(This post is co-authored by U.C. Davis Law School Professor Chris Elmendorf)

Last week, as President Trump harrumphed about the *faux* emergency on our nation's Southern border, California State Senator Nancy Skinner introduced a potentially transformative bill that addresses California's real emergency: the ever-escalating cost of housing in the state's economically productive metropolitan regions. As this post will explain, Skinner's new bill, SB 330, is a hugely important milestone in the evolution of state land use and housing policy, but it still falls short of what's needed. Happily, there is a fairly straightforward (and conveniently low-visibility) way to fix the bill's shortcomings.

What's Great About SB 330

Starting as far back as the 1970s, California has enacted a huge range of mostly ineffectual remedies for the arbitrary and excessive barriers to new housing that local governments continue to throw up. In addition to being (largely) ineffectual, most of the state's mandates have one other thing in common: they apply indiscriminately to local governments throughout the state, paying little heed to differences among jurisdictions in housing demand, supply restrictions, development potential, or planning capacity.

SB 330 is different. It recognizes that the housing crisis now afflicting San Francisco, whose median home would cost you $1.2 million, is not really a crisis in, say, Fresno, where the median house barely crests $200,000. Most of SB 330's provisions would apply only to a subset of "covered" jurisdictions, defined by average rent and vacancy rates. The idea of tying state housing remedies to market conditions is very important, and long overdue. San Francisco needs to permit loads of new housing. Fresno does not.

SB 330's "coverage" strategy is also *politically* advantageous. State legislators can pull specific jurisdictions out of the bill's reach by adjusting the coverage formula or cutoffs. Back in the 1960s, Congress used the same strategy to pass the Voting Rights Act. The VRA created special protections for black voters in most of the Jim Crow South, but its coverage formula was reverse-engineered to exclude Texas. This was the price of getting the bill across the finish line.

SB 330 would impose a panoply of new controls on the jurisdictions that it covers. Among other things, SB 330 would prohibit covered jurisdictions from applying any off-street parking requirement to new housing proposals, and it would prevent them from making their zoning more restrictive, from enacting new caps on building permits, and from applying fees or historic-preservation ordinances retroactively.

However, apart from the parking provisions, SB 330 does nothing to erode the thick accumulation of growth controls, excessive zoning restrictions, cumbersome permitting procedures, exorbitant fees, arbitrary code requirements, and layers of discretionary review that already exist in the covered jurisdictions.

How to Improve SB 330

SB 330's glaring omission—its failure to remove *existing* barriers to housing in the high-cost jurisdictions—probably reflects a political calculation. If the bill were to enumerate certain "excessive" barriers to housing which local governments could no longer enforce, it might become too hot to handle.

But an effective attack on existing barriers to new housing needn't be so overt. As one of us (Elmendorf) explains in a draft law review article, the California Legislature could bring about the elimination of many of these restrictions simply by tweaking the legal standard for determining whether a local government's housing plan complies with state law, and by authorizing mayors to promulgate interim housing plans.

Let us explain. Since 1980, California has required its local governments to revise the "housing element" of their general plans every 4-8 years. The housing element is supposed to explain how each local government will accommodate its fair share of regional housing needs. It must include an analysis of local constraints to the development of housing, and a schedule of actions addressing those constraints. Local governments must submit their

periodically updated housing elements to the state Department of Housing and Community Development (HCD) for review and approval.

But there's a hitch. The legal standard for what constitutes a "substantially compliant" housing element has no teeth. So long as the housing element "contains the elements mandated by the statute," the courts will uphold it. Whether it will actually *result* in construction of the target number of units has been regarded as a question of "workability" or "merits," and *irrelevant as matter of law* to the housing element's validity.

This deferential approach makes some sense for the Fresnos of the world, but it's a disaster for the San Franciscos. SB 330 is thus the perfect vehicle for a solution. California should enact a new definition of "substantial compliance" that applies only to the high-cost jurisdictions covered by SB 330. In these jurisdictions, a housing element should be deemed compliant only (1) if it is *likely to result* in production of the targeted amount of new housing over the planning cycle; or (2) if it removes, or commits the local government to removing, all unreasonable constraints to the production of new housing. Discrete, removable constraints which are identified in the housing element but not reformed on schedule should become inoperative as a matter of state law. And if a local government fails to adopt a new, substantially compliant housing element on schedule, state law should authorize the mayor (with HCD's approval) to promulgate an interim housing element, which would govern housing development in the meantime.

These seemingly small-bore reforms would have far-reaching consequences. Initially, they would make it easy for a city's elected leadership to suspend exclusionary, voter-adopted growth controls, while deflecting blame to the state. If a housing element lists a voter-adopted restriction on its schedule of (unreasonable) "constraints," and if the city's voters fail to approve an adequate reform by the appointed date, the constraint would be repealed by operation of state law. While local officials may have some reservations about putting voter-adopted measures on the chopping block, the state-law framework would give them cover. "The state pushed us to do it; we had to or else we'd lose our state funding," they can say.

And if mayors can promulgate interim housing elements when cities would otherwise be out of compliance, this will shift cities' land-use policies toward the mayors' preferences. Mayors, who are elected citywide, tend to be less responsive to neighborhood NIMBY groups than city councils. Knowing that the mayor could issue an interim—yet legally binding—housing element, city councils would make generous concessions *ex ante* to the mayor, in the hopes of avoiding a veto or other mayorally-induced delay of the council's housing element.

Senator Skinner deserves major plaudits for SB 330. Now let’s make it even better.