclusionary-zoning-in-new-york-citys-suburbs>. Finally, the process frequently defers to affluent cities that lobby to keep their RHNA shares low. Monkkonen et al, *supra* note 25 at 3.

26. Monkkonen et al, *supra* note 25 at 3.

27. Elmendorf et al., *supra* note 18 at 612.

28. Moira O'Neill, Giulia Gualco-Neslon, and Eric Biber, "Examining Entitlement in California to Inform Policy and Process: Advancing Social Equity in Housing Development Patterns," Berkeley Law, March 18, 2022, <https://www.law.berkeley.edu/wp-content/uploads/2019/02/Examining-the-Local-Land-Use-Entitlement-Process-in-California.pdf>. ("CARB Report").

29. California's Housing Accountability Act (HAA) codified in Cal. Gov't. Code Sec. 65589.5 et seq. requires that a local government issue written health and safety findings when imposing conditions of approval that reduce density or outright denying approval for certain housing developments; the written findings must justify the denial "based on a preponderance of the evidence in the record." (65589.5(d).) 1999 amendments to the HAA also provided that the HAA limits the scope of local discretion over developments that conform to "objective" general plan and zoning requirements. Cal. Gov't. Code Sec. 65589.5(j). There are also penalties for bad faith disapprovals. Cal. Gov't. Code Sec. 65589.5(l).

30. For a discussion of what characterizes a discretionary action, see *Friends of Westwood, Inc. v. City of Los Angeles* 181 Cal. App. 3d 259, 269-74 (1987) (when city employees can set standards and conditions for many aspects of a proposed building, the approval process is discretionary).

31. For a definition of ministerial in California law, see *Prentiss v. City of S. Pasadena*, 15 Cal. App. 4th 85, 90, 18 Cal. Rptr. 2d 641 (1993), citing Cal. Code Regs., title 14 section 15268(b)(1) ("Ministerial" describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out.")

Discretionary design, architecture review, site development review, and historical preservation review are all examples of discretionary processes that localities apply to development that conforms to all base zoning requirements.³² In past research, we found that nearly all dense developments we studied went through a discretionary approval process—even in areas that cities have identified for dense development through zoning and planning designations.³³ Discretionary processes may enable local governments and homeowners to effectively block projects by creating costly delay and uncertainty.³⁴ Our earlier work also found that median entitlement timeframes for discretionary projects can span a few months to many years, with timeframes varying widely across neighboring cities for similar developments subject to similar processes.³⁵

In California, local discretionary review also triggers state-mandated environmental review under the California Environmental Quality Act (CEQA). The California legislature enacted CEQA in 1970 as a tool to review and mitigate potentially significant environmental impacts of public actions.³⁶ As relevant here, CEQA requires local governments to study and disclose the impacts of their decisions, including discretionary housing approvals, on the environment (defined broadly), and to engage in a public participation process to guide that analysis of impacts.³⁷ Projects that are more likely to have a significant effect on the environment require more extensive study and disclosures. CEQA review also applies to local legislation. For example, if the local legislature would like to create a new ministerial pathway for housing approvals previously subjected to discretionary review, CEQA applies.³⁸

32. CARB Report, p. 18.

33. CARB Report at 51-52. (We studied ~2,000 housing approvals for 5 or more units of housing. Over 80% required discretionary approvals.)

34. Elmendorf, *supra* note 25 at 88. A recent appellate opinion demonstrates that project proponents and housing advocates may successfully seek judicial relief from local level bad faith denials under the HAA, partially ameliorating this problem. See *California Renters Legal Advocacy & Education Fund v. City of San Mateo*, 68 Cal.App.5th 820 (2021).

35. CARB Report, Table 8.

36. See Cal. Pub. Res. Code Sec. 21002.

37. Our prior research found that most dense development of five units or more across twenty jurisdictions was subject to discretionary review, even when sited in areas designated for dense development. As a result, most multifamily developments fell within CEQA's ambit. Moreover, courts have interpreted CEQA broadly. Notoriously, a state court of appeal recently found that U.C. Berkeley's decision to increase student enrollment was a "project" subject to CEQA review, and considered environmental impacts including "increased use of off-campus housing by U.C. Berkeley students (leading to increases in off-campus noise and trash), displacement of tenants and a consequent increase in homelessness, more traffic, and increased burdens on... public safety services." See *Berkeley's Neighborhoods v. Regents of University of California*, 51 Cal.App.5th 226 (1st Dist. 2020). In this instance, the state legislature stepped in to supersede the court's decision by amending CEQA to state that enrollment increases on their own do not constitute a project under CEQA. Cal. Pub. Res. Code Sec. 21080.09.

38. See, e.g. *Union of Med. Marijuana Patients, Inc. v. City of Upland*, 245 Cal. App. 4th 1265, 1272 (4th Dist. 2016) ("Ordinances passed by cities are clearly activities undertaken by a public agency and thus potential 'projects' under CEQA") (quoting *Santa Monica Chamber of Commerce v. City of Santa Monica*, 101 Cal.App.4th 786, fn. 2 (2nd Dist. 2002). However, "a municipal ordinance that merely restates or ratifies existing law does not constitute a project..." *Id.* at 1273.

Critics of CEQA argue that this environmental review process adds significant expense, time, and uncertainty to project development, potentially leading to fewer residential projects being pursued and built.³⁹ CEQA lawsuits have challenged or stalled the development of affordable housing, as well.⁴⁰ Indeed, some scholars argue that CEQA's deference to local agencies in the face of extensive delays and bad faith tactics may allow development opponents to "launder" project denials through CEQA when the actual grounds for their option may have nothing to do with environmental concerns.⁴¹

How Senate Bill 35 Operates

SB 35 reduces procedural hurdles to production. SB 35 does this by eliminating both local discretionary review and state mandated environmental review for qualifying urban housing developments in jurisdictions that have not met their state-set housing production targets or process requirements under the Housing Element Law.

If cities or counties failed to approve enough housing units in their most recent reporting period to meet their need allocation for certain income levels, they lose their discretionary authority over specified projects.⁴² Instead, housing developers can apply to have the city use a state-required ministerial approval process.⁴³

Under the SB 35 process, local governments may still impose their objective⁴⁴ local zoning and design review standards. (However, SB 35 significantly reduces or eliminates parking requirements.⁴⁵) Local governments may not impose additional discretionary review, however. Importantly, SB 35 also provides for strict timelines for the approval process. The local government must adhere to 90 or 180-day time limits (depending on the size of

39. See, e.g., Jennifer Hernandez, "California Environmental Quality Act Lawsuits and California's Housing Crisis," *Hastings Environmental Law Journal* 24, no. 1 (January 1, 2018): 21–71, https://repository.uchastings.edu/cgi/viewcontent.cgi?article=1032&context=hastings_environmental_law_journal; M. Nolan Gray, "How Californians Are Weaponizing Environmental Law," *The Atlantic*, March 12, 2021, <https://www.theatlantic.com/ideas/archive/2021/03/signature-environmental-law-hurts-housing/618264/>.

40. Maureen Sedonaen, "CEQA Abuse Delays, Frustrates Affordable Housing," *San Mateo Daily Journal*, August 1, 2018, https://www.smdailyjournal.com/opinion/guest_perspectives/ceqa-abuse-delays-frustrates-affordable-housing/article_4f04b844-951c-11e8-bfac-4759a0b619fd.html; Gray, *supra* note 39.

41. Christopher S. Elmendorf and Timothy G. Duncheon, "When Super-Statutes Collide: CEQA, the Housing Accountability Act, and Tectonic Change in Land Use Law," Social Science Research Network, July 25, 2022, <https://doi.org/10.2139/ssrn.3980396>.

42. Cal. Gov't. Code Sec. 65913.4(a)(4)(A). SB 35 initially provided that a jurisdiction that either permitted too few developments by income level or had not submitted their annual report for two consecutive years was required to perform streamlined review for qualified developments. The state legislature later removed two consecutive years of nonreporting as a way for jurisdictions to fall under SB 35. Compare Stats.2017, c. 366 (S.B.35), Sec. 3, eff. Jan. 1, 2018 to Stats.2018, c. 92 (S.B.765), Sec. 2, eff. Jan. 1, 2019.

43. See *Prentiss v. City of S. Pasadena*, 15 Cal. App. 4th 85, 90 (1993).

44. Cal. Gov't Code Sec. 65913.4(a)(5).

45. Localities may not impose parking standards for streamlined developments located within a half mile of public transit, located within architecturally and historically significant historic districts, requiring on-street parking permits but not offering them to occupants of the development, or located within one block of a car share vehicle. For all other developments, parking standards cannot exceed one parking space per unit. Cal. Gov't Code Sec. 65913.4(d).

the development) for design review and public oversight processes.⁴⁶ Affordable housing developments also receive extended expiration periods to complete construction.⁴⁷ If the project is not consistent with objective standards, the city must inform the developer in writing within 60 or 90 days.⁴⁸ Local governments may not impose additional fees or inclusionary housing requirements on these developments.⁴⁹ Because SB 35 does not allow for a discretionary approval process for qualifying projects, CEQA review is no longer required.

Which projects are eligible? SB 35 applies a ministerial approval process only to urban multi-family housing developments that meet specific affordability thresholds.⁵⁰ Additional criteria attempt to preserve affordability and prevent displacement: eligible projects cannot involve the demolition of affordable or tenant-occupied housing.⁵¹ The development must not require subdivision.⁵² The development may not be sited in environmentally sensitive or significant areas.⁵³ A significant portion of the law also ensures developers using this streamlined process pay prevailing union wages to both contractors and subcontractors.⁵⁴

Research Questions and Hypothesis

In this paper, we explore how SB 35 operated within specific study cities for project approvals in 2018, 2019, and 2020. We examine:

1. What types of developments benefited from SB 35 in these years in our study cities?
2. For development that benefited from SB 35, how did the SB 35 approval process unfold?
3. What impact does SB 35 have on approval processes within these cities?

46. Cal. Gov't Code Sec. 65913.4(c).

47. Cal. Gov't Code Sec. 65913.4(e).

48. Cal. Gov't Code Sec. 65913.4(b)(1).

49. Localities cannot impose any increased fees or inclusionary housing requirements based solely or partially on the fact that the project has received streamlined approval under SB 35. Cal. Gov't Code Sec. 65913.4(f).

50. Cal. Gov't Code Sec. 65913.4(a).

51. Cal. Gov't Code Sec. 65913.4(a)(7). Indeed, if the proposed project is on a site that used to have tenant-occupied housing but that tenant housing was demolished within the past 10 years, the project is ineligible. There are additional anti-displacement provisions in the code as well.

52. Cal. Gov't Code Sec. 65913.4(a)(9).

53. Cal. Gov't Code Sec. 65913.4(a)(6).

54. Cal. Gov't Code Sec. 65913.4(a)(8).

In earlier research, we examined the pathways to approvals for developments of five or more units of housing issued in 2014, 2015, 2016, and 2017 in twenty-seven jurisdictions. We found that more than 80 percent of the over 2,000 approved developments navigated a discretionary review process on the way to approval, i.e., they required “entitlement” before they could proceed to the building department for permits to build.

For developments subject to a discretionary process, we found extreme differences in the time between a project’s application and its entitlement, even between neighboring urban cities for similar housing development. The median timeframe to entitlement for multi-family development that conformed to all local planning and zoning requirements in San Francisco exceeded 25 months. Next door, in Oakland, the median for the same was 6 months. Both cities had similar regulation “on the books” and applied identical CEQA streamlining to satisfy state required environmental review.

We hypothesized that (as the Legislature intended it to) SB 35 should curtail process time lags and risk of opposition for at least some mixed income development. We hypothesized that SB 35 would have the greatest impact in cities with more onerous procedural hurdles—like San Francisco or Berkeley.

Methods

To understand SB 35’s impact on entitlement processes in our study jurisdictions, we built on past research by adding analysis and data from existing case studies and Annual Progress Reports produced under the Housing Element Law. Our Comprehensive Assessment of Land Use Entitlements Study (CALES) case studies used mixed method research to understand planning, zoning, and approval pathways in twenty-seven jurisdictions throughout the State of California. To identify which of these cities would provide us insight into the potential impact of SB 35, we first used 2018 and 2019 annual progress reports to identify which of our 27 study jurisdictions reported approving developments that used SB 35. Only five of our study cities reported approvals through SB 35 in these years, so we restricted our study to those five jurisdictions: Berkeley, Oakland, Los Angeles, Los Angeles County, and San Francisco. (That said, that the other 22 jurisdictions initially reported no approvals under SB 35 is itself a notable fact about the law’s early implementation, meriting further investigation.)

Local governments implement SB 35, not the state. Whether developers use SB 35 depends partly on how localities provide information about their SB 35 procedures and whether they make prompt determinations about whether projects meet objective criteria. Thus, to better understand some factors that might drive local outcomes despite the state's attempt to standardize approval processes, we reviewed how these five local governments explain their implementation of SB 35 and how SB 35 fit into each jurisdiction's existing legal regime.

Next, we examined how SB 35-eligible projects navigated the SB 35 approval pathway in each city. Our goal was to compare these processes to processes for similar developments in earlier years, which we can explore using a housing approval dataset developed for each of our CALES case study cities.

Reviewing both Annual Progress Reports and local data portals, we found 49 potential observations of proposed developments across five jurisdictions.⁵⁵ We then confirmed whether these 49 observations did, in fact, benefit from SB 35 and we expanded our data collection to determine if additional developments benefited from SB 35 in 2020. We then coded the data to allow for comparative analysis with similar developments entitled in 2014-2017 in the same five jurisdictions.

The observations from prior years do not have all the details we would need to conclusively determine that a project would have met SB 35 requirements. For example, we do not have information on whether developments entitled in 2014-2017 met the statute's prevailing wage requirements. We therefore selected projects entitled prior to SB 35 that met SB 35's affordability, density, and siting requirements and that were consistent with objective zoning and design review standards. We then compared these pre-SB 35 entitlements to SB 35 approvals in later years. We focused on required steps and entitlement timeframes when comparing developments. Each jurisdiction requires its planning department to review whether the proposed development qualifies for review under SB 35, and approval under SB 35, to proceed to the next step of applying for a building permit. This allows us to create a comparison with discretionary approvals in prior years.

55. We note here that a quick review of the APR data across the entire state for these same years suggests that the total number of SB 35 approvals statewide may not be very high. The majority of reported SB 35 approvals in the 2018, 2019, and 2020 APR data (Table A) are not correct. In particular, jurisdictions appeared to report SB 35 approvals for single family development (not allowed under the law). The APRs from those years indicate only around 125 possible SB 35 approvals across the state. We are unable in this research to fully explain why more development did not benefit from SB 35. Base zoning (density and use controls) in some urban communities could be the problem. Prevailing wage requirements could be problematic in some regional markets. Or site characteristics might also present an obstacle.

An important limitation of our study, and data, is that what we observe in each study city is not representative of how entitlement (or SB 35) operates across the state. We rely on case studies to explain entitlement (and the application of SB 35) in specific cities—we not draw conclusions about how SB 35 operates in California, more generally, though we hope these findings help build towards that larger understanding. Also, our observations are limited to proposed developments that were successfully entitled in 2014-2017 or successfully qualified for SB 35's ministerial process in 2018, 2019, or 2020. In other words, our data represent those developments that developers likely believed had a high enough probability of success that they were willing to pursue entitlement in the first place. Thus, we cannot rigorously evaluate whether SB 35 is changing the quantity or type of project proposed by developers, who make those decisions in light of the applicable legal regime. Even so, to the extent that we show a faster and more predictable approval process under SB 35, we would expect that developers adjust their behavior accordingly. Finally, we did not find complete data in all five cities that would allow for comprehensive timeframe calculations.

Findings

Though SB 35 provides criteria about when and where it applies and imposes time constraints on planning department eligibility review, it is not possible to extract a fully standard approach to reviewing and processing applications from the language of the statute itself. Indeed, none of the five jurisdictions we studied modified their procedural rules in exactly the same way. Thus, we begin each city-specific discussion with how the local government complied with the state law's eligibility review requirements. This is significant in California because past efforts to impose time constraints on procedure have had mixed results, at best.⁵⁶ Fully understanding our findings with respect to SB 35's project-level impacts requires contextualizing those findings with cities' still-disuniform procedures for accessing the SB 35 process. Having provided that context, we then discuss the impact of SB 35 on development approvals, offering comparisons with similar developments in prior years where possible.

The City of Los Angeles

Los Angeles' SB 35 Processes Add More Steps to Determining Eligibility, but the City's Application of Density Bonus Law Allows More Developments to Qualify.

Separate from SB 35, the City of Los Angeles generally provides a ministerial process for code compliant development, up to 49 units.⁵⁷ California's Density Bonus law further allows some code compliant developments larger than 49 units to benefit from Los Angeles' local ministerial process.⁵⁸ A property owner that qualifies for ministerial approval under local law applies for a building permit directly with the Department of Building and Safety. If the development does not qualify for ministerial review, the building department refers the project to the Department of City Planning for planning review.

56. For example, the Permit Streamlining Act requires that local governments make completeness determinations within 30 days of a project application date, or the project application is "deemed complete" and ready for planning department review. We have observed many cities ignore this requirement entirely, whereas others do not make completeness determinations but do capture "deemed completed" dates within planning review tracking software.

57. Site Plan Review (the blanket discretionary provision with Los Angeles' local code) generally applies at 50 units. Los Angeles Municipal Code §16.05 (C)(1) There are additional criteria (related to specified planning areas) that may also pull what would be ministerial into a discretionary approval pathway. Also, Community Design Overlays can render what would be ministerial discretionary (see § 13.08 (E)).

58. Los Angeles Municipal Code §12.22 A.25(g).

In contrast, to access SB 35 ministerial review, a project proponent begins with the Department of City Planning and navigates multiple steps before proceeding to the Department of Building and Safety. Los Angeles created an administrative procedure, the Streamlined Infill Project (SIP) process, to review and track housing developments that qualify for SB 35.⁵⁹ The goal of the SIP process is to confirm that eligible projects meet the City's objective zoning standards necessary to access SB 35's ministerial review. The SIP process requires multiple reviews, including from the Department of City Planning and the Housing and Community Investment Department, before proponents submit plans to the Los Angeles Department of Building and Safety.⁶⁰ Under the current procedures, it appears that applicants for ministerial review under SB 35 are required to pay an "Expedite fee" for this service, in addition to the regular fee for a plan check.⁶¹ Notably, SB 35 forbids the levying of "increased fees" based solely or partially on the fact that the project has received this ministerial approval process, though it is unclear whether the prohibition extends to processing fees.⁶²

Los Angeles states that it will determine whether the application is consistent with objective design standards within SB 35's required timeframes. Any amendment to the original submission, however, restarts that review clock.⁶³ Moreover, the City requires a project proponent complete a "Pre-Application Review Process (PARP)" to determine eligibility. The City interprets SB 35's time limitations to apply only after this preliminary review.⁶⁴ It is unclear whether these pre-application review process requirements are consistent with SB 35.

A final interpretive issue arising in Los Angeles' implementation of SB 35 concerns the application of density bonuses to SB 35 projects. SB 35 applies only to projects where half of units are affordable, but until recently did not provide clear language on whether the minimum affordability threshold was to be calculated prior to or after a density increase.⁶⁵ The City interpreted SB 35 to allow for "[a] minimum of 50 percent of the total units in the development, calculated prior to any density increase, must be affordable."⁶⁶

59. The same process is used to approve supportive housing projects that qualify for streamlined review under AB 2162 (2018).

60. "SB 35 Streamlined Infill Projects - Fact Sheet [PDF]." City of Los Angeles. Accessed January 31, 2023. <https://planning.lacity.org/odocument/c1c1bf8b-a0c8-4a4f-8237-7e097528deba/SB%252035%2520Streamlined%2520Infill%2520Projects%2520-%2520FAQ.pdf>.

61. *Id.*

62. Cal. Government Code § 65913.4(h)(1) provides "A local government shall not adopt or impose any requirement, including, but not limited to, increased fees or inclusionary housing requirements, that applies to a project solely or partially on the basis that the project is eligible to receive ministerial or streamlined approval pursuant to this section."

63. "SB 35 Streamlined Infill Projects - Fact Sheet [PDF]."

64. Matthew Glesne, "Implementation of SB 35 and SB 167 in the City of Los Angeles," PDF, Slide show, Los Angeles Department of City Planning, (n.d.) (n.d.), https://static1.squarespace.com/static/58793de5f7e0abe551062b38/t/5a907bd8085229b2646756f6/1519418329943/SB+35+and+SB+167+SCANPH+event_DCP_pdf.pdf.

65. Cal. Gov't Code § 65913.4(a)(4)(B)(ii) (2021).

66. "SB 35 Streamlined Infill Projects - Fact Sheet [PDF]."

This parallels how the City applies the state Density Bonus Law to its own local ministerial process. However, in September 2022, the state legislature amended the law to provide that the minimum affordability threshold should be calculated prior to the application of a Density Bonus, as Los Angeles was already doing.⁶⁷

SB 35 appears to cut approval times in Los Angeles

So, how did the City's SIP operate? Overall, the SIP appears to have reduced approval timeframes for 18 developments. The median approval timeframe for the developments that qualified for SB 35 was less than 3 months (or 2.7 months). We found 11 similar developments entitled in prior years that have project and site characteristics that would seem to qualify for SB 35—had the state law applied in those prior years. The median time to entitlement for the developments in earlier years was approximately 7 months. This indicates that SB 35 reduces approval timelines for some multifamily affordable housing developments in Los Angeles.

To illustrate the impact of SB 35 on individual developments we provide two examples from the same neighborhood. We compare 459 Hartford Ave S and 1218 Ingraham St, which are both 100 percent affordable developments in the Westlake neighborhood. 459 Hartford Ave S, a 101-unit development sited on what was once surface parking, took 132 days to reach its final entitlement in 2017. 1218 Ingraham, a 121-unit development also sited on a former surface parking lot, took 71 days to approve under SB 35.

In terms of affordability mix, the 11 comparable pre-SB 35 developments were all 100 percent affordable.⁶⁸ After SB 35, the City approved 18 developments through SB 35. 16 of 18 developments were 100 percent affordable. The City also approved one development that was 37 percent affordable and another that was 34 percent affordable. (In both instances, the developments received density bonuses and the City appears to have calculated the affordability mix prior to applying the bonuses based on its interpretation of SB 35.)

67. Stats.2022, c. 658 (A.B. 2668), Sec. 1, eff. Jan 1, 2023.

68. We define developments with all but one or two units designated as affordable units to be 100% affordable, since typically those units are set aside as managers' units.

City of Los Angeles 2014-2017 Observations with SB 35 Qualifying Criteria

Project	Total Units	Total Affordable Units	CEQA Compliance Pathway	Months to Approval to proceed to Building Department	Opposition through local administrative appeal
7843 N Lankershim Blvd	50	50	Mitigated Negative Declaration	4.3	Not appealed
3200 W Temple St.	59	59	CEQA Exempt (Class 32)	3.7	Not appealed
307 N Wilmington Blvd.	176	174	Mitigated Negative Declaration	10.8	Appealed (land use)
1307 W 7th St.	76	75	Mitigated Negative Declaration	8	Appealed (land use)
649 S Wall St.	55	54	Mitigated Negative Declaration	6.9	Not appealed
2631 S Crenshaw Blvd.	50	49	Mitigated Negative Declaration	11.4	Not appealed
13366-13380 W Beach Ave.	21	20	CEQA Exempt (Class 32)	4.5	Not appealed
655 San Pedro St. S	81	80	CEQA Exempt (Class 32)	6.5	Not appealed
4306 Adams Blvd. W	38	37	CEQA Exempt (Class 32)	2.6	Not appealed
4339 Adams Blvd. W	48	47	Mitigated Negative Declaration	7.8	Not appealed
459 Hartford Ave. S	101	100	Addendum to Prior Mitigated Negative Declaration	4.4	Not appealed

City of Los Angeles 2018-2020 SB 35 Approvals

Project	Total Units	Total Affordable Units	Months to Approval to proceed to Building Department
3200 Temple ST. W	64	63	2.1
1218 Ingraham St. W	121	120	2.4
14142 Vanowen ST. W	64	63	2.9
4200 Pico Blvd. W	54	53	2.8
4719 Normandie Ave. S	43	42	4.0
5627 Fernwood Ave. W	60	59	6.9
456 9th St. W	91	90	Unknown
7022-7026 South Broadway and 235 W 71st St	52	51	2.6
2106, 2108, 2112 South Central Ave.	57	56	2.8
1601-1647 North Las Palmas Ave.	202	69	8
1104-11014 Santa Monica Blvd.	51	50	4.1
5501, 5511 South Main St	57	56	3.5
401-411 E 6th St and 522 S San Julian St	94	93	5.6
4219 - 4227 S Broadway	87	87	2.3
1040 N Kenmore Ave, 4904-4920 W Santa Monica Blvd	62	61	1.5
3300-3322 W Washington Blvd	84	31	2.9
407-413 E 5th St	150	150	6.3
6576-6604 S W Blvd.	64	63	2.1

San Francisco

SB35 Simplifies San Francisco's Project Application Procedures for Qualifying Projects

San Francisco's local application process provides important context to understand the impact of SB 35. San Francisco applies discretionary review to all development. San Francisco procedural requirements provide multiple opportunities for discretionary review, public hearings, and neighborhood opposition that often begin before a developer applies for entitlement.⁶⁹ These pre-application hearing requirements are supposed to air out potential opposition to proposed development and mediate disputes with neighbors. But they can add years to the entitlement process before the start of formal planning review (and environmental review). Moreover, San Francisco historically has not applied time constraints once formal planning review begins.⁷⁰ Another unique feature of San Francisco local law is that it provides a catch-all opportunity for "interested parties" to request Discretionary Review of any permit, including code compliant development.⁷¹ (This process is separate from the processes for local administrative appeal of housing approvals, which offer additional opportunities for neighborhood opposition post-entitlement.) In practice, this allows project opponents anywhere within the City to present previously undisclosed complaints about the proposed development when the proposed development is on the eve of entitlement.⁷² In our study of San Francisco, we found that when the Planning Commission takes Discretionary Review, it imposes a new set of conditions of approval. We have also heard from stakeholders that even when the Planning Commission does not take Discretionary Review, the request alone may trigger last minute negotiations that alter the proposed development.

San Francisco's implementation of SB 35 creates a comparatively simplified and time-constrained initial review process and eliminates the notice and hearing requirements typically required of development proposals. Importantly, SB 35 eliminates the pre-application hearings *and* the opportunity for project opponents to request Discretionary Review.

69. San Francisco requires all development proposals of more than ten units of housing to complete a Preliminary Project Assessment (PPA) *before* they may file a Project Application. See "Preliminary Project Assessment: Informational Packet," San Francisco Planning, January 21, 2022, accessed January 16, 2023, <https://sfplanning.org/resource/ppa-application>. The PPA triggers a mandatory public notice and hearing that precedes the formal planning review process (and required hearings).

70. Specifically, San Francisco has openly acknowledged its failure to make completeness determinations (consistent with the Permit Streamlining Act) when reviewing Project Applications. See <https://sfbos.org/permit-streamlining-act>. We found that to be true in our 2014-2017 dataset.

71. Municipal Business and Tax Regulations Section 26(a).

72. Though the Planning Commission may only "take" Discretionary Review under "extraordinary circumstances" there is a hearing to allow the interested party to request Discretionary Review.

Applicants seeking to use SB 35 must only complete the appropriate applications and submit architectural plans to initiate review of whether SB 35 applies.⁷³ SB 35 thus eliminates substantial sources of unpredictability. Developers can be certain that if the proposed development conforms to planning and zoning law and meets all SB 35 criteria, San Francisco will approve the plans for development as proposed and allow the developer to proceed to the Department of Building Inspection.

The City also provides an informational packet that summarizes the major objective criteria a project must meet under the statute and describes the application process.⁷⁴ Like Los Angeles, San Francisco specifies that any changes to the application will restart the statutorily required 90 and 180-day review timelines.

SB35 Shortens Approval Timeframes for Qualifying Developments in San Francisco

In San Francisco, we found only one multifamily affordable housing development out of 140 entitlements issued in 2014-2017 that offered an opportunity for meaningful comparison. In fact, there are only five 100 percent affordable developments in the San Francisco 2014-2017 entitlement dataset. Four of them are not suitable for comparison because of process or site characteristics.⁷⁵

The pre-SB 35 development is a 94-unit 100 percent affordable development in the Mission/Dolores neighborhood for formerly homeless seniors that satisfied the City's application of its inclusionary ordinance on another parcel slated for mixed-use development. This project took just over a year to entitlement (367 days).⁷⁶ This affordable development conformed to all planning and zoning, and qualified for a streamlined environmental review process.⁷⁷ The planning department applied its priority processing, as well. The proposed affordable housing did not require any approvals other than environmental review.

73. *Id.* at 2-3.

74. "SB 35 Supplemental Application [PDF]," San Francisco Planning, October 23, 2020, accessed April 8, 2022, https://sfplanning.org/sites/default/files/forms/SB35_SupplementalApplication.pdf. San Francisco has also dedicated a section of its city website to information on SB 35, in English, Spanish, Mandarin, and Tagalog. See "Affordable Housing Streamlined Approval (SB-35)," San Francisco Planning, accessed April 8, 2022, <https://sfplanning.org/resource/sb35-application>.

75. These four were not suitable for different reasons: one required demolition of housing for sensitive populations, one required a conditional use permit, and two required general plan amendments. These characteristics would have disqualified these projects from benefiting from SB 35.

76. This calculation is from the date of application. San Francisco also requires a mandatory pre-application review process, called a Preliminary Project Assessment (PPA) for large projects (over ten units). If you calculate the total timeline from the PPA application date, that would add another 59 days to the entitlement timeframe.

77. The development qualified for tiering under section 15183.3 of the CEQA guidelines and Public Resources Code Section 21094.5.

City and County of San Francisco 2014-2017 Observations with SB 35 Qualifying Criteria

Project	Total Units	Total Affordable Units	CEQA Compliance Pathway	Months to Entitlement	Opposition through local administrative appeal
1296 Shotwell	94	94	Tiering (15183 Community Plan Exemption)	12.2	Appealed

After entitlement, someone appealed the Planning Commission's decision to use streamlined environmental review⁷⁸ (consistent with the planning department's recommendation).⁷⁹ The Board of Supervisors upheld the Planning Commission approval, but the local administrative appeal hearing and decision added another 76 days to the 367 days to entitlement.

Following the implementation of SB 35, San Francisco approved nine 100 percent affordable developments and one group housing development (with 53% of the beds below market rate) under SB 35 in 2018, 2019 and 2020. We lack data on the application date for one development. The median time frame to approval for the remaining nine developments was 125.5 days, or approximately 4 months.

City and County of San Francisco 2018-2020 SB 35 Approvals

Project	Total Units	Total Affordable Units	Months to Approval to proceed to Building Department
2340 San Jose Ave	130	130	6.2
266 4th St	70	69	Unknown
3001 24th St	45	45	5.2
457 Minna St	270	143	6.1
681 Florida St.	130	130	1.6
833 Bryant St.	146	145	5.3
1360 43rd Ave.	135	135	3.5
921 Howard St.	203	203	1.4
78 Haight St.	63	63	3.1
180 Jones St.	70	70	3.9

78. Sec. 15183.3 of CEQA Guidelines and Section 21094.5 of the CA Public Resources Code allow for Community Plan Exemptions (or the ability to "tier" off of plan EIR in specified circumstances).

79. San Francisco's online portal provides no additional detail about the administrative appeal or the party that appealed the approval. The record states "an appeal was filed" instead of naming the party that filed the appeal. The archived website no longer provides access to 2017 hearings in front of the Board of Supervisors.

Comparing specific developments to the pre-SB-35 development reveals more. For example, one SB 35 development was located five blocks away from the pre-SB 35 site described above: its entitlement under SB 35 took 157 days. This is less than half its pre-SB 35 neighbor. And while the pre-SB 35 project was then further delayed by a local administrative appeals process, SB 35 removed this as an obstacle altogether.

The City of Oakland

SB 35's Impact on Oakland's Project Application Procedures Are Unclear

As of summer 2022, Oakland offered scant resources explaining its SB 35 procedures. The extent of its SB 35 public education resources appears to be a two-page checklist and brief description of the SB 35 ministerial process.⁸⁰ The checklist details the major requirements for accessing ministerial review.⁸¹ The checklist states that approval decisions will be made within SB 35's required timelines of 90 days for developments of 150 or fewer units and 180 days for developments of greater than 150 units, but does not mention the separate 60 and 90-day deadlines for determining consistency with objective design standards. The document does not provide information on what forms developers must submit to qualify. Unlike the City of Los Angeles and San Francisco, Oakland does not specify whether application revisions restart the clock.⁸²

Oakland's application procedures are more difficult to ascertain from public, written documents than San Francisco's, but that does not necessarily mean that they are more burdensome. In our prior work, we found Oakland's discretionary timeframes to entitlement for development (including non-code compliant development) comparatively short.⁸³

80. "City of Oakland SB 35 Checklist Decision Tree [PDF]," Metropolitan Transportation Commission, n.d., https://mtc.ca.gov/sites/default/files/City_of_Oakland_SB_35_Checklist_Decision_Tree.pdf.

81. These track the law's requirements and include level of affordability, percentage of affordable units, zoning, siting, construction worker compensation, conformity with objective standards of the planning code, and potential for tenant displacement.

82. *Id.*

83. Timeline data is much more difficult to pull out of Oakland compared with San Francisco. Almost half of all our observations are missing applications and therefore, application dates, whereas nearly all San Francisco observations have application documents that we can use to determine application dates. Fortunately, the observations within Oakland with timeline data, combined with interviews, allowed us to draw some conclusions about how Oakland compared with its neighbors.

It Is Unclear Whether SB 35 Shortens Approval Timeframes in Oakland, Given a Lack of Pure SB 35 Developments

We found seven entitlements in our 2014-2017 dataset that offer valuable comparisons to developments that benefited from SB 35. All were 100 percent affordable. We have complete timeframe data for only five. The entitlement timeframes ranged from 4 months to 41 months.

City of Oakland 2014-2017 Entitlement Observations with SB 35 Qualifying Criteria

Project	Total Units	Total Affordable Units	CEQA Compliance Pathway	Months to Entitlement	Opposition through local administrative appeal
0 7th St.	79	79	Tiering (15183 Community Plan Exemption)	18.8	Not appealed
2126 Martin Luther King Jr. Way	62	62	CEQA Exempt (Class 32)	4.8	Not appealed
2201 Brush St.	59	59	CEQA Exempt (Class 32)	41.9	Not appealed
445 30th St.	58	57	CEQA Exempt (Class 3)	–	Not appealed
0 35th Ave.	181	179	Tiering	–	Not appealed
1415 Harrison St.	81	81	CEQA Exempt (Class 3)	4	Appealed on land use grounds
344 13th St.	66	65	CEQA Exempt (Class 3)	4	Not appealed

In 2018-2020, Oakland approved two developments under SB 35, both 100 percent affordable. They took 10 months to approval for a project of 97 units and around 14 months for a project of 60 units. This is longer than the median pre-SB 35 timeframes.

City of Oakland 2018-2020 SB 35 Approvals

Project	Total Units	Total Affordable Units	Months to Approval to proceed to Building Department
2125 Telegraph Ave.	97	97	10.3
2372 International Blvd.	60	59	13.9

However, a closer exploration suggests these projects were not approved entirely within the SB 35 framework (and indeed, exceeded the statutory SB 35 time limits).⁸⁴ These two developments both required approvals outside of the SB 35 process. The 97-unit development revised its plans to allow for more units after obtaining a lot line adjustment, which may have delayed the final approval. The 60-unit project involved subdividing an existing

84. SB 35 holds local government to strict time limits. For projects of 150 units or fewer, they must respond within 60 days if a project conflicts with any standards and 90 days to complete design review and public oversight. Cal Gov't. Code § 65913.4(c)(1)-(d)(1).

parcel into two lots, which required a separate application outside the SB 35 process.⁸⁵ The approval documents suggest that the City of Oakland allowed the project to qualify for ministerial review under SB 35 while also requiring the developer to separately process the subdivision application, a process which perhaps did not strictly adhere to SB 35, but did facilitate the approval process. Moreover, the 60-unit project appears not to have requested review under SB 35 when it first sought approval in 2019, only doing so in 2020.

Oakland's approval process for the 97-unit project also raises a fundamental question of what qualifies as "objective" design criteria under SB 35. In this case, the developer and city disagreed over whether historic district design criteria were objective. The criteria required, for example, that new construction be "compatible... in terms of massing, siting, rhythm, composition, patterns of openings, quality of material, and intensity of detailing" and provide "high visual interest."⁸⁶ The developer argued that the criteria were subjective and therefore should not be applied during design review. The city maintained that the criteria were objective, but ultimately found that the project satisfied them.

The City of Berkeley

Berkeley's SB 35 Eligibility Determination Processes Are Complex, But SB 35 Importantly Modified Berkeley's Use Permit Requirements

The City of Berkeley provides several SB 35 specific forms and resources on its website with considerable detail about requirements for use of the ministerial process and the necessary documentation to satisfy these requirements.⁸⁷ Berkeley's checklist adds documentation requirements beyond those of SB 35, including affordable housing, landscaping, and green building documentation depending on the project's specifications.⁸⁸ Though SB 35 does not enumerate these requirements, they fall under the local objective criteria provision of SB 35. Notably, the Berkeley checklist also "strongly encourage[s]" the project proponent to convene a "pre-application neighborhood meeting,"⁸⁹ even though SB 35 does not allow the imposition of additional requirements on projects solely or partially because they are receiving ministerial review under SB 35.

85. Under SB 35, lot subdivisions disqualify a project from ministerial review unless the subdivision falls under one of two exceptions. Cal. Gov't. Code § 65913.4(a)(9).

86. Oakland Planning Code Sec. 17.136.055(B)(2).

87. "SB 35 Eligibility Criteria," City of Berkeley, n.d., <https://berkeleyca.gov/sites/default/files/2022-02/SB-35-Eligibility-Requirements.pdf>.

88. "SB 35 Development Application Submittal Requirements," City of Berkeley, n.d., https://berkeleyca.gov/sites/default/files/2022-02/SB-35-Project-Application_Submittal-Requirements.pdf.

89. *Id.*

Berkeley's local regulations are comparatively difficult to understand and access, relative to other cities we have studied, which makes determining whether a project qualifies for SB 35 more difficult. Or in other words, determining what is "code compliant" is difficult in Berkeley. SB 35 does not resolve this issue, because it does not modify local density and use controls—it intervenes in process. Unlike the other four jurisdictions we discuss in this paper, Berkeley does not automatically disqualify proposed development that is inconsistent with current zoning provisions. Instead, it allows applicants an opportunity to "reconcile those discrepancies and demonstrate how the development will be consistent."⁹⁰ SB 35 had another major impact in Berkeley: Berkeley's local law requires all developments to obtain a use permit, even when the project fulfills all objective criteria for development. One of SB 35's provisions voids this requirement for qualifying development.⁹¹

Notably, Berkeley considered SB 35 a major imposition on its control of land use, arguing in litigation against the constitutionality of the statute under California home rule law. The narrow dispute at issue concerned whether a project proposed to be built on an Ohlone shellmound burial ground could receive a ministerial permit under SB 35.⁹² But when a developer sued because Berkeley declined to apply SB 35, Berkeley's arguments extended far beyond the contested issues of the case, which concerned whether the burial site was a historic "structure," and challenged the state's authority to intervene in charter cities' land use processes.⁹³ These arguments, made by a liberal city in the context of a site of cultural significance to Native American tribes, echoed those made by the conservative city of Huntington Beach in related litigation. In both cases, courts ultimately found in favor of the state and affirmed that SB 35 was reasonably related to the statewide issue of insufficient low-cost housing and narrowly tailored to address the issue.⁹⁴ However, this litigation may indicate the practical importance of SB 35 in Berkeley; the city itself considered the law sufficiently intrusive to challenge the statute as a whole during litigation.

90. *Id.*

91. Cal. Gov't Code § 65913.4(a).

92. Yao Huang, "Berkeley Declines Developers' Request to Build on 1900 Fourth St. for 2nd Time," *The Daily Californian*, September 5, 2018, <https://www.dailycal.org/2018/09/05/berkeley-declines-developers-request-build-1900-fourth-st-2nd-time>; *Ruegg and Ellsworth v. City of Berkeley*, 63 Cal.App.5th 277, 293 (2021).

93. The City also unsuccessfully argued for other narrowing constructions of the statute. *Ruegg*, 63 Cal. App. 5th at 318-19 (2021).

94. Matt Szabo, "Huntington Beach Loses Housing Case with State of California - Los Angeles Times," *Daily Pilot*, February 3, 2021, <https://www.latimes.com/socal/daily-pilot/news/story/2021-02-02/huntington-beach-loses-housing-case-with-state-of-california>.

SB 35 Approvals Moved Quickly in Berkeley

In Berkeley, there were two multifamily affordable developments approved prior to SB 35's passage that we can compare with three SB 35 developments. Of the two developments from 2014-2017, we were not able to determine the application date for one, so we could not calculate an entitlement timeframe. The other took over 34 months to entitlement.⁹⁵ In 2014, the developer sought approval of modifications to reduce parking and make minor adjustments to the building, which it secured in 2017. One of the pre-SB 35 projects was 100 percent affordable; the other was 57 percent affordable.

City of Berkeley 2014-2017 Entitlement Observations with SB 35 Qualifying Criteria

Project	Total Units	Total Affordable Units	CEQA Compliance Pathway	Months to Approval to proceed to Building Department	Opposition through local administrative appeal
2748 San Pablo Ave.	23	13	CEQA Exempt (Class 32)	34.7	Not appealed
3132 Martin Luther King Jr. Way	42	42	Unknown	Unknown	Not appealed

Two of the three projects approved under SB 35 were significantly larger (142 units and 87 units) than the two projects from the 2014-2017 dataset (23 units and 42 units). Two of the SB 35 projects moved quickly. One took ~3.4 months and the other just under 2 months to secure planning approval. We were unable to confirm the application date for the third SB 35 project, but press coverage described the process as swift.⁹⁶ All three of these projects were 100% affordable.

City of Berkeley 2018-2020 SB 35 Approvals

Project	Total Units	Total Affordable Units	Months to Approval to proceed to Building Department
2012 Berkeley Way	142	141	1.9
2001 Ashby	87	86	3.4
1601 Oxford	37	34	Unknown

95. It also appears that the development was entitled in prior years, as well. We found a similar entitlement from 2007.

96. Tony Hicks, "Berkeley Approves Two Affordable Housing Projects in Record Time under New State Law, SB35," *Berkeleyside*, August 4, 2022, <https://www.berkeleyside.org/2019/01/17/berkeley-approves-two-affordable-housing-projects-in-record-time-under-new-state-law-sb-35>.

We were able to locate the date of the SB 35 Checklist, but not the date for the main application document, so we cannot confirm the application date. If the Checklist date is the same as the application date, then the approval timeframe is 31 days.

Los Angeles County

Los Angeles County Provides Substantial Guidance on How to Qualify for SB 35

Los Angeles County created several SB 35 documents to explain how to access this process. An English and Spanish-language fact sheet lays out the basics of SB 35, including the major criteria for projects, what ministerial review entails, and SB 35's approval timelines.⁹⁷ A "Pre-existing Site Condition Questionnaire" takes developers through six questions about the site location that determine whether or not it is eligible for SB 35 review.⁹⁸ The county also provides an FAQ and memo that go into greater detail about the SB 35 process.⁹⁹

Los Angeles County also provides more information than the other five jurisdictions discussed above regarding approval expiration. In addition to notifying developers that approvals are valid for three years, the County provides that privately funded project proponents can extend the approval for one year and certain publicly funded affordable housing projects have no approval expiration date.¹⁰⁰ Finally, Los Angeles County updated its Housing Element in November 2021. The Housing Element includes basic provisions relating to SB 35.

The County's support for SB 35 applicants is not limited to written materials. The County's Department of Regional Planning has also established a team of Affordable Housing Case Planners who serve as the point of contact for all SB 35 applicants.¹⁰¹

97. "Senate Bill (SB 35) Fact Sheet [PDF]," Los Angeles County Department of Regional Planning, n.d., https://planning.lacounty.gov/assets/upl/apps/sb35_fact-sheet.pdf.

98. "Pre-Existing Site Condition Questionnaire: (For the Streamlined Ministerial Review Pursuant to SB 35)," Los Angeles County Department of Regional Planning, accessed January 31, 2023, https://planning.lacounty.gov/assets/upl/apps/sb35_pre-existing-questionnaire.pdf.

99. "SB 35 Streamlined Infill Projects - Fact Sheet [PDF]."; David DeGrazia, "Senate Bill 35: Streamlined Approval Process for Multifamily Residential Developments (Updated)," Los Angeles County Planning, January 3, 2023, https://planning.lacounty.gov/assets/upl/general/SB35_Memo.pdf.

100. *Id.*

101. "County of Los Angeles Housing Element (2021-2029) Appendices," Los Angeles County Department of Regional Planning, November 30, 2021, https://planning.lacounty.gov/assets/upl/project/housing_appendix-c-to-g-20211130.pdf.

Los Angeles County Applies SB 35 Broadly— Even to Small Market Rate Developments

Before SB 35's passage, LA County entitled two multifamily affordable developments between 2014-2017.

County of Los Angeles 2014-2017 Observations with SB 35 Qualifying Criteria

Project	Total Units	Total Affordable Units	CEQA Compliance Pathway	Months to Approval to proceed to Building Department	Opposition through local administrative appeal
6218 Compton Ave.	30	29	Unknown	7.9	Not appealed
1854 E. 118th St.	100	100	Hybrid exemption (Transit Priority Project)	4	Not appealed

Following SB 35, the County entitled seven qualifying projects between 2018-2020. What is also notable is the range of time until approval across SB 35 developments—while many took only a few months, one took over 9 months and another took almost 20 months to approval. Thus, among the seven SB 35 approvals, there is considerable variation in timeframes. Indeed, one 10-unit development accounted for the near 20 month timeframe, while another 10-unit development required only 2 months. In this county, SB 35 did not lead to predictable entitlement timeframes for qualifying projects. However, we lack the detail needed to understand why certain projects in Los Angeles County exceeded the statutory timelines in SB 35. (Hypothetically, the story may involve projects with non-SB 35 components or which changed their approval process midway through the entitlement process, as in Oakland, but we do not know.)

2018-20 Observations Los Angeles County

Project	Total Units	Total Affordable Units	Months to Approval to proceed to Building Department
10928 S. Inglewood Ave.	10	0	19.9
7220 Maie Ave	192	29	9.2
1351 W. 95th St.	57	56	3.6
1619 Firestone Blvd.	12	2	3.5
Valley Blvd. & Workman Mill Rd.	81	80	.1
4101-4111 Whittier Blvd.	34	33	1
11503 S. New Hampshire Ave.	10	2	2.2

The longest approval timeline of the County's SB 35 projects may be explained by its small size and lack of affordable units. Overall, there was a range of affordability levels for the County's SB 35 projects. Of the 7 multifamily affordable developments approved using SB 35, three were 100 percent affordable developments but the remaining developments were mixed income, with affordable rates at 15 percent 17 percent and 20 percent of total units. The final development, of 10 units, had no affordable units, however. The application of SB 35 to the market rate 10-unit building may suggest that Los Angeles County interprets SB 35 to also apply to market rate developments of under 10 units (meeting the other site and project criteria). SB 35 requires that to be eligible for ministerial review, a development must be "subject to a requirement mandating a minimum percentage of below market rate housing" based on one of several criteria.¹⁰² In one such scenario, SB 35 provides that a project of more than 10 units must make 10 percent of units affordable, but does not specify that projects of 10 units or fewer do not need to meet the requirement of being subject to a minimum percentage of below market rate housing.¹⁰³ Los Angeles County advises in its materials that to be eligible for SB 35 review, a "project with more than 10 dwelling units must include a 10 percent affordable housing set-aside for lower or very low income households."¹⁰⁴ The development without any below market rate units had an approval timeframe of 597 days. While we are unsure exactly how, or why, Los Angeles County applied SB 35 to this project, it appears to be an outlier in multiple respects.

102. Cal Gov't Code Sec. 65913.4(a)(4)(B)

103. Cal Gov't Code Sec. 65913.4(a)(4)(B)(i)

104. "Senate Bill (SB 35) Fact Sheet [PDF]."

Discussion

SB 35 is a state intervention in local discretionary review of a select group of developments that meet predetermined affordability, site, and other project criteria. It also provides local planning departments and developers relief from state mandated environmental review. SB 35 does not disrupt local choices around density, use, or design. For researchers and policymakers, the form of SB 35 poses important questions about whether a procedural intervention alone can catalyze meaningful or marginal increases in housing production. Because SB 35 requires planning review to determine whether a proposed development qualifies for the state level ministerial process, the statute also creates a unique opportunity to compare the impact of state law on pre-entitlement processes within that state ministerial framework with pre-entitlement processes under local discretionary review. Future research may want to compare ineligible developments approved within the same period.¹⁰⁵

Our preliminary review indicates that in the first years following the statute's effective date, few developments statewide used SB 35. There are many possible explanations. First, SB 35 modifies process, not density and use controls. The parcels that meet the state law's site criteria may not have zoning in place to allow for multi-family developments, or developments big enough to be financially feasible given the required affordability thresholds. Second, in some places, only certain developers can benefit from SB 35. In four of the cities we studied (Berkeley, Los Angeles, Oakland, and San Francisco), the threshold to qualify for SB 35 was 50 percent of units being affordable but most SB 35 approved development was 100 percent affordable.¹⁰⁶ Third, it could be that developers and planners were uncertain about how to apply the new state law within the context of local legal regimes. Local use of SB 35 may change over time as various actors learn how SB 35 applies and how it interacts with other laws (like the state density bonus law in question in Los Angeles)—and as courts and the state legislature perhaps provide more clarity.

Nonetheless, our case studies provide preliminary evidence that SB 35 will likely quicken approval timeframes for qualifying developments. Certainly, this is worth tracking statewide. San Francisco and Los Angeles best illustrate how SB 35 can shorten approval timeframes, with what appear to be meaningful reductions in timelines and increases in predictability.

105. Future research may want to compare the impact of SB 35 on qualifying developments with proposed developments that do not meet SB 35's site criteria, for example, or prevailing wage requirements.

106. Each city had a requirement of 50% affordable except LA County, which had a 10% affordable requirement.

Also important, in some cities, SB 35 will offer a ministerial pathway to approval for mixed income and 100 percent affordable development where none existed. This is especially important to affordable developers in cities with complex local rules that repeatedly invite opportunity for neighborhood opposition—like Berkeley and San Francisco. Thus, SB 35's impact on planning review processes is also significant, even if it has been limited to only a handful of jurisdictions in the first years of the statute's implementation.

Our case studies also signal that SB 35 is unlikely to fully standardize how cities and counties determine eligibility. These five jurisdictions adjusted their local planning review processes to implement SB 35 differently. For example, San Francisco's process changes infused simplicity into a procedural maze, whereas the City of Los Angeles imbued more complexity into its Planning Department review process. These distinctions reflect interactions between SB 35 and the local rules previously in place: the eligibility review in Los Angeles is more complicated than local ministerial review, while San Francisco eliminated lengthy pre-application requirements and its use of a disruptive, blanket Discretionary Review provision. The City of Los Angeles' SB 35 process thus highlights the importance of functional differences between what local ministerial processes and the state ministerial process created by SB 35 can offer developers in terms of ease and efficiency. Other differences in local application of SB 35 included the calculation of affordability when density bonuses are applied—an issue subsequently clarified by state legislation—as well as how to apply SB 35 when approvals ineligible for SB 35 (like subdivision) are required project components.

Still, outcomes from these jurisdictions also suggest that SB 35 is working—at least in some cities—to accelerate approval of affordable housing development. Reforms which affect only procedure are, inherently, insufficient to promote housing production in all places: in many jurisdictions, the underlying substance of the zoning code provides the binding constraints on development. However, where the base zoning purportedly permits development—whether by local initiative or due to separate state-level interventions—procedural reforms can play a critical role.

Appendix

Comparable Developments (Neighborhoods & Affordability)

	2014-17 entitlement observation	SB 35 2018-2020 Observations
Jurisdiction	San Francisco	San Francisco
Neighborhood	Mission	Mission
Number of units	94	63
Percent affordable	100%	100%
Entitlement timeframe	367 days	92 days
Jurisdiction	Oakland	Oakland
Neighborhood	Uptown	Uptown
Number of units	62	97
Percent affordable	100%	100%
Entitlement timeframe	143 days	308 days
Jurisdiction	City of LA	City of LA
Neighborhood	Westlake	Westlake
Number of units	101	121
Percent affordable	100%	100%
Entitlement timeframe	132 days	71 days
Jurisdiction	City of LA	City of LA
Neighborhood	Westlake	Westlake
Number of units	76	64
Percent affordable	100%	100%
Entitlement timeframe	240 days	64 days
Jurisdiction	City of LA	City of LA
Neighborhood	West Adams-Baldwin Hills-Leimert	West Adams-Baldwin Hills-Leimert
Number of units	38	54
Percent affordable	100%	100%
Entitlement timeframe	78 days	84 days
Jurisdiction	City of LA	City of LA
Neighborhood	West Adams-Baldwin Hills-Leimert	West Adams-Baldwin Hills-Leimert
Number of units	48	64
Percent affordable	100%	100%
Entitlement timeframe	235 days	63 days
Jurisdiction	City of LA	City of LA
Neighborhood	Central City	Central City
Number of units	81	94
Percent affordable	100%	100%
Entitlement timeframe	198 days	169 days



The NYU Furman Center advances research and debate on housing, neighborhoods, and urban policy. Established in 1995, it is a joint center of the New York University School of Law and the Wagner Graduate School of Public Service. More information can be found at furmancenter.org and [@FurmanCenterNYU](https://twitter.com/FurmanCenterNYU).

Support for this project was provided by The Pew Charitable Trusts.