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Los Angeles's Transit-Oriented Communities Program: Challenges and Opportunities

By *Julia E. Stein*

Executive Summary

In recent years, municipalities throughout California have struggled to meet housing needs, and construction of new housing units in the state has not kept pace of demand, resulting in increased housing costs that rank among the highest in the nation. At the same time, California faces pressure to achieve ambitious greenhouse gas (GHG) reduction goals in the relatively near term. Meeting those goals will require significant decreases in transportation sector emissions, which represent about 40 percent of the state's GHG emissions. Particularly impacted by both the affordability and climate change crises are low-income Californians, whose communities suffer disproportionate impacts from lack of housing availability and vulnerability to climate change—and who also are California's most reliable transit riders.

Lawmakers seeking to tackle both housing and greenhouse gas reduction goals have turned to transit-oriented development programs—zoning programs that promote increased housing density close to mass transit options like bus and rail—as one way to address both issues. This paper focuses on one such transit-oriented development program, the City of Los Angeles' Transit Oriented Communities Affordable Housing Incentive Program (TOC Program). The TOC Program offers density and other development incentives to projects within a half-mile radius of major transit stops, in exchange for developer commitments to provide a set percentage of deed-restricted affordable housing units within those projects.

The TOC Program has been a major driver of affordable housing production in the City of Los Angeles since its adoption in late 2017, but certain structural and legal constraints may be impeding its full capacity to augment affordable housing supply. This paper explores those potential constraints and offers recommendations to increase the program's efficacy. It also explores how the program can provide data and lessons learned to lawmakers considering similar inclusionary transit-oriented development programs within their jurisdictions, or even at the state level.

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To that end, this paper's recommendations include:

- Alterations to the TOC Program itself to address existing structural and legal hurdles to its full implementation, including through better interagency coordination, adoption of a pilot program to test limited streamlining efforts, and expansions of its applicability;
- Better data collection and analysis to assess the program's performance to date, including data regarding discretionary and non-discretionary program applications, legal challenges to applicant projects, neighborhood patterns and demographics in program incentive areas, and trends in vehicle miles traveled (VMT) and transit ridership among applicant project occupants; and
- Lawmaker attention to lessons learned from TOC Program implementation, including stakeholder experiences, the relationship of the discretionary approval process to the program's efficacy, financial constraints impacting developer utilization of the program, and a critical review of affordability designations and requirements associated with the program.

Introduction

Los Angeles is the third most rent-burdened metropolitan area in the country and ranks second in the country for the percentage of severely rent-burdened residents.

In recent years, California has found itself at the epicenter of a nationwide housing affordability crisis.¹ The median price of a home in California rose to \$570,000 in 2018, up 6 percent from the prior year, and more than 2.5 times higher than the median home price nationwide.² Los Angeles is the third most rent-burdened metropolitan area in the country and ranks second in the country for the percentage of severely rent-burdened residents, defined as residents who spend 50 percent or more of their income on rent.³ Earlier this year, Governor Newsom called for the state to add 3.5 million new homes by 2025. The Governor has proposed a \$1.75 billion housing package to attempt to meet that goal, but at the current pace of construction, the state is on track to reach only half that number.⁴ Low-income residents are most impacted: housing for households that earn less than 50 percent of the area median income (AMI) in their region is at a 1.5 million unit deficit.⁵

- 1 Only about 30 percent of Californians could afford to purchase a median-priced home in the first quarter of 2019. CALIFORNIA ASSOCIATION OF REALTORS, Housing Affordability Index – Traditional, available at <https://www.car.org/marketdata/data/haitrtraditional> Jul. 8, 2019). At the beginning of 2019, California was home to 17 of the country's 25 least affordable housing markets. Michael B. Sauter, USA TODAY, America's 25 least affordable housing markets: California home to 17 of them, available at <https://www.usatoday.com/story/money/2019/06/20/americas-25-least-affordable-housing-markets/39579711/> (Jun. 20, 2019).
- 2 See CALIFORNIA ASSOCIATION OF REALTORS, Housing Market Forecast (Oct. 11, 2018), available at <https://www.prnewswire.com/news-releases/car-releases-its-2019-california-housing-market-forecast-300729605.html>; Matt Levin, et al., CALMATTERS, Californians: Here's why your housing costs are so high (Aug. 21, 2017), available at <https://calmatters.org/explainers/housing-costs-high-california/>.
- 3 See FREDDIEMAC MULTIFAMILY, Rental Burden by Metro (Apr. 2019), available at https://mf.freddiemac.com/docs/rental_burden_by_metro.pdf.
- 4 See CALIFORNIA OFFICE OF THE GOVERNOR, Governor Newsom Announces Legislative Proposals to Confront the Housing Cost Crisis (Mar. 11, 2019), available at <https://www.gov.ca.gov/2019/03/11/governor-newsom-announces-legislative-proposals-to-confront-the-housing-cost-crisis/>; Michael Hiltzik, LOS ANGELES TIMES, California's housing crisis reaches from the homeless to the middle class—but it's still almost impossible to fix (Mar. 29, 2018), available at <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-housing-crisis-20180330-story.html>.
- 5 Hiltzik, *supra* note 4. While many argue that the methodology for calculating the extent of the housing deficit itself requires improvement, it is clear that there is a dearth of housing available in the state. See, e.g., Paavo Monkkonen, et al., UCLA LEWIS CENTER, Issue Brief, *A Flawed Law: Reforming California's Housing Element* (2019) at 2-3, available at https://www.lewis.ucla.edu/wp-content/uploads/sites/17/2019/05/2019_RHNA_Monkkonen-Manville-Friedman_FF.pdf.

Apartment construction in Hollywood, CA



In theory, “transit-oriented development” would result in infill development that produces additional housing units in areas where residents will need to be less reliant on cars for transportation.

Lawmakers have pushed through a bevy of new measures aimed to address the problem. During the past two legislative sessions, the California Legislature passed, and the Governor signed into law, a total of 31 housing-related bills, and 13 more were introduced during this session.⁶ On the regional and local level, cities and counties have also been exploring options to ease the housing shortage. This summer, San Francisco’s Board of Supervisors unanimously voted to place a \$600 million bond measure on the November ballot that would support the building or rehabilitation of more than 2,000 affordable housing units, with support from other San Francisco politicians, construction unions, and nonprofit developers.⁷ And in addition to the ordinance that is the subject of this paper, the City of Los Angeles has been moving forward with a long-term effort to establish Transit Neighborhood Plans focused on land use planning near four Metro rail lines, with a goal of enhancing transit ridership in part through siting development of new housing close to mass transit.⁸

One tool under consideration at both the state and local levels has been the concept of upzoning—or allowing for more dense development—near existing mass transit, such as rail stations or bus lines with frequent service. In theory, this type of development, known as “transit-oriented development,” would result in infill development that produces additional housing units in areas where residents will need to be less reliant on cars for transportation. Proponents of transit-oriented development argue that it serves both housing and environmental goals. Densifying in select areas allows for more residential units than would otherwise be permitted, and those units are situated in already-developed areas. This avoids the environmental impacts

6 CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, California Housing Package Launched January 1 with a Resolution to Ease Housing Costs, Shortage (Jan. 3, 2018), available at <http://www.hcd.ca.gov/about/newsroom/docs/2018-CA-Housing-Package.pdf>; CENTRAL CITY ASSOCIATION OF LOS ANGELES, Summary of California Housing Bills (Mar. 2019), available at https://www.ccala.org/clientuploads/comms/2019/2019_Housing_Bills_Summary_v2.pdf.

7 Joshua Sabatini, SAN FRANCISCO EXAMINERS, SF places \$600M bond on November ballot to address affordable housing crisis (Jul. 9, 2019), available at <https://www.sfexaminer.com/the-city/sf-places-600m-bond-on-november-ballot-to-address-affordable-housing-crisis/>.

8 CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, Los Angeles Transit Neighborhood Plans: About the Project, available at <https://www.latnp.org/>.

of building on undeveloped land in the suburbs or exurbs, including greenhouse gas (GHG) emissions from increases in vehicle miles traveled (VMT) to get to and from home, as well as species, air quality, and other impacts associated with “greenfields” development.⁹

Indeed, climate change-related goals are a topic of significant concern at the state level as well. California has adopted the most ambitious GHG emission reduction policies in the country, with laws mandating reductions to 40 percent below 1990 emission levels by the year 2030 and 100 percent use of net-zero electricity by 2045.¹⁰ Transportation plays a key role in the state’s ability to meet emission reduction targets, because emissions from the transportation sector represent nearly 40 percent of California’s total GHG emissions.¹¹ In discussing methods to reduce transportation sector emissions, lawmakers and regulators have increasingly emphasized the need to consider modifying land use patterns that contribute to increased VMT, and thereby, increased GHG emissions.¹² Transit-oriented development is one way to achieve more climate-friendly land use patterns.

But transit-oriented development is not necessarily a silver bullet. Some housing advocates express concerns that as rents rise due to an influx of market-rate transit-oriented housing, low-income residents in infill areas—often communities of color—will be displaced to suburban and exurban areas far from their jobs and current neighborhoods.¹³ Such a displacement

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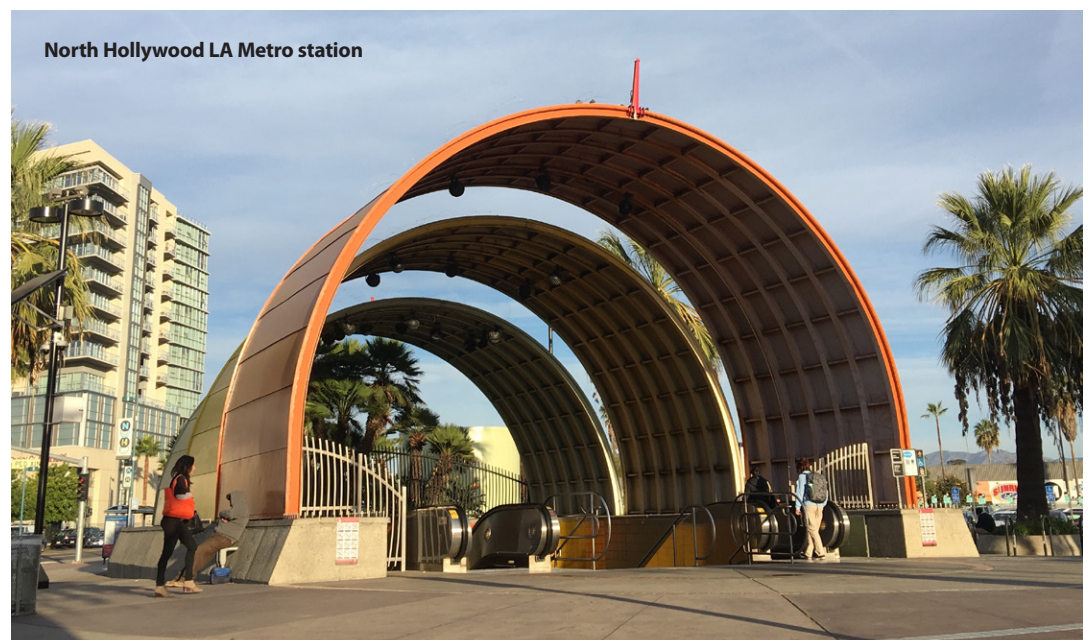
9 See, e.g., U.S. ENVIRONMENTAL PROTECTION AGENCY, *Encouraging Transit Oriented Development; Case Studies that Work* (May 2014), available at <https://www.epa.gov/sites/production/files/2014-05/documents/phoenix-sgia-case-studies.pdf>; Joel Epstein, STREETS BLOG LA, *Los Angeles and the Case for Transit-Oriented Development* (May 23, 2012), available at <https://la.streetsblog.org/2012/05/23/los-angeles-and-the-case-for-transit-oriented-development-part-1-of-3/>.

10 Sen. Bill 32, 2016 Reg. Sess., Ch. 249, 2016 Cal. Stat.; Sen. Bill 100, 2018 Reg. Sess., Ch. 312, 2018 Cal. Stat.; CALIFORNIA AIR RESOURCES BOARD, *California’s Climate Change Scoping Plan (Scoping Plan)* (Nov. 2017) at ES1, available at https://ww3.arb.ca.gov/cc/scopingplan/scoping_plan_2017.pdf; Alexei Koseff, THE SACRAMENTO BEE, *California approves goal for 100% carbon-free electricity by 2045* (Sept. 10, 2018), available at <https://www.sacbee.com/news/politics-government/capitol-alert/article218128485.html>.

11 *Scoping Plan*, supra note 10.

12 *Id.* at ES5-6.

13 See, e.g., ALLIANCE FOR COMMUNITY TRANSIT—LOS ANGELES, *Transit for All: Achieving Equity in Transit-Oriented Development* at 3, available at <http://www.allianceforcommunitytransit.org/wp-content/uploads/2015/02/ACT-LA-Transit-for-All-Achieving-Equity-in-Transit-Oriented-Development.pdf>.



The TOC Program allows for certain projects to increase both the number of residential units in a building and the building's footprint beyond that which would be permitted by-right, as long as developers agree to build a set percentage of deed-restricted affordable housing.

pattern would be concerning: these communities are at the highest risk of the housing insecurity the state is attempting to tackle, and also represent the state's most reliable transit ridership base.¹⁴ And some proponents of transit-oriented development also urge streamlining under the California Environmental Quality Act (CEQA), a public disclosure and mitigation statute that environmental justice communities—low-income communities of color that are overburdened by pollution and other environmental harms—have historically used to protect themselves in the face of unwanted development. CEQA streamlining, if not thoughtful, could have serious unintended consequences for these communities.

Against this backdrop, this paper will explore one effort to boost transit-oriented development: the City of Los Angeles's Transit Oriented Communities Ordinance (hereinafter referred to as the TOC Program).¹⁵ Adopted about two years ago, the TOC Program is an upzoning measure that allows for increased density in projects built close to mass transit, provided that the project developer agrees to include a set percentage of deed-restricted affordable housing as part of the project and replace any existing affordable or rent stabilized units.¹⁶ The density increase provided by the TOC Program is reflected in a boost to two different density-related metrics employed by Los Angeles' zoning code: (1) the number of units that may be sited on a property; and (2) the floor-area ratio (FAR) of the property, which reflects a building's or buildings' total floor area in relation to the size of the lot upon which the building or buildings are constructed. Unit count increases allow for additional residential construction beyond what would otherwise be permitted, while FAR increases can impact both the size and number of residential units and the type of commercial space that can be built in a mixed-use project.¹⁷ The program also provides additional menu incentives that can increase building envelope beyond FAR and number of units, including height increases and reductions in yard and setback requirements.

In other words, the TOC Program allows for certain projects to increase both the number of residential units in a building and the building's footprint beyond that which would be permitted by-right by the project site's zoning, as long as developers agree to build a set percentage of deed-restricted affordable housing. As discussed below, the TOC Program also offers another transit-oriented incentive by right if the conditions of the program are met: a reduction in the amount of required parking for a project.

This paper aims to assess how the TOC Program is working, challenges to the TOC Program's implementation, and some potential implications of a wider-scale adoption of TOC-like mea-

14 Michael Manville, et al., *Falling Transit Ridership: California and Southern California* (Jan. 2018) at 5, available at <https://www.its.ucla.edu/2018/01/31/new-report-its-scholars-on-the-cause-of-californias-falling-transit-ridership/>

15 Los Angeles Municipal Code (L.A.M.C.) 12.22. A.31; see also CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, *Transit Oriented Communities Affordable Housing Incentive Program Guidelines (TOC Program Guidelines)* (revised Feb. 26, 2018), available at <https://planning.lacity.org/ordinances/docs/toc/TOCGuidelines.pdf>.

16 Inclusionary housing programs like the TOC Program are one way of addressing the need for deed-restricted affordable housing but have the effect of placing the responsibility to build such housing on private developers, who are beholden to investors. Due to financial constraints private developers face, in some cases, the requirements of inclusionary housing programs can result in reduced production of affordable housing. See David Garcia, TERNER CENTER FOR HOUSING INNOVATION, UNIVERSITY OF CALIFORNIA BERKELEY, *Making It Pencil: The Math Behind Housing Development* (Aug. 2019) at 1, available at http://ternercenter.berkeley.edu/uploads/Making_It_Pencil_The_Math_Behind_Housing_Development.pdf. There are other alternatives to augmenting affordable housing production—for example, applying increased property taxes to landowners and utilizing the revenue to build government-subsidized housing—which, some argue, would more properly align costs and responsibilities of providing affordable housing. This paper does not address the relative merits of increasing property taxes (an exercise which is politically challenging) as contrasted with inclusionary housing programs. Instead, recognizing that inclusionary housing programs are used as a tool to increase affordable housing stock, this paper assesses possible improvements to such programs through the lens of the TOC Program.

17 While the TOC Program Guidelines restrict project developers from applying FAR increases to uses other than residential, the bonus residential FAR can mean that a project can become a draw for certain types of commercial tenants; in some cases this can impact project financials, making it easier to offset the costs of providing additional affordable housing units, and allowing developers to add neighborhood amenities that will support residential uses.

As similar proposals are considered on the state level and by other local jurisdictions, it is important to take stock of lessons learned through Los Angeles's experiences.

asures. As similar proposals are considered on the state level—through legislation like SB 50 and its predecessor, SB 827—and by other local jurisdictions, it is important to take stock of lessons learned through Los Angeles's experiences.

At the outset of this assessment, it is important to note that while implementation of the TOC Program has led to the production of both market-rate housing units and deed-restricted affordable housing units, this paper will focus primarily on TOC's efficacy at producing affordable housing units. An ongoing debate rages in California (and nationally) about the extent to which production of market-rate housing alone contributes to the alleviation of the housing shortage. This paper does not seek to answer that question, but instead focuses on the ways that the TOC Program, and potential future programs like it, could enhance production of deed-restricted affordable housing units more likely to relieve housing pressure for low-income Californians while simultaneously providing a GHG emission reduction benefit.

This paper will proceed in four additional parts: first, it will explain the mechanics of the TOC Program; next, it will offer an assessment of the TOC Program's efficacy to date and hurdles¹⁸ curbing a more robust implementation of the program; then, it will discuss the potential implications of a TOC-like program writ large; and finally, it will summarize recommendations and concluding thoughts.

What is the Transit-Oriented Communities Program?

In November 2016, Los Angeles voters approved Measure JJJ, a ballot initiative intended to promote the development of affordable housing stock, by an overwhelming 64 percent of the vote. Measure JJJ codified a requirement that projects seeking general plan amendments or certain zone changes both include a set percentage of affordable housing or pay a fee to an affordable housing trust fund, and meet prevailing wage and labor standards in their construction. Separately, the measure also required the City to create an affordable housing incentive program for developments located near major transit stops.

Pursuant to Measure JJJ's mandate, the City's TOC Program Guidelines, effective September 22, 2017, created new obligations and a new incentives system for residential and mixed-use projects located within a half-mile radius of a major transit stop (defined as a rail station or the intersection of at least two bus routes with frequent service during peak commute times). Projects qualify for the program only if they meet certain affordable housing requirements. Developments that seek to take advantage of the TOC Program are required to provide a set percentage of Extremely Low Income (ELI) (defined as households earning 30 percent of AMI), Very Low Income (VLI) (defined as earning 50 percent AMI), and Lower Income (LI) (defined as earning 80 percent AMI) units based on their proximity to particular types of transit.¹⁹ The TOC Program is unique among density bonus programs in its provision of incentives specifically

¹⁸ This paper will primarily focus on legal hurdles baked into the structure of the existing TOC Program or resulting from its interface with already existing zoning and land use approval regimes in the City of Los Angeles. There are other limitations on TOC Program implementation that are economics-driven—for example, materials costs for high-rise buildings—but this paper will not concentrate on those.

¹⁹ *TOC Program Guidelines*, *supra* note 15, at 7.

for ELI units. For example, California's Density Bonus Law, more typical of these programs, provides incentives starting at the VLI level and ranges up to the moderate income (MI) level. The TOC Program is therefore specially positioned to create dedicated housing for the ELI segment of the population. That has borne out as the TOC Program has been implemented, with ELI units representing a significant portion of those proposed in program applications.

The TOC Program Guidelines establish four tiers of major transit stops. Higher tiers provide nearer access to high-quality transit, and therefore receive the greatest incentives under the program. A project's tier is based on the shortest distance between its lot and a qualified transit stop, as well as the type of stop the lot is proximate to, as follows²⁰:

The TOC Program Guidelines establish four tiers of major transit stops. Higher tiers provide nearer access to high quality transit, and therefore receive the greatest incentives under the program.

TIER 1	TIER 2	TIER 3	TIER 4
750-2640 feet from the intersection of two regular bus lines ²¹	0-749 feet from the intersection of two regular bus lines (non-rapid buses with service at 15 min. intervals during peak hours)	0-749 feet from the intersection of a regular bus line and a rapid bus line	0-749 feet from a Metro rail station that intersects with another rail line or a rapid bus
1500-2640 feet from the intersection of a regular bus line and a rapid bus line ²²	750-1499 feet from the intersection of a regular bus line and a rapid bus line	0-1499 feet from the intersection of two rapid bus lines	
1500-2640 feet from a Metrolink rail station	1500-2640 feet from the intersection of two rapid bus lines	0-749 feet from a Metrolink rail station	
	750-1499 feet from a Metrolink rail station	0-2640 feet from a Metro rail station	

²⁰ *Id.* at 5.

²¹ Regular buses are non-rapid buses with service at intervals of at least an average of 15 minutes during peak hours.

²² A rapid bus line is higher quality service bus line with attributes that can include dedicated bus lanes, branded vehicles/stations, high frequency service intervals, limited stops at major intersections, intelligent transportation systems, possible off-board fare collection, and/or all door boarding. Rapid buses include the Metro Rapid 700 lines, the Metro Orange and Silver Lines, the Big Blue Rapid lines, and the Metro Bus Rapid Transit lines, among others.

Base incentives—a density bonus, a FAR bonus, and relaxed parking requirements—are available by tier to projects that meet the percentage affordable housing requirements (calculated using the project’s total number of units) set by the TOC Guidelines, as follows²³:

	TIER 1	TIER 2	TIER 3	TIER 4
Min. % On-Site Restricted Affordable Units	8% ELI, 11% VLI, or 20% LI	9% ELI, 12% VLI, or 21% LI	10% ELI, 14% VLI, or 23% LI	11% ELI, 15% VLI, or 25% LI
Max. % Increase to No. of Dwelling Units	50% unless RD Zone, then 35%	60% unless RD Zone, then 35%	70% unless RD Zone, then 40%	80% unless RD Zone, then 45%
FAR²⁴	Greater of up to 40% increase or 2.75:1 in commercial zones	Greater of up to 45% increase or 3.25:1 in commercial zones	Greater of up to 50% increase or 3.75:1 in commercial zones	Greater of up to 55% increase or 4.25:1 in commercial zones
Residential Parking	No more than 0.5 spaces/bedroom required	No more than 0.5 spaces/bedroom or 1 space/residential unit required	No more than 0.5 spaces/residential unit required	No required parking for residential units
Non-Residential Parking (for Mixed-Use projects)	Up to 10% reduction in non-residential parking requirement	Up to 20% reduction in non-residential parking requirement	Up to 30% reduction in non-residential parking requirement	Up to 40% reduction in non-residential parking requirement

²³ TOC Program Guidelines, *supra* note 15, at 9-11.

²⁴ There are some exceptions: in the RD Zone or a specific plan or overlay district that regulates residential FAR, the maximum FAR increase is 45 percent; if allowable base FAR is less than 1.25:1 then the maximum FAR is 2.75:1; in the Greater Downtown Housing Incentive Area, the FAR increase is limited to 40 percent. *See id.*



All-affordable projects—projects comprised of 100 percent affordable housing—can “tier up” under the program, allowing them to seek the bonuses that would normally be applicable to projects in the next tier. This mechanism provides an added incentive to drive production of affordable housing units. In addition to base incentives, projects may be granted up to three additional incentives in return for meeting specific affordability requirements²⁵:

- To receive one additional menu incentive, the percentage of on-site restricted affordable housing units must be at least 4 percent ELI, 5 percent VLI, 10 percent LI, or 10 percent MI in a common interest development, based on the project’s base units.
- To receive two additional menu incentives, the percentage of on-site restricted affordable housing units must be at least 7 percent ELI, 10 percent VLI, 20 percent LI, or 20 percent MI in a common interest development, based on the project’s base units.
- To receive three additional menu incentives, the percentage of on-site restricted affordable housing units must be at least 11 percent ELI, 15 percent VLI, 30 percent LI, or 30 percent MI in a common interest development, based on the project’s base units.

25 *Id.* at 8-9.

Additional menu incentives include, by tier²⁶:

All-affordable projects can “tier up” under the program, allowing them to seek bonuses that would normally be applicable to projects in the next tier.

	TIER 1	TIER 2	TIER 3	TIER 4
Comm. Setback	Any yard req’t for the RAS3 Zone	Same as Tier 1	Same as Tier 1	Same as Tier 1
Residential Setback Decrease²⁷	Up to 25% in width or depth of one yard or setback	Up to 30% in width or depth of one yard or setback	Same as Tier 2	Up to 35% in width or depth of one yard or setback
Open Space Decrease	Up to 20%	Same as Tier 1	Up to 25%	Same as Tier 3
Lot Coverage Increase	Up to 25%	Same as Tier 1	Up to 35%	Same as Tier 3
Lot Width Decrease	Up to 25%	Same as Tier 1	Same as Tier 1	Same as Tier 1
Total Height²⁸	Add one story up to 11 ft.	Same as Tier 1	Add two stories up to 22 ft.	Add three stories up to 33 ft.
Transitional Height Step Back²⁹	45° from a horizontal plane originating 15 ft. above grade	Same as Tier 1	45° from a horizontal plane originating 25 ft. above grade	Within the first 25 ft. of the property line, 45° from a horizontal plane originating 25 ft. above grade

²⁶ *Id.* at 11-14.

²⁷ Front yard reductions are limited to no more than the average of the front yards of adjoining buildings on the same frontage; if there are no adjoining buildings, no reduction is permitted. Yard reductions may not be applied along any property line that abuts a R1 or more restrictive residential zoned property. *Id.* at 12.

²⁸ Projects located on lots with a 45-foot or less height limit or in a Specific Plan area or overlay district that regulates height will require any height increases over 11 feet to be stepped-back at least 15 feet from the exterior face of the ground floor of the building located along any street frontage. *Id.* at 13.

²⁹ Measurements are taken from the property line of the adjoining lot. *Id.*

Three other additional menu incentives are available in all tiers³⁰:

- Projects located on two or more contiguous parcels may average the floor area, density, open space, and parking over the project site, and permit vehicular access from a less restrictive zone to a more restrictive zone, assuming the project is permitted by the underlying zoning on each parcel and no further lot line adjustment or subdivision is required.
- Any land area required to be dedicated for a street or alley may be included as lot area for purposes of calculating the maximum density permitted by the underlying zone of the project site.
- In lieu of L.A.M.C. requirements, a joint public-private development may include the uses and area standards permitted in the least restrictive adjoining zone.

The Planning Director determines availability of these additional menu incentives. The Director must grant the additional incentives if the project meets the TOC Guidelines requirements, unless the Director finds (1) an incentive is not required to provide for affordable housing costs or rents, or (2) the incentive will cause a specific adverse impact on public health and safety, the physical environment, or a listed historic resource, and there is no way to mitigate the impact without rendering the project unaffordable to VLI, LI, or MI households.³¹

The below chart compares two scenarios for projects located in Tier 4, and demonstrates the significant base incentives that are available under the TOC Program even without submitting to the discretionary City process to take the added menu incentives:

	ORIGINAL PROJECT³²	USING TOC PROGRAM INCENTIVES
Residential Only	<ul style="list-style-type: none"> □ 75 base units □ 3:1 FAR on a 30,000 sf lot with 25,000 sf buildable area, translating to 75,000 sf of floor area □ 113 parking spaces³³ 	<ul style="list-style-type: none"> □ 135 units (80% density bonus) □ At least 15 affordable units (at 11% ELI) □ 4.25:1 FAR, translating to 106,250 sf of floor area □ No parking required
Mixed-Use in Commercial Zone	<ul style="list-style-type: none"> □ 150 base units □ 1.5:1 FAR on a 60,000 sf lot, translating to 90,000 sf of floor area □ 225 residential parking spaces, plus between 1/100 sf and 1/500 sf of non-residential parking, depending on use 	<ul style="list-style-type: none"> □ 270 base units (80% density bonus) □ At least 30 affordable units (at 11% ELI) □ 4.25:1 FAR translating to 255,000 sf of floor area □ No parking required for residential component; 40% reduction

³⁰ *Id.* at 13-14.

³¹ *Id.* at 11, L.A.M.C. 12.22 A.25(g)(2).

³² These calculations assume one unit for 400 feet of lot area per the L.A.M.C.

³³ This number was calculated using an average of 1.5 spaces/unit based on L.A.M.C. requirements for residential units.

While additional menu incentives may prove beneficial for a project, the City considers the process of obtaining additional menu incentives to be discretionary. As discussed in additional detail in Section III.B.2 *infra*, the discretionary nature of the process may require projects to comply with CEQA.

At least one analysis of Measure JJJ has concluded that the benefits of the TOC Program have been offset by reductions in zone change and other entitlement applications, which also lead to production of both market-rate and affordable housing, and has suggested that the TOC Program be strengthened to account for this effect.³⁴ While this paper does not assess the overall impacts of Measure JJJ as a whole or the particular recommendations of that report, it does concur that strengthening the TOC Program could yield positive results for increased production of deed-restricted affordable housing in the City and offers recommendations to address specific legal barriers that present hurdles to the program's efficacy.

Is TOC really leading to the production of more affordable units? Could it produce even more?

The TOC Program has now been in effect for nearly two years, and the City of Los Angeles is closely tracking the ordinance's implementation. While the number of requests for TOC incentives and permitted TOC projects indicate the program is contributing to the addition of a significant number of affordable housing units city-wide, the implementation challenges discussed below may still be constraining the program's ability to meet its full potential.

While the TOC Program is contributing to the addition of a significant number of affordable housing units city-wide, implementation challenges may still be constraining the program's ability to meet its full potential.

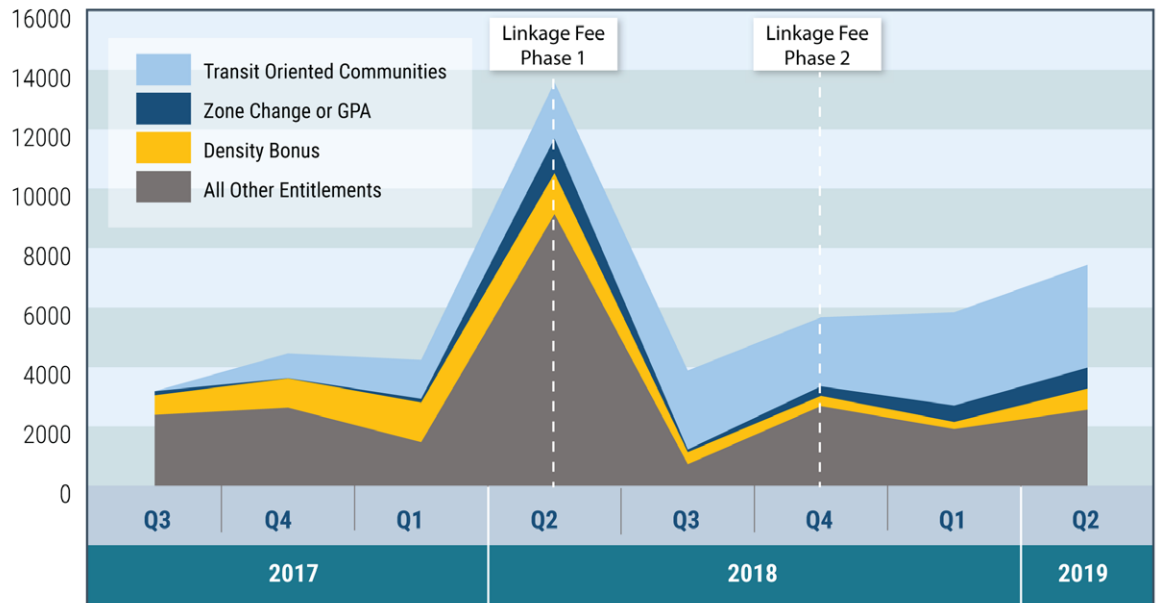
TOC By the Numbers

The City of Los Angeles's initial assessment indicates that the TOC Program appears to be on track to increase the number of permitted affordable housing units. Hundreds of projects have requested TOC incentives from the City, and project developers are using the TOC Program far more often than other incentives programs, including California's Density Bonus Law, to propose and seek permits for affordable housing units.³⁵ By the end of 2018, a little over a year after the TOC Program was implemented, proposed housing entitlements through the program represented 30 percent of all proposed housing entitlements in the City.

Since the TOC Program's inception, it has earned the distinction of being the strongest driver of new housing, a trend that continued into 2019. During the second quarter of 2019, the TOC Program accounted for nearly half of all housing units proposed through discretionary applications. Moreover, the share of deed-restricted affordable housing units in the City's development pipeline that were proposed through the program has increased to 19.4 percent from a previous high of 18 percent in the fourth quarter of 2018. In total, the TOC Program has added nearly 20,000 new housing units to the City's development pipeline since its 2017 launch, and

34 Mark Vallianatos et al., LAPLUS AND REAL ESTATE DEVELOPMENT & DESIGN PROGRAM, COLLEGE OF ENVIRONMENTAL DESIGN, UNIVERSITY OF CALIFORNIA AT BERKELEY, *Measure JJJ: An evaluation of impacts on residential development in the City of Los Angeles* (May 2019), available at <https://wordpressstorageaccount.blob.core.windows.net/wp-media/wp-content/uploads/sites/867/2019/06/2019-Measure-JJJ-An-Evaluation-of-impacts-on-residential-development-in-City-LA.pdf>.

35 The City of Los Angeles tracks trends in housing production on a quarterly basis through its Housing Progress Report. See CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, *Housing Progress Report—Quarterly Report: April-June 2019*, available at <https://planning.lacity.org/odocument/c795255d-9367-4fdf-9568-0a34077720ef>; see also CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, *Housing Progress Report—Quarterly Report: January-March 2019*, available at <https://planning.lacity.org/odocument/c82e412b-9d5a-4306-8e19-48bd17ebd752>.



Graphic provided by Los Angeles Department of City Planning.

The TOC Program has driven, and continues to drive, the City's production of deed-restricted affordable housing units.

nearly 4,000 of those units are deed-restricted affordable housing units. The City announced in early 2019 that during the past calendar year, the City had produced more housing than it has annually in the past 30 years. The City credited the TOC Program as a major contributor to this housing increase.³⁶

The TOC Program has not only driven the City's generation of housing units generally, but also has specifically driven, and continues to drive, its generation of deed-restricted affordable housing. Market-rate developers have utilized the program to add density to their projects, adding a significant number of affordable units along with that density. Furthermore, all-affordable housing projects are eligible to use the TOC Program and receive additional incentives through it, adding more housing units to all-affordable projects.³⁷ In the first quarter of 2019, 75 percent of all proposed deed-restricted affordable housing units in the City—of which there were nearly 1,000—took advantage of TOC Program incentives.³⁸ Affordable housing unit production through the TOC Program appears to be on the upswing: the number of deed-restricted affordable housing units proposed through the program increased by over 150 percent from the fourth quarter of 2018 to the first quarter of 2019.³⁹ Of the proposed units, 40 percent are designated to serve ELI households.⁴⁰ The City predicts that nearly 4,000 new deed-restricted affordable housing units will be in the development pipeline by the end of 2019 as a result.⁴¹ And ground is starting to break on projects that have used the TOC Program, translating these affordable units to a reality—by the second quarter of 2019, 65 percent of proposed TOC projects had applied for building permits, and many had received early-start permits to begin work.⁴²

³⁶ See CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, Housing Progress Report—Quarterly Report: January-March 2019 at 3.

³⁷ This fact accounts, in part, for the 20 percent share of deed-restricted affordable housing units proposed through the TOC Program, as many market-rate developers are electing to build housing for ELI residents, which range from rates of 8 percent to 11 percent depending on tier.

³⁸ CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, Housing Progress Report—Quarterly Report: January-March 2019, *supra* note 35, at 4.

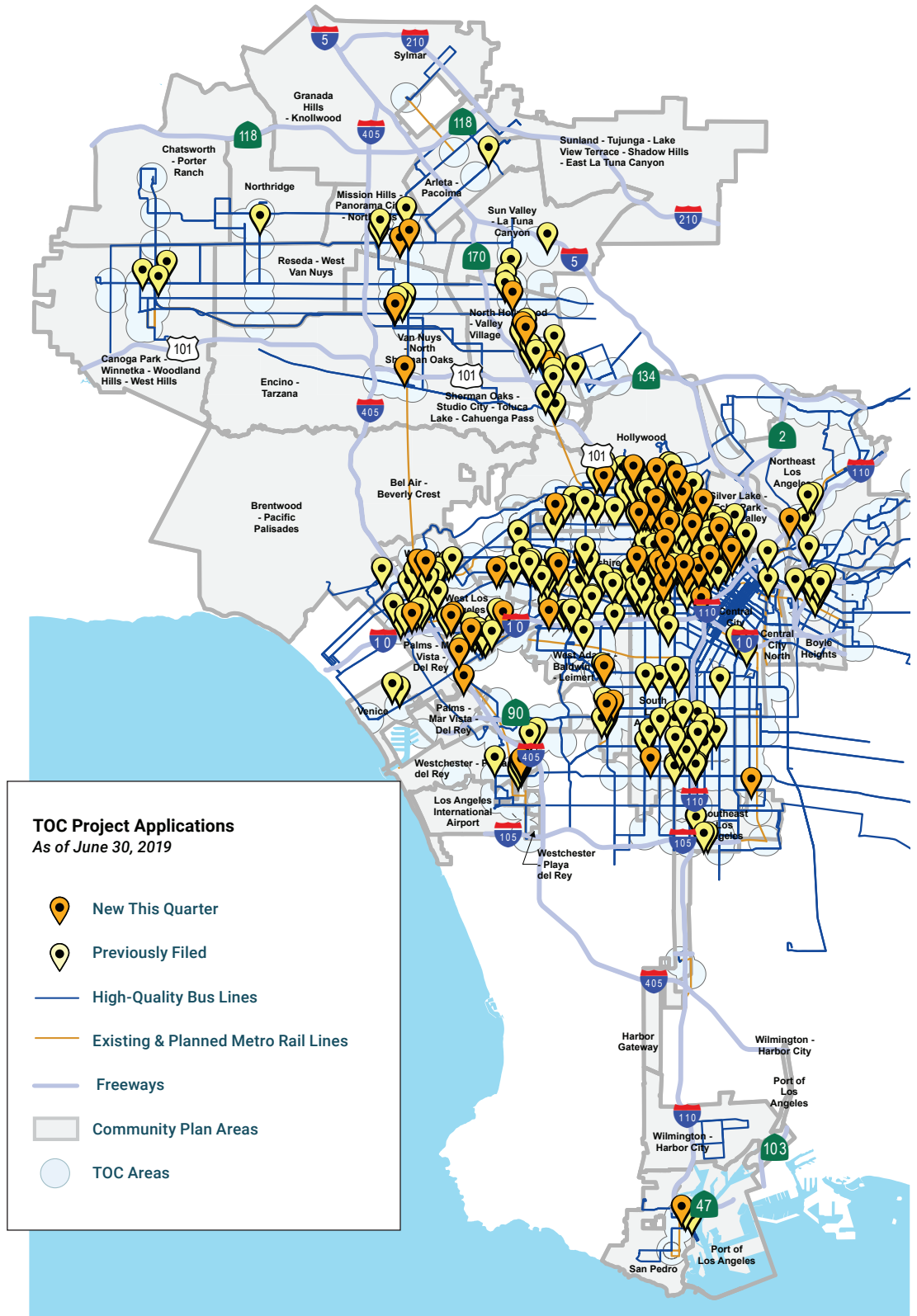
³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, Housing Progress Report—Quarterly Report: April-June 2019, *supra* note 35, at 4.

⁴² *Id.* at 4.

Projects proposed through the TOC Program continue to be sited in areas of Los Angeles with good access to job centers and mass transit.



Map provided by Los Angeles Department of City Planning.

Projects proposed through the TOC Program also continue to be sited in areas of Los Angeles with good access to job centers and mass transit. Half of all proposed TOC Program projects are located in Central Los Angeles, an area that includes Wilshire Center, Koreatown, and Hollywood.⁴³ Westside neighborhoods with strong mass transit access, like Palms, Mar Vista, West Los Angeles, and Westchester, represent another 15 percent of proposed projects.⁴⁴ In other words, the TOC Program appears to be meeting its objective to site new housing units in areas of the City that are better served by mass transit.

Potential Challenges for TOC Program Implementation

Although the City of Los Angeles has documented a continued rise in TOC Program applications since the program became available in late 2017, there are a number of possible constraints on the program's implementation that could prevent projects near major transit stops from utilizing the program. These constraints reduce the number of total deed-restricted affordable housing units the TOC Program could potentially produce.

While some constraints are economic,⁴⁵ this paper focuses on potential legal constraints that could impact the TOC Program due to conflicts with existing zoning or discretionary approval regimes in the City. This section of the paper identifies three such possible constraints, and considers potential methods to reduce their impacts, either through interagency cooperation or through modifications to the existing TOC Program.

Before moving into a discussion of the three identified possible legal constraints, it is important to highlight a pending lawsuit that challenges the validity of the TOC Program and poses a potential threat to the program's stability.⁴⁶ This challenge was filed in late August 2019 by a neighborhood group, Fix the City, well known in Los Angeles for its efforts to challenge other community- and city-wide transit-oriented development plans.⁴⁷

Fix the City's lawsuit challenges the TOC Program via its application to one development project, which is sited in a densely developed area of West Los Angeles, on a major thoroughfare and close to the skyscrapers and multi-story mall of Century City. The lawsuit contends that the project was improperly granted density, height, and setback incentives through the TOC Program—and that the incentives were improperly granted not because the City did not apply the program's requirements correctly, but because the program itself is inconsistent with Measure JJJ. The lawsuit alleges that Measure JJJ was intended to require labor standards to apply to development projects that sought certain zone changes—the kinds of zone changes the project in question would have needed if the TOC Program were not available—and the TOC Program goes beyond what voters authorized by allowing incentives, like height and setback incentives, that are not contemplated in Measure JJJ.

Constraints on the program's implementation reduce the number of total deed-restricted affordable housing units the TOC Program could potentially produce.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ For example, material costs for high-rise construction (which requires steel rather than wood-frame construction) can sometimes mean that a project developer only takes partial advantage of a TOC Program density bonus incentive, which limits the number of deed-restricted affordable housing units included in the project.

⁴⁶ Verified Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief, *Fix the City, Inc. v. City of Los Angeles, et al.*, Case No. 19STCP03740 (Aug. 30, 2019).

⁴⁷ See, e.g., Bianca Barragan, CURBED LA, Anti-Development Group Forcing LA to Take Back Big-Deal Plan For Less Car-Centric City (Nov. 9, 2015), available at <https://la.curbed.com/2015/11/9/9902490/los-angeles-mobility-plan-lawsuit>; David Zahniser, LOS ANGELES TIMES, Judge deals a major blow to Hollywood growth plan (Dec. 11, 2013), available at <https://www.latimes.com/local/lanow/la-me-ln-judge-hollywood-growth-plan-20131211-story.html>.

While assessing the validity of Fix the City's claims and offering recommendations regarding pending litigation at the City are outside the scope of this paper, the lawsuit may at least temporarily chill use of the TOC Program, which, in addition to the constraints discussed in this paper, would further restrict its efficacy. It is also worth noting that there is potential for the lawsuit to resolve in such a way as to require a follow-on ballot measure to achieve the objectives of the TOC Program. In that event, such a measure could provide a vehicle for adoption of some of the recommendations in this paper, such as a pilot program to test streamlining in Tiers 3 and 4 or permitting the program to apply in the limited case of a zone change from industrial to residential use.

This paper will now turn its focus to other legal hurdles to full implementation of the TOC Program's core goals.

1. Conflicts with the successor agency to the City's former Community Redevelopment Agency.

The first such limitation involves conflicts between the TOC Program and the requirements of land use plans administered by the Community Redevelopment Agency of Los Angeles, a Designated Local Authority (CRA/LA-DLA). CRA/LA-DLA is a successor agency to the City's Community Redevelopment Agency, and currently administers redevelopment plan areas, some of which impose development limitations that can limit the application of TOC Program incentives.

Community redevelopment agencies were originally authorized by California's Community Redevelopment Act in 1945 and became part of a post-World War II effort to promote urban renewal. By 1952, a tax-increment financing structure put in place by Proposition 18 gave local governments the authority to declare certain areas as "blighted" and in need of renewal, allowing local governments to distribute property tax revenue growth in that area to the redevelopment agency as revenue.⁴⁸ Redevelopment agencies were legally obligated to use those tax dollars to reduce blight and encourage economic activity in the designated redevelopment plan areas, and California law gave redevelopment agencies significant authority to regulate land uses and development within those areas. Over the years, the number and scope of redevelopment plan areas expanded, and some expressed concerns that redevelopment agencies' growth was coming at the expense of funding for other local programs; by 2008, redevelopment agencies received 12 percent of statewide property tax revenue.⁴⁹ But while the agencies' roles and administration of their funds became controversial, they provided the largest source of revenue for affordable housing in California.⁵⁰

In 2011, the California Legislature enacted legislation that dissolved redevelopment agencies statewide; when the redevelopment agencies were formally dissolved in early 2012 after a period of litigation, agencies were appointed to wind down the existing operations of the redevelopment agencies, including administering their assets and liabilities.⁵¹ The City of Los Angeles chose not to become the successor agency to the Community Redevelopment Agency of Los Angeles (CRA/LA), and as a result, Governor Brown appointed a Designated Local Authority (DLA) to wind down CRA/LA's operations.⁵² While the responsibility of CRA/LA-DLA is primar-

There are multiple redevelopment areas within the City where redevelopment plans may bar developers from utilizing TOC Program incentives to their full extent, restricting the number of housing units that may be built.

48 Casey Blount, et al., U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *Redevelopment Agencies in California: History, Benefits, Excesses, and Closure* (Jan. 2014) at 1, available at https://huduser.gov/portal/publications/Redevelopment_WhitePaper.pdf.
49 *Id.* at 2.

50 Katy Murphy, SAN JOSE MERCURY NEWS, California lawmakers want to bring back local redevelopment agencies (Mar. 16, 2018), available at <https://www.mercurynews.com/2018/03/16/sjm-l-redevelop-0317/>.

51 CALIFORNIA DEPARTMENT OF FINANCE, Redevelopment Agency Dissolution, available at www.dof.ca.gov/Programs/Redevelopment.

52 CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, Recommendation Report: Case No. CPC-2013-3169-CA (May 8, 2014) at 3, available at http://clkrep.lacity.org/onlinedocs/2013/13-1482-s1_misc_e_6-16-14.pdf.

ily to administer the former CRA/LA's enforceable obligations and dispose of its assets, it also plays a role in the administration of the former CRA/LA's redevelopment plan areas because the dissolution legislation did not abolish the redevelopment plan areas or eliminate the redevelopment plans that govern them.⁵³

In the City of Los Angeles, CRA/LA-DLA has authority over 19 active redevelopment plan areas, each of which has a redevelopment plan that specifies permitted land uses and prohibitions or limitations, like density limitations, on land uses. In mid-2018, CRA/LA-DLA released a memorandum articulating its position on the interplay between the land use provisions set forth in its redevelopment plans and the TOC Program. Because its authority over redevelopment plan areas is derived from state law, CRA/LA-DLA has taken the position that its land use authority to administer redevelopment plans exceeds that of the City Planning Department, and that as a result, the land use requirements of the redevelopment plans—in particular, the density limits set by redevelopment plans—trump application of the TOC Program when the two conflict.⁵⁴ CRA/LA-DLA clearance is required for projects located in redevelopment plan areas.

In practical effect, this means that there are multiple redevelopment areas within the City where redevelopment plans may bar developers from utilizing TOC Program incentives to their full extent, restricting the number of housing units that may be built. At this time, the City seems to concur that developers seeking TOC Program incentives in those redevelopment areas will be constrained by the limits in the redevelopment plans.⁵⁵ CRA/LA-DLA initially asserted that the conflict would impact six redevelopment plan areas—City Center, Central Industrial, Hollywood,

⁵³ *Id.* at 3.

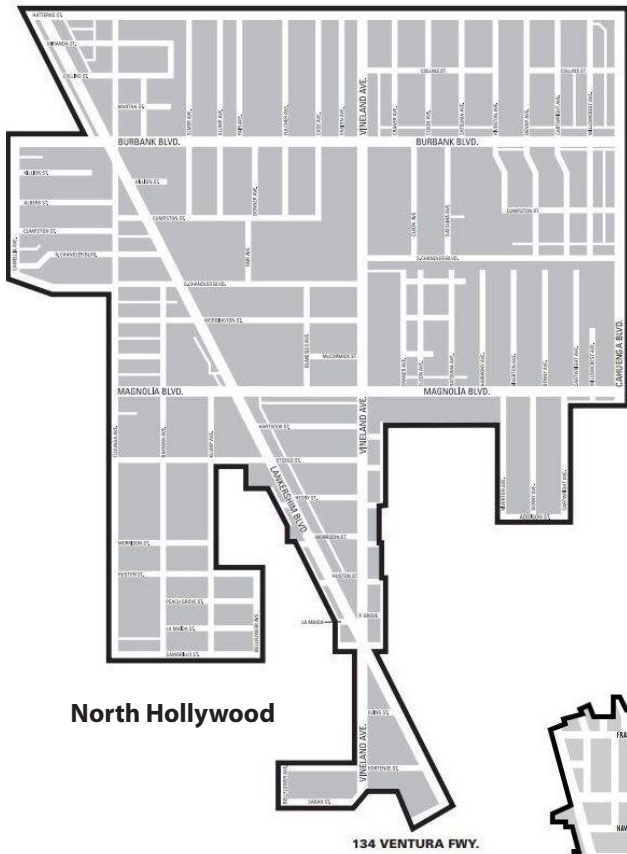
⁵⁴ CRA/LA, A DESIGNATED LOCAL AUTHORITY, Transit Oriented Communities (TOC) Density Bonuses (Jun. 27, 2018).

⁵⁵ CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, Advisory Memo on Application of Transit Oriented Communities (TOC) Incentives in CRA/LA Redevelopment Plan Areas (Jan. 9, 2019), available at <https://planning.lacity.org/ordinances/docs/TOC/adopted/AdvisoryMemo.pdf>.

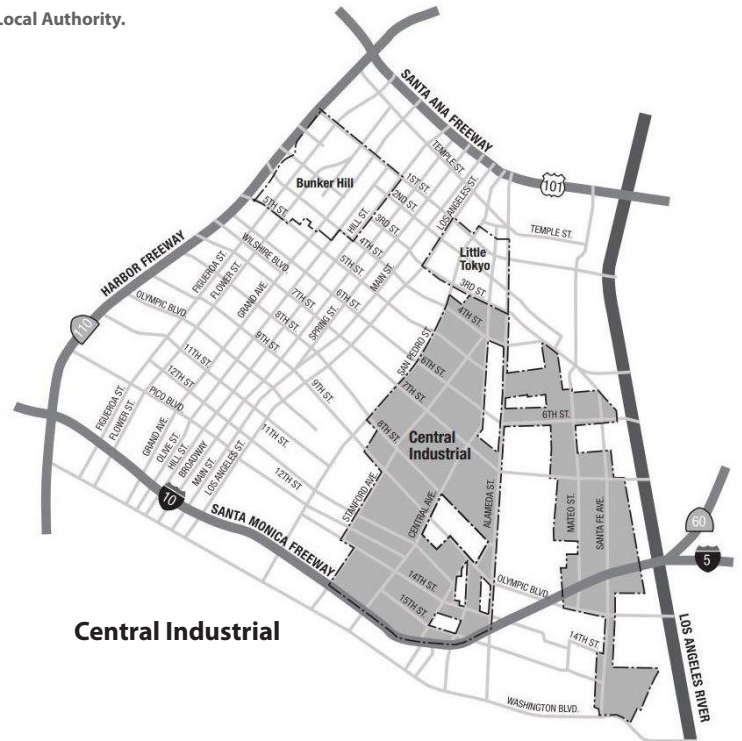


Hollywood/Western Metro Station

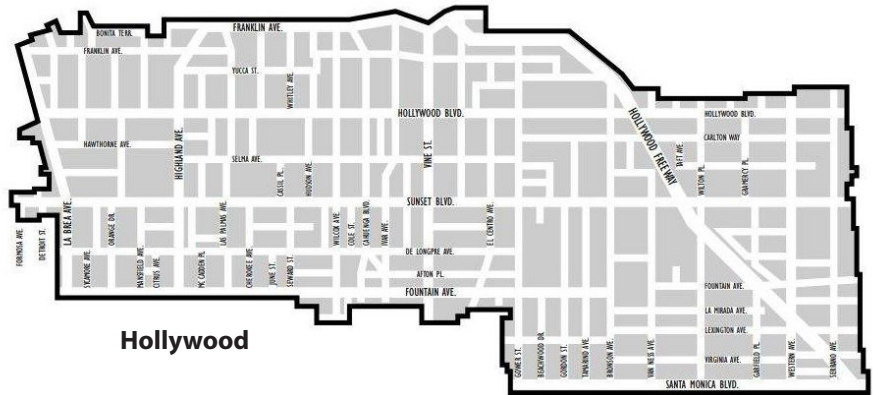
Maps provided by CRA/LA, a Designated Local Authority.



North Hollywood



Central Industrial



Hollywood

North Hollywood, Wilshire Center/Koreatown, and Pacific Corridor—and estimated that at least 25 TOC Program projects, including over 200 affordable housing units and over 50 permanent supportive housing units, mostly in the Hollywood and Wilshire Center/Koreatown areas, would be restricted in their ability to take advantage of program incentives as a result.

Upon direction by the City Council, Planning Department staff assessed the status of impacted projects, as well as any direction project applicants received from the City about the conflict and the status of ongoing efforts to address the conflict with CRA/LA-DLA.⁵⁶ The Plan-

56 CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, Community Redevelopment Agency/Los Angeles Designated Local Authority (CRA/LA-DLA) and Measure JJJ Transit Oriented Communities Incentives; CF 18-1023 (Apr. 4, 2019), available at https://ckrep.lacity.org/online/docs/2018/18-1023_rpt_PLAN_04-04-2019.pdf.

For now, the Planning Department's imperfect solution may be the best option, but the TOC Program's ability to produce more deed-restricted affordable housing in affected plan areas is likely to remain constrained.

ning Department concluded that only three redevelopment plan areas—Hollywood, North Hollywood, and Central Industrial—should be affected, eliminating the impact of the conflict in the Wilshire Center/Koreatown area where a number of projects seeking to utilize TOC Program incentives have been proposed.⁵⁷ As of April, 16 projects in the Hollywood and North Hollywood redevelopment plan areas were impacted by the conflict; the Planning Department indicated that it had reached out to project applicants to suggest that they explore using the Density Bonus Law or other entitlement options instead of the TOC Program.⁵⁸

The Planning Department's proposed workaround raises a key issue for project applicants in these plan areas; utilizing the Density Bonus Law or conditional use entitlements instead of the TOC Program incentives can mean that a project moves from ministerial approval to discretionary approval, increasing its potential vulnerability to legal challenges.⁵⁹ Utilizing these pathways instead of the TOC Program could also result in a reduction in the number of permitted deed-restricted affordable housing units, as the Density Bonus Law offers density incentives at a lower percentage of committed affordable housing units than is required by the TOC Program. And, as noted above, the Density Bonus Law does not offer incentives at the ELI level, so inability to use the TOC Program could reduce the availability of deed-restricted units for individuals and families at this most vulnerable income level. The Planning Department's assessment of impacted projects also offers a limited snapshot; as applications to utilize TOC Program incentives continue to rise, the conflict may worsen, and there is no way to accurately capture the number of forgone development projects that are not pursued—and the number of deed-restricted affordable housing units never developed—as a result.

At this time, interagency cooperation between CRA/LA-DLA and the Planning Department remains the best hope for resolving this issue. While the Planning Department's proposed workaround could still lead to the production of some number of deed-restricted affordable housing units, it is not an ideal solution. In the past, the City of Los Angeles has contemplated accepting a transfer of CRA/LA-DLA's land use authority under the redevelopment plans⁶⁰; doing so could effectively eliminate this conflict. However, questions remain about the City's administration of CRA/LA-DLA's land use authority, and confirming the City's responsibility to adhere to past CRA/LA-DLA agreements that guarantee the preservation of lower-income housing is critical to ensuring the availability of affordable housing.⁶¹ Until these issues can be resolved, the Planning Department's imperfect solution may be the only option, but the TOC Program's ability to produce more deed-restricted affordable housing in affected plan areas is likely to remain constrained.

57 *Id.* at 2. CRA/LA-DLA has not challenged the City's assessment that only projects in three redevelopment plan areas are affected.

58 *Id.* at 3-4.

59 As discussed in Section III.B.2, *infra*, discretionary approvals are subject to CEQA, while ministerial approvals are not. A discretionary approval process increases the likelihood that a project will be challenged under CEQA, adding a risk of protracted litigation that may dissuade developers and their investors from pursuing a project.

60 CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, Recommendation Report: Case No. CPC-2013-3169-CA, *supra* note 52. On August 27, 2019, the City Council's Planning and Land Use Management Committee approved a CEQA exemption for a proposed City Council resolution and ordinance delegating CRA/LA-DLA's land use authority to the City, but keeping the redevelopment plans intact. The proposed ordinance contains express language stating that the redevelopment plans will supersede the Municipal Code and City ordinances to the extent that there is any conflict, perpetuating the constraint identified in this section. See CITY OF LOS ANGELES PLANNING AND LAND USE MANAGEMENT COMMITTEE, Council File No. 13-1482-S3 (Aug. 27, 2019), available at http://clkrep.lacity.org/online/docs/2013/13-1482-S3_ord_draft_08-23-2019.pdf.

61 See LEGAL AID FOUNDATION OF LOS ANGELES, Letter to Los Angeles City Council Planning & Land Use Management Committee (Aug. 9, 2016), available at https://clkrep.lacity.org/online/docs/2013/13-1482-S1_pc_8-9-16.pdf.



Construction site in downtown LA

2. Impacts of discretionary review processes.

Because discretionary review can complicate the development process, some developers may choose not to take full advantage of program incentives--or choose not to use them at all.

There are multiple ways in which projects that are eligible for TOC Program incentives could become subject to discretionary review—review that requires the exercise of judgment or deliberation by the City in determining whether to approve the project—if they utilize those incentives. Because discretionary review can complicate the development process, some developers may choose not to take full advantage of program incentives—or choose not to use them at all. The end result of such choices would be fewer affordable housing units, limiting achievement of the program’s goals.

The California Environmental Quality Act, or CEQA, is an environmental review statute applicable to plans and projects in the state that require discretionary approval from a government agency.⁶² The law requires government agencies, before approving a project, to assess the significance of a project’s environmental impacts and to identify and require measures to mitigate significant impacts when feasible.⁶³ In addition to its important function of lessening or avoiding project environmental impacts where possible, CEQA serves an important public disclosure function, allowing for community and stakeholder participation in project approval processes with the goal of increasing transparency in those processes.

Because the statute itself does not delegate enforcement authority to any particular state agency, CEQA enforcement comes in the form of private litigation against projects that allegedly fail to satisfy the law’s requirements. As the housing shortage has worsened in recent

⁶² CAL. PUB. RES. CODE § 21080.

⁶³ See CAL. PUB. RES. CODE § 21002.1.

Some Los Angeles developers have focused their efforts on pursuit of by-right projects, which are exempt from discretionary review but are also relatively low-density.

years, CEQA has come under attack for what some claim is its role in perpetuating the crisis.⁶⁴ Proponents of this theory argue that CEQA can be abused when individuals, organizations, or community groups with a “not in my backyard” approach, or other organized interests like labor groups, use the statute to sue projects for purposes unrelated to the environmental objectives it was designed to achieve. Such lawsuits can be used as tools to delay a project or to extract other concessions from the project developer. Because CEQA challenges take time and resources to litigate, potentially impacting a project’s bottom line, some say that the threat of CEQA litigation chills development of key infill projects that could help alleviate the housing shortage.

But other studies show that CEQA litigation, while certainly a risk for project developers, impacts only a very small percentage of all projects that undergo CEQA review.⁶⁵ A review of CEQA litigation data also does not demonstrate that litigation frequency is trending upward, meaning that there have not been more CEQA suits on an annual basis as the housing crisis has progressed.⁶⁶ However, even without litigation, the CEQA review process can itself take between 10 and 29 months,⁶⁷ and the litigation process can extend for an average of 18 to 24 months beyond that. In a changing market, financing options for a project can become more uncertain, or can disappear altogether, during that timeframe. Developers and their investors do view the possibility of CEQA review and litigation as an additional project risk when evaluating development potential for sites,⁶⁸ and in Los Angeles in particular, recent years have seen high-profile CEQA litigation challenges, some resulting in major project stalls.⁶⁹ Weighing these factors has led some Los Angeles developers to focus their efforts on pursuit of by-right projects: projects consistent with existing zoning and that do not require discretionary approvals from the City. These kinds of ministerial projects are exempt from the CEQA process but are also relatively low-density.

Projects utilizing the TOC Program can be subject to discretionary review in two different ways. First, while some menu incentives are ministerial—they are automatically granted by the City if certain conditions are met—others are not, and the determination to allow for those

64 For example, some have claimed that infill development projects are disproportionately the subject of CEQA challenges. See Jennifer Hernandez, et al., HOLLAND & KNIGHT, *In the Name of the Environment* (Jul. 14, 2015), available at https://issuu.com/hollandknight/docs/ceqa_litigation_abuseissuu. Others have challenged the methodology behind these claims, contending they use a nonstandard and misleading definition of infill, or are flawed in other ways. See, e.g., Sean Hecht, LEGAL PLANET, *Anti-CEQA Lobbyists Turn to Empirical Analysis, But Are Their Conclusions Sound?* (Sept. 28, 2015), available at <https://legal-planet.org/2015/09/28/anti-ceqa-lobbyists-turn-to-empirical-analysis-but-are-their-conclusions-sound/>.

65 See ROSE FOUNDATION, *CEQA in the 21st Century: Environmental Quality, Economic Prosperity, and Sustainable Development in California* (Aug. 2016), available at <https://rosefdn.org/wp-content/uploads/2016/08/CEQA-in-the-21st-Century.pdf>.

66 *Id.* at ii.

67 *Id.* at iii.

68 See MGAC, *Los Angeles Construction Market Mid-Year Report 2018* (Jun. 2018), available at https://www.mgac.com/blog/wp-content/uploads/2018/08/MGAC-Los-Angeles-Construction-Market-Mid-Year-Report-2018.pdf?utm_source=LA%20market%20report&utm_medium=blog&utm_campaign=AB%20bottom (noting that challenges as part of the entitlements process have deterred foreign developers from building in Los Angeles).

69 See, e.g., Bianca Barragan, CURBED LOS ANGELES, AIDS Healthcare Foundation sues LA over Crossroads of the World redevelopment (Feb. 21, 2019), available at <https://la.curbed.com/2019/2/21/18234996/aids-healthcare-foundation-law-suit-crossroads-of-the-world-development> (challenging redevelopment of the Crossroads of the World site as a mixed-use transit-oriented development project with 950 residential units, including deed-restricted affordable housing units); BUSINESSWIRE, *AHF Sues City of Los Angeles, Council Members and Developer over Hollywood’s Palladium Project* (Apr. 21, 2016), available at <https://www.businesswire.com/news/home/20160421006848/en/AHF-Sues-City-Los-Angeles-Council-Members> (CEQA lawsuit challenged mixed-use development project near the Hollywood Palladium Theater); Bianca Barragan, CURBED LOS ANGELES, Judge Tanks Plans for Two Giant Towers by Capitol Records (Apr. 30, 2014), available at <https://la.curbed.com/2015/4/30/9965214/judge-tanks-plans-for-two-giant-towers-by-capitol-records> (CEQA lawsuit halted construction of the Millennium Hollywood high-rise project). These high-profile cases have largely been due to the efforts of a handful of individuals and organizations but have captured significant attention in the city. And while the 2017-2018 period saw a rise in housing construction, 2019 data suggests construction may be slowing. See Elijah Chiland, CURBED LOS ANGELES, *LA housing construction surging—for now* (Aug. 13, 2019), available at <https://la.curbed.com/2019/8/13/20802833/los-angeles-housing-development-data-construction>.

Developers interested in a by-right approval process may choose to avoid using discretionary TOC Program incentives or to avoid developing larger projects on TOC Program-eligible sites.

additional incentives is a discretionary one.⁷⁰ The discretionary review process applicable to TOC Program bonuses is less onerous than that which applies to other discretionary City approvals, such as requests for zone changes; discretionary TOC Program bonuses are approved by review of the Planning Director, and a public hearing is required only in the event of an appeal. By contrast, zone changes and General Plan amendments require multiple public hearings culminating in approval by the City Council, a far lengthier and more involved political process. Nonetheless, even the TOC Program's more limited discretionary process triggers CEQA review.

Second, all projects in the City that exceed 50 net new residential units are subject to the site plan review process, which is discretionary, regardless of whether or not those projects would otherwise have been permitted by-right given a site's zoning.⁷¹ The City has clarified that site plan review requirements apply to the base number of allowable residential units on a site.⁷² In other words, if a project would contain fewer than 50 base residential units, but by virtue of ministerial TOC Program incentives, more than 50 units may be proposed, site plan review requirements still would not apply. But for larger projects hoping to take advantage of TOC Program incentives, even when those incentives are ministerial, the discretionary site plan review process will be necessary.

Developers interested in a by-right approval process may choose to avoid using discretionary TOC Program incentives or to avoid developing larger projects on TOC Program-eligible sites, which could impact the number of deed-restricted affordable housing units ultimately permitted through the program. For example, while density bonuses are ministerial under the TOC Program, discretionary incentives, like height increases or setback reductions, may be necessary to make the most of those bonuses. If a developer chooses not to pursue those discretionary incentives in favor of a ministerial process, forgone density could mean a lower absolute number of deed-restricted affordable housing units in a project (because required affordable housing is defined as a percentage of total housing units). Similarly, a developer seeking to avoid the discretionary site plan review process entirely may choose to build a project of fewer than 50 units on a site that has more zoned capacity, and in so doing, would not take advantage of the TOC Program incentives at all—meaning that developer would not be bound by the affordable housing obligations that come along with those incentives. Finally, developers leery of the discretionary process could focus their attention on development of smaller sites with density limited to 49 units or less, limiting the number of larger projects with more potential impact to produce deed-restricted affordable housing units.

Still, as discussed above, questions remain about the extent to which discretionary review processes chill infill development. In part, those questions persist due to a dearth of data and analysis that could assist policymakers in understanding the role discretionary review plays in developers' choices to use—or not use—density bonus incentives. Some advocate for streamlining benefits that would apply to infill development projects like those eligible for the TOC Program, and would free developers from having to consider the impacts of discretionary review—particularly the threat of CEQA litigation—when making these choices. But streamlining can come with significant consequences for public disclosure processes and community involvement, meaning that policymakers should be wary of making indiscriminate streamlining changes without knowing

⁷⁰ See *TOC Program Guidelines*, *supra* note 15, at 9, 11; L.A.M.C. 12.22 A.25(g)(2).

⁷¹ L.A.M.C. 16.05. The result of this requirement is that virtually all projects that attain transit-supportive density are subject to discretionary site plan review.

⁷² *TOC Program Guidelines*, *supra* note 15, at 9.

more about the impact of discretionary review processes on the use of density incentives.

The TOC Program could offer opportunities to gather data that would clarify whether, and how much, discretionary review processes are chilling maximum development of TOC Program-eligible parcels. One way to collect this data would be to institute a short-term pilot project in Tier 3 and 4 areas testing the impact of further streamlining. For one year, the City could test two measures that could theoretically increase the number of projects taking advantage of TOC Program incentives in Tiers 3 and 4: (1) making all discretionary TOC Program incentives ministerial and (2) eliminating site plan review for projects up to 100 base units, both in exchange for an increase in the required percentage of deed-restricted affordable housing units.⁷³

The pilot could be restricted to Tier 3 and 4 areas that do not abut single-family residential properties, to limit any perceived impact on neighborhood character, and could additionally require that any development taking advantage of the pilot be required to provide discounted transit passes to all residents for 3 years. This could have the effect of increasing the number of by-right TOC Program projects in the areas best-served by mass transit, while also requiring that significant numbers of residential units be set aside for low-income residents. The year-long time limitation for the pilot would allow the City to assess developers' interest and impact on overall number of permitted deed-restricted affordable housing units through the TOC Program without more substantial and longer-term program revisions, while further promoting the program's affordability and transit-oriented development goals.

In proposing such a pilot project, this paper does not adopt the view that the CEQA process or CEQA litigation plays an outsize role in the perpetuation of housing shortages. This paper also strongly advocates that any streamlining of discretionary approval processes not be taken lightly: CEQA is an important public participation and environmental mitigation tool, and where environmental review obligations under CEQA are eliminated, advocates of streamlining should consider requiring additional benefits in the public interest, like increased percentages of deed-restricted affordable housing, to ensure the needs of disadvantaged communities are met. However, a short-term pilot project such as the one proposed here would be a limited measure that could help clarify the ways in which discretionary approval processes constrain, if at all, the number of housing units built through the TOC Program.

3. Lack of application in cases of zone change.

The TOC Program also has a constraint built into its framework: the program cannot be used if a project receives the benefit of “any development bonus or other incentive granting additional residential units or floor area provided through a General Plan Amendment, Zone Change, Height District Change, or any affordable housing development bonus in a Transit Neighborhood Plan, Community Plan Implementation Overlay (CPIO), Specific Plan, or overlay district.”⁷⁴ The provision appears intended to address “double-dipping”—preventing a project from using multiple density bonuses on top of each other. But because of its import for industrially-zoned and conditionally-zoned properties, it may have unintended consequences that could limit the production of additional deed-restricted affordable housing units. It removes

⁷³ Recommended increases in the required percentage of deed-restricted affordable housing units would be to 14 percent ELI, 19 percent VLI, 33 percent LI, or 33 percent MI in a common interest development in Tier 3 or 15 percent ELI, 20 percent VLI, 35 percent LI, or 35 percent MI in a common interest development in Tier 4. Current required affordable housing percentages to receive the maximum number of discretionary additional incentives under the TOC Program are 11 percent ELI, 15 percent VLI, 30 percent LI, or 30 percent MI in a common interest development. See Section II, *supra*.

⁷⁴ *TOC Program Guidelines*, *supra* note 15, at 7.

a potential incentive to convert non-residential properties to residential use, and results in confusion about the effect of certain pre-TOC zone changes.

Potentially the most significant of these consequences is the impact that the provision has on industrially-zoned properties close to major transit stops.⁷⁵ Many industrially-zoned properties in the City are use-restricted such that a zone change would be required to site residential units on them. Applying for such a zone change would, however, make them ineligible for TOC Program incentives.

The City has recently taken some steps to modify the zoning of certain industrial properties near mass transit, but many industrially-zoned properties are not impacted by those modifications. For example, the Exposition Corridor Transit Neighborhood Plan, approved last year, will allow taller mixed-use buildings within a half-mile radius of five Westside Expo Line stops, rezoning some industrial properties to allow for residential development.⁷⁶ The plan also includes its own affordable housing incentive program, which supersedes the TOC Program in covered plan areas. This program offers a density bonus and parking incentives provided a project commits to 10 percent ELI, 14 percent VLI, or 23 percent LI deed-restricted affordable housing units.⁷⁷ However, the Exposition Corridor Transit Neighborhood Plan affects a limited number of properties and does not impact zoning near any Expo Line station east of Culver City. Industrially-zoned properties remain elsewhere in the City, including near mass transit in Downtown Los Angeles.

The process for converting these properties to residential zoning will not necessarily result in the production of deed-restricted affordable housing units at the levels required by the TOC Program. And significantly, conversion would bar a developer from using TOC Program incentives that come with an obligation to produce more affordable housing.⁷⁸ Properties like these can only be a net gain from a housing perspective: they move from a prohibition on housing units to some permitted number of housing units after a zone change. Rendering them ineligible for TOC Program incentives, however, removes an important incentive that could prompt the development of more deed-restricted affordable housing units when these properties do turn over. Zone changes alone typically cannot result in the amount of density available to developers through ministerial TOC Program incentives; the Municipal Code applies a 1 unit per 400 square foot unit density ratio to much residential and mixed-use zoning, meaning that developers must weather the more time-intensive and riskier variance process to add density. Nor will a zone change itself result in reduced parking requirements, which the TOC Program allows ministerially. And in many cases a zone change will not implement reduced yard and

Where a developer is considering the value of engaging in the zone change process for an industrial property, eligibility for TOC Program incentives could offer a reason to convert the property.

75 Another unintended consequence, albeit one with less likely impact on a project's number of deed-restricted affordable housing units, is the effect on parking reductions, which are one tool the City has to incent increased transit use. Under the TOC Program, parking reductions are ministerial, but through the zone change process, they are discretionary; this means that industrial properties near mass transit that utilize the zone change process alone to convert to a residential use could face significant opposition with respect to parking requirements that would otherwise be eliminated if the zone change were sought first and then the TOC Program were utilized to reduce parking requirements.

76 See CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, *Exposition Corridor Transit Neighborhood Plan*, Council File No. CPC-2013-621-ZC-CPA-SP (approved Aug. 2, 2018), available at http://clkrep.lacity.org/online/docs/2018/18-0437_misc_1_05-17-2018.pdf.

77 *Id.* at 3-5. These percentages are slightly lower than the 11 percent ELI, 15 percent VLI, or 25 percent LI required in Tier 4 under the TOC Program, so for projects sited in what would otherwise be designated a Tier 4 area, the plan's application would result in slightly fewer deed-restricted affordable housing units. The plan also eliminates site plan review for projects in the plan area, which means tracking projects that seek affordable housing-related density bonus incentives in the plan area could be another way to track the impact of lessening site plan review requirements near mass transit.

78 Measure JJJ requires that, where a zone change would permit a residential use where none was previously allowed, 5 percent of total project units must be provided at rents affordable to ELI households, and either 11 percent of total project units must be provided at rents affordable to VLI households or 20 percent of total project units must be provided at rents affordable to LI households. Measure JJJ, Sec. 11.5.11(a)(1)(iii). These affordability percentages are consistent with TOC Program requirements in Tier 1.

setback requirements, which can increase building envelope and are available through the discretionary TOC Program process. In other words, where a developer is considering the value of engaging in the zone change process, eligibility for TOC Program incentives could offer the developer a reason to convert the property.

A second potential consequence involves properties that were subject to a conditional zone or height district change when the TOC Program became effective. While the TOC Program incentives clearly apply to a site's existing zoning, when conditional zone changes are at play, an added wrinkle could create confusion about the availability of program incentives. In some cases, a project's zone change is subject to a "Q," or qualified, condition, meaning that the zone change becomes effective once the condition has been met.⁷⁹ If a property was already entitled for a conditional zone change when the TOC Program went into effect, but the condition has not yet cleared, it is unclear whether the "existing zoning" for purposes of applying TOC Program incentives is the approved zoning, with the Q Condition attached, or the pre-entitlement site zoning. Developers who take title to a Q-conditioned property before the condition has cleared may also wonder whether the clearance of the condition represents a zone change that would render the project ineligible for TOC Program incentives. While this scenario is likely to have far less impact than the issue of industrially-zoned properties, ambiguity on this point could further constrain application of the TOC Program.

The City could take steps to address both of these potential issues. With respect to industrially-zoned properties, the City could add clarifying language to the TOC Program Guidelines

⁷⁹ In Los Angeles, site- or project-specific provisions can be established by ordinance as part of a lot's zoning; these specific provisions are known as Q Conditions (Qualified Classifications) and T Conditions (Tentative Zone Classifications). T Conditions represent City Council requirements for public improvements imposed as a result of zone changes, while Q Conditions represent property use restrictions that ensure compatibility with the zoning of surrounding properties. Developers must "clear" any entitlement conditions for zone change requirements to be satisfied.



that would allow for incentives to apply when industrially-zoned properties receive a zone change converting the site to mixed-use or residential zoning, while preserving the general prohibition on use of TOC Program incentives in the event of a zone change. This would allow for application of bonuses specifically in instances where the site did not contain any housing units before. In turn, that would maximize the capacity to add housing units, including deed-restricted affordable housing units, close to mass transit.

With respect to ambiguity around conditional zoning, the City could revise the TOC Program Guidelines to clarify its position on this point. Where a condition is attached to a zone change that was approved prior to the enactment of the TOC Program, the City could specify that the satisfaction of the condition does not preclude eligibility for the program. These clarifications would reduce administrative burden on the City as project developers move through the program application process, and would err on the side of eligibility to maximize the number of deed-restricted affordable housing units required through the program.

Implementation of Possible Measures to Address Identified Challenges

This portion of the paper has identified four possible measures that the City could take to address the TOC Program implementation issues discussed above:

- **Measure #1:** Coordination with CRA/LA-DLA to resolve conflicts between the limitations of the redevelopment plans CRA/LA-DLA administers and the terms of the TOC Program;
- **Measure #2:** Adoption of a one-year pilot program in Tiers 3 and 4, limited to sites that do not abut residential properties, that would, in exchange for an increased deed-restricted affordable housing component and an obligation to provide reduced-price transit passes for 3 years, allow projects to take advantage of the TOC Program's discretionary incentives on a ministerial basis and allow projects of up to 100 base units to avoid site plan review;
- **Measure #3:** Modification of the TOC Program to clarify that zone changes from industrial to mixed-use or residential zoning will not bar a project site from taking advantage of TOC Program incentives; and
- **Measure #4:** Clarification that, where a project site is subject to a conditional zoning requirement imposed before the TOC Program went into effect, the site zoning for purposes of calculating TOC Program incentives is the new zoning, and that clearance of the condition does not reflect a "zone change" barring application of TOC Program incentives.

Of the various measures discussed above, some would require no change to the existing TOC Program ordinance, which is codified in the Los Angeles Municipal Code. Those measures could be implemented by the City either through its normal dealings with other agencies or by making technical clarifications to the TOC Program Guidelines, as the City already did once in February 2018. Measure #1, coordination with CRA/LA-DLA, can occur without any changes to the structure of the TOC Program. Measure #4, clarification on conditional zoning, could likely be implemented through a technical change to the TOC Program Guide-

lines. Technical changes in the past have included clarifications about the applicability of particular tiers to certain forms of transit (e.g., rapid bus and metro line intersections), clarifications about the applicability of step-backs to certain height increases, and clarifications regarding allowable FAR increases. A clarification on conditional zoning would be consistent with the technical nature of these changes.

The other two recommendations may require additional process. The City could argue that Measure #3, which affects changes from industrial to mixed-use or residential zoning, is a technical change; however, past technical changes to the TOC Program Guidelines have simply resolved ambiguities in the Guidelines's drafting, while this change would represent a modification of the existing program to eliminate a prior restriction in some cases. Similarly, Measure #2, the one-year pilot program, would be a departure from the current program, rather than a technical change.

In both cases, there are two possible mechanisms for modifying the TOC Program. First, TOC incentives may be adjusted in individual incentive areas—meaning individual half-mile radii around a particular transit stop or transit stops—through a Community Plan update, Transit Neighborhood Plan, or Specific Plan, as provided by Ordinance No. 184745, which enacted the program. Alternatively, the TOC Program may be modified citywide if the City Council or a private citizen or group proposes a new ordinance that is approved by the voters, amending the Municipal Code to reflect these adjustments. The first option would require a separate process for each incentive area seeking to employ a modification; the second option would be more widely applicable, but would require a ballot initiative. However, if there was a desire to further limit or test the applicability of either the industrial exemption elimination or the pilot program in individual incentive areas, the City could utilize the first option to create an even smaller-scale adjustment to the program. Modification of the site plan review threshold as proposed by Measure #2 could also require amendment to the Municipal Code provisions applicable to site plan review.

Both options involve a public process and are not without risk: opponents of proposed changes could mount a political or legal challenge to bar any suggested changes to the program. Community Plans, Transit Neighborhood Plans, and Specific Plans are typically reviewed and recommended by a local Area Planning Commission and the City Planning Commission before being heard and adopted by the City Council. Such a process can take months, or years, and engagement by local stakeholders may be high depending on the particular incentive area in question. While the ballot initiative process could theoretically lead to wide-scale program changes on a shorter timeframe, it is subject to significant political risk; Measure JJJ passed with overwhelming support in 2017, but after multiple years of program implementation, community groups that disfavor the TOC Program's upzoning provisions would likely mount significant opposition. Even after a plan or ordinance has been adopted, it is subject to legal challenge, which could further delay implementation.

While some of the more ambitious TOC Program changes identified in this paper could carry their own implementation challenges, they are still worth investigation and consideration. Each proposal may assist in achieving program goals, and serve as valuable data collection tools to test live theories about the effects of transit-oriented development and affordable housing incentive programs.

What could increased efficacy in implementation of TOC mean for Los Angeles, and California?

The TOC Program's implementation to date has already made it the strongest driver of proposed deed-restricted affordable housing in the City of Los Angeles' production pipeline.⁸⁰ The suggestions in this paper, including Measures #2 and #3, have the potential to further increase the efficacy of the program, which in turn would lead to additional production of deed-restricted affordable housing in areas of the City nearest to mass transit. Given the City's current projections, it is safe to say that making the TOC Program easier to utilize would only solidify its position as a major contributor—indeed, at present, the most significant contributor—to deed-restricted affordable housing production in the City.

It bears mentioning, though, that along with this additional deed-restricted affordable housing comes a significant amount of market-rate development, raising questions about neighborhood character and displacement in some areas. There is a body of still-developing literature that examines the potential impacts of infill development on gentrification and displacement in major metropolitan areas.⁸¹ Although a full assessment of those issues is beyond the scope of this paper, sensitivity to concerns about gentrification and displacement must be paramount when considering expansions to measures like the TOC Program, either locally or on the state level. The suggestions made in this paper are designed to enhance the program's potential to produce housing, including deed-restricted affordable housing, while limiting the effects of displacement by conditioning streamlining provisions on increased provision of deed-restricted affordable housing and concentrating streamlining in areas nearest rail stations, and by eliminating program restrictions only when the property in question is moving from an industrial to a residential use. However, before making any changes, policymakers should carefully assess and consider the potential effect of such changes on gentrification and displacement.

To help with this assessment, policymakers and others could be doing more to collect data about the ways in which new transit-oriented infill development impacts existing residents in surrounding neighborhoods. The nature of the TOC Program allows researchers to identify specific sites and their changes in use. Policymakers could develop early and continued engagement with residents near TOC Program sites once a project is proposed or approved, and collect information about specific attributes of new projects once they are developed. For example, data tracking the number and percentage of market-rate versus affordable units, demographics of residents living in market-rate and affordable units, demographics in adjacent residential areas, frequency of mass transit use by residents in market-rate units versus affordable units, car ownership among market-rate and affordable residents, and more could be collected. In sum, gathering data about TOC Program projects may help to further elucidate questions about gentrification, displacement, and infill development.

80 See CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, Housing Progress Report—Quarterly Report: January-March 2019, *supra* note 35.

81 See, e.g., Quentin Brummett and Davin Reed, FEDERAL RESERVE BANK OF PHILADELPHIA, *The Effects of Gentrification on the Well-Being and Opportunity of Original Resident Adults and Children* (Jul. 2019), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3421581; Miriam Zuk, et al., 33 JOURNAL OF PLANNING LITERATURE 31, *Gentrification, Displacement, and the Role of Public Investment* (Feb. 2018), available at <https://escholarship.org/uc/item/0mh6f3tr>; Karen Chapple, et al., *Developing a New Methodology for Assessing Potential Displacement* (Apr. 26, 2017), available at <https://ww3.arb.ca.gov/research/apr/past/13-310.pdf>; UC BERKELEY, The Urban Displacement Project, available at <https://www.urbandisplacement.org/>.

In addition to serving as a potential source of useful data, the TOC Program has a role to play as an example for other localities and state legislators grappling with application of transit-oriented development principles to the state's current housing shortage. The program's implementation successes and challenges can give lawmakers a sense of the outcomes associated with inclusionary transit-oriented development laws. This information can also help them think critically about the best ways to iterate: assessing how laws define and designate affordable housing, whether and how streamlining of discretionary processes is permitted, and stakeholder experiences as the program continues in effect. As legislation intended to promote transit-oriented development emerges on the state level year after year—first with SB 827 and now with SB 50⁸²—the City's lessons learned from the TOC Program will have particular relevance.

While there is still much we do not know about the outcomes associated with the TOC Program, the information we have suggests a few important points lawmakers should keep in mind as they work to address the housing crisis.

First, the TOC Program has demonstrated that transit-oriented density incentive measures that mandate inclusionary housing can be successful at spurring development of deed-restricted affordable housing under current market conditions. As discussed above, there are still many questions to ask about the mechanics of programs like these. Should the required percentages of affordable housing be higher? What are the financial constraints (e.g. investor concerns, material costs, etc.) that affect developers' choices about participation in the program and the type of affordable housing units to produce, and how do those constraints affect a decision to increase affordability requirements? Do our definitions of AMI appropriately match the demographics of neighborhoods in which new projects are sited, to ensure neighborhood residents can afford a new project's deed-restricted affordable housing units? Even so, the TOC Program has become the top performer in adding affordable housing units to the City's development pipeline. And early data shows, at the very least, that programs like these can result in more, and more affordable, housing as long as current market conditions favorable to the production of housing persist.

Second, the TOC Program can itself be designed to shed light on the impacts of streamlining approval processes. A short-term and limited pilot project designed to streamline project approvals in Tiers 3 and 4 in exchange for an increased affordability requirement would help better assess the role risk from discretionary approval processes plays in developers' choices. But even if such a pilot is not introduced, the TOC Program can already serve as a source of valuable data about developer choice on this score. For example, assessments of the number of ministerial versus discretionary incentive applications could help elucidate the point at which density bonus incentives outweigh concerns about delays due to discretionary processes.⁸³ As approved TOC Program projects move forward, timelines for discretionary review and litigation challenges to discretionary projects can be tracked. This information can give lawmakers a better sense of how to most effectively employ streamlining efforts, if at all—rather than blindly proposing across-the-board streamlining, which can strip vulnerable communities of important opportunities for public participation.

82 Local governmental bodies, including the Los Angeles City Council, have been highly critical of these measures, which they view as unreasonable attempts to strip local governments of control over their own land use processes. In Los Angeles, members of the City Council have even pointed to the TOC Program as evidence that state legislation is not needed. See Statement of Paul Koretz at Los Angeles City Council Meeting (Apr. 16, 2019) (speaking in opposition to SB 50) (“...in Los Angeles, we have already densified and we already have TOCs...So, there doesn't seem to be much of a point and where we do something that most cities haven't done, this legislation doesn't acknowledge that.”).

83 For example, current City data on TOC Program implementation suggests that discretionary TOC Program applications outpaced by-right applications by a factor of about 2 to 1 in the first quarter of 2019. CITY OF LOS ANGELES DEPARTMENT OF CITY PLANNING, Housing Progress Report—Quarterly Report: January-March 2019, *supra* note 35, at 4.

Finally, the TOC Program provides one possible blueprint for targeted placement of inclusionary housing in places where it can provide greenhouse gas reduction benefits. The Southern California region accounts for over half of the state's transit trips⁸⁴, and recent data shows that transit riders in the region are heavily concentrated in urban areas that hold 45 percent of the region's mass transit commuters, despite only holding about 17 percent of the region's total population.⁸⁵ Low-income riders are the most frequent users of mass transit in Southern California.⁸⁶ This data suggests that situating affordable housing in areas well-served by mass transit can ensure continued transit ridership rather than the use of more carbon-intensive transportation alternatives, and underscores the importance of providing housing options near transit for low-income residents. Transit-oriented development measures should take into account the realities of mass transit ridership; a transit-oriented inclusionary housing incentive program can do just that by requiring that developers provide housing accessible to low-income residents in order to unlock a site's full development potential. The TOC Program serves as an important reminder that simply increasing density near mass transit is not enough to tackle either our housing or our greenhouse gas reduction goals: increasing density while at the same time providing for the needs of our most vulnerable populations will better help us achieve both.

Recommendations and Conclusion

Since coming into effect in late 2017, the TOC Program has quickly become a key driver of deed-restricted affordable housing production in the City of Los Angeles. However, the program faces some implementation challenges that potentially limit its full efficacy. Limited modifications to the way that the program is implemented could assist in better understanding and mitigating those challenges, and in promoting the production of additional affordable housing units.

To address these possible challenges, and to take advantage of the TOC Program as a learning tool as state and local politicians consider the role of transit-oriented development in addressing California's housing shortage and climate goals, this paper recommends:

■ Possible alterations to the TOC Program that could assist in easing program implementation challenges:

- Coordination with CRA/LA-DLA to resolve conflicts between the limitations of the redevelopment plans CRA/LA-DLA administers and the terms of the TOC Program;
- Adoption of a one-year pilot program in Tiers 3 and 4 that would allow projects to take advantage of the TOC Program's discretionary incentives on a ministerial basis and allow projects of up to 100 base units to avoid site plan review in exchange for affordability and transit pass concessions;
- Modification of the TOC Program to clarify that zone changes from industrial to mixed-use or residential zoning will not bar a project site from taking advantage of TOC Program incentives; and
- Clarification regarding conditional zoning requirements imposed before the TOC Program went into effect, explaining that site zoning for purposes of calculating TOC Program incentives is the new zoning and TOC Program incentives apply.

⁸⁴ Manville, et al., *supra* note 14, at 17.

⁸⁵ *Id.* at 5-6.

⁸⁶ *Id.* at 5.

- **Expanded efforts to take advantage of opportunities for data collection related to the TOC Program. These efforts could include:**
 - Assessment of existing TOC Program data, already collected by the City, that tracks the number of discretionary and non-discretionary TOC Program applications;
 - Tracking legal challenges to discretionary TOC Program projects;
 - Assessment of Tier 3 and 4 TOC Program application data created by the implementation of the one-year pilot program suggested as Measure #2, if it is implemented;
 - Collection of data to track neighborhood patterns and demographics in TOC Program incentive areas, including data regarding prior uses of TOC Program project sites, number and percentage of market-rate versus affordable housing units within individual TOC Program projects, neighboring uses to project sites, income levels and racial demographics of the residents of TOC Program projects and in surrounding residential areas, area rents over time as compared to average city-wide rent increases in the same time period, etc.; and
 - Collection of data to track VMT and transit ridership associated with TOC Program projects, including information about car ownership rates in market-rate versus affordable housing units, frequency of mass transit use by market-rate and affordable housing residents, impacts of discounted transit pass programs on ridership by project residents, etc.
- **Careful attention to lessons learned from the TOC Program, including stakeholder experiences, successes, and challenges, as other lawmakers think about crafting additional legislation to promote transit-oriented development. Areas for consideration include:**
 - Assessment of AMI and affordability designations, and their interplay with neighborhood demographics for individual TOC Program projects;
 - The impact of discretionary approval processes and, if relevant in the future, limited streamlining, on utilization of the program;
 - Financial constraints that affect developer choice about participation in the TOC Program and impacts of those constraints on the production of affordable housing units; and
 - A critical review of required affordability percentages for the TOC Program, taking into consideration anti-displacement concerns and market factors.

In sum, the TOC Program's success is notable, but does not fully resolve how transit-oriented development measures can best be utilized to address California's housing shortage. As lawmakers at the state and local levels continue to develop and propose solutions to improve housing outcomes in the state, they should both look to the TOC Program as a potential source of valuable data and lessons learned about inclusionary transit-oriented development incentives programs, and work to further improve and build on the program.



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