LAWYERING CITIES INTO HOUSING SHORTAGES: THE CURIOUS CASE OF DISCRETIONARY REVIEW UNDER THE SAN FRANCISCO CITY CHARTER

CHRISTOPHER S. ELMENDORF*

ABSTRACT

This Article investigates a curiosity of local land-use procedure in one of the most expensive, supply-constrained housing markets in the nation. Conventional wisdom has it that San Francisco's city charter renders all permits subject to "Discretionary Review" (DR) by the Planning Commission or Board of Appeals. A permit undergoing this form of review may be vacated for almost any reason under the sun, regardless of whether the project complies with the applicable land-use regulations. I show that the conventional wisdom about DR is founded not on the text of the Charter, or historical evidence of its meaning, or even binding judicial constructions. Rather, it appears to have been invented by lawyers in the Office of the City Attorney in the late 1970s, cut from the whole cloth of policy arguments that resonated in a city which had turned against development. The city attorney's opinions, once issued, took root and have gone substantially unchallenged since, even as housing advocates waged a major campaign (unsuccessfully) to reform the Charter at the ballot box.

However, though the Charter does not guarantee DR, a growth-control ballot initiative adopted in 1986 may require such review for certain permits. I suggest that the "regional welfare" limitation on the municipal police power, understood as a canon of ballot-measure interpretation, counsels strongly against reading the 1986 measure as a DR guarantee.

* Martin Luther King, Jr. Professor of Law, U.C. Davis School of Law. I am indebted to Jesse Smith of the Office of the City Attorney, City and County of San Francisco, for sharing with me the prior public opinions of the Office on discretionary review as well as a treatise on the city charter. The analysis and opinions expressed in this paper are my own. I have not discussed the substance of my argument with Mr. Smith or his colleagues, and certainly nothing in this paper should be read as an indicator of current thinking within the Office. Thanks also to the student editors of the *N.Y.U. Environmental Law Journal* for their excellent editorial assistance.

INTRODUCTION 292
I. WHAT IS DISCRETIONARY REVIEW? 296
A. *The Nature and Legal Consequences of Discretionary Review* 296
B. *Practical Effects of Discretionary Review* 300
II. DO CONVENTIONAL SOURCES OF LEGAL AUTHORITY SUPPORT THE CHARTER-DR THESIS? 304
A. *Lessons from the Text of the Charter* 304
B. *Lessons from the History of the Charter* 306
C. *Lessons from Judicial Precedent* 308
III. THE OPINIONS OF THE OFFICE OF THE CITY ATTORNEY 312
IV. CODA: DID PROPOSITION M (1986) MAKE DISCRETIONARY REVIEW THE LAW OF THE CITY? 319
A. *An Overview of Prop M* 320
B. *The Nature of the Required Finding for "Demolition, Conversion and Change of Use" Permits* 323
C. *Livermore, Regional Welfare, and the Construction of Local Ballot Measures* 329
CONCLUSION 336

INTRODUCTION

Many cities in California require housing development proposals to undergo some form of discretionary review.[1] This means that the city planning commission or another municipal actor is authorized to modify a project's design—or even to reject the project outright—if it doesn't conform to local aesthetic or political sensibilities, notwithstanding the project's compliance with all objective requirements of the city's zoning code.[2]

[1] *See* MOIRA O'NEILL ET AL., FINAL REPORT TO THE CAL. AIR RES. BD. AND CAL. EPA: EXAMINING ENTITLEMENT IN CALIFORNIA TO INFORM POLICY AND PROCESS: ADVANCING SOCIAL EQUITY IN HOUSING DEVELOPMENT PATTERNS 51–52 (Mar. 18, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956250.

[2] Note that a state law called the Housing Accountability Act presently limits cities' authority to deny or reduce the density of a project on the basis of subjective standards. However, cities remain free to put discretionary conditions of approval on a project, so long as the conditions don't reduce density. *See* CAL. GOV'T CODE § 65589.5(j). *See also* Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo, 68 Cal. App. 5th 820, 846 (Cal. Ct. App. 2021) (quoting CAL. GOV'T CODE § 65589.5(j)(1)) ("[W]ith respect to standards that are not objective, the HAA does not bar local agencies from imposing conditions of approval; rather, it prohibits

By reputation, however, San Francisco is unique among California cities in that it (1) makes *every single permit* issued by a city agency subject to discretionary review, and (2) has ensconced the citizen-objector's right to discretionary review in the city charter itself.[3] A city charter, akin to a municipal constitution, is binding on the city's governing body and may only be altered by the municipal electorate.[4]

The principal contention of this Article is that San Francisco's unique form of discretionary review (which I'll capitalize as Discretionary Review and abbreviate as "Charter DR" or "DR") is a kind of lawyer's lore. The drafters of the city charter did not choose it, and the voters who adopted the charter did not ratify it. Rather, it was invented by the city's lawyers decades later—during the heyday of anti-growth activism in the late 1970s—and then "ratified" by a careless and unnecessary passage in a California Court of Appeal opinion.[5] Since then, DR has done yeoman's work as a rationalization for the city's unwillingness to fix a process that just about

conditions of approval 'that the project be developed *at a lower density*,' unless public health or safety findings are made.").

[3] *See* O'NEILL ET AL., *supra* note 1, at 52. *See also* Guinnane v. S.F. City Planning Comm'n, 209 Cal.App.3d 732, 738–40 (Cal. Ct. App. 1989). In other California cities, building permits (and probably most other permits for ordinary activities like opening a business or parking on the street) are considered "ministerial," meaning that they are issued automatically to applicants who comply with the applicable objective standards. *Cf.* Protecting Our Water and Env't Res. v. Stanislaus Cnty., 10 Cal.5th 479, 493 (Cal. 2020) (explaining that the ministerial nature of building permits is recognized in guidelines under the California Environmental Quality Act).

[4] *See* CAL. CONST. art. 11, § 3; JOSEPH R. GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION 277–78 (2016).

[5] *See Guinnane*, 209 Cal.App.3d at 738–40.

everyone regards as dysfunctional.[6] "Our hands are bound by the Charter" is a recurring excuse.[7]

San Francisco's theory and practice of DR have roots in a World War II-era opinion of the California Supreme Court,[8] but as best I can tell, DR was not officially understood as a Charter-based prerogative until the Office of the City Attorney (CAO) propounded the thesis in 1979 and 1981 advisory opinions.[9] Those opinions elevate dated policy arguments over the text and history of the Charter. The 1981 opinion also flies right by the California Supreme Court's prior holding that the Board of Appeals—the body in which Charter DR is said to be lodged[10]—has no greater authority to reject

[6] The city's own planning documents acknowledge some aspects of the dysfunction. *See* CITY AND CNTY. OF S.F., 2014 HOUSING ELEMENT, I.90 (2022) ("The problem with the Discretionary Review process is that [it] eliminates a developer's sense of predictability and certainty in the entitlement process."). *See also* CITY AND CNTY. OF S.F., 2022 HOUSING ELEMENT, APPENDIX C, 129–32 (2022) ("The Discretionary Review process can result in a significant cost [and] unpredictable outcomes"). The biggest problem, however, is that the *existence* of discretionary review makes housing approvals subject to review under the California Environmental Quality Act (CEQA), which in turn provides any project opponent with a ticket to appeal the project's environmental clearance to the Board of Supervisors. If the environmental clearance is appealed, the Board has unfettered political discretion to delay the project indefinitely by ordering further environmental studies, whether or not CEQA actually requires the studies. *See generally Hearing on the Effects of the California Environmental Quality Act*, Mar. 16, 2023 [hereinafter *Hearing*] (statement of Christopher S. Elmendorf). *See also* Christopher S. Elmendorf & Timothy Duncheon, *When Super-Statutes Collide: CEQA, the Housing Accountability Act, and Tectonic Change in Land Use Law*, 49 ECOLOGY L.Q. 655, 657 (2022).

[7] *Cf.* Noah Arroyo, *Could Major Hurdle to More Housing Projects in San Francisco Be Easily Changed?*, S.F. CHRONICLE (Mar. 22, 2023), https://www.sfchronicle.com/sf/article/housing-review-hurdles-17846048.php (quoting a spokesperson for City Attorney, who, when asked whether the Board of Supervisors might have authority to enacted a ministerial-review ordinance, responded, that the CAO "stands by its previous interpretations [of the Charter].")

[8] *See* Lindell Co. v. Bd. of Permit Appeals, 23 Cal. 2d 303, 309 (Cal. 1943).

[9] *See* S.F. City Atty., Opn. No. 79-29, at 1 (Apr. 30, 1979). *See also* S.F. City Atty., Opn. No. 81-7, at 5–6 (Mar. 11, 1981).

[10] The Board of Appeals is a 5-member body, appointed by the Mayor and the President of the Board of Supervisors, which

> shall hear and determine appeals with respect to any person who has been denied a permit or license, or whose permit or license has been suspended, revoked or withdrawn, or who believes that his or her interest or

a development permit than the primary city decision-maker who issued the permit in the first instance.[11]

This Article methodically examines the Charter's text, its history, and its prior interpretation by the courts and the CAO, all to determine whether the lore of Charter DR has any grounding in law. My argument relies on publicly available documents; I have not done archival research or interviewed local officials. I conclude that the Charter DR thesis lacks justification in conventional sources of legal meaning. The absence of a conventional legal justification probably didn't trouble anyone when the lore of Charter DR took hold, as the practice of DR fit perfectly with the ascendant anti-development ideology of the time.[12]

If I am right that Charter DR is more lore than law, it follows that the Charter allows the city's legislative body, the Board of Supervisors, to enact an ordinance making the approval of any class of development permits ministerial and therefore exempt from DR. Permits could still be appealed to the Board of Appeals, but the Board would review them only for conformity with objective standards.

This conclusion comes with a few caveats. First, a ministerial permitting ordinance would almost certainly face legal challenges in light of prior opinions of the city attorney—and one opinion of the Court of Appeal—that embrace the Charter DR thesis. My best guess is that a Charter-based challenge to a ministerial permitting ordinance would probably succeed at the trial-court level and then fail at the Court of Appeal.[13]

> the public interest will be adversely affected by the grant, denial, suspension or revocation of a license or permit . . . .

CHARTER OF THE CITY AND CNTY. OF S.F. § 4.106.

[11] *See* City & Cnty. of S.F. v. Super. Ct. of City & Cnty. of S.F., 53 Cal. 2d 236, 250 (Cal. 1959) ("In truth, in *Lindell* the emergency ordinance which set the standard by which the board [of permit appeals] was guided was the same ordinance which guided the permit department whose action the board overruled. The same situation prevails here.").

[12] *See infra* notes 112–18 and accompanying text.

[13] In a number of recent opinions, the First District Court of Appeal, which hears cases from San Francisco, has expressed skepticism about the present-day value of local discretion over housing approvals. *See*, *e.g.*, Tiburon Open Space Comm. v. Cnty. of Marin, 78 Cal. App. 5th 700, 782 (Cal. Ct. App. 2022) (castigating CEQA as a statute that can be "manipulated to be a formidable tool of

Second, there is a pretty good argument that Proposition M (1986) (Prop M), which made sweeping amendments to the city's planning code, requires DR of demolition, conversion, and change-of-use permits.[14] Then again, there is also a pretty good argument, especially in light of *Associated Home Builders v. City of Livermore*,[15] which recognizes a regional-welfare limitation on the municipal police power, that Prop M should be construed narrowly so as not to entrench DR. How the Prop M question will be resolved is anyone's guess. But even on the most DR-protective interpretation, Prop M would still allow the Board of Supervisors to eliminate DR for development activities other than demolitions, conversions, and changes of use.

The balance of this Article runs as follows. Part I sets the stage, explaining what DR is and why it matters. Part II considers whether any of the conventional sources of legal authority—text, history, and judicial precedent—support the Charter-DR thesis, concluding that none does, save for an unnecessary passage in a distinguishable opinion of the Court of Appeal. Against this backdrop, Part III discusses and critiques the CAO opinions that spawned the thesis. Finally, in Part IV, I consider whether Prop M qualifies or moots the conclusions of Parts II and III.

I. WHAT IS DISCRETIONARY REVIEW?

A. *The Nature and Legal Consequences of Discretionary Review*

DR is the San Francisco practice by which a city agency—typically the Planning Commission or Board of Appeals—hears a resident's complaint that a recently issued permit is somehow contrary to the public interest, notwithstanding that the permitted project or

obstruction"). *See also* Cal. Renters Legal Advoc. & Educ. Fund v. City of San Mateo, 68 Cal. App. 5th 820, 851 (Cal. Ct. App. 2021) (sustaining state Housing Accountability Act against city's home-rule challenge, and holding the cities are owed no deference on the meaning of local ordinances and regulations that cities use to justify housing denials); Ruegg & Ellsworth v. City of Berkeley, 63 Cal. App. 5th 277, 301 (Cal. Ct. App. 2021), *appeal dismissed*, S269012 2021 Cal. Lexis 5333, at *1 (Cal. July 28, 2021) (broadly construing a state law requiring ministerial review of certain housing projects, and rejecting city's claim to deference on local historic preservation determinations).

[14] *See infra* Part IV.B.

[15] 557 P.3d 473 (Cal. 1976).

activity complies with all applicable, objective standards of the municipal code.[16] DR has been codified in the city's Business and Tax Regulations Code,[17] but it is also said to be compelled by the Charter.[18] In *Guinnane v. San Francisco Planning Commission*, the Court of Appeal said that, pursuant to the Charter, the Board of Appeals may vacate or condition a permit if the Board determines that the "proposed project will [adversely] 'affect the public health, safety or general welfare.'"[19]

[16] The Planning Commission has DR authority under the municipal code with respect to "demolition, new construction, or alteration of buildings," the "removal of an authorized or unauthorized dwelling unit," and certain change of uses. S.F., CAL., PLANNING CODE art. III, § 311(b), (d), (e) (2023). *See also* CITY AND CNTY. OF S.F., 2022 HOUSING ELEMENT UPDATE, APPENDIX C 130 (2022) ("During their weekly hearings, the [Planning] Commission will hear a request to review a permit application when requested by a member of the public or neighborhood organization. The Commission may determine that modifications to the proposed project are necessary in order to protect the public interest and require such changes or may not 'take' the request and instead let the project remain as proposed. This process of Commission consideration is commonly known as 'Discretionary Review' or simply 'DR.'"). The Board of Appeals, to which any permit issued by a city agency may be appealed, has DR authority under both the Business and Tax Regulation Code and the Charter. *See* Guinnane v. S.F. City Planning Comm'n, 209 Cal.App.3d 732, 737 (Cal. Ct. App. 1989) (holding that under article I, § 26 of the Business and Tax Regulations Code, "any city department may exercise its discretion in deciding whether to approve a [permit] application; and in so doing, it may consider the effect of the proposed project upon the surrounding properties"). *See also id.* at 740 (concluding that the Planning Commission and the Board of Appeals both have authority to "exercise independent discretionary review of a building permit application" and that "such review is not confined to a determination whether the applicant has complied with the city's zoning ordinances and building codes").

[17] *See* S.F., CAL., BUS. & TAX REGUL. CODE, art. I, § 26(a) (2023) ("[I]n the granting or denying of any permit, or the revoking or the refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof; and in granting or denying said permit, or revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied, or revoked.").

[18] *See, e.g.*, *Guinnane*, 209 Cal.App.3d at 738–40 (1989) (stating that the Board of Appeals is authorized by the Charter to "to determine whether a proposed project will affect the public health, safety or general welfare" and to vacate or modify the corresponding permit if the Board so determines) (internal citation and quotation marks omitted).

[19] *Id.* at 739.

One important consequence of this broad administrative discretion to disapprove or modify projects that comply with objective standards is that it brings all project entitlements and building permits within the ambit of the California Environmental Quality Act (CEQA).[20] CEQA applies to public permitting only if the decision-maker has a zone of discretion to disapprove or modify a project in response to the findings of an environmental study.[21] "Ministerial" permits—"those which involve little or no personal judgment by the public official as to the wisdom or manner of carrying out the project"[22]—are excluded.[23]

CEQA, in turn, politicizes project review, because the statute designates the elected governing body of a city or county as its official CEQA decision-maker.[24] Every environmental review must be appealable to the city's politicians, who traditionally exercised what I have called "one-way political discretion" to require further studies, apparently without limit.[25] If the governing body shortcut environmental review by approving a legally insufficient CEQA study, project opponents could sue and a court would put the project on hold pending further study.[26] But if the governing body "long-cuts" review—demanding further study when CEQA doesn't require it, or even study of impacts that aren't "environmental effects" within the meaning of CEQA—the project proponent had no

[20] *See* CAL. PUB. RES. CODE § 21000 *et seq.* (West 2023).

[21] *See id.* § 21080(a), (d), (f).

[22] Protecting Our Water and Env't Res. v. Stanislaus Cnty., 10 Cal.5th 479, 489 (Cal. 2020) (internal citations and quotation marks omitted). For a thoughtful review of the ministerial/discretionary distinction, see Rozalynne Thompson, *Somewhere in Between: The Classification and Standard of Review of Mixed Ministerial-Discretionary Land Use Decisions*, 15 HASTINGS W. N.W. ENVT. L. J. 325 (2009).

[23] *See* CAL. PUB. RES. CODE § 21080(b) (West 2023).

[24] *See id.* § 21151(c).

[25] *Hearing*, *supra* note 6, at 7 (Written Testimony of Christopher S. Elmendorf).

[26] *See generally* STEPHEN KOSTKA & MICHAEL H. ZISCHKE, PRACTICE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT §§ 23.3–23.14 (standing), 23.84–23.96 (interim remedies), 23.120–23.125 (final remedies) (2d ed. 2023).

remedy to challenge this demand.[27] Recent legislation and an important judicial decision have started to curtail city councils' political discretion to demand further CEQA studies without limit, but it remains to be seen how courts will cash out the new frameworks.[28]

Another consequence of Charter DR is that it opens the door to claims that property owners near a project have a constitutional right to notice and a hearing before the city approves the project. In *Horn v. County of Ventura*, the California Supreme Court held that neighbors whose property would be "'significant[ly]' or 'substantial[ly]'" affected by a city's issuance of a discretionary development permit have a state-constitutional right to a hearing prior to the issuance of the permit.[29] *Horn*'s tacit threshold for a significant effect does not seem high: the dispute centered on a four-lot subdivision, which the plaintiff alleged would "interfere with his use of the only access from his parcel to the public streets, and will increase both traffic congestion and air pollution."[30]

---

[27] Such at least was the holding of the San Francisco Superior Court. *See generally* Order re: Demurrer, Yes in My Backyard v. City & Cnty. of S.F., CPF-22-517661 (Cal. Super. Ct. Oct. 21, 2022). In 2023, the Legislature enacted a partial remedy through the Housing Accountability Act but it applies only to dense housing projects on a narrow class of infill sites. *See* CAL. GOV'T CODE § 65589.5 (West 2024). *See also* Chris Elmendorf (@CSElmendorf), X (Oct. 12, 2023, 12:54 AM), https://twitter.com/CSElmendorf/status/1712376261463724069.

[28] *See* A.B. 1633, 2023–24 Leg. (Reg. Sess. 2023) (codified at CAL. GOV'T CODE § 65589.5 (West 2024)); Hilltop Grp., Inc. v. Cnty. of San Diego, 99 Cal. App. 5th 890 (Cal. Ct. App. 2024). For explanations of the significance of AB 1633 and the *Hilltop* case, see Chris Elmendorf (@CSElmendorf), X (Oct. 12, 2023, 12:54 AM), https://twitter.com/CSElmendorf/status/1712376261463724069; Chris Elmendorf (@CSElmendorf), X (Feb. 16, 2024, 8:28 AM), https://twitter.com/CSElmendorf/status/1758709894209798316.

[29] Horn v. Cnty. of Ventura, 596 P.2d 1134, 1139–40 (Cal. 1979) ("We . . . conclude that, whenever approval of a tentative subdivision map will constitute a substantial or significant deprivation of the property rights of other landowners, the affected persons are entitled to a reasonable notice and an opportunity to be heard before the approval occurs."). *See also id.* (stating that "agency decisions having only a de minimis effect on land" and "action involving only the nondiscretionary application of objective standards" do not trigger the notice-and-a-hearing right); Am. Tower Corp. v. City of San Diego, 763 F.3d 1035, 1049–50 (9th Cir. 2014) (construing *Horn* as resting on the due process clause under the California Constitution, not the U.S. Constitution).

[30] *Id.* at 1136, 1139.

Because of *Horn*, due process attacks could be mounted against efforts by San Francisco to limit the burdens of DR by, for example, paring back notices of approvals to nearby landowners, or increasing fees charged to DR petitioners, or making the DR hearing a "paper hearing" rather than an oral hearing in a public forum.[31] The California Supreme Court has said that the requirements of due process are "flexible and call[] for such procedural protections as the particular situation demands,"[32] but the tenor of *Horn* is not flexible.[33] There are good arguments for reading *Horn* narrowly today[34] but, in the meantime, the decision invites constitutional attacks on any effort by the city to pare down or speed up DR hearings short of adopting a ministerial permitting framework.[35]

B. *Practical Effects of Discretionary Review*

San Francisco is notorious for having the slowest process for approving housing of any jurisdiction in the state.[36] It is also

[31] *Cf. id.* at 1141 (holding that the county's provisions for notifying neighbors of results of CEQA review were constitutionally insufficient, while "refrain[ing] from describing a specific formula which details the nature, content, and timing of the requisite notice"); *id.* at 1140–41 (holding that county's CEQA process, which required public notice, invited public comment, and provided the county's responses to public comment, was not sufficient for due process purposes because, inter alia, "public hearings . . . are not required" and thus the "affected landowner [has no] 'meaningful' predeprivation hearing" . . . at which his [s]pecific objections to the threatened interference with his property interests may be raised").

[32] People v. Ramirez, 500 P.2d 622, 627 (Cal. 1979) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

[33] While *Horn* pays lip service to the flexibility of due process, the *Horn* court did not balance costs and benefits in announcing the neighbors' right to a hearing; it waived off the argument that the CEQA process afforded a sufficient "hearing" for due process purposes and summarily announced, in dicta, that the automatic-approval provision of the state's subdivision statute was unconstitutional as a violation of neighbors' due-process rights, again without balancing costs and benefits of more robust procedure. *See Horn*, 596 P.2d at 1137–41.

[34] *See generally* Milene Minassians, *Saving the Permit Streamlining Act: The California Supreme Court Must Depart from* Horn v. County of Ventura, 30 U.C.L. ENVT. L.J. 105 (2024).

[35] *Horn* said that neighbors don't have a due process hearing right on ministerial permits. *See Horn*, 596 P.2d at 1139.

[36] *See* Press Release, Cal. Dep't Hous. & Cmty. Dev., State Announces New Review of San Francisco Housing Policies and Practices (Aug. 9, 2022),

believed to be the only city that provides for internal appeal and discretionary review of *every single permit* issued by a city agency.[37] Not surprisingly, many observers—including San Francisco's own planning department—think that DR, and the CEQA processes triggered by discretionary permitting, are a big part of the reason why the city's review of housing development applications is so time consuming and unpredictable.[38]

The percentage of projects that face a DR hearing may be small, but the threat of DR petitions and CEQA appeals drives other aspects of the city's process. For example, the city requires developers to notify and meet with neighbors and community groups before submitting certain project applications on the theory that if neighbors had their objections heard early, there would be fewer

https://www.hcd.ca.gov/about-hcd/newsroom/state-announces-new-review-san-francisco-housing-policies-and-practices ("According to San Francisco's self-reported data, it has the longest timelines in the state for advancing housing projects to construction"). *See also* MOIRA O'NEILL ET AL., EXAMINING LOCAL LAW, POLICY, AND PLANNING PRACTICE ON DEVELOPMENT IN SAN FRANCISCO USING CALES, REPORT IN SUPPORT OF SAN FRANCISCO POLICY AND PRACTICE REVIEW 6 (2023), https://www.hcd.ca.gov/sites/default/files/docs/policy-and-research/plan-report/ucb-examining-local-law-policy-planning-practice-on-development-in-sf-using-cales.pdf ("[A]mong all our study cities, San Francisco was an extreme outlier in process requirements and timeframes to approval."); Bilal Mahmood, *87 Permits, 1,000 Days of Meetings and $500,000 in Fees: How Bureaucracy Fuels S.F.'s Housing Crisis*, S.F. CHRON. (Mar. 11, 2023), https://www.sfchronicle.com/opinion/openforum/article/sf-housing-development-red-tape-17815725.php.

[37] I have never heard of any other city that understands its charter as subjecting any permit issued by a city agency to discretionary review and I've asked numerous city and state officials whether they have found any other examples—none has. Traditionally, building permits, final subdivision maps, and certain conditional use permits have been regarded as ministerially. *See* Thompson, *supra* note 22, at 328.

[38] *See* CITY AND CNTY. OF S.F., 2014 HOUSING ELEMENT I.90 (2022) (stating that the "Discretionary Review process . . . eliminates a developer's sense of predictability and certainty" and that it "acts as a constraint to housing development and increases the overall cost of housing particularly in the city's lower density neighborhoods"). *See also* CITY AND CNTY. OF S.F., 2022 HOUSING ELEMENT, APPENDIX C 129–32 (2022) ("The Discretionary Review process can result in a significant cost [and] unpredictable outcomes"); O'NEILL ET AL., *supra* note 1, at 101 (characterizing San Francisco as a city with relatively liberal zoning but an extremely onerous and unpredictable permitting process); Mahmood, *supra* note 36 (providing examples of DR and CEQA delays).

DR-derailments at the back end.[39] The threat of DR and CEQA also shapes developers' incentives regarding which projects to propose and what concessions to make to project opponents during the review process.

That insiders with deep local knowledge of San Francisco think that DR is a big deal is evidenced by the time, money, and political capital they have expended trying to reform it—or block its reform. In 2022, housing advocates qualified a charter amendment, Proposition D, which would have (1) required ministerial approval of projects that meet certain affordability and labor standards and, critically, (2) authorized the Board of Supervisors to add other classes of projects to the ministerial-review bin by ordinance.[40] Opponents on the Board of Supervisors voted onto the ballot a countermeasure, called Proposition E, which would have streamlined a narrower class of one hundred percent affordable projects and not authorized future ministerial-permitting ordinances.[41] Housing advocates saw Proposition E as a poison pill whose main function was simply to confuse voters about whether to support Proposition D.[42] If that was its purpose, it appears to have worked: both measures were defeated, with Proposition D failing by less than two percentage points, a

[39] *See* CITY AND CNTY. OF S.F., 2022 HOUSING ELEMENT, APPENDIX C 116 (2022) ("As a matter of Planning Commission Policy, some housing projects require a Pre-Application (Pre-App) Community Outreach Process prior to submitting permits or land use applications.").

[40] *See* The Affordable Homes Now Initiative, Prop. D of 2022, S.F., CAL. (2022).

[41] *See San Francisco, California, Proposition E, Require Board of Supervisors' Approval for Affordable Housing Projects Using City Property or Financing and Expedite Approval Process for Certain Affordable Housing Projects Amendment (November 2022)*, BALLOTPEDIA, https://ballotpedia.org/San_Francisco,_California,_Proposition_E,_Require_Board_of_Supervisors%27_Approval_for_Affordable_Housing_Projects_Using_City_Property_or_Financing_and_Expedite_Approval_Process_for_Certain_Affordable_Housing_Projects_Amendment_(November_2022) (last visited Aug. 7, 2024).

[42] *See* Sarah Wright, *Controversial Housing Measure Will Appear on November Ballot After Court Petition Fails*, S.F. STANDARD (Sept. 7, 2022), https://sfstandard.com/housing-development/both-rival-housing-ballot-measures-will-appear-on-november-ballot-judge-rules/ ("[P]roponents of Prop. D have called Prop. E a 'poison pill' designed to kill their measure by splitting the vote and tacking on labor and affordability requirements that are too onerous, making housing projects infeasible.").

considerably narrower margin than Proposition E.[43] Altogether, $2.4 million was spent on the Proposition D campaign, and another $800,000 on Proposition E.[44]

San Francisco's DR and CEQA processes have also put the city in the crosshairs of the state. The Department of Housing and Community Development (HCD) recently singled out the city for "the longest timelines in the state for advancing housing projects to construction, among the highest housing and construction costs, and [HCD's Housing Accountability Unit] has received more complaints about San Francisco than any other local jurisdiction in the state."[45] In August of 2022, HCD announced that San Francisco was the target of its first-ever "Housing Policy and Practices Review," a top-to-bottom investigation of the city's housing-approval process meant to pinpoint problems and propose reforms.[46] The city has already pledged, through its recently enacted housing element, "to implement priority recommendations of HCD's finalized Policy and Practice Review."[47]

Those recommendations dropped in October of 2023, and DR is squarely in the crosshairs.[48] HCD's number-one demand is that

[43] *See* S.F. DEP'T OF ELECTIONS, NOVEMBER 8, 2022 FINAL ELECTION RESULTS (Dec. 1, 2022), https://sfelections.org/results/20221108w/index.html (reporting final margin for Proposition D of 50.8% to 49.2%, and final margin for Proposition E of 53.9% to 46.1%).

[44] *See* Leila Darwiche & Sriharsha Devulapalli, *These 16 Charts Show the Money Behind San Francisco Propositions and Candidate Races*, S.F. CHRON. (Oct. 31, 2022, 10:32 AM), https://www.sfchronicle.com/election/article/campaign-funds-san-francisco-17542721.php.

[45] Press Release, Cal. Dep't Hous. & Cmty. Dev., State Announces New Review of San Francisco Housing Policies and Practices (Aug. 9, 2022), https://www.hcd.ca.gov/about-hcd/newsroom/state-announces-new-review-san-francisco-housing-policies-and-practices.

[46] *See id.*

[47] CITY AND CNTY. OF S.F., HOUSING ELEMENT 2022 UPDATE 147 (2023), https://www.sfhousingelement.org/final-draft-housing-element-2022-update-clean ("8.8.2 Revise local process, procedures, and other relevant requirements to implement priority recommendations of HCD's finalized Policy and Practice Review.").

[48] *See* CAL DEP'T OF HOUS. & CMTY. DEV., SAN FRANCISCO HOUSING POLICY AND PRACTICE REVIEW 13 (2023), https://www.hcd.ca.gov/sites/default/files/docs/policy-and-research/plan-report/sf-housing-policy-and-practice-review.pdf.

the city "[r]evise [its] entitlement processes to require that housing developments that conform to existing planning and zoning standards move efficiently through a local *non-discretionary, ministerial entitlement process*."[49] If the city does not comply, HCD "will initiate [the] process to revoke" its certification of the city's housing element.[50]

II. DO CONVENTIONAL SOURCES OF LEGAL AUTHORITY SUPPORT THE CHARTER-DR THESIS?

Now that I have explained what DR is and why it matters, let us consider whether it is, in fact, mandated by the San Francisco Charter. I shall argue in this Part that nothing in the text or history of the Charter, and little in judicial precedent, supports the proposition that DR is mandated by the Charter. The Board of Appeals will be my focus, as it is the municipal organ in which the *Guinnane* court located the supposedly Charter-conferred power of DR. After reviewing the Charter's text and history, I will turn to the case law and show how *Guinnane* both misread the relevant California Supreme Court precedents and veered way beyond what was necessary to decide the matter before it.

A. *Lessons from the Text of the Charter*

The city's Board of Appeals (formerly the Board of Permit Appeals) has authority under the Charter to:

> hear and determine appeals with respect to any person who has been denied a permit or license, or whose permit or license has been suspended, revoked or withdrawn, or who believes that his or her interest or the public interest will be adversely affected by

[49] *Id.* at 16 (emphasis added).

[50] *Id.* at 15. In December of 2023, the city enacted a "constraint removal" ordinance under pressure from the state. The ordinance cuts back on public hearings but it does not purport to establish any ministerial approval pathways. *See* S.F., Cal., Ordinance 248-23 (Dec. 14, 2023). However, the state seems to have accepted it, at least as a first step. *See* J.K. Dineen, *State Approves S.F. Housing Ordinance, Avoiding Potential Penalties for the City*, S.F. CHRONICLE (Dec. 12, 2023), https://www.sfchronicle.com/bayarea/article/s-f-housing-ordinance-state-approves-18550114.php.

> the grant, denial, suspension or revocation of a license or permit . . . .[51]

As to the standards the Board applies when it "hear[s] and determine[s]" an appeal, the Charter says very little. In the case of appeals from the Zoning Administrator,[52] the Charter stipulates that the Board of Appeals shall review the Administrator's decision for "error or abuse of discretion."[53] Taken at face value, this is the same, quite limited scope of review that would apply in court: questions of law are to be reviewed *de novo* (for legal error); findings of fact and exercises of discretion are to be set aside for procedural error or if no reasonable person could agree with them given the evidence in the record.[54] The Charter does not address standards of review for other types of decisions that the Board of Appeals may review.

According to the Charter, the Board of Appeals shall be "subject to *the same limitations* as are placed upon the Zoning Administrator by this Charter or by ordinance."[55] This seems redundant, given that the Administrator's decisions are only reviewable for error or abuse of discretion but, in any event, it runs against the conventional wisdom that something in the Charter confers substantive authority on the Board of Appeals to reject permits on discretionary

[51] CHARTER OF THE CITY AND CNTY. OF S.F. art. IV, § 4.106(b). There is an exception for a "permit or license under the jurisdiction of the Recreation and Park Commission or Department, or the Port Commission, or a building or demolition permit for a project that has received a permit or license pursuant to a conditional use authorization." *Id.*

[52] The Zoning Administrator administers the Planning Code and is responsible for issuing variances and certain other administrative exceptions. *See* S.F., CAL., PLANNING CODE art. III, §§ 301, 307 (2023).

[53] CHARTER OF THE CITY AND CNTY. OF S.F. art. IV, § 4.106(c).

[54] *See* Topanga Ass'n for a Scenic Cmty. v. Cnty. of Los Angeles, 11 Cal.3d 506, 515 (Cal. 1974) (quoting Zakessian v. City of Sausalito, 28 Cal.App.3d 794, 798 (Cal. Ct. App. 1972)) ("[A]buse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record."); W. States Petroleum Ass'n v. Super. Ct., 9 Cal.4th 559, 571 (Cal. 1995) (quoting Crawford v. S. Pac. Co., 3 Cal. 2d 427, 429 (Cal. 1935)) ("When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."). *See generally* CECITY T. BARCLAY & MATTHEW S. GRAY, CALIFORNIA LAND USE & PLANNING LAW 536–38 (36th ed. 2018).

[55] CHARTER OF THE CITY AND CNTY. OF S.F. art. IV, § 4.106(c)(2) (emphasis added).

grounds independent of the applicable ordinances—unless the Charter also confers that same discretion on the Zoning Administrator.

The Charter confers substantive discretion on the Zoning Administrator only with respect to variances.[56] It does not say anything about the substantive discretion of other primary decision-makers, such as the Planning Commission, Department of Building Inspections, or any other city agency whose permitting decision with respect to a housing project may be appealed to the Board of Appeals. In the case of the Planning Commission, it merely states that "permits and licenses dependent on, or affected by, the City Planning Code . . . shall be approved by the Commission prior to issuance," and that this function is delegable.[57]

In short, the Charter leaves it to the city's legislative authority—the Board of Supervisors—to establish, by ordinance, the substantive grounds for project entitlements and building permits.

B. *Lessons from the History of the Charter*

The Board of Appeals' (or the Planning Commission's) exercise of a free-roving, discretionary review authority to reject or modify permits in the public interest or to propitiate neighbors is inconsistent with the Charter's division of functions between elective and appointive offices. As explained in Francis Keesling's early treatise, the "formula [that] prevailed" in the Charter of 1932 "was to retain, as elective, officials whose functions directly affect the people and whose functions are peculiar to government," whereas "*[o]fficers whose functions are largely ministerial are made appointive*."[58] Keesling then observes that "[i]n keeping with [this] formula," the Board of Permit Appeals was made an appointive office under the mayor.[59]

As such, the framers of the Charter likely anticipated that the Board of Appeals would engage in only a limited form of review,

---

[56] *See* CHARTER OF THE CITY AND CNTY. OF S.F. art. IV, § 4.105.

[57] *Id.*

[58] FRANCIS V. KEESLING, SAN FRANCISCO CHARTER OF 1931, at 40 (1933) (emphasis added). *See* CHARTER OF THE CITY AND CNTY. OF S.F. § 39 (1932) ("The mayor shall appoint five qualified electors . . . to constitute a board of permit appeals.").

[59] KEESLING, *supra* note 58, at 41.

such as correcting legal errors, rather than exercising broad political discretion to decide what is in the public interest. Even if the Charter does not require that the Board of Appeal's authority be so limited, it would be quite odd to read the Charter as (by implication) barring the Board of Supervisors from enacting a ministerial development ordinance, given that the framers of the Charter thought that the Board of Appeals' review of development permits would be, in Keesling's words, "largely ministerial."[60]

Of course, the original meaning of the Charter could have been transformed by subsequent amendments, either expressly or by implication. For example, if the city's voters were asked to consider a charter amendment about the Board of Appeals and were told that the Board of Appeals has authority under the Charter to perform DR, it *might* be argued that the voters, by adopting the amendment, had placed DR in the Charter, even though that power is nowhere mentioned. No charter amendment has conferred express DR authority on the Board of Appeals and, while I have not tracked down the official ballot pamphlet for every amendment that may have touched the Board, the ballot pamphlet for the most recent such amendment (adopted in March of 2002) does not say anything about DR under the Charter.[61]

The ballot pamphlet for failed Propositions D and E in November 2022 does mention DR in passing, but it does not describe it as a Charter-conferred right.[62] Certainly one cannot infer from the (close) failure of Proposition D that the electorate tacitly ratified the Charter DR theory. For, in addition to expressly authorizing the enactment of ministerial-review ordinances, Proposition D would have placed in the Charter a requirement that city bureaucrats

[60] *Id.* at 40–41.

[61] *See* CITY & CNTY. OF S.F., VOTER INFORMATION PAMPHLET AND SAMPLE BALLOT, CONSOLIDATED PRIMARY ELECTION MARCH 5, 2002, at 61–75 (2002) (providing an official summary of each measure and pro-con arguments from ballot measure committees as well as discussing Proposition D, which gave the Board of Supervisors authority to appoint some members of the Planning Commission and Board of Appeals).

[62] *See* CITY & CNTY. OF S.F., VOTER INFORMATION PAMPHLET, NOVEMBER 8, 2022 CONSOLIDATED GENERAL ELECTION 87 (2022) ("The proposed Charter amendment would exempt [certain] affordable housing developments from any discretionary approvals if they comply with the Planning Code and would allow developments to proceed without environmental review under State law.").

approve a defined class of projects ministerially.[63] People who voted "No" on Proposition D may have done so because they didn't want the Charter to *mandate* ministerial review of anything; because they were confused by competing Proposition E;[64] because they distrusted Proposition D's financial backers; or because they actually thought the Charter prohibited the Board of Supervisors from passing a ministerial-review ordinance and hoped to maintain that state of affairs. Because all of these (and probably other) explanations for a No vote are plausible, the fact that just over fifty percent of the city's electorate voted against Proposition D cannot be said to constitute an implied ratification of the Charter DR thesis.

C. *Lessons from Judicial Precedent*

The case law on DR originates with *Lindell Co. v. Bd. of Permit Appeals* (1943), which concerned a World War II era incident in which Miraloma Park homeowners rose up against a proposal to build thirty units of inexpensive housing for wartime laborers.[65] The objectors raised the specter of their "first class residential district" becoming a "slum" if the housing were built.[66] Acting pursuant to an emergency ordinance that authorized discretionary waivers of zoning and building code standards during the war, the city's Central Permit Bureau issued the permit for the project, which was sustained by the Board of Appeals.[67] The Board of Appeals then accepted a petition for rehearing and reversed itself.[68]

The developer asked the California Supreme Court to take original jurisdiction of the matter because of the wartime emergency, which it did, only to uphold the Board of Appeals' decision.[69] The court held that the city's Central Permit Bureau had essentially unlimited discretion over the project *pursuant to the applicable*

63 *See id.* at 86–87 (breaking down the classes of projects that would be streamlined).

64 *See* S.F. DEP'T OF ELECTIONS, *supra* note 43.

65 *See* Lindell Co. v. Bd. of Permit Appeals, 23 Cal. 2d 303, 308–09 (Cal. 1943).

66 *Id.* at 314, 316.

67 *See id.* at 308–09.

68 *See id.* at 309–10.

69 *See id.* at 307.

ordinances,[70] and that the Board of Appeals, under the Charter, was empowered not simply to review the issuance of a permit for procedural error (as the developer argued), but also to exercise all of the discretion vested in the primary decision-maker (the Central Permit Bureau).[71]

The *Lindell* court did *not* hold that the Charter conferred discretion on the Board independently of the applicable ordinances. But it did remark, cavalierly, that the Board of Appeals "possessed *at least* the discretion" of the Central Permit Bureau,[72] and it called the discretion conferred by city ordinances on the Central Permit Bureau "harmonious" with the "plan of appeal . . . established by . . . *Charter* and ordinance provisions."[73] This raised, without answering, the question of whether something in the Charter *might* convey substantive discretion on the Board.

The California Supreme Court put this question to rest in 1959, declaring that the discretion of the Board of Appeals is coextensive with—not larger than—the discretion of the primary decision-maker:[74] "We hold that the standards administered by the board of permit appeals are, as a matter of law, *precisely the same standards* which are administered at the primary level by the planning commission."[75]

---

[70] *See id.* at 311–13 (relying on Ordinance No. 3.0411, § 3; S.F. Municipal Code part III, art. I, Permit Procedure, § 26; Ordinance No. 1829; and Ordinance No. 1577).

[71] *See id.* at 313–14 ("Harmonious and co-extensive with the wide discretionary power thus vested in the Central Permit Bureau is the plan of appeal from decisions of that agency as established by pertinent San Francisco Charter and ordinance provisions.").

[72] *Id.* at 314 (emphasis added).

[73] *Id.* at 313 (emphasis added).

[74] *See* City & Cnty. of S.F. v. Super. Ct. of City & Cnty. of S.F., 53 Cal. 2d 236, 250 (Cal. 1959) ("In truth, in *Lindell* the emergency ordinance which set the standard by which the board [of permit appeals] was guided was the same ordinance which guided the permit department whose action the board overruled. The same situation prevails here.").

[75] *Id.* at 252 (emphasis added). *See also id*. at 250 ("[I]t would appear to be an elementary proposition not open to doubt that in the general and customary course of any appeal from a lower hearing officer . . . , the standards to be followed by the body of higher authority, unless otherwise authoritatively provided, are the same as those which control the lower: the relevant law whether enunciated by

But in 1989, the California Court of Appeal in *Guinnane v. San Francisco Planning Commission* badly misread *Lindell* and the Charter, stating that the Charter confers substantive DR authority on the Board of Appeals.[76]

The *Guinnane* court made five substantial errors and omissions:

First, it took *Lindell*'s statement that "it cannot be argued that [the Board of Permit Appeals] was in any way limited or restricted in its consideration of the instant case" out of context.[77] The question in *Lindell* was whether the Charter limits the Board of Appeals to review for procedural error, rather than substantive, *de novo* review. *Lindell* held that the Charter authorizes substantive review.[78] Read in context, *Lindell*'s statement that the Board of Appeals was not "in any way limited" just meant that the Board's discretion was not more limited than that of the primary decision-maker, as the California Supreme Court would explain some years later.[79]

Constitution, statute, charter, ordinance, or controlling court decisions and a lawful discretion, applied to the facts in evidence."). There is one confusing passage in which the court seems to suggest that standards applied by the Board of Appeals may have some grounding in the Charter. *See id.* at 247 (stating that the city's "director of planning was correct in his view" that "[t]he authority of the Board is not confined to the determination of whether there has been compliance with the ordinances relating to permit procedures, because, under authority granted by Section 39 of the Charter, the Board also has discretionary powers to pass upon a case on appeal"). In context, however, it's clear that the court is using the term "discretionary powers" to refer to whatever substantive authority the front-line decision-maker had over the permit. *See id.* at 248 (quoting from *Lindell* to establish that the Board of Appeals' authority is not limited to review for procedural error). As noted in Part II.A above, the Charter confers discretion on front-line decision-makers only with respect to variances.

[76] *See* Guinnane v. S.F. City Planning Comm'n, 209 Cal.App.3d 732, 738 (Cal. Ct. App. 1989) ("assuming, arguendo, that the Planning Commission lacked discretion to deny the permit . . . the Board of Permit Appeals . . . possessed such power of discretion [under the Charter]."). *See also id.* at 739 n.5 (rejecting plaintiff's argument that that Board of Appeals was foreclosed from exercising DR because the Board of Supervisors had never authorized the primary decision-maker—i.e., the Planning Commission—to exercise discretionary powers).

[77] *Lindell*, 23 Cal. 2d at 314.

[78] *See supra* note 70–71 and accompanying text.

[79] *See supra* notes 74–75 and accompanying text. *Lindell*'s thesis that the Charter authorizes *de novo* review by the Board of Appeals of all questions of law, fact, and discretion is in considerable tension with the text and history of the

Second, the *Guinnane* court mistook *Lindell*'s rejection of the argument that review by the Board of Appeals is limited to questions about procedural error (as opposed to *de novo* review) as a holding that the Board of Appeals has broad substantive discretion under the Charter.[80] But of course review can be *de novo* without also being discretionary, as when a court reviews a city's issuance of a ministerial permit, or a court of appeal reviews a lower court's interpretations of law.

Third, the *Guinnane* court failed even to mention, let alone distinguish, the California Supreme Court's holding, fifteen years after *Lindell*, that the discretion of the Board of Appeals is coextensive with the discretion of the primary decision-maker.[81]

Fourth, the *Guinnane* court did not identify any provision in the current text of the Charter that confers substantive discretion on any primary actor whose decisions are subject to review by the Board of Appeals. (As noted in Part II.A above, the Charter does confer this discretion with respect to variances, but not otherwise.)

Fifth, the *Guinnane* court did not consider what the structure or historical context of the Charter implies about whether the Board of Appeals has Charter-conferred DR authority. As noted in Part II.B above, the structure and history confirm that it does not.[82]

Guinnane's detour into Charter DR was unnecessary. The city's ordinances plainly authorized DR by the Planning Commission, as *Guinnane* correctly held.[83] It was also well settled by this time that, under the Charter, the Board of Appeals reviews Planning

Charter, *see* Part II.A, but I doubt that the California Supreme Court would revisit the matter. *Compare Guinnane*, 209 Cal.App.3d at 739, *with Lindell*, 23 Cal. 2d at 313–15.

[80] *Compare Guinnane*, 209 Cal.App.3d at 739, *with Lindell*, 23 Cal. 2d at 314.

[81] *See* City & Cnty. of S.F. v. Super. Ct. of City & Cnty. of S.F., 53 Cal. 2d 236, 250 (Cal. 1959).

[82] *See also infra* notes 103–10 and accompanying text (explaining why historical context of the Charter's administrative standing provision refutes the San Francisco City Attorney's assertion, in 1981, that the Charter's administrative standing provisions imply that the Board of Appeals may vacate a permit on "public interest" grounds that are not authorized by ordinance).

[83] *See Guinnane*, 209 Cal.App.3d at 737 (holding that under art. I, § 26 of the Business & Tax Regulations Code, "any city department may exercise its discretion in deciding whether to approve a[permit] application; and in so doing, it may consider the effect of the proposed project upon the surrounding properties").

Commission decisions *de novo*.[84] Accordingly, there was simply no need for the *Guinnane* court to say "assuming, *arguendo*, that the Planning Commission lacked discretion to deny the permit, . . . the Board of Permit Appeals . . . possessed such power of discretion" by dint of the Charter.[85]

Opinions of the Court of Appeal are binding on superior courts but not on future panels of the Court of Appeal.[86] Thus, if San Francisco were to pass a ministerial-review ordinance that limits the Planning Commission and Board of Appeals to the narrow question of whether a housing project conforms to applicable objective standards, the Court of Appeal would be free to reject the reasoning of *Guinnane* and uphold the ordinance as consistent with the Charter.[87]

III. THE OPINIONS OF THE OFFICE OF THE CITY ATTORNEY

To the best of my knowledge, the CAO has never issued a formal, public opinion on whether the Charter disallows the Board of Supervisors from creating, by ordinance, a ministerial permitting framework. But the CAO has issued three public opinions on DR, two of which appear to ground DR in the Charter.[88]

---

[84] *See City & Cnty. of S.F*, 52 Cal. 2d at 252.

[85] *Guinnane*, 209 Cal.App.3d at 738–39.

[86] *See In re* Marriage of Shaban, 88 Cal.App.4th 398, 409 (Cal. Ct. App. 2001) ("[B]ecause there is no 'horizontal stare decisis' within the Court of Appeal, intermediate appellate court precedent that might otherwise be binding on a trial court . . . is not absolutely binding on a different panel of the appellate court.").

[87] Superior Court judges may consider themselves bound by *Guinnane*, although it's possible that the Superior Court would distinguish as dicta the passages in *Guinnane* about the Board of Appeals' DR authority under the Charter. Notably, neither *Guinnane* nor any other Court of Appeal opinion has actually confronted a San Francisco ordinance that purports to eliminate DR for a class of projects. *Cf. In re* San Diego Com., 40 Cal.App.4th 1229, 1234–35 (Cal. Ct. App. 1995) (quoting People v. Toro, 47 Cal.3d 966, 978 n.7 (Cal. 1989)) ("[A] decision is not authority for propositions not considered").

[88] The Charter tasks the City Attorney with, among other responsibilities, "provid[ing] advice or written opinion to any officer, department head or board, commission or other unit of [city] government." CHARTER OF THE CITY & CNTY. OF S.F., art. VI, § 6.102(4).

First came Opinion No. 845, written in 1954.[89] It finds that the Planning Commission has DR authority based on what was then part III, article I, section 26 of the municipal code.[90] The opinion also notes, in passing, that this authority is "consistent with" provisions in the Planning Code and in the Charter about permits appeals by "any person who may deem his interests or property or that the general public interest will be adversely affected . . . ."[91]

Opinion No. 845 posits that DR is integral to "sound administration,"[92] but it also recognizes that the resulting uncertainty about property rights "may cause grave concern to individual landowners."[93] It closes by stating that if the broad discretionary authority lodged in the Planning Commission by section 26 of the Municipal Code is "an undesirable result from a policy standpoint," then "the legislative authority must provide a remedy."[94] Given that the opinion describes land use regulation as a purely municipal affair,[95] this reference to "the legislative authority" surely means "the legislative authority of the Board of Supervisors." As such, the opinion's closing observation confirms that the right of DR was then regarded by the city attorney as a right conferred by ordinance (and thus subject to revision by the Board of Supervisors), rather than as a right conferred by the Charter.

---

89 *See* S.F. City Atty., Opn. No. 845 (May 26, 1954).

90 *See id.* at 5.

91 *Id.* at 5–6.

92 In effect, it treats DR as the cousin of the variance. By issuing a variance, a city can approve a project that violates the letter of the city's zoning code in order to avoid excessive hardship to the project applicant. *See* BARCLAY & GRAY, *supra* note 54, at 59–60. DR allows the city to deny a project that complies with the letter of the zoning code in order to avoid "hardship"—i.e., excessive injury—to the general public. *See* Opn. No. 845, *supra* note 89, at 6–7 (asserting that "[h]uman wisdom cannot foresee the exceptional cases that can arise [in the administration of a zoning ordinance]," and that the "mechanical inclusion or exclusion of such cases may well result in great and needless hardship," with citations to cases upholding the constitutionality of procedures and standards for variances).

93 Opn. No. 845, *supra* note 89, at 7–8.

94 *Id*. at 8.

95 *Id.* at 4 (stating that "regulating the issuance of building permits" is "undeniably a 'municipal affair' over which the City has supreme control"). *See also* Lindell Co. v. Bd. of Permit Appeals, 23 Cal. 2d 303, 310–11 (Cal. 1943).

The City Attorney's next opinion on DR (Opinion No. 79-29), issued in 1979, incorrectly states that the 1954 opinion located DR authority in section 24 of the Charter (rather than section 26 of the Municipal Code, as was actually the case).[96] Former section 24, later recodified as Charter section 7.400, is a plain-vanilla procedural provision about the Planning Commission's role in project approvals:

> No permit or license that is dependent on or affected by the zoning, set-back or other ordinances of the city and county administered by the city planning commission shall be issued except on prior approval of the planning commission.[97]

From this purely procedural provision of the Charter, it would be a huge stretch to infer that the Planning Commission has *substantive* DR authority under the Charter—irrespective of whether the Board of Supervisors wants the Commission to have it. Yet that is the gloss that Opinion No. 79-29 puts on the provision, relying in part on the incorrect assertion that Opinion No. 845 already decided the matter, and in part on a policy argument that DR is "*essential* to the rational, comprehensive application of land-use regulations in the modern, densely populated urban setting of San Francisco."[98]

The 1979 opinion also asserts that DR is a "proper administrative tool to be used in implementation" of a "master plan" contemplated by sections 3.524 and 3.527 of the Charter.[99] It is unclear what the opinion means by "proper administrative tool" (a good tool? a permissible tool?). However, it would be a rather spectacular leap to infer a mandate for DR from the simple fact that the Charter

---

[96] *See* Opn. No. 79-29, *supra* note 9, at 1. The 1954 opinion does cite section 24 of the Charter as authority for the Board of Supervisors to establish a general regulatory framework for land use and development, with permit review by the Planning Commission, but it grounds discretionary review specifically on "ordinances." *See* Opn. No. 845, *supra* note 89, at 4–5 ("The ordinances contemplate no such pro forma consideration. Section 26 of the permit procedure regulation defines the scope of action as follows: 'In the granting or denying of any permit, . . . the granting . . . power . . . may take into consideration the effect of the proposed business or calling on surrounding property and upon its residents [and] may exercise its sound discretion as to whether said permit . . . should be granted'").

[97] Opn. No. 79-29, *supra* note 9, at 2.

[98] *Id.* at 2–3 (emphasis added).

[99] *Id.* at 2. Sections 3.524 and 3.527 are no longer in the Charter.

contemplates that San Francisco, like every other city in California, will create a comprehensive land use plan.

In 1981, the CAO issued what I believe to be its most recent public opinion on Charter DR, Opinion No. 81-7.[100] This opinion suggests that the Charter's provision about administrative standing—that is, who may file an appeal with the Board of Appeals—implies that the Board of Appeals has DR authority:

> [Charter s. 3651] specifically empowers the filing of an appeal protesting the granting of a permit by any person "who deems his interests or property or that of the general public will be adversely affected as a result of the operations authorized by or under any permit or license . . . ." Hence, if the Board were precluded from considering the effect of activities or work authorized by a permit on the appellant's or the general public's interests or property, the right to file the protest appeal under s. 3651 would be meaningless.[101]

The opinion uses this argument only to construe the municipal code, but the clear implication is that DR is conferred by the Charter, independently of any ordinance.

The argument is silly. The public's right to file a protest appeal certainly would not "be meaningless" if the Board of Appeals lacked substantive discretion to reject code-compliant permits. In a world of ministerial permitting, the Charter's provisions about administrative standing would be precisely as meaningful as the substantive land use standards that the Board of Supervisors enacts. For example, if city ordinances established objective standards that prevent obstruction of public views or public rights of way, and city bureaucrats issued a permit for a project that violated those standards,[102] the Charter's administrative standing provision would ensure that the permit may be challenged by any person who deems the "interests . . . of the general public" to be adversely affected by the

---

100 *See* Opn. No. 81-7, *supra* note 9.

101 *Id.* at 5–6.

102 San Francisco, like other California cities, is beginning to issue objective design standards in order to deal with state laws that require ministerial approval of certain classes of projects. *See, e.g.*, SAN FRANCISCO PLANNING, SB-9 OBJECTIVE DESIGN STANDARDS (2023), https://sfplanning.org/sites/default/files/documents/publications/Standards_SB-9_Objective_Design.pdf (prescribing standards for duplex and lot-split projects).

violation. Absent this Charter provision, the Board of Supervisors could limit administrative appeals to permit applicants, leaving the general public unprotected.

The 1981 Opinion's inference of substantive DR from broad administrative standing also misses the historical context of the Charter's administrative standing provision. As Elizabeth Magill, the former dean of Stanford Law School, explained in a seminal article, courts in the 1930s recognized two types of standing to challenge government decisions.[103] First, if a statute or the common law conferred substantive protections on the would-be petitioner, the petitioner had standing.[104] Second, a statute could deputize competitors and members of the public to act as a "private attorney general" and vindicate interests of the general public, even if the injury that the petitioner had suffered due to the government's action was not a type of injury that the statute was designed to prevent.[105] The classic example is competitive injury to a business engaged in the same line of work as the permittee whose permit is at issue.[106]

The San Francisco Charter was adopted in the 1930s and it tracks this convention exactly. In relevant part, it states:

> The Board shall hear and determine appeals with respect to any person who has been denied a permit or license, or whose permit or license has been suspended, revoked or withdrawn, or who believes that his or her interest or the public interest will be adversely affected by the grant, denial, suspension or revocation of a license or permit . . . .[107]

The passage authorizing appeals by "any person who has been denied a permit or license, or whose permit or license has been suspended, revoked or withdrawn" recognizes what Magill calls the "legal wrong" theory of standing.[108] And the passage about "any

---

[103] *See* Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1135–48 (2009).

[104] *See id.* at 1136–39.

[105] *See id.* at 1139–48.

[106] *See id.* at 1139–40.

[107] CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO, art. IV § 4.106(b).

[108] As Magill explains, the "legal wrong" test focused on whether a statute (or the common law) confers substantive protections or entitlements on the plaintiff. *See* Magill, *supra* note 103, at 1136–39. The denial or suspension of a permit,

person . . . who believes that his or her interest or the public interest will be adversely affected" confers administrative standing on everyone else. The phrasing of the latter passage is quite similar to the canonical private attorney general provisions of the Federal Communications Act, except that it makes standing to bring appeals on behalf of "the public interest" a little more explicit.[109]

I am not aware of any state or federal case from the New Deal Era—or any other era—in which a court interpreted a private-attorney-general provision of a statute (i.e., a provision authorizing legal challenges to a permit by members of the general public) as conferring substantive discretion on the body that adjudicates the dispute. For example, if the Federal Communications Act created a ministerial entitlement to a broadcasting permit, it would be very strange to say that the Federal Communications Commission or a court could set aside such a permit on the ground that it is "not in the public interest" just because another provision of the Act authorizes any person aggrieved to challenge the permit. Yet that is the logic that Opinion No. 81-7 uses to conclude that the Board of Permit Appeals has DR authority under the Charter.[110]

***

Ultimately, the 1979 and 1981 opinions are just spare legal window dressing for what was then an ascendant ideology: that more process, more public participation, and (often) more administrative discretion to deny development is always the better way.[111] University of Michigan law professor Nicholas Bagley calls it "The Procedure Fetish."[112] This fetish manifested in, among other things,

under a regime that requires the permit to be issued to the applicant under specified circumstances, is a "legal wrong" in precisely this sense.

109 *Id.* at 1139–48 (stating that the Federal Communications Act provided for suits by "any . . . person aggrieved or whose interests are adversely affected," and explaining how the Supreme Court and lower courts read this language as authorizing enforcement by competitors and members of the general public).

110 *See supra* note 101 and accompanying text.

111 For a terrific history of the ideology, see generally Jacob Anbinder, Conference Paper at the Berkeley Housing Politics and Policy Conference, Building Ecotopia: Environmentalism, Liberalism, and the Making of Antigrowth Political Culture in California, 1950–1990 (Oct. 20, 2023) (on file with author).

112 *See generally* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345 (2019). Bagley emphasizes procedural requirements that make it hard for

the transformation of zoning from a set of rules spelled out and mapped in advance to a platform for public discussion, negotiation, and "dealing" on a project-by-project basis.[113] The small-is-beautiful ethos of 1970s-era environmentalism surely contributed to this transformation,[114] as did fiscal pressures engendered by property tax limits such as Proposition 13,[115] but lawyers and judges were the aiders and abettors. For example, the California Supreme Court in 1976 authorized local governments to change development regulations retroactively,[116] and soon afterwards it invented a constitutional public-hearing right for landowners whose quality of life could be affected by a development project (at least if the local

public agencies to say "yes" to projects without reversal by courts or other actors. *See id.* at 361–64. Discretionary review, San Francisco style, is a close cousin: a procedural requirement that both induces delay and makes it easy for public agencies to say "no" to projects with minimal risk of judicial reversal. Also, by making approvals discretionary, the existence of Charter DR renders all development projects subject to CEQA, a canonical procedure fetish statute that establishes onerous analytical requirements and puts approvals at risk of both political and judicial reversal. *See* Elmendorf & Duncheon, *supra* note 6, at 663–69.

[113] *See* Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 592–93 (2011). Other commentators argue that various forms of project-specific "dealing" have been central to municipal land use practice for a lot longer. *See* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 849–50, 879–82 (1983). *But see* ROBERT C. ELLICKSON, AMERICA'S FROZEN NEIGHBORHOODS: THE ABUSE OF ZONING (2022) (arguing on the basis of data from three cities that areas zoned for single-family homes are almost never rezoned to allow denser development once they have been built out with single-family homes).

[114] *See generally* E.F. SCHUMAKER, SMALL IS BEAUTIFUL: ECONOMICS AS IF PEOPLE MATTERED (1973); Anbinder, *supra* note 111. *See also* Jacob Anbinder, *The Pandemic Disproved Urban Progressives' Theory About Gentrification*, THE ATLANTIC (Jan. 2, 2021), https://www.theatlantic.com/ideas/archive/2021/01/anti-growth-alliance-fueled-urban-gentrification/617525/.

[115] *See* Selmi, *supra* note 113, at 604–07 (discussing tax revolts). *See also* Paul J. Fisher, The Role of Property Tax in California's Housing Crisis 1 (Oct. 26, 2022) (unpublished manuscript), https://www.maxwell.syr.edu/docs/default-source/research/cpr/property-tax-webinar-series/2022-2023/fisher-p13-accessible.pdf?sfvrsn=2c017df_4 (estimating that Proposition 13 caused a 14%–32% reduction in housing production).

[116] *See* Selmi, *supra* note 113, at 608 (explaining that effect of California Supreme Court decision in Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n, 553 P.2d 546 (Cal. 1976) "was to offer no vested rights protection to large investments in long-term projects").

government has some discretion over whether to approve the project).[117] The 1979 and 1981 CAO opinions on DR are more of the same. They fit the moment beautifully,[118] even if not the text, history, or prior judicial and administrative constructions of the Charter.

IV. CODA: DID PROPOSITION M (1986) MAKE DISCRETIONARY REVIEW THE LAW OF THE CITY?

After I posted the first draft and a Twitter thread about this Article,[119] a reader responded that even if the Charter did not entrench DR, perhaps Prop M (1986) did.[120] On further investigation, I've concluded that there is a plausible argument that Prop M requires DR of permits for a "demolition, conversion or change of use"[121] (which most potential housing development projects in a dense city like San Francisco would require). But there are also reasonable arguments going the other way, and I have little sense of how a court would rule. I shall argue, however, that courts should treat California's "regional welfare" limitation on the municipal police power as a canon for interpreting voter-adopted measures and, on this basis, hold that Prop M does not prohibit the Board of Supervisors from prescribing ministerial review of demolition, conversion, or change of use permits.

In Part IV.A, I provide an overview of the history, substance, and subsequent judicial construction of Prop M. Part IV.B lays out the argument that Prop M requires DR of permits for demolition, conversion, and change of use, and considers some potential rejoinders to the argument. Finally, Part IV.C takes up the regional welfare limitation on the police power and explains how it could help

---

117 *See* Horn v. County of Ventura, 596 P.2d 1134, 1137 (Cal. 1979).

118 *Cf.* RICHARD EDWARD DELEON, LEFT COAST CITY: PROGRESSIVE POLITICS IN SAN FRANCISCO, 1975–1991, at 57–77 (1992) (detailing emergency of anti-growth politics in San Francisco and their fusion with environmental and other progressive sensibilities).

119 *See* Chris Elmendorf (@CSElmendorf), TWITTER (Mar. 22, 2022, 10:10 AM), https://twitter.com/CSElmendorf/status/1638589100910579712.

120 *See* Christopher Pederson (@ch_pederson), TWITTER (Mar. 22, 2022, 10:46 AM), https://twitter.com/ch_pederson/status/1638597966364827649.

121 SAN FRANCISCO PLANNING CODE, art. I, § 101.1(e).

to resolve the question of whether Prop M requires DR of demolition, conversion, and change of use permits.

A. *An Overview of Prop M*

Enacted in 1986, Prop M was a crowning achievement of San Francisco's slow-growth coalition.[122] Known today for its annual citywide cap on office growth,[123] Prop M did many other things too. It reduced zoning for office space under the city's Downtown Plan.[124] It required the city to "study and adopt" a job-training program for San Francisco residents.[125] And, of particular relevance to the DR question, it purported to add eight so-called Priority Policies to the city's general plan and planning code.[126]

Prop M demands a finding of consistency with the Priority Policies prior to the city "adopting any zoning ordinance or development agreement;" "issuing a permit for any project or adopt[ing] any legislation which requires an initial study under the California Environmental Quality Act;" "*issuing a permit for any demolition, conversion or change of use*;" or "taking any [other] action which requires a finding of consistency with the General Plan."[127]

The Prop M Priority Policies are:

(1) That existing neighborhood-serving retail uses be preserved and enhanced and future opportunities for resident employment in and ownership of such businesses enhanced;
(2) That existing housing and neighborhood character be conserved and protected in order to preserve the cultural and economic diversity of our neighborhoods;

---

122 *See* DELEON, *supra* note 118, at 44–68 (discussing failures of Proposition T (1971), Proposition O (1979), Proposition F (1985), and also the growing influence of the movement over individual projects and neighborhood plans).

123 *See, e.g.*, J.K. Dineen, *San Francisco's 1986 Cap on Office Space Now a Hurdle — But Fix May Be in Works*, S.F. CHRON. (June 4, 2018), https://www.sfchronicle.com/politics/article/Remember-Prop-M-SF-may-use-it-to-increase-12967248.php.

124 *See* CITY & CNTY. OF S.F., VOTER INFORMATION PAMPHLET, NOV. 4, 1986 GENERAL ELECTION 77 (1986).

125 *See id.*

126 *See id.* at 77–78.

127 S.F., CAL., PLANNING CODE, art. I, § 101.1(c)–(e).

(3) That the City's supply of affordable housing be preserved and enhanced;
(4) That commuter traffic not impede Muni transit service or overburden our streets or neighborhood parking;
(5) That a diverse economic base be maintained by protecting our industrial and service sectors from displacement due to commercial office development, and that future opportunities for resident employment and ownership in these sectors be enhanced;
(6) That the City achieve the greatest possible preparedness to protect against injury and loss of life in an earthquake;
(7) That landmarks and historic buildings be preserved; and,
(8) That our parks and open space and their access to sunlight and vistas be protected from development.[128]

Prop M passed by a narrow margin.[129] Heated debates and litigation then ensued about whether the Priority Policies could even be adopted by ballot initiative and, if so, how they would be implemented. The courts ruled that while the Charter does not allow the city's general plan to be amended by ballot initiative, the Priority Policies are valid as code amendments notwithstanding their apparent function as plan amendments.[130]

The next question was whether the consistency findings required by Prop M are just ordinary general plan consistency findings of the type normally required by California planning law, or different and somehow special, with greater legal bite. If "ordinary" is the answer, the Priority Policies need not disrupt San Francisco land use practice very much because, under background principles of state law, cities have broad discretion to *balance* competing general plan policies.[131] A city's finding that a project, rezoning, or other action

[128] S.F., CAL., PLANNING CODE, art. I, § 101.1(b).

[129] *See* Brad Paul, *Proposition M and the Downtown Growth Battle*, SPUR URBANIST (July 1, 1999), https://www.spur.org/publications/urbanist-article/1999-07-01/proposition-m-and-downtown-growth-battle (reporting that Prop M passed by a margin of 51.4% to 48.6%).

[130] *See* Residential Builders Ass'n of S.F. v. City & Cnty. of S.F., 259 Cal. Rptr. 610, 621–24 (Cal. Ct. App. 1989), *review denied and ordered not to be officially published* 1989 Cal. LEXIS 2631, at *1 (Cal. Sept. 28, 1989). The Priority Policies were later added to the general plan in the Charter-authorized manner. *See id.* at 624.

[131] *See* Sequoyah Hills Homeowners Assn. v. City of Oakland, 23 Cal. App. 4th 704, 719–20 (Cal. Ct. App. 1993).

is consistent with the general plan will be set aside by the courts only if no reasonable person could agree with the city's judgment of "overall consistency," given the evidence in the record.[132]

The City Attorney argued that Prop M left this deferential regime intact.[133] "Construing [P]roposition M to require that every action be consistent with *each* of the eight Priority Policies," the CAO wrote in an official advisory opinion, "would lead to the extreme result of blocking most planning actions."[134] It took almost thirty years, but eventually the Court of Appeal weighed in.[135] Agreeing with the City Attorney that "there is no evidence that . . . the voters intended to alter the City's practice of determining consistency by considering the relevant policies as a whole," and, further, that "a reasonable person could conclude that [Prop M's] language allows the City to weigh and balance the priority policies and to construe them in light of the purposes of the General Plan," the court held Prop M did not supplant the old balancing framework.[136]

Under this framework, no Priority Policy is individually decisive. "If a particular action would advance some Policies while frustrating others, a finding of consistency [is] proper . . . if the [Planning] Commission concludes that the benefits in furthering some of the Policies outweigh the harm in impeding others."[137] Moreover, because Prop M did not even succeed in amending the general plan, let alone disable the city from adding new policies to the plan, the Board of Supervisors has leeway to dilute the Prop M Priority Policies by adding additional policy declarations and statements of priority to the general plan.[138] The city could then find that a new

---

132 BARCLAY & GRAY, *supra* note 54, at 25–26, 46–47.

133 *See* S.F. City Atty., Opn. No. 86-17, *in* OPINIONS OF THE CITY ATTORNEY CITY AND COUNTY OF SAN FRANCISCO 1986, at 15–16 (1986) ("There is no evidence that in passing Proposition M, the voters intended to alter the City's practice of determining consistency by considering the relevant policies as a whole.").

134 *Id.* at 15 (emphasis added).

135 *See* S.F. Tomorrow v. City & Cnty. of S.F., 229 Cal. App. 4th 498 (Cal. Ct. App. 2014), *as modified* (Sept. 4, 2014), *as modified* (Sept. 5, 2014).

136 *Id.* at 519–21.

137 *Id.* at 521 (quoting S.F. City Atty., Opn. No. 86-17, at 15–16 (Dec. 16, 1986)).

138 *Cf. id.* at 520 (stating that the Prop M Priority Policies are to be "construe[d] . . . in light of the purposes of the General Plan").

ordinance has "benefits in furthering some of the [general plan p]olicies" (for example, certain newly declared priorities) that "outweigh the harm in impeding others" (for example, certain of the Prop M priorities).[139]

B. *The Nature of the Required Finding for "Demolition, Conversion and Change of Use" Permits*

The Court of Appeal's assimilation of Prop M Priority Policies into the framework of California planning law certainly limits the disruptive force of those policies, but there is still an argument that Prop M requires a discretionary determination whenever the city approves a permit for demolition, conversion, or change of use.

Let us begin with basic principles of California planning law. A city's general plan is said to be its "constitution" for development; subsequent land use actions by the city must be consistent with the general plan.[140] Cities therefore make findings of consistency when they exercise land use discretion, such as by adopting a zoning ordinance or specific plan, or approving a tentative subdivision map.[141] Cities need not—and as best I can tell, generally do not—make findings of general plan consistency when they issue ministerial permits.[142] A ministerial permit is consistent with the general

[139] *Id.* at 521. Indeed, there is one published opinion which suggests that San Francisco's balancing of general plan policies is not subject to judicial review at all. *See* Found. for S.F.'s Architectural Heritage v. City & Cnty. of S.F., 106 Cal. App. 3d 893, 916 (Cal. Ct. App. 1980) ("The Board's decision to balance the elements of the master plan is within its discretion and not subject to our review."). However, under background principles of general plan law, the balancing judgment call would be judicially reviewable, albeit under the extremely deferential "it passes if any reasonable person could strike the balance in this way" test. *See* BARCLAY & GRAY, *supra* note 54, at 25–26, 46–47.

[140] Though, as noted, the test for consistency is highly deferential.

[141] *See* BARCLAY & GRAY, *supra* note 54, at 25–26; GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, GENERAL PLAN GUIDELINES 254 (2017), https://opr.ca.gov/docs/OPR_Complete_7.31.17.pdf ("The general plan is largely implemented through zoning and subdivision decisions.").

[142] This is standard practice according to several practitioners with whom I have discussed the issue. But it may not be a universal practice. I have found one case where a city made consistency findings for a ministerial permit. *See* Cary Tai, Community Development Director, *Permit Approving Precise Plan Development and Related Entitlements*, CITY OF MANHATTAN BEACH (Mar. 29, 2022),

plan *by construction* if the ordinance that provides for ministerial permitting was enacted with a proper finding of consistency.[143]

If Prop M had simply added the Priority Policies to San Francisco's general plan and required findings of consistency prior to discretionary land use actions, then San Francisco, like any other city, would be free to choose the level of generality at which to exercise discretion and make the associated findings of consistency. The city could do it at the zoning stage only (by enacting a zoning ordinance that requires ministerial permitting), or at both the zoning stage and the project review stage (by enacting instead a zoning ordinance that provides for discretionary permitting). Yet Prop M expressly requires a consistency finding not only when the city takes legislative actions, but also when it "issu[es] a permit for any demolition, conversion or change of use."[144] A natural inference is that Prop M requires a *project-specific* determination of consistency for each such permit—even if the project complies with zoning ordinances already found to be consistent. The Prop M Priority Policies are, as the Court of Appeal put it, "subjective standards,"[145] and the task of striking a balance among competing priorities is unquestionably subjective, so Prop M's requirement of permit-specific consistency findings appears incompatible with a ministerial permitting regime.[146]

https://manhattanbeach.legistar.com/LegislationDetail.aspx?ID=5996222&GUID=F323EFF5-D66F-4299-8D3C-8E9BAC948487&FullText=1.

[143] *See, e.g.*, Venice Coal. to Pres. Unique Cmty. Character v. City of L.A., 31 Cal. App. 5th 42, 52 (Cal. Ct. App. 2019) ("The City previously determined that the ministerial process outlined in the specific plan was consistent with the LUP [Land Use Plan]. Thus . . . compliance with the specific plan is compliance with the LUP. Consistent with that 2003 determination, the specific plan *contains no language requiring the director of planning to independently review specific plan projects for compliance* with the LUP.") (emphasis added). *See also* Roselaren v. City of Berkeley, No. A097483, 2002 WL 1767574, at *5 (Cal. Ct. App. July 31, 2002) (agreeing with city that issuance of a ministerial permits does not require "factual findings on the consistency of the project with the general goals for residential districts articulated in Berkeley Municipal Code").

[144] S.F., CAL., PLANNING CODE, art. I, § 101.1(e).

[145] S.F. Tomorrow v. City & Cnty. of S.F., 229 Cal. App. 4th 498, 520 (Cal. Ct. App. 2014), *as modified* (Sept. 4, 2014), *as modified* (Sept. 5, 2014).

[146] Note also that the other categories of decisions for which Prop M requires a finding of consistency are quite clearly discretionary acts: "adopt[ing] any zoning

The electorate was certainly on notice that Prop M could affect development permitting in a significant way through the Priority Policies. The official description of the measure in the ballot pamphlet told voters that Prop M would prevent the city from "approv[ing] any zoning ordinance or development agreement, or *issu[ing] certain permits*, unless it *specifically determined* that the ordinance, development agreement, or permit did not violate [the Priority Policies]."[147] The sponsors of the measure wrote in the ballot pamphlet that Prop M was needed because "past overdevelopment" had created a wide range of harms including "loss of affordable housing and neighborhood-serving small businesses," concerns that are echoed in the Priority Policies.[148] Conversely, the opposition campaign argued that the Priority Policies were a "fatal flaw" that could stanch salutary development of decrepit properties.[149]

This is not to say that "Prop M requires discretionary review" is the only possible interpretation of its requirement for consistency findings with respect to demolition, conversion, and change of use permits. On another view, if the city, in adopting a ministerial review ordinance, makes the required finding that the ordinance is consistent with the Priority Policies on balance, that finding would be literally "prior to" the issuance of permits under the ordinance (as the text of Prop M requires[150]) and would logically compel the conclusion that any permit issued pursuant to the ordinance is consistent with the Prop M policies. A consistency finding could also be made when a ministerial demolition, conversion, or change of use permit is issued under the ordinance, but it would be purely proforma, as the permit is, by hypothesis, constructively consistent with

ordinance or development agreement;" "issuing a permit for any project or adopting any legislation which requires an initial study under the California Environmental Quality Act;" and "taking any [other] action which requires a finding of consistency with the General Plan." S. F., CAL., PLANNING CODE, art. I, § 101.1(e). This tends to reinforce the argument that Prop M requires a similarly discretionary finding of consistency for demolition, conversion, and change of use permits.

147 CITY & CNTY. OF S.F., *supra* note 124, at 77.

148 *Id.* at 79.

149 *See* DELEON, *supra* note 118, at 76.

150 *See* S. F., CAL., PLANNING CODE, art. I, § 101.1(e) ("Prior to . . . issuing a permit for any demolition, conversion or change of use . . . the City shall find that the proposed project or legislation is consistent with the Priority Policies.").

Prop M, assuming proper findings in the ministerial review ordinance.

This narrow reading of Prop M would not negate or render pointless the measure's requirement of consistency findings for demolition, change of use, and conversion permits. Recall that Prop M was passed at a time when every project approval in the city was subject to DR under the municipal code and the City Attorney's construction of the Charter. Were it not for the language in Prop M about demolition, conversion, and change of use, the city could have continued issuing such permits pursuant to ordinances that had been enacted without a finding of consistency with the Priority Policies and, if a permit were DR'd, without consideration of those policies during the discretionary review. My "narrow" reading of Prop M would not allow that. On the contrary, *every* exercise of discretion with respect to change of use, demolition, and conversion permits would be governed by the Prop M policies. The only difference is that the narrow reading would allow the city to decide to exercise that discretion at the wholesale level only, by adopting a ministerial review ordinance that is consistent with the Priority Policies.[151]

Indeed, a court might even require the city (if it wishes to make permits for demolition, conversion, or change of use permits ministerial) to find that ministerial review will *better serve* the Prop M Priority Policies than would discretionary application of the Priority Policies to such permits. The city could justify such a finding by pointing to provisions of the ordinance that advance Priority Policies,[152] and with empirical evidence that extant permitting

[151] The Planning Commission and the Board of Supervisors made similar wholesale findings of consistency with the Priority Policies when the city adopted an ordinance waiving density limits and neighbor-notification requirements for the construction of accessory dwelling units in connection with seismic-retrofit projects. *See* S.F., Cal., Ordinance No. 030-15, at 281–82 (Mar. 26, 2015), https://sfgov.legistar.com/LegislationDetail.aspx?ID=1903352&GUID=CDE90F51-CD76-4145-B274-C9B6B65A5492&Options=&Search= (reciting Planning Commission's findings of consistency). Note, however, that this ordinance did not purport to eliminate discretionary review of a seismic-retrofit-and-ADUs building permit, in the event such a permit were appealed to the Board of Permit Appeals.

[152] For example, objective criteria that allow change of use or demolition only in specified circumstances tailored to the Prop M Priority Policies, e.g., where no low-income tenant would be displaced and where renovating or replacing an

protocols—which invite the exercise of discretion after a public hearing—have elevated the parochial concerns of an unrepresentative subset of project neighbors over Priority Policy goals such as housing affordability and cultural and economic diversity.[153]

Still another way of reconciling Prop M with a ministerial review ordinance would be to require that the permitting authority find, for each demolition, conversion, or change of use permit, that a reasonable person *could* deem the project to be consistent with the Priority Policies, notwithstanding that other reasonable people might disagree. This is, of course, the same test that courts have traditionally applied when reviewing a city's finding that a project is consistent with the city's general plan.[154] Because it is a court question—a question of law—it is also a question that a ministerial permitting ordinance may require the city's permitting agency to answer on a project-by-project basis. This follows from the nature of a ministerial permitting, which requires the applicant to show that their project conforms to applicable *legal* requirements but does not allow the permitting authority to exercise policy discretion on a case-by-case basis.[155]

In considering these alternative interpretations, one should keep in mind that, while the electorate was certainly on notice that Prop M could affect permitting in some significant way through the

existing building would "protect against injury and loss of life in an earthquake." S.F., CAL, PLANNING CODE, art. I, § 101.1I (2023).

[153] *See* Alexander Sahn, Public Comment and Public Policy (Apr. 26, 2022), (unpublished manuscript), https://drive.google.com/file/d/1FGpCGEzVjuhc-C_ih5Xl5Z_qO3MIyQpy/view (finding that commentators at San Francisco Planning Commission meetings from 1998 to 2002 were unrepresentative along the lines of race, age, and homeownership; that negative comments were more likely to be given be people whose home address is spatially proximate to the project; and that comments opposing development have twice the impact of supportive comments on Planning Commission decisions).

[154] *See* S.F. Tomorrow v. City & Cnty. of S.F., 229 Cal. App. 4th 498, 515 (Cal. Ct. App. 2014), *as modified* (Sept. 4, 2014), *as modified* (Sept. 5, 2014) (citing cases).

[155] *Cf.* Witt Home Ranch, Inc. v. Cnty. of Sonoma, 165 Cal. App. 4th 543, 566 (Cal. Ct. App. 2008) ("Local governing bodies acting in a ministerial role inevitably are called upon to make interpretive decisions that will have import for future applicants who are similarly situated. Formalizing this statutory interpretation in the form of a policy did not convert that interpretation into legislation or convert a ministerial action into a legislative one.") (citation omitted).

Priority Policies, there is no basis for concluding that a majority of the voters intended to entrench discretionary review of every project that entails a demolition, conversion or change of use. Prop M featured a mishmash of policies,[156] and nothing in the ballot pamphlet said that the measure would require DR.

In fact, that marginal Yes on M voters—folks who were on the fence but swung to put it over the fifty percent margin—were probably more enticed by its job-training provisions than anything connected to the Priority Policies. Prop M's sponsors had responded to the failure of their previous anti-growth ballot measures by adding the job-training provisions and then "broaden[ing] the social base of the slow-growth coalition by investing most of their limited funds . . . in targeting African-American residents, working-class home owners, [and] labor-union voters . . . ."[157] An analysis of precinct-level election returns suggests that these efforts paid off, with Prop M outperforming previous growth-control measures in areas with high concentrations of African-Americans and working-class homeowners.[158] To the extent that a judge hearing a "Proposition M vs. ministerial permitting" case subscribes to the pivotal-voter theory of legislative (electorate) intent,[159] she will throw up her hands because the pivotal voter probably had no intent on this question.

Ultimately, how a judge answers the question of whether Prop M locked in DR of demolition, change of use and conversion permits may turn on whether she thinks old ballot measures should be given broad, purposivist readings or instead assimilated into background legal principles and norms. A purposivist judge might well conclude that ministerial review is incompatible with what the official summary of Prop M described as a requirement that the city "specifically determin[e]" that any proposed demolition, conversion, or change of use is consistent with the Priority Policies. The

156 *See supra* notes 123–26 and accompanying text.

157 DELEON, *supra* note 118, at 70, 75.

158 *See id.* at 79–80.

159 For explanations and defenses of this theory of collective intent, see generally Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2002). *See also* Cheryl Boudreau et al., *What Statutes Mean: Interpretive Lessons from Positive Theories of Communication and Legislation*, 44 SAN DIEGO L. REV. 957, 980 (2007).

assimilationist judge will say that an old ballot measure should not be construed to divest a city council of authority to decide the basic land use question of which classes of projects to review ministerially versus which classes to review in a discretionary fashion. The assimilationist approach carried the day in the sole Court of Appeal opinion about the Priority Policies,[160] but that is no guarantee of future results.

There is, however, one more piece of the puzzle to consider: the import of the California Supreme Court's decision in *Associated Home Builders v. City of Livermore* for construing local ballot measures that may conflict with regional welfare.[161]

C. *Livermore, Regional Welfare, and the Construction of Local Ballot Measures*

Livermore established that the municipal police power under the California Constitution reaches an outer limit when it butts up against the regional need for an adequate supply of housing. I argue in this section that *Livermore*'s recipe for adjudicating "regional welfare" challenges to municipal ordinances is unworkable, but that *Livermore* ought to have a second life as a canon of construction for voter-enacted measures like Prop M.

The question in *Livermore* was whether a suburban town had exceeded its police powers by enacting a growth control measure that "substantially limit[ed] immigration into [the] community" and arguably undermined the welfare of the larger metropolitan region.[162] The California Supreme Court explained that "municipalities are not isolated islands remote from the needs and problems of the area in which they are located."[163] "[A]n ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective."[164] The Court spelled out a three-step test for adjudicating

160 *See* S.F. Tomorrow v. City & Cnty. of S.F., 229 Cal. App. 4th 498, 513–26 (Cal. Ct. App. 2014), *as modified* (Sept. 4, 2014), *as modified* (Sept. 5, 2014).

161 *See* Associated Home Builders, Inc. v. City of Livermore, 18 Cal. 3d 582, 608 (Cal. 1976).

162 *Id.* at 589.

163 *Id.* at 607.

164 *Id.*

regional welfare challenges to local development restrictions, as follows:

> (1) "[F]orecast the probable effect and duration of the restriction."[165]
> (2) "[I]dentify the competing interests affected by the restriction."[166]
> (3) "Having identified and weighed the competing interests, . . . determine whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests."[167]

The *Livermore* framework was well meaning but impractical. Courts are ill equipped to make empirical forecasts of the "probable effect and duration" of an ordinance restricting development. Nor do they have much warrant to decide whether a local restriction "reasonabl[y] accommodate[s] the competing interests" in what *Livermore* aptly described as an "area [of] deep social antagonisms."[168] It is asking rather much of California's superior court judges—who must face their county's voters every six years[169]—to hold a "*Livermore* trial" and then make a politically fraught judgment call about whether the interests of people outside of a city (and often outside

---

[165] *Id.* at 608.

[166] *Id.* at 608–09. The Court noted,

> We touch in this area deep social antagonisms. We allude to the conflict between the environmental protectionists and the egalitarian humanists; a collision between the forces that would save the benefits of nature and those that would preserve the opportunity of people in general to settle. Suburban residents who seek to overcome problems of inadequate schools and public facilities to secure 'the blessing of quiet seclusion and clean air' and to 'make the area a sanctuary for people' may assert a vital interest in limiting immigration to their community. Outsiders searching for a place to live in the face of a growing shortage of adequate housing, and hoping to share in the perceived benefits of suburban life, may present a countervailing interest opposing barriers to immigration.

Id. (internal citations omitted).

[167] *Id.* at 609.

[168] *Id.* at 608–09.

[169] *See Judicial Selection: How California Chooses Its Judges and Justices*, CALIFORNIA COURTS NEWSROOM, https://newsroom.courts.ca.gov/branch-facts/judicial-selection-how-california-chooses-its-judges-and-justices (last visited Aug. 7, 2024) ("Superior court judges serve six-year terms and are elected by county voters on a nonpartisan ballot at a general election during even-numbered years.").

of the county that elected the judge) warrant overturning the wishes of a municipal electorate.

A few years after *Livermore*, the California legislature enacted an administrative framework—the Housing Element Law of 1980[170]—that empowers the state's HCD to periodically negotiate with every city a deal that balances local interests against the regional need for housing.[171] The deal is memorialized as the housing element of the city's general plan.[172] Through its HCD-approved housing element, a city must show that it has a workable plan to accommodate what the state and the regional "council of governments" have said is the city's fair share of regionally needed housing over the next five to eight years.[173] The city must also analyze, and mitigate or remove, a wide array of potential constraints to the development of housing.[174]

The housing-element framework obviates the constitutional justification for *Livermore* trials in most cases. If a city's housing element has already analyzed an ordinance as a potential constraint, and if HCD has ratified the city conclusion either that the ordinance is not a constraint or that it will be adequately mitigated by other actions in the housing element, a superior court's determination that

170 *See* 1980 CAL. STAT. ch. 1143 (adding CAL. GOV'T CODE § 65580 et seq.).

171 *See* Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 100–05 (2019) (describing emergence of California housing framework alongside other West Coast planning innovations). *See also* William C. Baer, *California's Fair-Share Housing 1967–2004: The Planning Approach*, 7 J. PLANNING HIST. 48, 59–61 (2008) (describing the 1980 law as a "great compromise" over substance of, and allocation of authority under, state law requiring cities to plan for housing).

172 *See generally Housing Elements*, CAL. DEP'T OF HOUS. & CMTY. DEV., https://www.hcd.ca.gov/planning-and-community-development/housing-elements (last visited May 15, 2024).

173 *See* CAL. GOV'T CODE § 65583. *See also* Christopher S. Elmendorf et al., *Making It Work: Legal Foundations for Administrative Reform of California's Housing Framework*, 47 ECOLOGY L.Q. 973, 978, 1001–52 (2020) (describing HCD's authority to insist on realistic housing plans under current law).

174 *See* CAL. GOV'T CODE § 65583(a)(5). *See also* CAL. GOV'T CODE § 65583(c)(3); Christopher S. Elmendorf et al., *State Administrative Review of Local Constraints on Housing Development: Improving the California Model*, 63 ARIZ. L. REV. 609 (2021) (describing practice of constraints review and suggesting strategies to improve it).

the ordinance "reasonably accommodates competing interests" would be redundant. Conversely, if the superior court disagreed with the shared conclusion of HCD and the city council, the superior court would be substituting its own political judgment for that of the actors to whom the Legislature has assigned responsibility for making precisely this call.[175]

Not surprisingly, there have been few *Livermore* trials of local development restrictions and there are almost no published cases in which a local land use restriction was invalidated for not reasonably balancing local and regional interests.[176] Developers and housing

[175] *Cf.* CAL. GOV'T CODE § 65589.3 ("In any action . . . taken to challenge the validity of a housing element, there shall be a rebuttable presumption of the validity of the element or amendment if . . . the department has found that the element or amendment substantially complies with the requirements of this article.")

[176] I have found only one case in which a full "*Livermore* trial" was held and a local restriction on housing development invalidated. *See* Bldg. Indus. Assn. v. City of Oceanside, 27 Cal. App. 4th 744, 764 (Cal. Ct. App. 1994) (summarizing, approvingly, a trial in which the court "balance[d] the City's problems and the relationship of Prop. A to those problems, against the quantified adverse effect Prop. A would have on affordable housing, applying that test as of the 1987 adoption date," using "[t]he *Livermore* criteria"). In Arnel Development Co. v. City of Costa Mesa, 126 Cal.App.3d 330 (Cal. Ct. App. 1981), a local initiative that "arbitrar[ily] and discriminat[orily]" rezoned a specific parcel to prevent construction of moderate-income housing was also invalidated on the ground that it was discriminatory and did "not even [make] an attempt to accommodate competing interests on a regional basis." *Id.* at 334–40. Rounding out the universe of published "regional welfare" cases are: City of Los Angeles v. County. of Kern, 154 Cal. Rptr. 3d 122, 144 (Ct. App. 2013) ("It is likely plaintiffs will succeed on the merits of [their regional-welfare challenge to waste-disposal measure] claim because the evidence presented so far shows . . . considerable hardship to waste-generating municipalities around the region if Measure E is enforced and no offsetting hardship to Kern County if it is not enforced."), *rev'd on other grounds*, 328 P.3d 56 (Cal. 2014); City of Los Angeles v. County. of Kern, 462 F. Supp. 2d 1105, 1110, 1117 (C.D. Cal. 2006) (holding that plaintiffs are likely to succeed on regional welfare challenge to voter-adopted restriction on "land application of biosolids in . . . unincorporated areas"); Northwood Homes, Inc. v. Town of Moraga, 216 Cal.App.3d 1197, 1201–04 (Cal. Ct. App. 1989) (finding no regional impact from Moraga's enactment of an open space ordinance); City of Cupertino v. City of San Jose, 33 Cal. App. 4th 1671, 1676–78 (Cal. Ct. App. 1995) (refusing to extend regional-welfare test to challenges to local taxes); City of Del Mar v. City of San Diego, 133 Cal. App. 3d 401, 407–15 (Cal. Ct. App.1982) (rejecting regional welfare challenge to a city's *approval* of higher-density housing than a neighboring city preferred, and noting that in contrast to *Livermore*, the approvals at issue were "inclusionary in nature"). *See also* Clearview Lake Corp. v. Cnty. of San

advocates who might have brought *Livermore* claims probably figured the claims would be costly and fruitless, notwithstanding the serious, cumulatively adverse effects that municipal development restrictions have had on regional welfare in California's high-price metro areas and beyond.[177]

But there is at least one circumstance in which *Livermore*'s "regional needs" perspective should continue to guide the courts: when they are interpreting local ballot initiatives.[178] Whereas ordinances enacted by a city council can be reformed by the council, pursuant to an agreement negotiated with HCD and memorialized in the city's housing element, ordinances enacted by the voters may prevent the city council and HCD from working out reasonable accommodations between local interests and regional needs. The extent to which voter-adopted measures have this effect will depend on how they are interpreted. Thus, one plausibly attractive future for *Livermore* would be to reconstruct it as a canon of interpretation for ballot measures.[179]

Could this be done without holding impractical "*Livermore* trials" on the contested ballot measures? I think so. Here is a sketch of an alternative to *Livermore*'s three-step framework:

> Step 1: Is the measure, or a proposed interpretation of it, standing in the way of reforming local practices that state officials have flagged as a regional-welfare issue?
>
> Step 2: Is the measure susceptible to an alternative interpretation that would allow those local practices to be reformed?

Bernardino, No. E056208, 2014 WL 936831, at *4 (Cal. Ct. App. Mar. 11, 2014) (dismissing regional-welfare claim because "the complaint alleges no facts concerning the probable effect and duration of the ordinance; the competing interests affected by the ordinance; or whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests").

[177] *See, e.g.*, Enrico Moretti & Chang-Tai Hsieh, *Housing Constraints and Spatial Misallocation*, 11 AM. ECON. J.: MACROECONOMICS 1 (2019).

[178] I do not mean to imply that this perspective is otherwise irrelevant. For example, it matters for adjudicating home-rule challenges to state housing laws, *see, e.g.*, California Renters Legal Advoc. & Educ. Fund v. City of San Mateo, 68 Cal. App. 5th 820, 848–51 (Cal. Ct. App. 2021), and it may have a role to play in the interpretation of state housing laws as well.

[179] The canon might also be extended to questions about whether the Housing Element Law preempts local voter-adopted measures.

> Step 3: Is the measure old? (The older the measure, the less likely it is that the intent of the people who voted for it reflects the current preferences of the city's electorate.)

If a voter-adopted measure is (1) preventing the city from adopting or implementing reforms that HCD thinks are needed for regional welfare; (2) susceptible to an interpretation that would not block those reforms; and (3) old, there should be a strong presumption in favor of the unblocking interpretation, even if it is not the most natural reading of the ordinance.

How would this play out in a case about Prop M? At Step 1, a court should look to HCD for answers. As noted above, HCD has told San Francisco that the city *must* establish a "non-discretionary, ministerial entitlement process" for housing development.[180]

At Step 2, a court would recognize that Prop M *could* be interpreted to allow constructive consistency findings for demolition, conversion, and change of use permits under a ministerial review ordinance, provided that the ordinance itself was enacted with the requisite consistency finding.[181] Or, a court could interpret Prop M as allowing the city to require, by ordinance, project-specific findings of consistency to be made if any reasonable person could deem the project to be consistent with the Priority Policies.[182] These may not be the most natural readings of the Prop M findings requirement, but they are at least formally compatible with the text, which requires that no permit for demolition, conversion, or change of use be issued without a "prior" determination of consistency with the Priority Policies.[183]

At Step 3, the analysis is rather easy. Prop M is nearly forty years old. Moreover, as noted above, we cannot infer from the circumstances of Prop M's enactment that the city's 1986 electorate specifically intended to require DR of demolition, conversion, and change of use permits. The municipal interest in an interpretation of Prop M that categorically precludes the Board of Supervisors from requiring ministerial review of these permits is weak.

---

180 *See supra* notes 48–50 and accompanying text.

181 *See supra* notes 150–53 and accompanying text.

182 *See supra* notes 154–55 and accompanying text.

183 *See* S.F., CAL., PLANNING CODE, art. I, § 101.1(e).

Balancing these considerations, a court should adopt the narrower interpretation of Prop M's requirement for demolition, conversion, and change of use permits. This would allow the city to make the permits ministerial so long as the ministerial-permitting ordinance was adopted with the requisite consistency finding.

Two final remarks in closing. First, courts that adopt my canonized reformulation of *Livermore* would not be arrogating to themselves the responsibility to strike the right balance among local and regional interests. They would just be clearing out old underbrush that has gotten in the way of a negotiated, political solution to the regional-needs problems.[184] If local interests and the city's voters really *want* that old underbrush, they could restore it by passing another ballot measure.

Second, the kinds of questions a court would ask under my approach are tractable for appellate judges. They don't require a trial of anything. Judges could take judicial notice of the age of a ballot measure, and of HCD's characterization of the nature and severity of the barriers to housing development in a city. Gauging whether there is more than one colorable interpretation of the ballot measure is also a standard appellate-judge task, as is figuring out whether one, both, or neither of the interpretations would create a legal obstacle to the city's adoption of the kind of reforms the state says are needed. All of this puts appellate judges in control of the canonized *Livermore*, whereas superior court factfinders have center stage under the original *Livermore*. This shifting of responsibility to the Court of Appeal is politically important because superior court judges must stand for county-wide election every six years, whereas the justices of the Court of Appeal serve twelve-year terms and are subject only to retention elections.[185] The electorate for retention elections consists of registered voters throughout the multi-county region served by a Court of Appeal, not just the residents of a single county.[186] There is, accordingly, a closer geopolitical alignment

[184] *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181 (1980) (arguing that courts should interpret the Constitution to unblock channels of political change, but otherwise avoid taking sides in political conflicts over fundamental values).

[185] *See Judicial Selection*, *supra* note 169.

[186] For example, the First District Court of Appeal, which hears cases from San Francisco, covers eleven other Northern California counties: Alameda, Contra

between Court of Appeal judges (relative to Superior Court judges) and the task at hand: deciding whether to construe a local ballot measure narrowly so as to facilitate a political accommodation between municipal and regional interests.

CONCLUSION

My review of the text, history, and prior constructions of the Charter by the courts and the CAO leads to the conclusion that there is no Charter-conferred right of DR before the Board of Appeals, the Planning Commission, the Board of Supervisors, or any other city agency. The Board of Supervisors thus has authority under the Charter to enact a ministerial framework for housing development if it wishes.

However, the fact that a former City Attorney and a panel of the Court of Appeal have said that DR is baked into the Charter makes it very likely that a ministerial review ordinance would be challenged in court. In my view, the Board of Supervisors should welcome this challenge, as it would provide much needed clarity going forward about the Board's authority to prescribe ministerial review. Although the courts and the CAO have expounded at length on DR, they have not actually encountered an ordinance that requires ministerial review of qualified housing projects. One may hope that confronting the Charter DR thesis again in the context of an actual ministerial review ordinance would prompt some attention to the lapses of reasoning in the earlier opinions—particularly given the state housing agency's directive telling the city to adopt a "nondiscretionary, ministerial entitlement process" for housing development.[187]

In revisiting DR, the CAO and the courts will also have to consider whether voter-adopted measures beyond the Charter have made DR the law of the city. There is a pretty good, though not conclusive, argument that Prop M (1986) does require DR of permits for demolitions, conversions, and change of use. Then again, there is also a pretty good argument that Prop M should be construed

Costa, Del Norte, Humboldt, Lake, Marin, Mendocino, Napa, San Mateo, Solano, and Sonoma. *See About The 1st District*, CAL. CTS. https://www.courts.ca.gov/1952.htm (last visited Aug. 7, 2024).

187 *See supra* notes 48–50 and accompanying text.

narrowly—because it is old, because the voters' intent with respect to DR was indeterminate, and because Prop M stands in the way of reforming a practice that the state has flagged as a major barrier to San Francisco providing the housing that the surrounding region needs.

The narrower constructions of Prop M that I have proposed would leave its "Priority Policies" intact, while letting the Board of Supervisors decide whether to balance and apply those policies on a wholesale rather than retail level. Ministerial review would be fine so long as the ministerial review ordinance is adopted with the requisite finding of Priority Policies consistency.