

# Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts

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*The problem of local-government barriers to housing supply is finally enjoying its moment in the sun. For decades, the states did little to remedy this problem and arguably they made it worse. But spurred by a rising Yes in My Backyard (YIMBY) movement, state legislatures are now trying to make local governments plan for more housing, allow greater density in existing residential zones, and follow their own rules when reviewing development applications. This Article describes and takes stock of the new state housing initiatives, relating them to preexisting Northeastern and West Coast approaches to the housing-supply problem; to the legal-academic literature on land use; and, going a bit further afield, to the federal government's efforts to protect the voting rights of African Americans in the Jim Crow South. Of particular interest, we will see that in California, ground zero for the housing crisis, the general plan is evolving into something that resembles less a traditional land-use plan than a preemptive and self-executing intergovernmental compact for development permitting, one which supersedes other local law at least until the local government has produced its quota of housing for the planning cycle. The parties to the compact are the state, acting through its housing agency, and the local government in whose territory the housing would be built. I argue that this general approach holds real promise as a way of overcoming local barriers to housing supply, particularly in a world—our world—where there is little political consensus about the appropriate balance between local and state control over land use, or about what constitutes an illegitimate local barrier. The main weakness of the emerging California model is that the state framework does little to change the local political dynamics that caused the housing crisis in the first place. To remedy this shortcoming, I propose some modest extensions of the model, which would give relatively pro-housing factions in city politics more leverage and facilitate regional housing deals.*

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## INTRODUCTION

In 1971, Fred Bosselman and David Callies famously described a “quiet revolution” in land-use law.<sup>1</sup> Prodded by the nascent environmental movement, states were fettering local governments with new planning mandates, new requirements for public participation, and new procedures for state-level review of local plans. In some instances, states seemed poised to preempt local land-use authority entirely.

Looking back twenty years later, Callies remarked that the “ancient regime” of local land use controls” had been “metamorphosed rather than . . . overthrown.”<sup>2</sup> The quiet revolution had culminated not in state preemption, but rather in the local embrace, or cooptation, of sensitive-lands and growth-control missions, and an overlay of environmental review and state-permitting requirements<sup>3</sup>—what economist William Fischel dubbed “the double veto.”<sup>4</sup> Development opponents who had lost a local battle could now use state law and state tribunals to take another whack.

Callies expressed concern that the “plethora of . . . requirements” might simply “choke off development, the good with the bad.”<sup>5</sup> His warning proved prescient. Anti-development interests used the new regulatory frameworks to slow housing production on urban and suburban lands, not just in remote natural areas.<sup>6</sup> In the coastal states that led the “quiet revolution,” the supply of new housing was throttled, with devastating equity, economic, and environmental repercussions.<sup>7</sup>

But something new is afoot. California, posterchild for the housing crisis, is laying groundwork to make heretofore restrictive local governments allow as much new housing as “healthy housing markets” in “comparable regions of the nation” would produce.<sup>8</sup> Though a number of states have set quantitative targets for the production of subsidized, income-restricted housing units, and a few states have instructed local governments to accommodate projected population growth with new housing at a variety of price points, California will be the first to assign market-rate housing quotas shaped by a nationally normed standard.<sup>9</sup>

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1. FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971).

2. David L. Callies, *The Quiet Revolution Revisited*, 46 J. AM. PLAN. ASS'N 135, 142 (1980).

3. See generally David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 26 URB. LAW. 197 (1994).

4. WILLIAM A. FISCHEL, *ZONING RULES!: THE ECONOMICS OF LAND USE REGULATION* 54-57 (2015) [hereinafter FISCHEL, *ZONING RULES*].

5. Callies, *supra* note 2, at 142.

6. See *infra* Part I.

7. See *infra* Part I.

8. See *infra* Subpart III.A.

9. See *infra* Subpart III.A.1.

These quotas are to be accommodated by local governments through the “housing elements” of their general plans.<sup>10</sup> Belying its nominal status, the California housing element is transmuting into something that resembles less a traditional land-use plan than a preemptive and self-executing intergovernmental compact for development permitting. The parties to the agreement are the state, acting through its housing agency, and the local government, whose general plan the housing element revises. Developers may apply for permits on the authority of the housing element itself, irrespective of contrary local ordinances, at least until the jurisdiction has produced its quota of housing for the planning cycle. Local governments must provide advance notice to the state before amending their housing elements, and the state agency may respond by decertifying the housing element, exposing the local government to financial and regulatory sanctions.

Beyond the planning mandates, state legislators are also trying more directly to preempt local restrictions on housing density.<sup>11</sup> Pro-housing lawmakers have won national media acclaim for bills to upzone land near transit stations, and to authorize additional dwelling units on parcels locally zoned for single-family homes.<sup>12</sup>

This Article describes and takes stock of the new state housing initiatives, relating them to preexisting Northeastern and West Coast approaches to the housing-supply problem; to the legal-academic literature on land use; and, going a bit further afield, to the federal government’s efforts to protect the voting rights of African Americans in the Jim Crow South. I shall argue that statutes that directly preempt local restrictions on housing of certain types or densities are prone to failure, but that the emerging California model of the plan as a preemptive intergovernmental compact for development permitting holds some promise as a political solution to the housing-supply problem.

The underlying difficulty is this: local government have, by tradition, very broad authority over land use and housing development, which has come to be exercised through discretionary permitting regimes.<sup>13</sup> Local governments also have better information than the state about local conditions, preferences, and practices. Under these circumstances, state mandates requiring local governments to allow certain housing types or densities are fragile and easily vitiated. If the state tells localities to allow accessory dwelling units (ADU) on parcels zoned for single family homes, for example, and the localities don’t want them, the local governments can bring the localities’ zoning into compliance while using discretionary design review to saddle ADU projects with expensive, ad hoc, and unpredictable conditions. Local governments can also use their residual regulatory authority to enact more systematic barriers to ADUs, such as costly building code amendments, setback or parking requirements, fees, layers

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10. For citations to the code provisions relevant to this paragraph, see *infra* Subparts II.B & III.A.

11. See *infra* Subpart III.B.

12. See *infra* Subpart III.B.

13. See *infra* Subparts I.B. & IV.B.

of internal appeals, and so on. The history of California's ADU statute illustrates this dynamic all too vividly.<sup>14</sup>

If the state is to intervene effectively under such circumstances, it is not enough to make discrete, liberalizing changes to the local regulatory baseline for housing development. The state also needs some way to block the retrogressive stratagems of local governments, including bad-faith exercises of permitting discretion.

The emerging California model of the general plan positions the state to do precisely this—and to do it in a manner that is politically discreet and responsive to local conditions, and thus suited to a world (our world) in which there is no general political consensus about the proper balance between state and local control over land use, or about what constitutes an illegitimate barrier to housing supply.<sup>15</sup> The baseline change occurs not by state legislative command, but through the local government's articulation in its housing element of appropriate densities for developable parcels and a schedule of actions to remove development constraints. These local commitments are made under pressure from the state, as the state determines housing need and penalizes local governments that do not adopt a new, "substantially compliant" housing element every eight years. But the state's hand is not particularly visible, as state-local negotiations over the housing element play out in a low-limelight administrative setting, rather than in the legislative arena.

The housing element's *de jure* status as a component of the local government's own general plan, and the obscure process through which state approval is obtained, should help state legislators parry any accusation that they have, through the housing-element framework, imposed a statewide zoning map and development code on local governments. Yet, to the extent that housing elements are self-executing and supersede contrary local requirements as a matter of state law, the aggregate set of housing elements has the potential to function much like a statewide zoning and development code, controlling permitting by local governments until such time as the locality has produced its quota of housing for the cycle.

The new regulatory baseline defined by a housing element is substantially, but not completely, locked in. A local government may amend its housing element without the state agency's consent,<sup>16</sup> but doing so is costly. The locality must provide advance notice and a justification, and the agency may respond by decertifying the housing element, exposing the local government to fiscal and possibly regulatory sanctions. This "soft" lock-in mechanism is just about right for a world lacking political consensus about the appropriate balance between local and state control over land use. It discourages local governments from circumventing the regulatory baseline, while leaving open a path for the most

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14. See *infra* Subpart III.B.

15. For citations to the code provisions relevant to the argument previewed here, see *infra* Parts III & IV.

16. See *infra* Parts III & IV.

dogged and influential anti-housing jurisdictions to get what they want without bringing down the whole regime.

All in all, the emerging California framework positions a pro-housing governor, acting through the state housing agency, to push very hard against local “NIMBYism” when the political stars align—and also to propitiate locally powerful interests when necessary.<sup>17</sup>

One should not be too Pollyannaish though. The California model is very much a work in progress. Its full realization may require changes to the legal standard for a “substantially compliant” housing element,<sup>18</sup> as well as stronger mechanisms for developers to obtain project-level exemptions from local standards or procedures that hinder plan-compliant projects. And then there is the matter of setting housing targets. The traditional methods have rewarded exclusionary locales with small quotas,<sup>19</sup> and while California’s new “healthy housing markets” approach sounds promising, it leaves much to be desired in the statutory particulars. Finally, even if California develops sensible housing targets, local governments with superior information about local practices, conditions, and political tolerances may still manage to bamboozle or cow the state agency into accepting dysfunctional housing elements.

This highlights the California model’s most fundamental weakness: the state-law framework positions an agency to pressure local governments from above, but it does not generate bottom-up political incentives for local officials to heed the interests of the outsiders (such as prospective residents) they now ignore.<sup>20</sup> I shall argue, however, that with a few modest tweaks, the California model could also be used to redistribute political authority and policymaking discretion at the municipal level toward relatively pro-housing actors—from the voters to the city council, and from the city council to the mayor.<sup>21</sup> The extensions I propose would also facilitate the sort of citywide and regional housing bargains for which Professors Rick Hills and David Schleicher have advocated.<sup>22</sup> In sum, the California framework could easily evolve into a source of bottom-up as well as top-down attacks on local barriers to new housing.

The balance of this Article unfolds as follows. Part I furnishes the motivation, briefly describing the transformation in housing supply and prices that has occurred over the last fifty years, and the attendant social, economic and environmental consequences. Part II provides an overview of state frameworks

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17. The acronym NIMBY stands for Not In My Backyard, and is an epithet used to describe anti-development activists who parochially resist changes to land use in their neighborhoods.

18. The reforms previewed in this paragraph are fleshed out in Part IV.

19. See *infra* Subpart II.B.2.

20. The outsiders, of course, are the prospective residents who would benefit from expansion of the housing supply.

21. In California, so-called “general law” cities lack a separately elected mayor. See CAL GOV’T CODE §§ 36501, 34851 (West 2019). Section 36501 provides that general law cities shall be governed by a city council, a city clerk, a city treasurer, a police chief, a fire chief and any subordinate officers or employees as required by law. Section 34851 authorizes a city-manager form of government for general-law cities. In these cities, the reallocation of authority could run to the city manager rather than to the mayor.

22. See *infra* Subpart IV.B.

that developed from the 1970s to the 1990s for superintending local regulation of housing supply and the critiques these frameworks engendered. Part III describes notable recent reforms to the state frameworks, discussing California's evolution and flagging examples from other states. Part IV offers a tentative defense of planning for housing through preemptive intergovernmental compacts and explains how the California model could be extended to put bottom-up as well as top-down pressure on local barriers to housing supply. I compare the problem of overcoming local barriers to housing supply to the problem the federal government faced in the 1960s when it undertook to dismantle Jim Crow, and I argue that the emerging California model of the plan can be understood as an adaptation of the regulatory paradigm of the federal Voting Rights Act for a structurally similar problem whose solutions are not (yet) the object of a sustaining consensus in the body politic.

## I. MOTIVATION: BOOMS WITHOUT BOOMTOWNS

### A. THE STYLIZED FACTS

For nearly all of American history, economic development unfolded more or less as follows.<sup>23</sup> A new technology or discovery would make certain places suddenly valuable. Entrepreneurs would locate to these high-value places and bid up wages, causing workers to flood in. A construction boom would ensue, furnishing housing to workers who had relocated from other parts of the country. Speculative bubbles or a temporary imbalance between supply and demand occasionally drove the price of housing above the cost of construction, but these fluctuations were temporary; soon enough, the price of housing would revert to construction cost.

This familiar pattern has broken down. The major cities of the West Coast and the Northeast have experienced a massive, decades-long economic shock accompanied by meager population growth and little expansion of the housing stock.<sup>24</sup> The population influx that has occurred in these economically fortunate places consists mostly of high earners.<sup>25</sup> Although wages for low-skilled labor have risen too,<sup>26</sup> housing has become so expensive that it's no longer worthwhile for low-skill workers to emigrate from the low-wage regions.<sup>27</sup>

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23. To read the story briefly summarized in this paragraph in much greater depth, see Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, 102 J. URB. ECON. 76 (2017); David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78 (2017).

24. See David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1675 (2013).

25. See ISSE ROMEM & ELIZABETH KNEEBONE, U.C. BERKELEY TERNER CTR. FOR HOUS. INNOVATION, DISPARITY IN DEPARTURE: WHO LEAVES THE BAY AREA AND WHERE DO THEY GO? (Oct. 2018), <https://turnercenter.berkeley.edu/disparity-in-departure>; Schleicher, *supra* note 23, at 83, and sources cited therein.

26. The long-term trend toward interstate convergence in wages slowed in the 1980s and has now stopped. Ganong & Shoag, *supra* note 23, at 76.

27. See Schleicher, *supra* note 23, at 82–83, 115–16, and sources cited therein.

Proving the point that the escalation of housing prices is not a nationally uniform phenomenon, economists Edward Glaeser and Joseph Gyourko estimate that as of 1985, about 6% of metropolitan regions had a median home price more than 25% above the cost of production.<sup>28</sup> By 2013, the share of metro areas in the high-cost bin had nearly doubled to 10%, still only a modest number.<sup>29</sup> Yet the small subset of metro areas afflicted by high housing prices is very economically significant. Los Angeles, San Francisco, New York, Seattle, the District of Columbia, Boston, and Denver are all in the high-cost bucket.<sup>30</sup> These regions have barely expanded their housing supply, even as the affordable metropolises of the South and Southwest—cities such as Atlanta, Charleston, Orlando, Houston, Phoenix, and Las Vegas—issued building permits between 2000 and 2013 totaling 30%–60% of their year-2000 housing stock.<sup>31</sup>

Geomorphology is an obvious difference between the high-cost coastal cities and their still-affordable counterparts in the South and Southwest, but regulation rather than “oceans and slopes” seems to be the principal housing-supply barrier in high-cost regions.<sup>32</sup> In a careful study of Manhattan, Glaeser and co-authors found that the cost of adding a new floor to an existing building, while very expensive, was only about half of what the additional living space would sell for.<sup>33</sup>

The scholarly consensus holds that regulatory barriers to new housing have become much more stringent in the high-cost regions since the late 1960s and early 1970s.<sup>34</sup> Exactly how much more stringent is hard to say, because it is difficult to quantify regional and over-time variation in the intensity of land-use regulation. Local regulations can take an almost innumerable number of forms—height limits, density and lot-size limits, setback requirements, design guidelines, neighbor notification requirements, development fees and in-kind exactions, historical preservation, price restrictions, open space preservation, environmental review requirements, prevailing-wage and local-workforce labor requirements, and so forth.<sup>35</sup>

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28. Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSP. 3, 13 tbl.2 (2018).

29. *Id.*

30. *Id.* at 14 n.8.

31. *Id.* at 19 fig.3.

32. See, e.g., Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265 (2009).

33. Edward L. Glaeser, Joseph Gyourko & Raven E. Saks, *Why is Manhattan So Expensive? Regulation and the Rise in Housing Prices*, 48 J.L. & ECON. 369 (2005).

34. For leading reviews, see FISCHER, *ZONING RULES*, *supra* note 4; Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, in 5B HANDBOOK OF REGIONAL AND URBAN ECONOMICS 1289 (Gilles Duranton et al. eds, 2015).

35. See, e.g., Edward L. Glaeser & Bryce A. Ward, *The Causes and Consequences of Land Use Regulation: Evidence from Greater Boston*, 65 J. URB. ECON. 265, 266 (2009) (describing “remarkable variety” and “astonish[ing] vague[ness]” of land-use regulations uncovered through the authors’ in-depth investigation of Boston-area suburbs).

Moreover, while the original theory of zoning presupposed that conforming projects would be approved as of right, development permitting in the high-cost regions has become thoroughly discretionary, requiring project-by-project negotiations over design, scale, public benefits, affordable housing set asides, and so much more.<sup>36</sup> Local governments and neighborhood NIMBYs use this discretion to kill projects they dislike, and though some projects make it through, the delays and uncertainties can be very costly.<sup>37</sup> The actual intensity of land-use regulation in a world of discretionary permitting is a function not just of the rules that exist on paper; rather, it is the interactive product of rules, interest groups, and the preferences of local administrators.<sup>38</sup>

Economists have tried to quantify and compare the stringency of land-use regulation by surveying nationally representative samples of local public officials, and aggregating the results into indices.<sup>39</sup> The general finding, unsurprisingly, is that metro areas with stricter regulation also have higher housing prices.<sup>40</sup> In theory, this could reflect the internalization of aesthetic and congestion externalities from new development, but studies that attempt to quantify benefits as well as costs have largely found that the costs of development restrictions far outweigh the benefits.<sup>41</sup>

There is no national time-series dataset on local land use regulation, but scholars have assembled detailed time series for California, the Boston area, and a few other locales. Difference-in-difference studies using these data corroborate the national, cross-sectional analyses: the adoption of most types of development restrictions reduces the number of housing units permitted in the next time period, relative to “control” jurisdictions that did not enact such restrictions.<sup>42</sup> The over-time studies also confirm that in expensive coastal regions, there has been a dramatic upswing in the number and variety of local land-use regulations.<sup>43</sup>

There is, however, one important commonality between the high-cost metro areas of the West and Northeast, and the low-cost metros of the South and

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36. See generally Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591 (2011). For an in-depth look at discretionary development permitting in the San Francisco Bay Area, see Moira O’Neill et al., *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California’s Housing Policy Debates*, 25 HASTINGS ENVTL. L.J. 1 (2019).

37. O’Neill et al., *supra* note 36, at 26; see also Edward L. Glaeser & Joseph Gyourko, *The Impact of Zoning on Housing Affordability* 11 (Nat’l Bureau of Econ. Research, Working Paper No. 8835, 2002), <https://www.nber.org/papers/w8835>.

38. Cf. Glaeser & Ward, *supra* note 35, at 266 (concluding from detailed study of Boston-area suburbs that one of the most basic facts about land use regulations is that they are “often astonishingly vague”).

39. For a review, see Gyourko & Molloy, *supra* note 34, at 1297–1302.

40. *Id.* at 1297.

41. See David Albouy & Gabriel Ehrlich, *Housing Productivity and the Social Cost of Land-Use Restrictions*, 107 J. URB. ECON. 101, 102 (2018), and sources cited therein.

42. See, e.g., Kristoffer Jackson, *Do Land Use Regulations Stifle Residential Development? Evidence from California Cities*, 91 J. URB. ECON. 45 (2016).

43. See Glaeser & Ward, *supra* note 32, at 269–71; Jackson, *supra* note 42, at 48. Using Google’s ngram service, Fischel shows that in the corpus of written work known to Google, references to “growth management” were very scarce before 1970 and shot upward after then. See FISCHEL, ZONING RULES, *supra* note 4, at 194–96.

Southwest: density stasis in extant residential neighborhoods.<sup>44</sup> Prior to the Great Depression, it was common for single-family homes in growing regions to be torn down and replaced by small apartment buildings.<sup>45</sup> Yet when housing development picked up again after World War II, the old pattern of residential intensification did not materialize.<sup>46</sup> Whether due to the spread of Euclidian zoning,<sup>47</sup> the interstate highway system,<sup>48</sup> or the increasing popularity of private covenants,<sup>49</sup> housing development since the 1940s and especially post-1970 has occurred mostly through building on outlying “greenfields” and, to a lesser extent, on repurposed industrial “brownfields.”<sup>50</sup> The main observable difference between the expensive coastal regions and their affordable inland counterparts is that less raw land has been converted from non-housing uses in the former areas.

## B. CAUSES

Why did some jurisdictions throw up the barricades to new housing while others continued to welcome development, at least in previously non-residential areas? A standard view, popularized by economist William Fischel in his 2001 book, *The Homevoter Hypothesis*, places the blame on incumbent homeowners.<sup>51</sup> Risk averse, and deeply concerned about the value of their most important asset (their home), suburban homeowners turn out in droves to oppose any development that might change the character of the neighborhood. Local governments end up functioning as *de facto* homeowner cartels. There are some puzzles though. No one suburb can exercise much power over the overall supply (and hence, price) of housing in a metropolitan region composed of numerous suburbs. And why would suburban homevoter cartels block housing starting in the 1970s, but not beforehand, and why in the Northeast and the West, but not in the South?

Fischel posits that general price inflation, and the environmental movement, explain the 1970s inflection point.<sup>52</sup> Inflation made homes into more

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44. Issi Romem, *America's New Metropolitan Landscape: Pockets of Dense Construction in a Dormant Suburban Interior*, BUILDZOOM (Feb. 1, 2018), <https://www.buildzoom.com/blog/pockets-of-dense-construction-in-a-dormant-suburban-interior>. Romem notes that the 1960s saw a modest upswing in densification, but this was choked off by the 1970s. *Id.*

45. *Id.*

46. *Id.*

47. On which, see William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317, 319 (2004).

48. CLAYTON NALL, *THE ROAD TO INEQUALITY: HOW THE FEDERAL HIGHWAY PROGRAM POLARIZED AMERICA AND UNDERMINED CITIES* (2018).

49. Erin A. Hopkins, *The Impact of Community Associations on Residential Property Values*, 43 HOUSING & SOC'Y 157 (2016).

50. See Romem, *supra* note 44.

51. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 1, 1, 4 (2001).

52. FISCHEL, *ZONING RULES*, *supra* note 4, at 203–07, 212–15.

economically important assets.<sup>53</sup> The environmental movement engendered local open-space and “small is beautiful” initiatives, particularly in affluent, topographically interesting communities, which raised the real price of existing homes.<sup>54</sup> This triggered a vicious spiral, as homeowners observing rising prices became more focused on protecting the value of their ever-more-important asset.<sup>55</sup> Corroborating Fischel’s hypothesis, Saiz finds that metro areas whose natural geography most constrains housing production—and which, therefore, “naturally” experience larger housing-price runups during local economic expansions—are also the metro areas with the tightest regulatory constraints.<sup>56</sup> The small size of towns in the Northeast, and the availability of the ballot initiative in the West, made local governments in these areas particular easy for homeowners to control.<sup>57</sup>

Empirically, the enactment of growth controls in a given suburb makes it more likely that nearby suburbs will do the same.<sup>58</sup> Thus do the decentralized decisions of many politically independent subdivisions cumulate into region-wide barriers to new housing. Development is pushed outward, into rural exurbs where owners of undeveloped land tend to have more political power,<sup>59</sup> or inward, into central cities, which were long thought to be controlled by “growth machine” business coalitions.<sup>60</sup>

If growth machines truly dominated urban politics, the deflection of development pressure from the suburbs might not constrain the regional supply of housing very much. But in economically productive coastal cities, the growth machine ran out of steam.<sup>61</sup> In 1960, Los Angeles was zoned for four times its then-current population.<sup>62</sup> Today, it’s zoned for the number of people it has.<sup>63</sup> Using parcel-level data from New York, Vicki Been and colleagues find that the probability of a parcel being upzoned for higher-density development is

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53. *See id.* at 212–15 (explaining tax laws that make homes an attractive investment during inflation periods).

54. *Id.* at 203–05.

55. *Id.* at 214–15.

56. Albert Saiz, *The Geographic Determinants of Housing Supply*, 125 Q. J. ECON. 1253, 1272–82 (2010).

57. FISCHEL, ZONING RULES, *supra* note 4, at 163–218.

58. Jan K. Brueckner, *Testing for Strategic Interaction Among Local Governments: The Case of Growth Controls*, 44 J. URB. ECON. 438, 465 (1998). This is consistent with strategic behavior by participants in a cartel, though it might be innocent copycatting. *See id.*

59. Michelle Wilde Anderson, *Sprawl’s Shepherd: The Rural County*, 100 CALIF. L. REV. 365, 373–76 (2012).

60. FISCHEL, ZONING RULES, *supra* note 4, at 296–98.

61. *See* Schleicher, *supra* note 23, at 114; Vicki Been, *City NIMBYS*, 33 J. LAND USE & ENVTL. L. 217, 219–27, 236–45 (2018) (discussing emergence and efficacy of anti-growth groups within cities).

62. Greg Morrow, *The Homeowner Revolution: Democracy, Land Use and the Los Angeles Slow-Growth Movement, 1965–1992* 3 fig.1-1 (2013) (unpublished Ph.D. in Urban Planning dissertation, UCLA) (on file with author).

63. *Id.* More precisely, it has been zoned for 92% of the number of people that it has. *Id.*

inversely correlated with the proportion of owner-occupied parcels nearby.<sup>64</sup> Homevoters are clearly exercising sway in the central city, not just in homogeneous suburbs.<sup>65</sup>

Anti-gentrification activists have also become a fixture of urban politics in expensive cities.<sup>66</sup> They are using discretionary permitting regimes and state environmental review laws as leverage to demand expensive “community benefit” concessions from developers,<sup>67</sup> or to block projects outright. The costs, delays, and uncertainties involved in negotiating a community benefit agreement constitute a large, *de facto* tax on new housing development in the urban core.

One might think that renters, who comprise a large share of the voting-eligible population in many cities, would be stalwart allies of developers. But renters vote at much lower rates than homeowners,<sup>68</sup> and though renters are generally more pro-development than homeowners,<sup>69</sup> renters in expensive cities have classic NIMBY preferences. They oppose projects in their neighborhood, even though they would favor citywide measures to increase housing development.<sup>70</sup> Alas, their neighborhood-level preferences are likely to be more consequential for new development (or its absence), since upzoning and project-approval decisions tend to be made on a neighborhood-by-neighborhood basis, with councilmembers deferring to one another on projects in their districts.<sup>71</sup>

64. Vicki Been et al., *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEGAL STUD. 227, 234 (2014). The same pattern occurs in Los Angeles. See C.J. Gabbe, *Why Are Regulations Changed? A Parcel Analysis of Upzoning in Los Angeles*, 38 J. PLAN. EDUC. & RES. 289, 295 (2018).

65. See Morrow, *supra* note 62, for a detailed, 30-year case study of Los Angeles, showing that “local groups of largely affluent, white homeowners used the community planning process to effectively re-direct growth away from their communities towards lower-income, minority areas that did not have strong local organizations to resist these changes.” *Id.* at 14.

66. Been, *supra* note 64, at 242–45; Nancy H Kwak, *Anti-Gentrification Campaigns and the Fight for Local Control in California Cities*, 12 NEW GLOBAL STUD. 9, 9 (2018).

67. See generally Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5 (2010) (describing emergence of contracts between developers and community groups whereby the groups agree not to sue or otherwise oppose a project, in return for benefits from the developer).

68. For a review of the literature and new estimates that plausibly identify the causal effect of homeownership on turnout, see Andrew B. Hall & Jesse Yoder, *Does Homeownership Influence Political Behavior? Evidence from Administrative Data* (Mar. 26, 2019) (unpublished working paper) (on file with author); see also Brian J. McCabe, *Are Homeowners Better Citizens? Homeownership and Community Participation in the United States*, 91 SOC. FORCES 929, 948–49 (2013) (finding that homeownership positively correlates with turnout in elections, but not with forms of civic participation that do not affect home values).

69. See Michael Hankinson, *When Do Renters Behave Like Homeowners? High Rent, Price Anxiety, and NIMBYism*, 112 AM. POL. SCI. REV. 473, 477 (2018); William Marble & Clayton Nall, *Where Self-Interest Trumps Ideology: Liberal Homeowners and Local Opposition to Housing Development* 10 (Mar. 19, 2019) (unpublished working paper) (on file with author); Press Release, Public Policy Institute of California, PPIC Statewide Survey: Californians & Their Government 5 (June 5, 2019), <https://www.ppic.org/wp-content/uploads/ppic-statewide-survey-californians-and-their-government-may-2019.pdf> [hereinafter *Californians & Their Government*].

70. Hankinson, *supra* note 69, at 473.

71. Schleicher, *supra* note 23, at 85.

### C. CONSEQUENCES

Barriers to housing development in the expensive coastal metropolises have at least three types of deleterious impacts: they exacerbate socioeconomic inequality; they induce pollution, particularly greenhouse gas emissions; and they undermine national economic welfare.

#### 1. *Inequality*

The escalating price of housing in economically productive coastal regions has made incumbent homeowners rich.<sup>72</sup> One study finds that returns on housing investments account for nearly all of the much-discussed increase in capital's share of national income since 1970.<sup>73</sup> Other studies show that land-use restrictions exacerbate segregation within metropolitan regions.<sup>74</sup>

There are also serious consequences for socioeconomic mobility across generations. Using income-tax microdata, Raj Chetty and co-authors have shown that intergenerational mobility in the United States varies greatly with geography.<sup>75</sup> Some locales "in the United States have relative mobility comparable to the highest mobility countries in the world, such as Canada and Denmark, while others have lower levels of mobility than any developed country for which data are available."<sup>76</sup> Many of the high-opportunity communities are found in the expensive metropolitan areas.<sup>77</sup> If more poor families could afford to emigrate from the South and the declining regions of the Midwest, more poor children would reach the middle class.

72. See, e.g., Glaeser & Gyourko, *supra* note 28, at 22; David Albouy & Mike Zabek, *Housing Inequality* (Nat'l Bureau of Econ. Research, Working Paper No. 21916, 2016) (documenting increase in housing-consumption inequality since 1970 and showing that it is mostly due to location-specific changes in dwelling-unit value, rather than more dispersion in the size and other observable characteristics of dwelling units consumed by the rich and the poor).

73. See Matthew Rognlie, *Deciphering the Fall and Rise in the Net Capital Share: Accumulation or Scarcity?*, BROOKINGS PAPERS ECON. ACTIVITY, Spring 2015, at 1, 3. To be sure, a more liberal regime of land use in expensive coastal cities would not necessarily reduce returns to capital. Liberalization would probably reduce the value of the existing housing stock, but increase the value of land.

74. Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLAN. ASS'N 6, 6 (2016) (showing strong correlation between land use regulation and income segregation across metro areas); Jessica Trounstine, *The Geography of Inequality: How Land Use Regulation Produces Segregation and Polarization 2* (July 2018) (unpublished working paper) (on file with author) (showing that restrictive land use policies exacerbate racial segregation).

75. Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility II: County-Level Estimates*, 133 Q. J. ECON. 1163, 1164 (2018); Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. ECONOMICS 1553, 1619 (2014).

76. Raj Chetty et al., *supra* note 75, at 1556. This is not just the byproduct of chance variation in the distribution of, say, "good families" across localities. Comparing siblings who moved to high-mobility zones at different ages and examining the subset of people who were displaced by adverse economic shocks, it is estimated that one-half to two-thirds of the geographic variation is causal. Raj Chetty & Nathaniel Hendren, *The Impacts of Neighborhoods on Intergenerational Mobility: Childhood Exposure Effects and County-Level Estimates 2-4* (May 2015) (unpublished working paper) (on file with author).

77. Arthur Acolin & Susan Wachter, *Opportunity and Housing Access*, 19 CITYSCAPE 135, 136 (2017).

## 2. Environment

Regulatory barriers to housing production in coastal cities displace growth to regions with less temperate climates and more autocentric commuting patterns, resulting in greater greenhouse gas emissions.<sup>78</sup> Americans who move to opportunity nowadays are mostly moving to the Atlantas, Houstons, and Phoenixes of the world, not to the mild coastal climes of Los Angeles, San Francisco, Portland, and Seattle.<sup>79</sup> Within metro areas, development restrictions in city cores and inner suburbs push growth to outlying rural areas, gobbling up land that may have value as natural habitat or parkland, and relegating the new homeowners to greenhouse-gas-intensive commutes.<sup>80</sup>

California is famous in environmental circles for its ambitious greenhouse-gas emission targets.<sup>81</sup> So far, the state is making impressive progress—except in the transportation sector.<sup>82</sup> California has little hope of meeting its 2030 and 2040 targets without a huge reduction in transportation emissions, and this is unlikely to be achieved unless urban and suburban communities start accommodating a lot of new, higher-density housing, particularly near transit stations.<sup>83</sup>

## 3. National Economic Welfare

As David Schleicher and others have emphasized, barriers to new housing in economically successful metro areas affect national economic welfare.<sup>84</sup> They deprive would-be residents of the “agglomeration” benefits of dense labor markets, where stiff competition among firms for workers raises wages, where workers have insurance (in the form of fallback job options) in the event that they prove to be a bad fit with one employer, and where innovation is nurtured by the everyday exchanges that occur when people live and work close to others

78. See generally EDWARD GLAESER, *TRIUMPH OF THE CITY* (2011); Nadja Popovich & Dennis Lu, *The Most Detailed Map of Auto Emissions in America*, N.Y. TIMES (Oct. 10, 2019) <https://www.nytimes.com/interactive/2019/10/10/climate/driving-emissions-map.html>.

79. See Schleicher, *supra* note 23, at 115 and sources cited therein.

80. Christopher M. Jones et al., *Carbon Footprint Planning: Quantifying Local and State Mitigation Opportunities for 700 California Cities*, 3 URB. PLAN. 35, 48 (2018); Nathaniel Decker et al., *Right Type, Right Place: Assessing the Environmental and Economic Impacts of Infill Residential Development Through 2030* 5 (Mar. 2017), (unpublished working paper) <https://ternercenter.berkeley.edu/right-type-right-place>.

81. See, e.g., David Roberts, *California Gov. Jerry Brown Casually Unveils History's Most Ambitious Climate Target*, VOX (Sept. 12, 2018), <https://www.vox.com/energy-and-environment/2018/9/11/17844896/california-jerry-brown-carbon-neutral-2045-climate-change>.

82. CAL. AIR RES. BD., 2018 PROGRESS REPORT: CALIFORNIA'S SUSTAINABLE COMMUNITIES AND CLIMATE PROTECTION ACT 5 (2018) [https://ww2.arb.ca.gov/sites/default/files/2018-11/Final2018Report\\_SB150\\_112618\\_02\\_Report.pdf](https://ww2.arb.ca.gov/sites/default/files/2018-11/Final2018Report_SB150_112618_02_Report.pdf).

83. Liam Dillon, *California Won't Meet Its Climate Change Goals Without a Lot More Housing Density in Its Cities*, L.A. TIMES (Mar. 6, 2017), <https://www.latimes.com/politics/la-pol-ca-housing-climate-change-goals-20170306-story.html>; David Roberts, *California Has a Climate Problem, and Its Name Is Cars*, VOX (Aug. 22, 2017), <https://www.vox.com/energy-and-environment/2017/8/22/16177820/california-transportation>.

84. See, e.g., Chang-Tai Hsieh & Enrico Moretti, *Why Do Cities Matter? Local Growth and Aggregate Growth* 5 (Univ. of Chi. Law Sch., Kreisman Working Paper Series in Hous. Law and Policy No. 30, 2015); Glaeser & Gyourko, *supra* note 37, at 5; Schleicher, *supra* note 23, at 85–86.

who are similarly engaged.<sup>85</sup> Schleicher also observes that mobility barriers make it harder for the Federal Reserve Bank to establish sensible monetary policies.<sup>86</sup> A lax monetary policy, calibrated to regions of the United States that have suffered negative shocks, would cause inflation in the thriving regions, whereas a tighter policy suited to the successful regions would perpetuate unemployment in other areas.

Economists have tried to quantify the national-welfare losses from underproduction of housing in expensive coastal markets.<sup>87</sup> These efforts are model-dependent and rest on strong assumptions, but by most estimates, GDP would be at least a couple of percentage points higher if housing supply could expand to the “natural” equilibrium point where price equals the average (non-regulatory) cost of production.<sup>88</sup>

## II. HOW THE EXPENSIVE STATES HAVE TRIED (?) TO MAKE HOUSING MORE AFFORDABLE

State efforts to check unduly restrictive zoning in the now-expensive coastal metropolises got underway in the late 1960s and 1970s, around the same time that housing prices in these areas began to separate from prices elsewhere in the nation. Though each state followed its own path, if one squints a bit, one can discern two basic models. I will call these the Northeastern Model and the West Coast Model, after the regions where each predominates. California, Oregon, and Washington (as well as Florida) follow the West Coast Model, while the Northeastern Model is found in New Jersey, Massachusetts, Connecticut, Rhode Island, and Illinois.

The Northeastern Model treats the affordability/housing supply problem as essentially about suburban regulatory barriers to subsidized, income-restricted housing. The primary goal is to get each local government to accommodate its “fair share” of low-income housing, and the primary tool is the “builder’s remedy,” a judicial or administrative proceeding whereby developers of housing projects with a large proportion of income-restricted units may obtain exemptions from local regulations.

The West Coast Model treats the problem instead as one of local regulatory barriers to producing enough housing to accommodate projected household growth across all income categories. Local governments are required to enact and periodically update a comprehensive plan or “housing element” that

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85. Schleicher, *supra* note 23, at 102. There is also some evidence that people underestimate losses to their own welfare from long commutes. See Alois Stutzer & Bruno S. Frey, *Stress that Doesn't Pay: The Commuting Paradox*, 110 SCANDINAVIAN J. ECON. 339, 340 (2008). Causal claims about this alleged cognitive bias are a bit suspect, since researchers have not been able to randomly assign commutes to workers and compare workers' projected well-being with their realized well-being. But whether or not they undervalue time lost to commuting, buyers and renters in expensive coastal markets are clearly willing to pay big premiums for housing near jobs and transit—if only the market would provide it.

86. Schleicher, *supra* note 23, at 88–96.

87. See Glaeser & Gyourko, *supra* note 37 (reviewing literature).

88. *Id.* at 24 fig.4.

explains how the jurisdiction will accommodate its share of state-projected population growth. These plans are subject to review and approval by a state agency. Localities without a compliant plan may lose access to certain funding streams, but traditionally, they have not been exposed to strong builders' remedies.

As we will see, there has been some cross-fertilization between the Northeastern and West Coast states. For example, housing need determinations in California are made in a loosely similar way to housing need determinations in New Jersey, except that California assesses need for market-rate as well as subsidized housing. And, echoing the builder's remedy of the Northeastern Model, California has authorized developers of affordable housing to bypass local zoning rules if the local government lacks a substantially compliant housing element. Conversely, most Northeastern Model states now immunize local governments from the builder's remedy if the locality submits its affordable-housing plan to a state agency and the agency approves it. This is analogous to plan-review under the West Coast Model, except review in the Northeastern Model states only addresses income-restricted housing.

The Northeastern Model and West Coast Model are not the only ways in which states have acted to accommodate more housing, denser housing, or more below-market-rate units. A few states have created incentive programs to encourage denser housing near mass transit, and many more provide for tax abatements or tax increment financing to encourage redevelopment of deteriorating areas. I focus here on the Northeastern and West Coast Models, however, because they capture the principal means by which parent states of expensive local governments have undertaken to regulate locally erected barriers to new housing. As such, these models are the precursors and reference points for the spate of "Yes In My Backyard" housing bills now making their way through the statehouses, the subject of the next Part.

#### A. THE NORTHEASTERN MODEL: BUILDER'S REMEDY, SAFE HARBORS, AND INDIFFERENCE TO MARKET-RATE HOUSING

##### 1. *The Framework*

The Northeastern Model is a legacy of the civil rights movement. Cities in the 1970s were in disarray. White people with means had fled to the suburbs and were using large-lot zoning and other exclusionary tactics to keep poor people and minorities from following behind them.<sup>89</sup> Civil rights activists demanded state intervention to make the "tight little islands" of suburbia accept their fair share of low-income housing.<sup>90</sup> The aim was to dismantle concentrated urban poverty and racial isolation, giving poor black families in the central cities

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89. See generally ANTHONY DOWNS, *OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA* (1973).

90. See Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

access via housing to the good schools and increasingly bountiful employment opportunities of the suburbs.<sup>91</sup>

New Jersey's courts in the *Mt. Laurel* line of cases famously converted this civil rights demand into state-constitutional doctrine.<sup>92</sup> In Massachusetts, Connecticut, Rhode Island, and Illinois, the legislature answered the call.<sup>93</sup> But all of these states eventually settled on a similar strategy for opening up the suburbs. A state-level actor—the legislature, an administrative agency, or the courts—sets a target for the number of “below-market rate” (BMR) dwelling units in the territory of each local government.<sup>94</sup> In New Jersey, BMR quotas emerge from a complicated and contentious process of periodically determining regional “needs” and then jurisdiction-specific “fair shares,”<sup>95</sup> whereas Massachusetts, Rhode Island, Connecticut, and Illinois have simply declared that 10% of the housing stock of each locality should consist of BMR units.<sup>96</sup> (BMR units are subject to deed restrictions permitting them to be sold or rented only to persons who earn no more than a defined share of the Area Median Income, and at restricted prices.<sup>97</sup>)

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91. See CHARLES M. HAAR, *Breaking New Ground: The Role of the Courts in Social Change, in SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* 3–11 (2d. ed. 1998) (describing background to the *Mt. Laurel* litigation).

92. *S. Burlington Cnty. NAACP v. Twp. Of Mount Laurel (Mount Laurel I)*, 336 A.2d 713, 728, 731–32 (N.J. 1975) appeal dismissed and cert. denied, 423 U.S. 808 (1975); *S. Burlington Cnty. NAACP v. Twp. Of Mount Laurel (Mount Laurel II)*, 456 A.2d 390 (N.J. 1983).

93. On the history of the Massachusetts framework, see Sharon Perlman Krefetz, *The Impact and Evolution of the Massachusetts Comprehensive Permit and Zoning Appeals Act: Thirty Years of Experience with a State Legislative Effort to Overcome Exclusionary Zoning*, 22 W. NEW ENG. L. REV. 381, 384–89 (2001). Regarding Connecticut, see Robert D. Carroll, Note, *Connecticut Retrenches: A Proposal to Save the Affordable Housing Appeals Procedure*, 110 YALE L.J. 1247, 1253–55 (2001). The Illinois framework, which dates to 2003, is summarized in ILL. HOUS. DEV. AUTH., AFFORDABLE HOUSING PLANNING AND APPEAL ACT: 2013 NON-EXEMPT LOCAL GOVERNMENT HANDBOOK (rev. Jan. 7, 2014), [hereinafter ILL. HANDBOOK], <https://www.ihda.org/wp-content/uploads/2016/03/Final2013AHPAANELGHHandbook.pdf>. Regarding Rhode Island, whose framework dates to 1991, see *Town of Burrillville v. Pascoag Apartment Assocs., LLC*, 950 A.2d 435, 439–40 (R.I. 2008).

94. Rachel G. Bratt & Abigail Vladeck, *Addressing Restrictive Zoning for Affordable Housing: Experiences in Four States*, 24 HOUSING POL'Y DEBATE 594, 596 (2014).

95. The state projects population growth in each of six regions, estimates the share of growth likely to consist of low- and moderate-income people, adds to this the number of low- and moderate-income households in the region who currently lack subsidized housing or inhabit substandard housing, and adjusts for projected demolitions and conversions of existing housing units. Having so determined each region's need, the state allocates a share of it to each political subdivision within the region, weighing the amount of undeveloped land in the subdivision, the characteristics of its population, and the quantity of BMR housing it has produced in the past. See *In re Declaratory Judgment Actions Filed by Various Municipalities*, 152 A.3d 915 (N.J. 2017) (instructing lower courts on housing-need calculation); Roderick M. Hills, Jr., *Saving Mount Laurel?*, 40 FORDHAM URB. L.J. 1611, 1619–23 (2013) (discussing controversy).

96. See Sam Stonefield, *Affordable Housing in Suburbia: The Importance but Limited Power and Effectiveness of the State Override Tool*, 22 W. NEW ENG. L. REV. 323, 339 (2001). Massachusetts has not sidestepped it entirely, however, in those jurisdictions below the 10%-of-housing-stock threshold that seek an exemption from the builder's remedy (on which, see *infra* notes 96–99 and accompanying text) must submit an affordable housing plan tied to projected population growth in various income categories. See MASS. DEP'T OF HOUS. & CMTY. DEV., G.L. C.40B COMPREHENSIVE PERMIT PROJECTS: SUBSIDIZED HOUSING INVENTORY II-8-II-10 (2014), <https://www.mass.gov/files/documents/2017/10/10/guidecomprehensivepermit.pdf>.

97. Bratt & Vladeck, *supra* note 94, at 598 (comparing BMR housing definition in several states).

The second feature of the Northeastern Model is the so-called builder's remedy. If a local government denies a project with a substantial fraction of BMR units, typically 20–25%,<sup>98</sup> the developer may appeal to a state tribunal and obtain an exemption from otherwise-applicable local ordinances.<sup>99</sup> In these proceedings, the burden of proof is on the local government to show that any local interests adversely affected by the project outweigh the regional or statewide need for BMR units.<sup>100</sup> To prevent local governments from killing BMR projects with delays, Massachusetts and Rhode Island deem qualifying projects approved as a matter of law if the local government fails to act on the permit application within a brief window of time.<sup>101</sup> However, only nonprofit or limited-profit developers are entitled to speedy permitting, which limits the disruptive potential of the “deemed approved” proviso.<sup>102</sup>

The final component of the Northeastern Model is a safe harbor. Local governments that have met their BMR target, or that have received state approval of their BMR housing plan, are immune from the builder's remedy.<sup>103</sup>

98. See, e.g., 45 R.I. GEN. LAWS ANN. § 45-53-4(a) (2019) (25%); *In re Adoption of N.J.A.C. 5:96 & 5:97*, 6 A.3d 445, 463 (N.J. Super. Ct. App. Div. 2010), *aff'd as modified In re Adoption of N.J.A.C. 5:96 & 5:97*, 74 A.3d 893 (N.J. 2013) (“[A] 20% set-aside requirement has been considered the norm in the administration of the *Mount Laurel* doctrine.”); *Stuborn Ltd. P’ship v. Barnstable Bd. Of Appeals*, Decision on Jurisdiction, No. 98–01, 1999 WL 34782799, at \*6–\*7 (Mass. Hous. Appeals Comm., Mar. 5, 1999) (25%).

99. These proceedings take place before an administrative tribunal in Massachusetts, Rhode Island, and Illinois, and courts in Connecticut. ILL. HANDBOOK, *supra* note 93 (describing the Illinois procedures); see Carroll, *supra* note 93 (describing the Connecticut procedures); Krefetz, *supra* note 93 (describing the Massachusetts procedures); *Town of Burrville v. Pascoag Apartment Assocs., LLC*, 950 A.2d 435, 438 (R.I. 2008) (exemplifying Rhode Island procedures). In New Jersey, the proceedings took place before courts initially, then an agency, and most recently before courts again, since the agency was declared “defunct.” See *In re Declaratory Judgment Actions*, 152 A.3d at 918-22 (summarizing history). Additionally, Rhode Island restricts the builder's remedy to projects that are publicly subsidized. 45 R.I. GEN. LAWS § 45-53-3 (2019). And Massachusetts restricts it to projects proposed by public agencies, nonprofits, and “limited divided” organizations. MASS. GEN. LAWS ch. 40B, § 21 (2019).

100. See ILL. HANDBOOK, *supra* note 93, at 33; Carroll, *supra* note 93, at 1255; Krefetz, *supra* note 93, at 388; *Town of Burrville*, 950 A.2d at 456.

101. Regarding the expedited, “comprehensive permit” procedure in Massachusetts and Rhode Island, see, respectively, 28 ARTHUR L. ENO, JR. & WILLIAM V. HOVEY, MASS. PRACTICE SERIES § 23.30 (4th ed. Supp. 2016–2017); Erika Barber, Note, *Affordable Housing in Massachusetts: How to Preserve the Promise of “40B” with Lessons from Rhode Island*, 46 NEW ENG. L. REV. 125, 132–33 (2011).

102. See Ellen Callahan, *Will an Increase in Profits Increase Affordable Housing? Examining the Limited Dividend Requirement of Chapter 40B of the Massachusetts General Laws*, 50 SUFFOLK U. L. REV. 649, 654 (2017) (describing and critiquing this limitation).

103. Regarding New Jersey, see section 52:27D–313–317 of the New Jersey code; see also *In re Adoption of N.J.A.C. 5:96 & 5:97*, 110 A.3d 31, 45 (N.J. 2015) (stating that “substantive certification” of plan “afford[s] the ordinances implementing the housing elements of such municipalities a strong presumption of validity in any exclusionary zoning action and, thus, would provide powerful protection from a builder's remedy”); *Hills Dev. Co. v. Twp. Of Bernards*, 510 A.2d 621, 651, 653–54 (N.J. 1986) (explaining certification procedure). Regarding Massachusetts, see title 760, section 56.03 of the Code of Massachusetts Regulations; MASS. DEP'T OF HOUS. & CMTY. DEV., G.L. C.40B COMPREHENSIVE PERMIT PROJECTS: SUBSIDIZED HOUSING INVENTORY II-8-II-10 (2014), <https://www.mass.gov/files/documents/2017/10/10/guidecomprehensivepermit.pdf> (exempting local governments that both have a current, state-approved “housing production plan” in place, and produced affordable units equal to 0.5% of their total housing stock during the previous year). Regarding Rhode Island, see title 45, section 45–53–4 of the General Laws of Rhode Island (stating that the review board may deny affordable-housing development application if the local government “has an approved affordable housing plan

To obtain the plan-based immunity, localities typically must adopt an inclusionary-zoning ordinance, which requires developers of multi-unit projects to set aside a percentage as BMR units or pay an in-lieu fee.<sup>104</sup> Local governments are also encouraged to enact a “density bonus” ordinance, allowing projects with a substantial share of BMR units to be somewhat denser or bulkier than otherwise permitted.<sup>105</sup>

The underlying premises of the Northeastern Model seem to be (1) that the problem of housing affordability deserves the state’s attention only insofar as it affects poor people; and (2) that the problem can be redressed only through the construction or rehabilitation of deed-restricted BMR units. Massachusetts, Connecticut, Rhode Island, and Illinois could hardly be more explicit about this, as they condition exposure to the builder’s remedy *solely* on the locality’s weak BMR track record or plan, and they provide the remedy *solely* for builders of BMR units.<sup>106</sup> And while New Jersey has recognized that a generous supply of new market-rate units may make existing units more affordable—thus reducing the regional need for BMR housing<sup>107</sup>—the state’s courts have resisted efforts to account for market-supply effects in the calculation of regional needs.<sup>108</sup> A

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and is meeting housing needs, and the proposal is inconsistent with the affordable housing plan”); DIV. OF PLANNING, R.I. DEP’T OF ADMIN., STATE GUIDE PLAN ELEMENT 423 app. D (2006), [http://www.planning.ri.gov/documents/guide\\_plan/shp06.pdf](http://www.planning.ri.gov/documents/guide_plan/shp06.pdf) (reprinting guidelines for affordable housing plans). Regarding Illinois, see ILL. HANDBOOK, *supra* note 93, at 13 (noting, *inter alia*, that local governments are exempt from builder’s remedy if they adopt an affordable housing plan establishing a goal that 15% of all new housing consist of affordable units). In contrast to the other Northeastern states, Connecticut does not appear to offer plan-based immunity. Instead, it limits the threat of the builder’s remedy by allowing local governments to adopt a temporary affordable-housing moratoria, provided that certain criteria are met. See CONN. GEN. STAT. § 8–30g(l) (2019).

104. See Stonefield, *supra* note 96, at 334–35 (noting that, with the partial exception of Massachusetts, the Northeastern Model states have all pushed local governments to achieve their affordable housing targets through zoning regimes designed to induce private developers to set aside BMR units).

105. See 42 R.I. GEN. LAWS § 128-8.1(g) (2019) (directing agency to promulgate guidelines for inclusionary zoning and density bonuses); DIV. OF PLANNING, R.I. DEP’T OF ADMIN., STATE GUIDE PLAN ELEMENT 423 app. D (2006), [http://www.planning.ri.gov/documents/guide\\_plan/shp06.pdf](http://www.planning.ri.gov/documents/guide_plan/shp06.pdf) (reprinting Inclusionary Zoning Guidelines, which call for the BMR set-aside to be offset more than 1:1 with extra market-rate units through a density bonus); *In re Adoption of N.J.A.C. 5:96 & 5:97*, 6 A.3d 445, 461–64 (N.J. Super. Ct. App. Div. 2010), *aff’d*, *In re Adoption of N.J.A.C. 5:96 & 5:97*, 74 A.3d 893 (N.J. 2013) (invalidating Third Round Regulations for implementing *Mt. Laurel* because, *inter alia*, the regulations did not provide sufficient density bonuses or other incentives for private construction of BMR housing).

106. See *supra* text accompanying notes 98–103.

107. See *In re Adoption of N.J.A.C. 5:94 & 5:95*, 914 A.2d 348, 362 (N.J. Super. Ct. App. Div. 2007) (stating that the housing agency had “recognized filtering as the most significant market force in reducing housing need”).

108. See *id.* at 372–75 (criticizing agency’s filtering adjustment for disregarding current data on house prices and paying no need to whether local governments actually would increase the supply of market-rate housing). In 2015, responsibility for fair-share calculations was reassigned to the judiciary pursuant to *In re Adoption of N.J.A.C.*, 110 A.3d 31, and the housing-need determinations since then have not adjusted for filtering. See *In re Twp. Of S. Brunswick*, 153 A.3d 981, 994 (N.J. Super. Ct. Law Div. 2016) (acknowledging filtering as relevant in principle but stating that neither expert had “satisfactorily addressed the deficiencies identified by the Appellate Division” with respect to filtering estimation); *In re Mun. of Princeton*, No. MER-L-1550-15, 2018 WL 1352272, at \*40–42 (N.J. Super. Ct. Law Div. 2018) (same).

New Jersey municipality that meets its fair-share obligation for BMR units may zone the rest of its land as restrictively as it wishes.<sup>109</sup>

## 2. Critiques

The Northeastern Model has been bashed from many directions.<sup>110</sup> The most fundamental concern for present purposes is the deep mismatch between the Model's conception of the housing-supply problem and the actual problems described in Part I. The root problem today is not (or not just) the racist or snooty suburb trying to keep out poor folks, but rather an unwillingness on the part of governments throughout expensive metro areas to allow enough market-rate housing, especially dense housing near transit. As the gentrification fights attest, there are now plenty of affluent whites willing to live near poor people and minorities,<sup>111</sup> but there is not enough housing to go around.

Some critics posit the Northeastern Model is not only mismatched to today's housing problems but actually exacerbates them.<sup>112</sup> Because Northeastern Model states (other than New Jersey) define the affordable-housing target as a *percentage* of the total housing stock (10%), rather than as an *amount* of new housing units,<sup>113</sup> they effectively punish suburban communities that approve market-rate housing projects. Any new market rate units will reduce the BMR share of the community's housing stock, potentially exposing the jurisdiction to builder's remedy lawsuits. There's also some evidence that the Northeastern Model has led suburban governments to buy up developable parcels for protected parks and open space, so that the parcels cannot be used to house locally unwelcome populations.<sup>114</sup>

On the other hand, the Northeastern Model may have induced some local governments to accommodate reasonably dense housing projects they would otherwise have rejected. The least fiscally burdensome way for a local government to meet its affordable-housing target is to make it profitable for developers to build projects with a substantial fraction of BMR units. Courts in New Jersey have also put some pressure on local governments to zone for fairly

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109. S. Burlington Cnty. NAACP v. Mount Laurel, 456 A.2d 390, 421 (N.J. 1983) (stating that jurisdictions which meet their fair-share obligations are free to enact "large-lot and open space zoning").

110. Some critics complain that deed-restricted BMR units are a terribly inefficient way to subsidize housing for poor people. See, e.g., Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983 (2009) (arguing for portable housing vouchers instead). Others fault the states for inadequate commitment. See *What Is the Mount Laurel Doctrine?*, FAIR SHARE HOUS. CTR., <http://fairsharehousing.org/mount-laurel-doctrine/> (last visited Nov. 6, 2019). Still, others want the states to better account for the filtering of market-rate units into or out of "affordable" price points. See Hills, *supra* note 90, at 1639–44.

111. For a review of the literature on time trends in white preferences for residential integration, see Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1351–52 (2016).

112. See, e.g., FISCHER, ZONING RULES, *supra* note 4, at 359–62.

113. See *supra* text accompanying note 96.

114. See FISCHER, ZONING RULES, *supra* note 4, at 359–60.

dense, low-cost housing forms, and have pushed back against BMR requirements that are so onerous as to render development unprofitable.<sup>115</sup>

The few empirical studies that have tried to sort out how the Northeastern Model has affected total housing supply are inconclusive.<sup>116</sup> About the best that can be said for the model is that while its conception of the housing-affordability problem is too narrow, it has induced construction of BMR units without clearly diminishing the overall supply of new housing.

## B. THE WEST COAST MODEL: SUPERVISED PLANNING FOR PROJECTED POPULATION GROWTH

### 1. *The Framework*

The West Coast Model emerged from the wave of enthusiasm for comprehensive planning that washed over the states in the 1960s and 1970s.<sup>117</sup> Housing wasn't the focus of the initial planning mandates,<sup>118</sup> but it became much more central in the 1980s and 1990s.<sup>119</sup> By 1991, when Washington enacted its

115. *Id.*

116. A recent difference-in-difference study finds that the *Mt. Laurel* intervention in New Jersey caused an increase in the multifamily and townhome housing stock in New Jersey counties relative to similar counties in New York, but not Pennsylvania (where the courts have also invalidated exclusionary zoning). See Nicholas J. Marantz & Huixin Zheng, *Exclusionary Zoning and the Limits of Judicial Impact*, J. PLAN. EDUC. & RES. 1 (2018). Another study finds that during the 1990s, a greater proportion of new construction in New Jersey consisted of multi-family units than in seven comparison states. See GARY K. INGRAM & YU-HUNG HONG, LINCOLN INST. OF LAND POLICY, EVALUATING SMART GROWTH: STATE AND LOCAL POLICY OUTCOMES 25–27 (2009), <https://www.lincolinst.edu/sites/default/files/pubfiles/evaluating-smart-growth-full.pdf>. In Connecticut, adoption of the Northeastern Model did not reduce housing production in Connecticut suburbs relative to nearby “control” suburbs in New York (a state that has not adopted the model). See Nicholas J. Marantz & Harya S. Dillon, *Do State Affordable Housing Appeals Systems Backfire? A Natural Experiment*, 28 HOUSING POL'Y DEBATE 267, 269 (2018). On the other hand, there's suggestive evidence that New Jersey suburbs, which voted (unsuccessfully) against the Northeastern Model, have used public “parkland” bonds to buy up and set aside parcels that have low value as parkland but high value for housing development. See Stephan Schmidt & Kurt Paulsen, *Is Open-Space Preservation a Form of Exclusionary Zoning? The Evolution of Municipal Open-Space Policies in New Jersey*, 45 URB. AFF. REV. 92, 94 (2009).

117. See Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976) (describing environmental, civil rights, and federal funding influences on the new planning requirements).

118. *Id.* at 900.

119. California's framework legislation dates back to 1968, but the Regional Housing Need Allocation (RHNA) and state-review requirements were not established until the early 1980s. See William C. Baer, *California's Fair-Share Housing 1967–2004: The Planning Approach*, 7 J. PLAN. HIST. 48, 54–62 (2008). Oregon's framework dates back to 1973 and acquired its modern form by 1979. See Paul A. Diller & Edward J. Sullivan, *The Challenge of Housing Affordability in Oregon: Facts, Tools, and Outcomes*, 27 J. AFFORDABLE HOUSING & COMMUNITY. DEV. L. 183, 185–86, 204–10 (2018); Robert L. Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 ENV'T'L L. REP. 10367, 10368 (1992); Edward J. Sullivan, *The Quiet Revolution Goes West: The Oregon Planning Program 1961–2011*, 45 J. MARSHALL L. REV. 357, 367–72 (2012). Washington's framework, the Growth Management Act, dates back to 1990. See Paul Marshall Parker, *The Evolution of Growth Management in Washington: 25 Years and Counting* (2015) (unpublished manuscript), [https://www.washington-apa.org/assets/docs/2015/Events/GMA\\_Gala\\_Event/parker\\_presentation\\_gma\\_25\\_years\\_and\\_counting.pdf](https://www.washington-apa.org/assets/docs/2015/Events/GMA_Gala_Event/parker_presentation_gma_25_years_and_counting.pdf). Florida's regime originated in the early 1970s, but state review of local plans for various required elements was

Growth Management Act, the three West Coast states (and Florida) had all embraced the following principles. First, local governments have a duty to plan, on a state-mandated cycle (generally seven to ten years)<sup>120</sup>, for enough new housing to accommodate projected population growth.<sup>121</sup> Second, local comprehensive plans, or at least their “housing elements,” must be submitted to

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not mandatory until the mid 1980s. See Nancy Stroud, *A History and New Turns in Florida’s Growth Management Reform*, 45 J. MARSHALL L. REV. 397, 400–06 (2012).

120. CAL. GOV’T CODE § 65588 (West 2019) (eight-year cycle); OR. REV. STAT. § 197.629 (2017) (seven-to ten-year cycle); FLA. STAT. § 163.3191 (2019) (seven-year cycle); WASH. REV. CODE § 36.70A.130 (2019) (eight year cycle).

121. In Washington, “[c]ounty officials . . . select[] a 20-year . . . planning target from within the range of high and low prepared by [the state finance agency]. . . . [T]hen within each county, population planning targets for cities, towns, and unincorporated areas are developed among all affected local jurisdictions.” *Growth Management Act County Projections*, OFFICE OF FIN. MGMT., <https://www.ofm.wa.gov/washington-data-research/population-demographics/population-forecasts-and-projections/growth-management-act-county-projections> (last visited Nov. 6, 2019). The housing element of the plan must “[i]nclude[] an inventory and analysis of existing and projected housing needs that identifies the number of housing units necessary to manage projected growth . . . mak[ing] adequate provisions for existing and projected needs of all economic segments of the community.” WASH. REV. CODE § 36.70A.070(2) (2019). In Oregon, local governments must plan for “needed housing” “in one or more zoning districts . . . with sufficient buildable land to satisfy that need.” OR. REV. STAT. § 197.307(3) (2019). “Needed housing,” in turn,

[M]eans all housing on land zoned for residential use . . . that is determined to meet the need shown for housing within an urban growth boundary at price ranges and rent levels that are affordable to households within the county with a variety of incomes, including but not limited to households with low incomes, very low incomes and extremely low incomes.

OR. REV. STAT. § 197.303(1) (2019). “Needed housing” is determined using a 20-year population forecast. See OR. REV. STAT. § 197.296(2) (2019) (requiring cities to adjust growth boundaries and/or density to accommodate needed housing per 20-year forecast); OR. ADMIN. R. 660-024-0040 (2019) (“The determination of 20-year residential land needs for an urban area must be consistent with the appropriate 20-year coordinated population forecast.”). In 2013, Oregon’s legislature assigned responsibility for making the associated population-forecast projection to the Population Research Center at Portland State University (for most of the state) and to the Metro regional government (for the Portland area). See Edward J. Sullivan, *Population Forecasting and Planning Authority*, 48 URB. LAW. 47, 62–64 (2016). The California process for determining housing need is described in the text accompanying *supra* notes 119–120, and *infra* note 122. But see also CAL. GOV’T CODE § 65584 et seq. (West 2019); CAL. AFFORDABLE HOUS. LAW PROJECT, CALIFORNIA HOUSING ELEMENT MANUAL 18–21 (3d ed. 2013) [hereinafter CAL. MANUAL]. In Florida:

The plan must be based on at least the minimum amount of land required to accommodate the medium projections as published by the Office of Economic and Demographic Research for at least a 10-year planning period . . . . Absent physical limitations . . . population projections for each municipality, and the unincorporated area within a county must, at a minimum, be reflective of each area’s proportional share of the total county population and the total county population growth.

FLA. STAT. § 163.3177(f)(3) (2019).

a state agency for review.<sup>122</sup> Third, local land-use regulations and by extension, local permitting decisions must conform to the plan.<sup>123</sup>

Population forecasts are made by a state agency and forwarded to local planners.<sup>124</sup> Oregon, Washington, and Florida instruct their local governments to convert these population forecasts into estimates of needed housing for “all economic segments of the community.”<sup>125</sup>

California goes a step further.<sup>126</sup> In 1980, the state legislature enacted a framework for periodically establishing regional housing quotas through negotiations between the state Department of Housing and Community Development (HCD) and regional associations of local governments, the so-called Councils of Governments.<sup>127</sup> Though HCD ultimately determines the size

122. Oregon requires local governments to have their comprehensive plans and implementing regulations “acknowledged” by the state agency. See Sullivan, *supra* note 119, at 370–71. This process was completed by 1986. *Id.* Amendments to an acknowledged plan must be submitted for state review. See OR. REV. ST. § 197.610 (2019). Additionally, plans covering urban areas (with a few exceptions) must be updated and submitted for state review every seven to ten years. *Id.* § 197.629. For a comparison of the post-acknowledgment amendment and periodic review processes, see Sullivan, *supra* note 109, at 370–72, 392–93. In California, local governments must submit draft housing elements and amendments to Housing and Community Development (HCD) for review. If HCD objects, the local government may enact the element or amendment anyway but must make findings regarding why it believes the element substantially complies. HCD then makes a written determination about substantial compliance and if it finds noncompliance, may refer the matter to the Attorney General for enforcement. See CAL. GOV’T CODE § 65585 (West 2019); See CAL. MANUAL, *supra* note 121, at 15. In Washington, plans and plan amendments must be submitted to the state Department of Commerce for review at least sixty days before adoption. See WASH. REV. CODE § 36.70A.106 (2019); WASH. ADMIN. CODE § 365-196-630 (2019). If the department believes that the plan is inadequate, it may initiate a proceeding before the Growth Management Hearing Board. See WASH. REV. CODE § 36.70A.280 (2019). In Florida, plans and plan amendments must be submitted to the state planning agency (and several other agencies) for comments after the local government’s first public hearing. After adoption of the plan or plan amendment, the final package is sent back to the state agency, which has forty-five days to make a compliance determination. If the agency finds the plan non-compliant, it may initiate proceedings before the Division of Administrative Hearings, which adjudicates plan validity. See FLA. STAT. §§ 163.3184(4)(e)(4), 163.3184(5) (2019). For a history of earlier incarnations of the Florida plan-review process, see Stroud, *supra* note 119 (offering a history of this background).

123. California’s consistency requirements are codified as sections 65860, 66473.5, and 65583, subsection I of the California Government Code. Regarding Florida, see Stroud, *supra* note 119, at 400–01, 414 (describing emergence of consistency requirement in the early 1970s, and its preservation even during the 2009–2011 “counter-revolution” against strong state oversight of local planning). In Washington, the courts seem somewhat ambivalent about the consistency requirement. Compare Citizens for Mount Vernon v. City of Mount Vernon, 947 P.2d 1208, 1214 (Wash. 1997) (deeming the comprehensive plan only a “guide” or a “blueprint”), with King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd., 979 P.2d 374, 380 (Wash. 1999), *as amended on denial of reconsideration* (Sept. 22, 1999) (holding that urban growth boundaries designated in plan are binding). Oregon has strong consistency requirements, enforceable via “work task” orders that the state land-use agency may issue to local governments. See OR. REV. STAT. § 197.636 (2019); Liberty, *supra* note 119, at 10372.

124. In California and Washington, the population projections are made by the state’s department of finance. See CAL. GOV’T CODE § 65584 et seq. (West 2019); WASH. REV. CODE § 43.62.035 (2019). In Oregon, they are made by a state university, see section 195.033 of the Oregon Revised Statutes, and in Florida, they are made by the state’s Office of Economic and Demographic Research, see section 163.3177 of the Florida Statutes.

125. See FLA. STAT. § 163.3177(f)(3); OR. REV. STAT. §§ 197.296(2) & 197.303(1); WASH. REV. CODE § 36.70A.070(2).

126. See generally CAL. MANUAL, *supra* note 121, at 18–21.

127. 1980 Cal. Stat. ch. 1143 (adding CAL. GOV’T CODE § 65580 et seq.).

of each region's quota (the "regional housing needs assessment," or RHNA), the Councils are invited to provide information and propose methodologies for translating the state's population forecasts into housing quotas.<sup>128</sup> RHNA's are subdivided into four affordability bands: housing units to be produced over the planning cycle for households of very-low, low, moderate, and above-moderate incomes, respectively<sup>129</sup> ("above-moderate" is code for market-rate housing).<sup>130</sup> Councils of Governments then allocate their region's quotas among the member governments.<sup>131</sup> This roughly resembles the process of determining and then allocating regional housing need in New Jersey, except that New Jersey considers only the need for subsidized housing, and New Jersey allocations have been made by courts or agencies, rather than by confederations of local governments.<sup>132</sup>

Beyond the essential commonalities noted above—periodic planning to accommodate state-forecasted population growth, state review of the plan, and a duty to conform local law to the plan—the housing frameworks of the West Coast Model states differ in many important particulars.

Consider how the planning mandate is enforced. In all of the West Coast Model states, local governments that fail to adopt a compliant housing element, on the state's timeline, may lose access to certain streams of funding.<sup>133</sup> In Washington, this appears to be the only consequence, and it is suffered only in the discretion of the governor.<sup>134</sup> In California and Oregon, local governments that do not maintain a compliant plan also put their regulatory autonomy at risk. California's courts and Oregon's Land Conservation and Development Commission (LCDC) have enjoined non-compliant local governments from issuing land-use permits.<sup>135</sup> In Oregon, permits issued by local governments that

128. *Id.*

129. *Id.*

130. Darrel Ramsey-Musolf, *Evaluating California's Housing Element Law, Housing Equity, and Housing Production (1990–2007)*, 26 HOUSING POL'Y DEBATE 488, 491 (2016).

131. CAL. GOV'T CODE § 65584.03 (West 2019).

132. In New Jersey, "regional need" is the sum of the region's "present need" (defined as substandard or too-expensive housing now occupied by the region's poorer residents) and projected "future need" (new housing for new poor families, per projected population growth). The "gap" between a local government's prior-round affordable housing quota and its actual production during that planning cycle is also carried forward. *See In re Declaratory Judgment Actions Filed by Various Municipalities*, 152 A.3d 915 (N.J. 2017).

133. Regarding Washington, see WASH. REV. CODE §§ 36.70A.340–345 (2019); Washington Department of Commerce Growth Management Submitting Materials, WASH. STATE DEP'T COMMERCE, <https://www.commerce.wa.gov/serving-communities/growth-management/washington-department-of-commerce-growth-management-submitting-materials/> (last visited Nov. 6, 2019). Regarding California, see DEP'T HOUS. AND CMTY. DEV., INCENTIVES FOR HOUSING ELEMENT COMPLIANCE (2009), [http://www.hcd.ca.gov/community-development/housing-element/docs/loan\\_grant\\_hecompl011708.pdf](http://www.hcd.ca.gov/community-development/housing-element/docs/loan_grant_hecompl011708.pdf).

Regarding Oregon, see sections 197.319 through 197.335 of the Oregon Revised Statutes from 2017 and section 660-045 of the Oregon Administrative Rules from 2017; *see also* Sullivan, *supra* note 119, at 391 (noting that these powers in Oregon are "now largely unused")

134. *See* WASH. REV. CODE §§ 36.70a.330, 36.70a.340, 36.70a.345 (2019).

135. Regarding California, see Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35, 43–44, 47–50 (1993) (discussing cases). Regarding Oregon, see sections 197.319 through 197.335 of the Oregon Revised Statutes from 2011 and section 660-045 of the Oregon Administrative Rules from 2011.

lack an approved comprehensive plan may also be invalidated for not conforming to the state's nineteen land-use goals.<sup>136</sup> Though no West Coast Model state has established a full-blown builder's remedy to enforce the planning duty,<sup>137</sup> California has recently taken some steps in this direction,<sup>138</sup> and Oregon's state-oversight body may remedy planning defaults by ordering development projects approved.<sup>139</sup>

The West Coast Model states also differ in how they superintend plan implementation. In Oregon, the LCDC has authority to review actions and inactions by local governments at the implementation stage, and to issue prescriptive "work task" orders if the LCDC deems implementation inadequate.<sup>140</sup> The commission also has broad rulemaking authority, which it has used to establish minimum zoning densities.<sup>141</sup> By contrast, Washington's oversight entity, the Growth Management Hearing Board (GMHB), has no authority to establish minimum densities or any other "public policy," and its remedial powers are very limited.<sup>142</sup> All it can do is forward its findings of noncompliance to the governor, who then decides whether to cut funding from the disobedient local government.<sup>143</sup> In California, HCD lacks general rulemaking authority and has had virtually no oversight role with respect to plan implementation,<sup>144</sup> although recent reforms are starting to change this.<sup>145</sup>

California and Oregon have taken some steps to thwart local evasion of the plan at the project-permitting stage. Both states set time limits within which local

136. Local land use actions, such as rezonings and permit decisions, may be challenged before the state's Land Use Board of Appeals (LUBA), and are reviewed for consistency with the state's land use goals *unless* the jurisdiction has adopted an LCDC-approved land use plan. *See* OR. REV. STAT. § 197.835(5) (2017); Liberty, *supra* note 119, at 10371.

137. That is, an expedited, burden-shifting procedure for developers in jurisdictions without an approved plan to bypass local ordinances and obtain permits from a state decision maker.

138. *See* ROBERT C. ELLICKSON ET AL., *LAND USE CONTROLS: CASES AND MATERIALS* 69–72 (4th ed. 2013).

139. More specifically, the LCDC may order "such interim measures as the commission deems necessary to ensure compliance with the statewide planning goals." OR. REV. STAT. § 197.636 (2017).

[It] shall, as part of its order, limit, prohibit or require the approval by the local government of applications for subdivisions, partitions, building permits, limited land use decisions or land use decisions until the plan, land use regulation or subsequent land use decisions and limited land use decisions are brought into compliance.

OR. REV. STAT. § 197.335 (2017) (emphasis added). Oregon's Land Use Board of Appeals also has authority to order projects approved. *See* OR. REV. STAT. § 197.835(10) (2017); *Walter v. City of Eugene*, 73 Or. LUBA 356, 362, *aff'd*, 383 P.3d 1009 (Or. Ct. App. 2016).

140. *See* OR. REV. STAT. § 197.636(2) (2017); *see, e.g.*, BILL KLOOS, *FAIR HOUSING COUNCIL OF OREGON—PLANNING FOR HOUSING: DON'T FORGET THE BASICS* 18 (May 15, 2008) (citing LCDC Compliance Order (Aug. 23, 1982) and Staff Report (Aug. 19, 1982) at 28-19); *id.* (citing LCDC Work Task Order 02-WKTASK-001412, at 4 (June 27, 2002) (faulting planned development overlay zoning for insufficient clarity).

141. OR. ADMIN. R. 660-07-035 (adopted 1981).

142. *Viking Properties, Inc. v. Holm*, 118 P.3d 322, 331 (Wash. 2005) (en banc).

143. *See* WASH. REV. CODE §§ 36.70A.330, 36.70A.340, 36.70A.345 (2019).

144. *See* Baer, *supra* note 119, at 56–60; CAL. GOV'T CODE § 65585(a) (West 2019).

145. *See infra* text accompanying note 211.

governments must act on permit applications,<sup>146</sup> and local governments may deny permits only on the basis of objective standards (Washington and Florida do not have such requirements).<sup>147</sup> In California, the housing element must include an analysis of constraints to the “development of housing for all income levels,”<sup>148</sup> and a “schedule of actions” to “[a]ddress and, where appropriate and legally possible, remove constraints.”<sup>149</sup>

Finally, the West Coast Model states vary in the strength of their commitment to periodic plan revision. At one end of the spectrum is California and, arguably, Washington. California, as we have seen, periodically assesses regional housing needs and requires local governments to update their housing elements shortly after receiving RHNA allocations.<sup>150</sup> In Washington, local governments must update urban growth boundaries on the official cycle if the state’s forecast of local population growth has changed since the last round.<sup>151</sup> In Oregon, by contrast, the theory of periodic plan revision has given way to a practice of ad-hoc amendment.<sup>152</sup> Oregon, by statute, requires most urban communities to revise their plans on a regular cycle,<sup>153</sup> but LCDC regulations have exempted local governments that choose other, simplified procedures for plan amendments.<sup>154</sup> Ed Sullivan, a veteran of the Oregon scene, reports that periodic review outside of the Portland metro area has become virtually a dead letter, and that piecemeal plan amendments provide little opportunity for LCDC to examine local housing policies.<sup>155</sup> Florida’s abandonment of periodic, state-supervised plan revision has been even more thoroughgoing.<sup>156</sup>

146. See CAL. GOV’T CODE § 65950 (West 2019) (requiring final action on housing development permits within 60-180 days of completion of environmental review); OR. REV. STAT. § 227.178 (2017) (requiring final action on development permits, including resolution of all appeals, within 120 days of date application is deemed complete); OR. REV. STAT. § 197.311 (2017) (requiring final action including resolution of internal appeals within 100 days on certain types of affordable housing projects).

147. See OR. REV. STAT. § 197.307(4) (2017) (“Except as provided in subsection (6) of this section, a local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing [on buildable land].”); *Honchariw v. Cty. Of Stanislaus*, 132 Cal. Rptr. 3d 874, 875–76, 880 (2011) (discussing the objective standards requirement and tracing it to a bill enacted in 1999).

148. CAL. GOV’T CODE §§ 65583(a)(5)– 65583(a)(6) (West 2019).

149. CAL. GOV’T CODE § 65583(3) (West 2019).

150. See *supra* notes 122, 126–131 and accompanying text.

151. See *Clallam Cty. V. Dry Creek Coal.*, 255 P.3d 709, 712 (Wash. Ct. App. 2011) (“The Growth Board determined that a county is *required* to revise its [urban growth area] designations when OFM population projections change. RCW 36.70A.130(3)(b).”); see also 36 WASH. PRAC., WASHINGTON LAND USE § 5:12 (2018) (“UGAs . . . [shall] provide densities[] ‘sufficient to permit the urban growth that is projected [by the State Office of Financial Management] to occur in the county or city for the succeeding twenty-year period.’” (footnote omitted)).

152. See Sullivan, *supra* note 119, at 392–93.

153. OR. REV. STAT. § 197.629 (2017).

154. See OR. ADMIN. R. 660-038-0020(15), 660-038-0210(2) (2018).

155. Telephone Interview with Edward J. Sullivan, Adjunct Professor, Lewis & Clark Law School (Oct. 1, 2018).

156. In 2011, the Florida legislature repealed the formerly mandatory duty of local governments to update and submit general plans for state review on a seven-year cycle. FLA. STAT. § 163.3191 (2010) (repealed 2011); Stroud, *supra* note 119, at 412. Now it suffices for local governments to write a septennial letter reporting their

## 2. Critiques

Critiques of the West Coast Model are, to some extent, state-specific, which should hardly be surprising given the differences described above. The critiques are also time-specific, especially as to California, whose state housing framework has undergone big changes since the early 2000s and especially over the last few years. But measured by results, the West Coast Model has been a disappointment everywhere.

Oregon and Washington have achieved somewhat denser patterns of housing development than other similar states, which is consistent with their stated goal of confining growth within urban boundaries while producing sufficient housing.<sup>157</sup> Yet “the increase in [Portland and Seattle’s] . . . rate of housing production pales in comparison to what similarly-sized cities like Phoenix and Atlanta have achieved through outward expansion.”<sup>158</sup> And despite the Oregon LCDC’s unique authority to establish minimum densities and direct the implementation of comprehensive plans, ninety percent of the residential land in Oregon’s largest city remains zoned for single-family homes.<sup>159</sup>

Since California adopted its RHNA framework in 1980, the state has become the poster child for housing policy dysfunction. A prominent 2005 study found that local governments in California with state-approved housing elements issued no more building permits than noncompliant jurisdictions, controlling for observable jurisdiction-level characteristics.<sup>160</sup> A more recent study finds some evidence that localities with approved housing elements developed more BMR housing—but *less market-rate housing*—than similar localities without certified housing elements.<sup>161</sup>

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self-assessed need for plan amendments. FLA. STAT. § 163.3191(1) (2019). According to leading land-use attorney, Nancy Stroud, the housing element of a newly formed Florida municipality will get a careful look and be rejected by the state if it does not accommodate forecasted population growth, but municipalities are effectively on their own once they have an initial, state-approved plan in place. Telephone Interview with Nancy E. Stroud, Of Counsel, Lewis, Stroud & Deutsch, P.L. (Oct. 2, 2018).

157. See Issi Romem, *Can U.S. Cities Compensate for Curbing Sprawl by Growing Denser?*, BUILDZOOM (Sept. 14, 2016), <https://www.buildzoom.com/blog/can-cities-compensate-for-curbing-sprawl-by-growing-denser>.

158. *Id.*

159. Diller & Sullivan, *supra* note 119, at 225 n.224 (reporting figures as of Dec. 23, 2017).

160. Paul G. Lewis, *Can State Review of Local Planning Increase Housing Production?*, 16 HOUSING POL’Y DEBATE 173 (2005).

161. See Ramsey-Musolf, *supra* note 130 (comparing jurisdictions in the Los Angeles and Sacramento regions with and without approved housing elements). A problem with studies in this vein is that rich jurisdictions are likely to have more planning capacity, greater NIMBYism, and more opportunities to extract rents through inclusionary-zoning requirements than poor jurisdictions; and planning capacity is probably correlated with having an approved housing element. This would bias the results of studies that treat jurisdictions without an approved element as counterfactuals for jurisdictions with an approved element, unless one has good measures of planning capacity and NIMBYism. For a case study of two Silicon Valley suburbs which suggests that California’s framework is becoming more effective, see Jessie Agatstein, *The Suburbs’ Fair Share: How California’s Housing Element Law (and Facebook) Can Set a Housing Production Floor*, 44 REAL EST. L.J. 219 (2015).

So what went wrong? One must be a bit circumspect in answering this question, because there is no state whose land-use interventions have been shown to expand the supply of housing substantially. I would venture, however, that the failures of the West Coast Model are at least partly due to (1) the use of projected household growth rather than market conditions to set housing-supply targets, and (2) a misplaced presumption of local good faith with respect to the design and implementation of land-use plans.

*a. Aiming at the Wrong Target*

The West Coast Model improves on its Northeastern counterpart by recognizing that local governments may over-restrict market-rate housing development.<sup>162</sup> It also furnishes a procedural framework for negotiating regional (California)<sup>163</sup> or countywide (Washington and Oregon)<sup>164</sup> housing goals in advance of discrete rezoning and project-permitting decisions.<sup>165</sup> But the West Coast Model launches these negotiations with a specific target in mind, and the target is perverse: accommodating *projected* household growth.<sup>166</sup>

A region that has allowed little new housing will have a depressed rate of new household formation, but this hardly means that the region has little need for new housing. On the contrary, if many people want to live in the region, the barriers to new housing will manifest in sky-high prices for existing housing; this, in turn, slows the rate of new household formation.<sup>167</sup> Young adults who cannot afford a place of their own will live with their parents or stacked up with roommates. The corresponding slowdown in the rate of household formation yields a smaller projection of “regional housing need,” while the economic reality is exactly the opposite.<sup>168</sup>

162. See *supra* text accompanying notes 121–125.

163. See CAL. GOV'T CODE § 65584 et seq. (West 2019); CAL. MANUAL 18–21; see also *supra* text accompanying note 121.

164. See, e.g., OR. REV. STAT. § 197.296(2) (2017) (regarding zoning in Oregon); WASH. REV. CODE § 36.70A.106 (2019) (regarding the submission process in Washington); see also *supra* text accompanying notes 121–123. In practice, county-level coordination never worked very well in Oregon, and the state's population forecaster now tells each city in a county how much growth it shall accommodate. See Sullivan, *supra* note 121, at 59–65.

165. As Rick Hills and David Schleicher have emphasized, such procedural frameworks can reduce the impact of NIMBYism on land use decisions, if there's a viable mechanism to enforce the agreements. See *infra* Subpart IV.B.2.

166. See CAL. GOV'T CODE § 65584 et seq. (West 2019).

167. See Sarah Mawhorter, Housing Policies in California Cities: Seeking Local Solutions to a Statewide Shortfall (Dec. 2018) (unpublished working paper), <http://californialanduse.org/working-papers.html>.

168. California law also presumes that “housing need” for new households at a particular income level can only be accommodated with new housing units, which are sold or rented at a price those households can afford—hence the division of the RHNA into units for very-low, low, moderate, and above-moderate income households. This overlooks the effect of new construction—or its absence—on the price of existing units. If the market produces loads of new luxury housing, some people will trade up, and existing less-fancy units will become more affordable. Conversely, if there are serious barriers to meeting demand for new luxury units, developers will scoop up existing less-fancy homes, renovate them, and put them on the market as luxurious, like-new units.

Because population and household growth in high-demand regions is endogenous to housing supply, it makes little sense to fix supply targets on the basis of population projections. Oregon all but acknowledges this point. Regulations issued in 2014 tell the state’s population forecaster to account for local governments’ “[p]lanned new housing,” “[e]xpected changes to zoning designations or density,” and “[a]dopted policies regarding population growth.”<sup>169</sup> Yet other Oregon laws tell local governments to gauge their housing needs and draw urban boundaries on the basis of the population forecast.<sup>170</sup> Thus does the planning dog chase its own tail.

The absurdity of basing housing-need determinations on population forecasts is well illustrated by the fact that, for the current planning cycle in California, the city of Beverly Hills—with a median home price of roughly \$3.5 million<sup>171</sup>—received an affordable housing quota of precisely three units, and a market-rate quota of *zero* units.<sup>172</sup> When journalists noticed this and began asking snarky questions, the city’s leadership responded that the tiny allocations were reasonable because Beverly Hills’s population was not growing.<sup>173</sup> According to the traditional logic of the West Coast Model, the city’s leadership had it exactly right. And this illustrates just how wrong it is for states to base local housing obligations on population-growth projections. Under any sane regime, a region comprised of Beverly Hillses—of cities that have utterly stanch population growth despite astronomical demand—would be presumptively categorized as having enormous unmet housing need.<sup>174</sup>

Or consider that San Francisco County, which as of this writing “has the highest total RHNA target assigned relative to population” of all counties in the state,<sup>175</sup> is expected to accommodate a mere 7.5% increase in its housing stock over the 2014–2022 planning cycle.<sup>176</sup> More than 60% of San Francisco’s target consists of subsidized, below-market-rate units that will not be built for decades,

169. PORTLAND STATE UNIV., FORECAST AND DELIVERABLES, 577-050-0050(3) (2019), <https://www.pdx.edu/ogc/sites/www.pdx.edu/ogc/files/Amended%20577-050-0050%20Forecast%20Process%20and%20Deliverables.pdf>. For a history of Oregon population forecasting, see Sullivan, *supra* note 121.

170. See OR. REV. STAT. § 197.296(2) (2017); see also *supra* text accompanying note 121.

171. *Beverly Hills Home Prices & Values*, ZILLOW, <https://www.zillow.com/108ncinit-hills-ca/home-values/> (last visited Nov. 6, 2019).

172. Thomas Fuller & Conor Dougherty, *California Today: The Beverly Hills Affordable Housing Loophole*, N.Y. TIMES (Feb. 5, 2018), <https://www.nytimes.com/2018/02/05/us/california-today-beverly-hills-affordable-housing.html>.

173. *Minneapolis Just Eliminated Single-Family Zoning. Should California Cities Follow Suit?*, GIMME SHELTER: THE CALIFORNIA HOUSING CRISIS PODCAST (Dec. 27, 2018), <https://calmatters.org/housing/2018/12/minneapolis-bans-single-family-zoning-should-california/>.

174. I say “presumptively” because a state might reasonably decide that some regions with high housing prices and low growth should be allowed to stay that way—say, because of historic preservation or environmental concerns.

175. NEXT10, MISSING THE MARK: EXAMINING THE SHORTCOMINGS OF CALIFORNIA’S HOUSING GOALS 29 (Feb. 28, 2019), <https://www.next10.org/housing-goals>.

176. The city’s RHNA share for the current planning cycle totals 28,870 units, and its housing stock circa 2013 totaled 376,081 units. See S.F. GEN. PLAN, 2014 HOUSING ELEMENT, at PART I (2015) [hereinafter 2014 HOUSING ELEMENT].

if ever. They will not be built because, as the city's housing element frankly acknowledges, producing that much below-market housing would require a stunning \$7.3 billion in subsidies.<sup>177</sup>

This is not normal or healthy. San Francisco, one of the nation's most expensive housing markets, should be producing new market-rate housing at many times the rate contemplated by its RHNA allocation. Whereas San Francisco's eight-year target for market-rate units corresponds to a housing-stock expansion of *less than 3%*, the economically productive metropolises in our nation's more affordable regions increased their housing stock by *30%–60%* over just the period from 2000 to 2013.<sup>178</sup> The Charlestons, Atlantas, and Phoenixes of the world didn't manage this feat with billion upon billion in public subsidies. They did it simply by allowing developers to build.<sup>179</sup> San Francisco should too—but it won't face much pressure to do so unless it's assigned a much bigger RHNA for unsubsidized housing.

This is not to say that there is one uniquely best or most defensible way to set housing-supply targets. But if West Coast Model states were serious about the problems canvassed in Part I, they would be well advised to tie local housing quotas to good indicators of unmet demand (such as housing prices that substantially exceed the usual costs of production),<sup>180</sup> as well as actual or potential access to job centers via convenient, non-greenhouse-gas-intensive modes of commuting.

Or, more simply, the state might require *every* local government to zone for a substantial increase in housing supply, and then let the market determine which regions shall grow. In recognition of the fact that the affordable metro areas of the South and Southwest managed to increase their housing supply by 30%–60% in barely more than a decade,<sup>181</sup> policymakers in a high-cost state might decide that local governments should plan for a potential 50% increase in housing supply, and maintain this “potential growth buffer” through decennial revisions of the general plan and zoning maps. A state agency would review the periodic revisions, rejecting those that fail to demonstrate potential for 50% growth (relative to the then-current housing stock), or that assign the buffer to difficult-to-develop sites.

The details of such a scheme are far beyond the scope of this Article. For now, suffice it to observe that West Coast Model states are not going to solve the housing-supply problem so long as cities or regions can effectively pick their

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177. *Id.* at I.101.

178. See Glaeser & Gyourko, *supra* note 28, at 16, 19 fig.3.

179. See Joseph Gyourko et al., *A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index*, 45 URB. STUD. 693 (2008) (documenting geographic variation in the stringency of land-use regulation).

180. Cf. Issi Romem, *Paying For Dirt: Where Have Home Values Detached From Construction Costs?*, BUILDZOOM (Oct. 17, 2017), <https://www.buildzoom.com/blog/paying-for-dirt-where-have-home-values-detached-from-construction-costs> (providing metro-area estimates of construction costs and home values).

181. See Glaeser & Gyourko, *supra* note 28, at 19 fig.3.

own housing quotas by enacting onerous controls that curtail population growth notwithstanding high demand.

*b. The Misplaced Presumption of Good Faith*

A key takeaway from the political science and economics research surveyed in Part I is that homeowners wield outsized influence over local governments, and that the self-interest of incumbent homeowners is at war with the public interest in expanding the housing stock of high-cost metro areas. Yet the West Coast Model states have tacitly assumed that local governments will try diligently and in good faith to meet the state's housing targets. This presumption of good faith is manifested in the standards for judicial review of local housing plans, and in the lack of a robust state-law framework to prevent or deter local governments from evading commitments in their state-approved plans.

Begin with judicial review. California courts have long treated housing elements as “legislative enactments” entitled to the usual presumption of validity that other legislation enjoys—even if the state agency has rejected the housing element in question.<sup>182</sup> So long as the housing element “contain[s] the elements mandated by the statute,” the courts will uphold it.<sup>183</sup> Whether it actually enables construction of the required number of units has been deemed *irrelevant as matter of law* to the housing element's validity.<sup>184</sup>

In Washington and Florida, the reviewing state agency cannot make binding determinations about the validity of a housing plan, but may challenge the plan before an administrative tribunal.<sup>185</sup> In both states, “comprehensive plans and development regulations . . . are presumed valid upon adoption,”<sup>186</sup>

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182. See, e.g., *Fonseca v. City of Gilroy*, 56 Cal. Rptr. 3d 374, 387 (Ct. App. 2007) (restating and applying doctrine that housing element is a legislative enactment subject to strong presumption of validity, notwithstanding agency disapproval); *Buena Vista Gardens Apartments Ass'n v. City of San Diego Planning Dep't*, 220 Cal. Rptr. 732, 737, 739 (Ct. App. 1985) (stating that “the appropriate standard of appellate review is whether the local . . . [government] has acted ‘arbitrarily, capriciously, or without evidentiary basis,’” and upholding housing element notwithstanding state agency's rejection of it for want of, *inter alia*, “a comprehensive five-year schedule of actions” (internal quotation marks omitted) (citations omitted)). For a review of other cases to similar effect, see Field, *supra* note 135, at 54–61.

183. *Fonseca*, 56 Cal. Rptr. 3d at 387.

184. *Id.* at 382 (“[J]udicial review of a housing element for substantial compliance with the statutory requirements does not involve an examination of the merits of the element,” that is, “*whether the programs adopted are adequate to meet their objectives.*” (emphasis added) (citations omitted) (quoting *Black Prop. Owners Ass'n v. City of Berkeley*, 28 Cal. Rptr. 2d 305 (Ct. App. 1994)); *Buena Vista Gardens*, 220 Cal. Rptr. at 737 (treating agency's view of workability of plan as a “merits” question not for courts to consider in judging plan's validity).

185. In Washington, this adjudicator is the specialized Growth Management Hearing Board. See 24 WASH. PRAC., ENVIRONMENTAL LAW & PRACTICE § 18.3 (2d ed. 2019). In Florida, it's the general-purpose Division of Administrative Hearings. See FLA. STAT. § 163.3184 (2019).

186. WASH. REV. CODE § 36.70A.320(1) (2019). There is an exception for certain coastal development regulations. See *id.*

and the burden of proof is on the party challenging them.<sup>187</sup> Washington’s administrative tribunal “shall find compliance” unless it determines that the plan or development regulation at issue “is clearly erroneous.”<sup>188</sup>

Only Oregon has firmly rejected judicial deference to local governments with respect to the plan. Approval by the LCDC is necessary to make a comprehensive plan legally effective,<sup>189</sup> and Oregon courts give LCDC actions the usual deference afforded to administrative rules and orders.<sup>190</sup>

Beyond the legal standards for housing plan validity, the tacit presumption of good faith is also manifested in the lack of backstopping measures to counteract local evasion of duly adopted plans. Zoning and other local ordinances must be consistent with the plan, but consistency challenges have to be brought within a brief window of time following enactment of the ordinance at issue,<sup>191</sup> and courts strongly defer to local governments when evaluating consistency.<sup>192</sup>

California and Oregon purport to limit local evasion of the plan at the project-permitting stage, by requiring local agencies to use only “objective” standards,<sup>193</sup> and to act on project applications within a fixed, reasonably short period of time.<sup>194</sup> But these strictures are less binding than they appear, and their weakness represents another manifestation of the tacit presumption of good faith. For example, time limits under California’s Permit Streamlining Act kick in only *after* the local government has completed reviews under the California Environmental Quality Act and resolved any internal appeals.<sup>195</sup> Environmental appeals of municipal decisions are heard by the city council.<sup>196</sup>

187. WASH. REV. CODE § 36.70A.320(2) (2019); *see also* FLA. STAT. § 163.3184(5)(2)(a) (2019) (stating that plans rejected by the state agency still enjoy a presumption of validity, and that it is the agency’s burden to prove “by a preponderance of the evidence that the comprehensive plan or plan amendment is not in compliance” with state law).

188. WASH. REV. CODE § 36.70A.320(3) (2019).

189. *See* OR. REV. STAT. §§ 197.319–.335 (2017); OR. ADMIN. R. 660–045 (2018).

190. *See, e.g.*, 1000 Friends of Or. v. Land Conservation & Dev. Comm’n, 724 P.2d 268, 284 (Or. 1986) (en banc) (extending deference to LCDC interpretations of law); *City of Happy Valley v. LCDC*, 677 P.2d 43, 46 (Or. Ct. App. 1984) (applying abuse-of-discretion review to LCDC decision rejecting plan).

191. *See* CAL. GOV’T CODE § 65860(b) (West 2019) (90 days).

192. *See* *Marracci v. City of Scappoose*, 552 P.2d 552, 553 (Or. Ct. App. 1976) (rejecting developer’s argument that project that complied with the plan could not be denied on basis of more restrictive zoning ordinance, on ground that it was local government’s prerogative to decide when and how to evolve “more restrictive zoning ordinances . . . toward conformity with more permissive provisions of the plan”); *see also* CECILY TALBERT BARCLAY & MATTHEW S. GRAY, CALIFORNIA LAND USE & PLANNING LAW 25–26, 46–47 (36th ed. 2018) (discussing “arbitrary and capricious” and “no reasonable person” standards in California). The California courts have been more willing to enforce those policies of the general plan that the courts deem to be “fundamental, mandatory and clear.” *See, e.g.*, *Ideal Boat & Camper Storage v. Cnty of Alameda*, 145 Cal. Rptr. 3d 417, 425 (Ct. App. 2012).

193. *See* *Honchariw v. Cty. of Stanislaus*, 132 Cal. Rptr. 3d 874, 875–76, 880 (2011) (discussing objective standards requirement and tracing it to a bill enacted in 1999); *see also supra* note 147 and accompanying text.

194. *See* CAL. GOV’T CODE § 65950 (West 2019); *see also supra* text accompanying note 146.

195. *See* CAL. GOV’T. CODE § 65950(a); *Eller Media Co. v. City of L.A.*, 105 Cal. Rptr. 2d 262, 264 (Ct. App. 2001).

196. CAL. PUB. RES. CODE § 21151 (West 2019).

So if a city councilmember wants to kill a housing project in her district, she can always insist on further, better, or different environmental analyses. Once the clock finally starts to run on the developer's permit application, local officials may "encourage" the developer to withdraw and resubmit it,<sup>197</sup> perhaps suggesting that if only this or that change were made, the application would more likely be approved. Or the decisionmaker may approve the project with conditions that make it tough to build or market. Weird or unexpected conditions might be challenged on the theory that the underlying development standard violates the state's objectivity requirement, but this is a crapshoot. Objectivity is a matter of degree,<sup>198</sup> and in any event, California's objectivity requirement only governs conditions that reduce a project's density or render it "infeasible."<sup>199</sup>

Finally, and perhaps most significantly, the tacit presumption of good faith is reflected in the lack of any material consequences for local governments that fail to meet their housing targets. Prior to the 2017 California housing package (discussed in the next Part), no West Coast Model state had enacted statutory ex-post punishments tied to actual housing construction over the planning cycle. This is in sharp contrast to the Northeastern Model states, which expose jurisdictions that fail to meet their BMR-housing targets to the feared builder's remedy.<sup>200</sup> Though Massachusetts, Rhode Island, and New Jersey provide for plan-based exemptions from the builder's remedy, Massachusetts and Rhode Island extend this exemption only to local governments making adequate yearly progress toward their affordable-housing goals.<sup>201</sup>

In principle, housing agencies in the West Coast Model states could incentivize local follow-through by announcing that the agency will review a locality's *next* plan very harshly if the local government fails to meet its housing targets under the current plan. Cities hoping to avoid fiscal and regulatory sanctions for not having an approved plan would then have good reason to permit the housing for which they planned. But to induce compliance in this way, the state agency must have authority to reject a housing plan as unlikely to work, given the local government's track record. California law historically would not allow this, and the presumption of validity in Washington and Florida works against it too.<sup>202</sup>

Putting all these pieces together—the inane, population-forecast metric of housing need; the deference to local governments on the substance of their plans;

197. See CAL. GOV'T CODE § 65943 (West 2019) (stipulating that clock restarts with each resubmission of an application).

198. Cf. *Rogue Valley Ass'n of Realtors v. City of Ashland*, No. 97-260, slip op. at 17 (Or. LUBA Sept. 24, 1998) ("[F]ew tasks are less clear or more subjective than attempting to determine whether a particular land use approval criterion is clear and objective.").

199. See CAL. GOV'T CODE § 65589.5(d) (West 2019).

200. See *supra* Subpart II.A.

201. See *supra* note 101 and accompanying text. In New Jersey, the prospect of a court-ordered builder's remedy hangs over all local land use decisions, so local governments disregard outcomes at their peril. See *supra* text accompanying note 99.

202. See CAL. GOV'T CODE § 65589.5(d) (West 2019); FLA. STAT. § 163.3184(5)(2)(a) (2019); WASH. REV. CODE § 36.70A.320(2) (2019).

the barriers to consistency challenges; the lack of an expeditious procedure for permitting projects that conform to the plan but violate contrary local ordinances; and the failure to punish or reward local governments on the basis of housing outcomes—one cannot help but wonder whether the state legislators who forged the West Coast Model were themselves acting in good faith. Did they really mean to overcome local barriers to the supply of an adequate amount of new housing, or was the mandate to plan for “needed housing” just a means of prettifying some other agenda?<sup>203</sup>

### III. THE NEW YIMBY MEASURES

Legal scholars and economists who write about housing-supply barriers have tended to regard state-level interventions skeptically, if at all.<sup>204</sup> Their skepticism is rooted in the risk that state control of local land-use regulation will enable local homevoter coalitions to band together into regional cartels.<sup>205</sup> In the absence of state control, the argument goes, developers should be able to buy off *some* local governments in a region and thereby increase the regional housing supply.<sup>206</sup> But once the state gets involved, antidevelopment interests can wield state law to make every local government establish rigid growth boundaries, onerous inclusionary zoning ordinances, or other restrictions that stanch the regional supply of new housing.

The state-cartelization thesis may be overdrawn—local governments have proven themselves quite capable of coordinating exclusionary policies without directives from the state<sup>207</sup>—but the traditional Northeastern and West Coast Models do not inspire much confidence in the states’ ability to intervene constructively in local land use. And yet, as housing prices in the expensive metro areas rocketed upward following the Great Recession of 2007–2009, the states, led by California, responded with forceful measures to increase the supply of market-rate as well as BMR housing. This Part explains California’s

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203. In Oregon and Washington, the “other agenda” was presumably the establishment of urban growth boundaries. In California, the other agenda is less apparent, but it may have been to support developers of BMR housing (much like the Northeastern Model); *cf.* Ramsey-Musolf, *supra* note 130 (finding, during study period, that jurisdictions with approved housing elements produce more BMR housing, but less market-rate housing, than jurisdictions without approved housing elements).

204. *See, e.g.*, FISCHER, ZONING RULES, *supra* note 4, at 54–57, 365–67 (discussing weakness of state housing requirements, and concluding with a dozen-item menu of suggestions for combatting housing supply restrictions, on which the “state planning mandate” is not mentioned). One exception is an article by John Infranca, written independently of this Article, which also discusses state ADU and density mandates. *See* John Infranca, *The New State Zoning: Land Use Preemption Amid a Housing Crisis*, 60 B.C. L. REV 823 (2019). Infranca focuses on upzoning by state statute, whereas I think the more promising reforms concern housing quotas and the nature of the plan. *See infra* Parts III & IV.

205. *See, e.g.*, FISCHER, ZONING RULES, *supra* note 4, at 307 (suggesting that homeowners in Portland metro area favor regional controls as a means of restricting housing supply); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 434–35 (1977) (discussing this risk).

206. *See* Ellickson, *supra* note 205, at 404–10 (arguing that developer influence means that exclusionary practices by some homogenous suburbs are unlikely to distort allocation of housing and people across metro areas).

207. *See supra* Part I.

reworking of its housing framework, as well as recent initiatives in California and other states to curtail the locally popular practice of zoning developable land exclusively for single-family homes on large lots.

Pushing the state-level interventions is a nascent Yes In My Backyard (YIMBY) movement.<sup>208</sup> YIMBY groups are springing up around the country to lobby for more housing at the state and local levels.<sup>209</sup> The YIMBYs' state-legislative and fundraising successes warrant a rethinking of the state-cartelization thesis, a point to which I shall return below.

#### A. CALIFORNIA STRENGTHENS THE WEST COAST MODEL

Starting around 2005 and accelerating a decade later, California passed a flurry of bills that try to answer critiques of the West Coast Model. In 2017 alone, the legislature enacted a fifteen-bill housing package. The state is feeling its way toward a better way of setting housing-supply targets, and the tacit presumption of good faith on the part of local governments is under attack.

##### 1. *Devising a Better Target*

California Senate Bill 828 (SB 828), enacted in 2018, begins to establish a new ground norm for RHNA, the regional housing targets.<sup>210</sup> The bill was a political compromise and leaves in place the old idea of tying housing quotas to population projections, while adding a new overlay of administrative discretion to plump up regional quotas on the basis of a nationally normed affordability goal.<sup>211</sup> Determinations of housing need are to account for the percentage of “cost burdened” households in the region (households spending more than 30% of their income on housing), relative to “the rate of housing cost burden for a healthy housing market.”<sup>212</sup> The “healthy housing market” standard is in turn defined as a cost-burden rate “no more than the average [such rate] in comparable regions throughout the nation.”<sup>213</sup> Similarly, the “overcrowding

208. See Kenneth Stahl, “*Yes in My Backyard*”: Can a New Pro-Housing Movement Overcome the Power of NIMBYs?, 41 ZONING & PLAN. L. REP., Mar. 2018.

209. See Stahl, *supra* note 208; see also YIMBY, WIKIPEDIA, <https://en.wikipedia.org/wiki/YIMBY> (last visited Nov. 6, 2019).

210. S.B. 828, 2017–2018 Leg. (Cal. 2018). SB 828 builds on a measure passed a year earlier, A.B. 1068, which curtailed Council of Governments (COG) authority to deviate from the state’s official population forecast, and which added “[t]he percentage of renters’ households that are overcrowded” as a factor to be weighed when converting the population forecast into RHNA quotas. See Assemb. B. 1086, 2017–2018 Gen. Assemb. (Cal. 2017) (amending CAL. GOV’T CODE §§ 65584, 65584.01, 65584.05 (West 2019)).

211. The bill, as passed initially by the state senate, provided that HCD “shall grant allowances” for the factors discussed in this paragraph, but the state assembly removed this language in favor of a more permissive authorization “to make adjustments.” See [https://leginfo.ca.gov/faces/billVersionsCompareClient.xhtml?bill\\_id=201720180SB828&cversion=20170SB82895AMD](https://leginfo.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180SB828&cversion=20170SB82895AMD).

212. S.B. 828 § 2 (amending CAL. GOV’T CODE § 65584.01(b)).

213. *Id.*

rate” among renter households should be “no more than the average overcrowding rate in comparable regions throughout the nation.”<sup>214</sup>

SB 828 is a very important development in the housing policy dialectic. The bill explicitly confronts, and condemns, the way in which exclusionary jurisdictions have, until now, been rewarded for their exclusion with small housing quotas.<sup>215</sup> The idea of a nationally normed “healthy markets” standard represents a new and facially plausible alternative to setting housing quotas on the basis of population trends.<sup>216</sup> But the bill’s metric of housing-market health is problematic: the “percentage of cost burdened households” fails to account for the effect of prices on population flows. As housing becomes more expensive in supply-constrained markets, less affluent residents are evicted or bought out and leave for cheaper pastures, and only rich people choose to move in.<sup>217</sup> This tends to equalize the share of cost-burdened households across supply-constrained and unconstrained regions.<sup>218</sup> Indeed, in economic models with costless mobility, an interregional disparity in the percentage of household income spent on housing will persist only if certain regions offer locational amenities not found elsewhere.<sup>219</sup> So, ironically, the fact that a region has a persistently large share of cost-burdened households may indicate that it is doing a very good job protecting environmental and other characteristics which make it desirable, not that it suffers from welfare-reducing supply constraints.

These conceptual problems notwithstanding, California’s housing agency may still manage to ramp up housing quotas using the authority granted by SB 828. Specifically, the housing agency could try to convert disequilibrium changes in the share of cost-burdened households into bigger RHNA’s for the state’s expensive, supply-constrained regions. Because moving between regions is costly, supply-constrained regions experiencing positive economic shocks are

214. *Id.*

215. S.B. 828 § 3 (amending CAL. GOV’T CODE § 65584.04(f)) (stating that neither “[p]rior underproduction of housing . . . from the previous regional housing needs allocation” nor “[s]table population numbers” shall be “a justification for a determination or a reduction in a jurisdiction’s share of the regional housing need”).

216. And the bill’s influence may be spilling across state lines: Oregon is about to launch its first state-directed regional housing needs assessment, and has authorized the state housing agency to consider not only population forecasts, but also “economic trends” and “trends in density and . . . urban residential development.” H.B. 2003 § 1, Gen. Assemb. Reg. Sess. (Or. 2019). Oregon has also told local governments estimating housing need to “adopt findings related to changes in,” *inter alia*, “housing costs” and “household incomes.” Or. HB 2003 § 10(a).

217. *See, e.g.*, ROMEM & KNEEBONE, *supra* note 25 (finding that the San Francisco Bay Area has the greatest socioeconomic disparity between its in-migrants, who tend to be rich, and its out-migrants, who tend to be poor, of all metro areas in the United States).

218. Tellingly, the share of cost-burdened households in the San Francisco region is smaller than that in the Riverside-San Bernardino region. *See California’s High Housing Costs: Causes and Consequences*, LEGISLATIVE ANALYST’S OFFICE (Mar. 16, 2015), <https://lao.ca.gov/Infographics/californias-high-housing-costs>. This is the case even though the price of housing relative to replacement cost in the San Francisco region is almost twice as high as in the San Bernardino-Riverside region. *See Romem, supra* note 180.

219. *See, e.g.*, Albouy and Ehrlich, *supra* note 41 (presenting model in which high housing costs relative to wage persist in equilibrium only because of locational amenities).

also likely to experience at least temporary increases in the share of cost-burdened and overcrowded households.<sup>220</sup> In the fall of 2019, HCD used its new authority to *triple* the RHNA for the Southern California Association of Governments.<sup>221</sup>

To be sure, newly ambitious RHNAs under SB 828 might not achieve very much if California's courts continue to give unstinting deference to local governments' housing elements, and if even the best of plans come to naught because there are no guardrails on implementation. But California has started responding to these critiques as well.

## 2. *Upending the Presumption of Local Good Faith*

I suggested earlier that if a state took seriously the political economy of local land use, the state would presume bad faith rather than good faith with respect to the design and implementation of the housing element, and backstop approved housing elements with strong measures to combat local governments' evasion of their state-approved plans.<sup>222</sup> California is starting to take this idea to heart.

### a. *The Standard for a "Substantially Compliant" Housing Element*

California has not expressly abrogated the courts' deferential, check-the-boxes test for the validity of a housing element,<sup>223</sup> but local governments can no longer count on judicial or administrative tolerance of dysfunctional housing plans. HCD now openly rejects the courts' gloss on substantial compliance, applying a more functional test (at least since 2012) and all but inviting legal challenge.<sup>224</sup> In 2017, the legislature authorized HCD to review housing-element implementation and, upon discovering a serious failure of implementation, to rescind the agency's finding that the housing element substantially complies with state law.<sup>225</sup> This new emphasis on implementation is hard to square with the courts' longstanding position that substantial compliance is just a matter of

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220. Price controls—rent control and BMR deed restrictions—may mute this.

221. Liam Dillon, *Southern California Must Plan for 1.3 Million New Homes in the Next Decade*, *Newsom Says*, L.A. TIMES (Aug. 22, 2019) <https://www.latimes.com/california/story/2019-08-22/southern-california-housing-growth>.

222. See *supra* Subpart II.B.2.

223. Regarding the traditional test, see *supra* notes 182–184 and accompanying text.

224. See Barbara E. Kautz, *Housing Elements: Beware of What You Promise* (Sept. 19, 2013) (unpublished working paper) (criticizing a 2012 letter from HCD to the Association of Bay Area Governments, in which the agency wrote: "While a court may review a housing element to find whether it contains the elements mandated by the statute, the Department's review considers the adequacy of information, program commitments, and timeframes to meet various statutory goals and objectives") <https://www.cacities.org/UploadedFiles/LeagueInternet/28/288f671f-501d-4ce4-9099-557bd10ef7f0.pdf>.

225. Assemb. B. 72, 2017–2018 Gen. Assemb. (Cal. 2017) (adding CAL. GOV'T CODE § 65585(i)(1)(a) (West 2019) (A.B. 72). The first enforcement action under A.B. 72 was filed against a city that amended a specific plan in a manner that conflicted with the housing element. See *Complaint*, Cal. Dep't of Hous. & Cmty. Dev. v. City of Huntington Beach, No. 30-2019-01046493-CU-JR-CJC (Cal. Sup. Ct. Jan. 25, 2019).

whether the housing element “contains the elements mandated by the statute.”<sup>226</sup> So too is a new requirement that local governments allocate their RHNA shares to imminently developable sites,<sup>227</sup> as is a fairly recent statutory provision encouraging affordable-housing developers to challenge housing elements’ assignment of RHNA shares to sites.<sup>228</sup> The California Supreme Court, which has yet to address what constitutes a substantially compliant housing element, may eventually conclude that the legislature has tacitly ratified HCD’s gloss on substantial compliance.<sup>229</sup>

*b. Pressure to Remain in Compliance*

In the early 1990s, only about a quarter of California jurisdictions had HCD-approved housing elements in place.<sup>230</sup> By the early 2000s, more than 50% were compliant.<sup>231</sup> Today the figure is about 90%.<sup>232</sup> This evolution reflects escalating legislature and judicial pressure to adopt and maintain compliant housing elements. The legislature has tied local governments’ eligibility for an ever-lengthening list of grant programs to housing element compliance,<sup>233</sup> and trial courts have enjoined noncompliant local governments from issuing building permits for commercial and other uses.<sup>234</sup> In 2005, the legislature stripped local

226. *Fonseca v. City of Gilroy*, 56 Cal. Rptr. 3d 374, 387 (Ct. App. 2007); *see also* text accompanying note 183.

227. *See infra* text accompanying notes 244–247.

228. *See infra* note 245.

229. It is significant in this regard that A.B. 72 was enacted subsequent to HCD’s public flaunting of the judicial test for substantial compliance. Also, in 2018, the legislature codified its intent to “ensure that future housing production meets, at a minimum, the regional need established for planning purposes.” S.B. 828, 2017–2018 Leg. (Cal. 2018) (adding CAL. GOV’T CODE § 65584(a)(2) (West 2019)).

As for the origins of the “substantial compliance” test, it was added to the housing element law in 1984, and at that time the legislature expressed its intent to codify the standard first applied in *Camp v. Bd. Of Supervisors*, 176 Cal. Rptr. 620 (Ct. App. 1981). *See Hernandez v. City of Encinitas*, 33 Cal. Rptr. 2d 875, 880 (Ct. App. 1994) (quoting the legislative declaration). *Camp* is actually a better decision than many more recent “substantial compliance” cases, because the *Camp* court gave considerable weight to the views of the state housing agency and characterized “substantial compliance” as a matter of substance rather than form. *See* 176 Cal. Rptr. at 629–32. Thus, the statutory origins of the substantial compliance standard would not prevent the California Supreme Court from putting a more demanding gloss on it than the lower courts have to date. However, because the substantial compliance test per *Camp* governs challenges to any element of the general plan, not just the housing element, *see* 176 Cal. Rptr. At 629, the California Supreme Court may be wary of making the test very demanding.

230. *See* PAUL G. LEWIS, CALIFORNIA’S HOUSING ELEMENT LAW: THE ISSUE OF LOCAL NONCOMPLIANCE 21–22 (2003) (reporting that 19% were deemed compliant in 1991, and 37% by 1993).

231. *Id.* at 4–5 fig.1.1, fig.1.2 (noting that in 2002, 51% of cities and 66% of counties were deemed by HCD to be compliant).

232. CAL. DEP’T. OF HOUS. & CMTY. DEV., HOUSING ELEMENT COMPLIANCE REPORT (2019), <http://www.hcd.ca.gov/community-development/housing-element/docs/status.pdf>.

233. *See* DEP’T HOUS. & CMTY. DEV., INCENTIVES FOR HOUSING ELEMENT COMPLIANCE (2009), [http://hcd.ca.gov/community-development/housing-element/docs/loan\\_grant\\_hecompl011708.pdf](http://hcd.ca.gov/community-development/housing-element/docs/loan_grant_hecompl011708.pdf). Since 2009, the legislature has provided additional funding to compliant jurisdictions through a real-estate recording fee. *See SB. 2 Planning Grants*, DEP’T HOUS. & CMTY. DEV., <http://www.hcd.ca.gov/grants-funding/active-funding/planning-grants.shtml> (last Nov. 6, 2019).

234. For a now-somewhat-dated summary of housing element litigation, remedies, and consent decrees, *see* SANTA BARBARA CTY. COUNSEL, SUMMARY OF HOUSING ELEMENT LAW AND LITIGATION 19–25 app. A (2007),

governments without compliant housing elements of authority to use local zoning or the general plan to deny 20%-BMR projects on any site where housing is a permitted use.<sup>235</sup> Additional penalties are in the offing: a 2019 statute subjects noncompliant local governments to escalating monthly fines of up to \$600,000.<sup>236</sup> It also authorizes courts to appoint a judicial agent with “expertise in planning” to “bring the jurisdiction’s housing element into substantial compliance.”<sup>237</sup> No city will relish the prospect of bleeding \$600,000 a month while a court rewrites its housing element.

*c. The New, Self-Executing Housing Element?*

The traditional West Coast requirement that local ordinances conform to the plan did little to help developers get projects approved. In California, a consistency challenge had to be brought within ninety days of enactment of the ordinance,<sup>238</sup> and even a successful challenge might result only in an order telling the local government to make the ordinance consistent (rather than an order approving a housing project). But a little-noticed reform adopted in 2004 and extended in 2018 lays down a path for later, as-applied challenges. The 2004 legislation requires local governments to approve 20%-BMR projects whose location and density comport with the housing element, “even [if the project] is inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation.”<sup>239</sup> The 2018 statute put developers of 100% market-rate projects on similar footing,<sup>240</sup> and, in conjunction with an amendment the previous year, appears to have eliminated deference to local governments on the question of whether zoning is consistent with the housing element or other

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[https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/23990/Attachment\\_35\\_-\\_Memo\\_on\\_Housing\\_Element\\_Law\\_and\\_Litigation.pdf](https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/23990/Attachment_35_-_Memo_on_Housing_Element_Law_and_Litigation.pdf).

235. S.B. 575, 2005–2006 Leg. (Cal. 2005) (amending CAL. GOV’T CODE § 65589.5(d) (West 2019)).

236. Assemb. B. 101, 2019–2020 Gen. Assemb. § 4 (Cal. 2019) (adding subsections (k)–(n) to CAL. GOV’T CODE § 65585 (West 2019) (explaining that the local authority can be imposed a fine of up to \$100,000, which is subject to increase by a factor of six if the court finds the original fees insufficient); *see also* Liam Dillon and Taryn Luna, *California Leaders Strike Deal to Give Cities and Counties Hundreds of Millions to Fight Homelessness*, L.A. TIMES (June 27, 2019), <https://www.latimes.com/politics/la-pol-ca-homeless-housing-money-state-budget-20190627-story.html>.

237. CAL. GOV’T CODE § 65585(l)(3)(B).

238. *See* CAL. GOV’T CODE § 65860(b) (West 2019); *see also supra* text accompanying note 198.

239. Assemb. B. 2348, 2003–2004 Gen. Assemb. § 4 (Cal. 2004) (amending CAL. GOV’T CODE §§ 65589.5(d)(5)(A), 65915(b)(1) (West 2019)).

240. *See* Assemb. B. 3194, 2017–2018 Gen. Assemb. (Cal. 2018) (adding CAL. GOV’T CODE § 65589.5(j)(4) (West 2019)) (requiring approval of projects that comply with the general plan—of which the housing element is a part—notwithstanding “zoning standards and criteria” to the contrary). In contrast to the 2004 amendments for twenty percent BMR projects, the 2018 amendments are silent on whether local governments must grant permits for housing-element-compliant projects if the housing element conflicts with the land-use element and thus violates the background state-law requirement of “horizontal consistency” among components of the general plan. However, an intermediate court of appeals has held that housing elements that conflict with other components of the plan are valid and enforceable so long as the housing element acknowledges the inconsistency and spells out an action plan to fix it, for example, by amending the conflicting component of the plan. *See* *Friends of Aviara v. City of Carlsbad*, 148 Cal. Rptr. 3d 805, 810–11 (Ct. App. 2012).

components of the general plan.<sup>241</sup> The thrust of these reforms is to make the housing element self-executing.<sup>242</sup> Developers may apply for permits on the authority of the housing element, and the local officials who review the project must disregard more restrictive zoning ordinances. Local governments that deny or reduce the density of a project in violation of this principle must pay the prevailing party's attorney fees.<sup>243</sup>

*d. The Requirement of Imminently Developable Sites*

A favorite ruse of anti-housing local governments has been to assign their RHNA shares to sites that are impractical to develop.<sup>244</sup> A limited builder's remedy, enacted in 2005, puts some pressure on local governments not to do this,<sup>245</sup> and in 2017, California took another big step, ordering local governments

241. The 2018 amendments do not expressly prescribe an evidentiary standard for resolving questions about the consistency of zoning with the general plan. However, when the consistency language was added to the bill, the associated bill analysis emphasized that the legislature had in 2017 abrogated deference to local governments on questions about a project's consistency with applicable standards, and quoted language to the effect that a project must be deemed compliant with the plan if a "reasonable person" could deem it so. *See* BILL ANALYSIS, Assemb. B. 3194, SEN. COMMITTEE ON TRANSP. & HOUS. 4 (2018), [https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201720180AB3194](https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB3194); *see also* text accompanying notes 248-252 (describing and contextualizing the new evidentiary standard). This drafting history, together with the stated purpose of A.B. 3194—to thwart local efforts to evade the HAA by zoning for less bulk or density than the general plan allows, thereby shunting multifamily housing projects into discretionary variance or rezoning processes, *see* BILL ANALYSIS, Assemb. B. 3194, SEN. FLOOR 3-4 (2018), [https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201720180AB3194](https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB3194) (suggesting strongly that local governments are now prohibited from denying or reducing the density of housing projects if a reasonable person *could* deem the project compliant with the plan, notwithstanding zoning standards that are more restrictive).

242. Indeed, it appears that even commitments made in the housing element to allow greater bulk or density by some specified date in the future can now be enforced through the HAA. *See* BILL ANALYSIS, Assemb. B. 3194, SEN. GOV'T & FIN., (2018), [https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201720180AB3194](https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB3194) (distinguishing legitimate from illegitimate denials of projects whose density is consistent with the density contemplated for the site by the general plan, giving as example of the former a denial during "a [reasonable] period between an amendment to portions of a general plan, such as the housing element, and when the local government updates its zoning ordinances to match the general plan"); Assemb. B. 72, 2017-2018 Gen. Assemb. (Cal. 2017) (adding CAL. GOV'T CODE § 65585(i) (West 2019) (using term "inconsistency" in reference to "any failure to implement any program actions included in the housing element") (emphasis added)).

243. CAL. GOV'T CODE § 65585.5(k)(2) (West 2019).

244. This bit of conventional wisdom is indirectly supported by the California Legislative Analyst's finding that most multi-family construction occurs on sites which are *not* designated for multifamily construction in the corresponding housing element. *See* LEGISLATIVE ANALYST'S OFFICE, DO COMMUNITIES ADEQUATELY PLAN FOR HOUSING? 8-9 (2017) [hereinafter LAO, DO COMMUNITIES ADEQUATELY PLAN], <https://lao.ca.gov/reports/2017/3605/plan-for-housing-030817.pdf>. Evidently, cities "plan" for multifamily housing where its uneconomical to build, and then work out case-by-case exemptions for certain developers.

245. The relevant statutory provisions state that if the local government has not designated sufficient sites for its low- and moderate-income RHNA shares, it may not rely on local zoning or the general plan to deny a project that is proposed for a residential site in which at least twenty percent of the units would be affordable to lower-income households. *See* CAL. GOV'T CODE § 65589.5(d)(5)(B) (West 2019); S.B. 575, 2005-2006 Leg. § 1 (Cal. 2005). The only allowable ground for denial in most cases is that the project would have a "specific, adverse impact upon the public health or safety." CAL. GOV'T CODE § 65589.5(d)(2). In these proceedings, the local agency has the burden of proof "to show that its housing element does identify adequate

to accommodate their RHNA allocations on imminently developable sites.<sup>246</sup> Using HCD-issued forms, local governments must furnish a parcel-by-parcel enumeration of the available or potentially available sites for housing development, noting for each parcel its “realistic and demonstrated” development potential at various levels of affordability, current uses of the parcel, barriers to development at the parcel’s potential density over the next period in the planning cycle, and any steps the local government intends to take to remove those constraints.<sup>247</sup>

*e. An End to Deference on Project-Specific Denials and Density Reductions*

As far back as 1982, with the first iteration of its Housing Accountability Act (HAA), California recognized that local governments may try to evade state housing mandates through project-specific shenanigans, such as unwarranted delay, bad-faith application of existing standards, or denial on the basis of post hoc requirements invented for the purpose of killing the project.<sup>248</sup> The original HAA provided that local governments may deny or reduce the density of a housing project that complied with applicable development standards at the time the permit application was submitted only if the decisionmaker makes “written findings supported by substantial evidence” that the project would have a “specific, adverse [and non-mitigable] impact upon the public health or safety.”<sup>249</sup> Subsequently, the legislature clarified that only “objective” standards could be used to deny or reduce the density of a project.<sup>250</sup>

The difficulty with this requirement is that development standards are never perfectly clear, and it’s hard for judges who lack intimate familiarity with the development process to say whether a standard is clear enough to qualify as “objective.”<sup>251</sup> The 2017 housing package includes a clever fix: housing proposals must be deemed compliant with applicable development standards “if there is substantial evidence that would *allow a reasonable person to conclude*”

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sites with appropriate zoning and development standards and with services and facilities to accommodate . . . [the jurisdiction’s] share of the regional housing need for the very low, low-, and moderate-income categories.” CAL. GOV’T CODE § 65589.5(d)(5).

246. See *Fonseca v. City of Gilroy*, 56 Cal. Rptr. 374, 390–91 (Ct. App. 2007) (discussing 2005 amendments, while applying previous standards which did not require parcel identification); Assemb. B. 1397, 2017–2018, Gen. Assemb. (Cal. 2017) (delineating criteria for what counts as an available site).

247. Assemb. B. 1397, 2017–2018 Gen. Assemb. (Cal. 2017) (amending CAL. GOV’T CODE §§ 65583(a)(3), 65583.2 (West 2019)). If the local government assigns more than fifty percent of its lower-income RHNA share to presently non-vacant parcels, it must make findings supported by substantial evidence that the existing use of each such parcel “is likely to be discontinued” during the planning period. CAL. GOV’T CODE § 65583.2(g)(2)(West 2019).

248. 1982 Cal. Stat. 5484, ch. 1438 (adding CAL. GOV’T CODE § 65589.5 (West 2019)).

249. *Id.*

250. S.B. 948, 1999–2000 Leg. (Cal. 1999) (amending CAL. GOV’T CODE § 65589.5(d)(2)).

251. *Cf. Rogue Valley Ass’n of Realtors v. City of Ashland*, No. 97-260, slip op. at 17 (Or. LUBA Sept. 24, 1998) (“[F]ew tasks are less clear or more subjective than attempting to determine whether a particular land use approval criterion is clear and objective.”)

that the project conforms to the standards.<sup>252</sup> So if a local government chooses to employ mushy standards, it will have enormous difficulty denying any project, as the very mushiness of the standards means there will almost always be enough evidence to allow (not require) a reasonable person to conclude that the standards were met.

The 2017 amendments also hack away at local governments' discretion to deny zoning-compliant projects on the basis of alleged health or safety impacts. Previously, such projects could be denied or reduced in density if there was substantial evidence in the record to support the local government's health or safety finding.<sup>253</sup> Going forward, the local government must show *by a preponderance of the evidence* that the project would have a "significant, quantifiable, direct, and unavoidable [public health or safety] impact, based on objective, identified written public health or safety standards . . . as they existed on the date the application was deemed complete."<sup>254</sup> The local government must make these findings in writing within sixty days of its decision,<sup>255</sup> and, if the decision is challenged in court, the local government must carry the burden of proof.<sup>256</sup> Lest judges fail to get the message, the legislature in 2018 declared that adverse health and safety impacts from new housing "arise infrequently."<sup>257</sup>

Finally, recent amendments to the HAA extend standing to sue to "housing organizations" and potential residents, and require defendants to pay the attorney's fees of prevailing plaintiffs.<sup>258</sup> Developers who have ongoing relationships with a local government may be wary of litigating, say, a modest reduction in the size of their project. The attorney's fee and liberal standing provisions enable other parties to step in and make local governments follow their own rules.

#### *f. Statutory Consequences for Failing to Meet Housing Targets*

With the passage of California Senate Bill 35 (SB 35) in 2017, California became the first West Coast Model state to make local governments liable for failing to meet state housing targets, not just for failing to plan.<sup>259</sup> SB 35 directs HCD to determine mid-cycle and at the end of the cycle whether each local government is on pace to meet, or has met, its RHNA targets.<sup>260</sup> If a local government falls short, it must permit as-of-right development of qualifying

252. Assemb. B. 1515, 2017–2018 Leg. § 1 (Cal. 2017) (amending CAL. GOV'T CODE § 65589.5(f)(4)).

253. The Housing Accountability Act originally required "written findings supported by substantial evidence" that the project would have "a specific, adverse [and not feasibly mitigable] impact upon the public health or safety." 1982 Stats. 5484, ch. 1438.

254. S.B. 167, 2017–2018 Leg. (Cal. 2017) (amending CAL. GOV'T CODE § 65589.5(j)(1)(A)).

255. CAL. GOV'T CODE § 65589.5(j)(2).

256. CAL. GOV'T CODE §§ 65589.5(i), 65589.6.

257. Assemb. B. 3194, § 1, 2017–2018 Gen. Assemb. (Cal. 2018) (adding subdivision (a)(3) to CAL. GOV'T CODE § 65589.5).

258. See S.B. 167 (amending CAL. GOV'T CODE § 65589.5(k)(1)(A)).

259. S.B. 35, 2017–2018 Leg. (Cal. 2017) (enacted).

260. CAL. GOV'T CODE §§ 65913.4(a)(4) & (h)(7) (West 2019).

projects that comply with objective zoning and development standards.<sup>261</sup> Projects submitted under SB 35 must be approved or rejected by the local government within a brief window of time or else they are deemed approved as a matter of law, and they are exempt from environmental review.<sup>262</sup>

In keeping with the idea of the housing element as self-executing and preemptive, SB 35 provides that in the event of inconsistency between “zoning, general plan, subdivision, or design review standards . . . a development shall be deemed consistent with the objective zoning and subdivision standards . . . if the development is consistent with the standards set forth in the general plan.”<sup>263</sup> (The housing element is a component of the general plan.)

Though SB 35 projects must meet several other criteria that may blunt the statute’s impact,<sup>264</sup> the statute advances an important principle: the local prerogative to use cumbersome, discretionary permitting procedures is conditional on the local government actually permitting the amount of new housing—including market-rate housing—that the state expects of it.<sup>265</sup>

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California’s housing policy contraption would have made Rube Goldberg blush. But abstracting from the jury-rigged details, the big picture is this: California, home to the nation’s most expensive housing markets, is groping its way toward a nationally normed, “healthy housing market” standard for how much new housing local governments must accommodate. California has also taken steps to make state-approved housing plans self-executing, so that developers can get permits for plan-compliant projects notwithstanding contrary local ordinances. California has terminated judicial deference to local governments on the question of whether a development proposal complies with applicable zoning, development, environmental, and safety standards. And, using fee-shifting rules, liberal standing, and evidentiary reforms, California has armed interest groups and private citizens to challenge permit denials and density reductions, as well as the adequacy of the housing plan as a whole. These are unabashedly pro-housing reforms, applicable to market-rate as well as affordable projects.

Taken together, the California reforms are redefining the character and function of the comprehensive plan. Rather than serving as an “impermanent

261. See S.B. 35, § 3 (now codified as CAL. GOV’T CODE § 65913.4 (West 2019)).

262. CAL. GOV’T CODE § 65913.4(b) & (c).

263. CAL. GOV’T CODE § 65913.4(a)(5)(B).

264. The project must have at least ten percent BMR units (more if the jurisdiction has a compliant housing element and met its quota for market-rate housing in the previous cycle), must not use sites that were recently occupied by residential tenants or rent-controlled dwelling units, and, for larger projects, must pay union wages. CAL. GOV’T CODE § 65913.4(a)(4), (7) & (8).

265. The same principle is also advanced by another statutory provision added in 2017, which stipulates that local governments may not count a parcel toward their lower-income RHNA quota without rezoning it for by-right development, if the parcel had been counted toward the quota but not developed in the previous planning cycle. See Assemb. B. 3197, 2017–2018 Gen. Assemb. (Cal. 2017) (amending CAL. GOV’T CODE § 65583.21 (West 2019)).

constitution” for zoning and development ordinances,<sup>266</sup> or as a statement of a community’s aspirations for its built environment,<sup>267</sup> the plan, through its housing element, increasingly resembles a compact between the local government and the state about development permitting. Through the plan, local governments provide the state with an inventory of developable or re-developable parcels within their territory, agree to accommodate a certain number of new housing units on those parcels, and commit to a schedule of actions to remove development constraints.<sup>268</sup> In return for making these promises, the local government maintains its eligibility for certain funding streams and avoids incursions on its regulatory autonomy. Developers, housing organizations, and potential residents can enforce the compact in court, both by suing the local government to make it follow through on rezoning and other actions promised in the housing element, and by demanding building permits on the authority of the housing element itself, even if the project conflicts with other local ordinances.

And yet this agreement is not quite a contract. The housing element, as a component of the local government’s general plan, remains local law, and may itself be amended without the state agency’s consent. The agency can respond to bad amendments by decertifying a housing element midcycle—exposing the local government to a loss of funding and possibly builder’s remedy lawsuits—but the agency cannot compel the local government to stick to the original compact. Nor may the agency rewrite the housing element of a local government that has failed to revise its housing element on the state’s cycle.

One can think of the housing element, then, as a kind of provisionally preemptive state intervention in local land use. The state has considerable influence over the housing element’s content, and while in place, the housing element supersedes contrary local regulations and establishes a basis for development permitting. But the housing element’s preemptive character is softer than that of ordinary state law, both because the housing element must be locally adopted before it takes effect, and because it can be changed by the local government without the concurrence of the state—albeit at the price of risking pecuniary and regulatory sanctions.

It bears emphasis, finally, that the California transformation I have described in this section is still a work in progress. Housing elements in practice may fall pretty far short of the (evolving) statutory ideal. For example, during the most recent planning cycle, HCD approved the housing element of famously supply-constrained San Francisco, notwithstanding the plan’s utterly vacuous program to address and remove constraints.<sup>269</sup> The California framework seems

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266 For influential statements of this theory of the plan, see Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); Mandelker, *supra* note 117.

267. On plans as dreamy visions for the future, see ELLICKSON ET AL., *supra* note 138, at 69-72.

268. See *supra* Subpart III.A.

269. See 2014 HOUSING ELEMENT, *supra* note 176, at C.23–C.24 app. C (setting forth a few vaguely stated, ongoing program actions to address constraints, while entirely ignoring one of the primary constraints identified the housing element’s own analysis of constraints: the city’s very unusual and cumbersome discretionary review

unlikely to achieve very much absent political leadership from the governor and HCD to make it work. The state's recently elected governor, Gavin Newsom, has made housing a priority, so his tenure will be an important test case for the framework.<sup>270</sup>

## B. DENSITY MANDATES

In 1981, Oregon's LCDC promulgated the Metropolitan Housing Rule, which sets minimum zoning densities for cities in the Portland metro area.<sup>271</sup> Ever since, land-use scholars have regarded the rule with a kind of wry bemusement, as if to say, "Oh, leave it to Oregon's urban-boundary enthusiasts to try something way too zany for any other state."<sup>272</sup> Yet in recent years, and on both coasts, states have begun to challenge local control over housing density, including the density of market-rate housing. This is an ideologically important development because, as Part II explained, the expensive Northeastern states traditionally regarded the "affordability problem" as being solely about barriers to the construction of subsidized, deed-restricted housing,<sup>273</sup> and because even West Coast states often privilege projects with a large share of BMR units.<sup>274</sup>

To date, most of the new density interventions have focused on so-called ADUs, small homes which may be developed in an under-utilized garage or basement, or added in the backyard of existing or proposed house.<sup>275</sup> Washington, California, Oregon, New Hampshire, and Vermont now require local governments to permit ADUs on parcels zoned for single family homes.<sup>276</sup> Connecticut, Florida and Rhode Island have proceeded a bit more indirectly, encouraging ADUs by allowing local governments to count them toward the

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procedure); Letter from Paul McDougall, Hous. Policy Manager, Cal. Dep't of Hous. & Cmty. Dev., to John Rahaim, Dir., Planning Dep't, City of S.F. (Sept. 10, 2014) (on file with author) (deeming the city's draft housing element compliant, without comment on constraints).

270. See Alexei Koseff, *Newsom Blazing a Trail of His Own*, S.F. CHRONICLE, Feb. 23, 2019, at A7 (comparing Newsom's housing positions with those of his predecessor).

271. The rule is codified at OR. ADMIN. R. 660-07-000-660-07-360 (2018). For discussion of its history, see *City of Happy Valley v. Land Conservation & Dev. Comm'n*, 677 P.2d 43, 44 (Or. 1984).

272. See, e.g., FISCHER, ZONING RULES, *supra* note 4, at 303-07, 366-67 (describing that Portland is "Oregon's boat to float"); Hills, *supra* note 95, at 1639-42 (praising Metropolitan Housing Rule, but describing the adoption of anything similar in New Jersey, the subject of his article, as "improbabl[e]").

273. See *supra* Subpart II.A.

274. See *supra* Subpart III.B. (describing reforms in California).

275. ADUs are typically defined by statute as a small dwelling (for example, less than 800 or 1200 square feet) contained within, or located in close proximity to, another existing or zoning-authorized structure. See, e.g., CAL. GOV'T CODE § 65852.150 (West 2019).

276. See CAL. GOV'T CODE § 65852.2 (West 2019); N.H. REV. STAT. ANN. § 674:72 (2018); VT. STAT. ANN. Tit. 24, § 4412(1) (2019); WASH. REV. CODE § 43.63A.215 (2019); S.B. 1051, 2017-2018 Leg. § 6 (Or. 2017) (enacted); WASH. STATE. DEP'T. OF CMty., TRADE, AND ECON. DEV., MODEL ACCESSORY DWELLING UNIT ORDINANCE RECOMMENDATIONS (1994) <http://mrsc.org/getmedia/3ccc6c5e-0cc9-43c1-8936-b0017c7c161e/ADUordrecommendations.pdf.aspx> (describing model ADU ordinance which local governments of a certain size in Washington must conform to).

locality's fair-share obligation for affordable housing.<sup>277</sup> Several other states have enacted modest ADU incentive programs.<sup>278</sup>

More aggressive density mandates are also on the table. In 2019, Oregon enacted a statewide upzoning bill that requires cities with at least 25,000 residents to allow fourplexes in all areas zoned for residential use, and cities with 10,000–25,000 residents to allow duplexes.<sup>279</sup> Cities that fail to bring their zoning ordinances into compliance within two to three years will have to permit duplexes and fourplexes pursuant to a default model ordinance issued by the LCDC.<sup>280</sup>

The most ambitious of the statewide upzoning bills would rezone residential parcels near transit stations for four-to-five story buildings.<sup>281</sup> California state senator Scott Wiener has been pushing this idea since early 2018,<sup>282</sup> drawing national attention to the connections between housing density, socioeconomic mobility, mass transit, and climate change.<sup>283</sup> So far his efforts have been unavailing,<sup>284</sup> but the governor has signaled support,<sup>285</sup> legislators in other states are picking up on the idea,<sup>286</sup> and it seems safe to say that statewide

277. CONN. GEN. STAT. § 8-30g (2019); FLA. STAT. § 163.31771 (2019); 42 R.I. GEN. LAWS § 42-128-8.1(b)(5) (2018).

278. See, e.g., MD. CODE ANN., HOUS. & CMTY. DEV. § 4-926 (LexisNexis 2019) (providing for loan program for affordable housing including ADUs).

279. H.B. 2001, 80th Leg. Assemb., Reg. Sess. § 2 (Or. 2019) (enacted).

280. H.B. 2001 § 3.

281. See Scott Wiener, *My Transit Density Bill (S.B. 827): Answering Common Questions and Debunking Misinformation*, EXTRANEWSFEED (Jan. 16, 2018), <https://extranewsfeed.com/my-transit-density-bill-sb-827-answering-common-questions-and-debunking-misinformation-226eaa7e1653>.

282. *Id.*; see also S.B. 50, 2019–2020 Leg. (Cal. 2019).

283. See, e.g., Conor Dougherty, *California Lawmakers Kill Housing Bill after Fierce Debate*, N.Y. TIMES (Apr. 17, 2018), <https://www.nytimes.com/2018/04/17/business/economy/california-housing.html>; Conor Dougherty & Brad Plumer, *A Bold, Devisive Plan to Wean Californians from Cars*, NY TIMES (Mar. 16, 2018), <https://www.nytimes.com/2018/03/16/business/energy-environment/climate-density.html>; Megan McArdle, *Opinion, Democrats' Housing Problem*, WASH. POST. (Apr. 19, 2018), <https://www.washingtonpost.com/blogs/post-partisan/wp/2018/04/19/democrats-housing-problem/>; Dante Ramos, *Go On, California—Blow up Your Lousy Zoning Laws*, BOS. GLOBE (Jan. 14, 2018), <https://www.bostonglobe.com/opinion/2018/01/14/california-blow-your-lousy-zoning-laws/AcT0vOJCdArOJp3cBH9zmJ/story.html>; David Roberts, *The Future of Housing Policy Is Being Decided in California*, VOX (Apr. 4, 2018), <https://www.vox.com/cities-and-urbanism/2018/2/23/17011154/sb827-california-housing-crisis>.

284. Wiener's 2017 bill, SB 827, died in its first committee vote. See Dougherty, *supra* note 283. His 2018 bill, SB 50, sailed through its first two committee hearings before an obscure legislative procedure was used to table it. See Liam Dillon, *The Revenge of the Suburbs: Why California's Effort to Build More in Single-Family-Home Neighborhoods Failed*, L.A. TIMES (May 22, 2019), <https://www.latimes.com/politics/la-pol-ca-california-sb50-failure-single-family-homes-suburbs-20190522-story.html>.

285. See Randy Shaw, *New Progress in Battling Housing Crisis*, BEYONDCHRON (Oct. 15, 2019), <http://beyondchron.org/will-ca-boost-housing-in-2020/>.

286. In Washington, an upzoning-near-transit bill covering the Seattle region has been introduced. See S.B. 5424, 2019 Reg. Sess. (Wash. 2019); Doug Trumm, *State Sen. Palumbo Plans to Introduce a Minimum Housing Density Bill*, THE URBANIST (Oct. 5, 2018), <https://www.theurbanist.org/2018/10/05/state-sen-palumbo-plans-to-introduce-a-minimum-housing-density-bill/>. In Massachusetts, one house of the legislature has voted to require every local government to zone at least one district “of reasonable size” for multi-family housing, at state-prescribed minimum densities. See S.B. 2311, 189th Gen. Court § 6 (Mass. 2016) (enacted); see also Katie

upzoning bills will be the subject of ongoing debate and attention in the years ahead, in California and beyond.<sup>287</sup>

The statewide upzoning bills have generated a lot of excitement, but it's not clear that states will be able to get local governments to allow significantly more housing simply by preempting local restrictions on size and density. The evolution of California's ADU legislation offers an instructive lesson.<sup>288</sup> The state's ADU framework dates to 1982, when the legislature decreed that local governments may disallow ADUs within residential zones only if the locality makes findings of "specific adverse impacts on the public health, safety, and welfare."<sup>289</sup> Many local governments responded by "authorizing" ADUs while requiring ADU applicants to obtain onerous, discretionary permits.<sup>290</sup> Concerned that local governments were abusing their discretion, the state legislature, in 2002, directed local governments to permit ADUs ministerially; demanded approval of ADU applications that conform to state-prescribed requirements (irrespective of local ordinances); prescribed a template to which local ADU ordinances must conform; and required local governments to submit their ADU ordinances to the state housing agency for review.<sup>291</sup> The 2002 bill did not, however, displace "height, setback, lot coverage, architectural review, site plan review, fees, charges, and other zoning requirements generally

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Lannan, *Chandler: State Senate "Ready to Go" on Housing Bill*, TELEGRAM.COM (Feb. 27, 2018), <http://www.telegram.com/news/20180227/chandler-state-senate-ready-to-go-on-housing-bill>.

287. In addition to overt density mandates, several states have tried to use regulatory safe harbors to prod local governments into zoning for greater density. Oregon, Washington, California, and New Jersey provide examples. Since the mid-2000s, California has encouraged rezoning for higher densities through a safe-harbor provision in the housing element law. Sites zoned at or above the statutory minimum densities are deemed to have adequate density, as a matter of law, to accommodate a portion of the jurisdiction's lower-income RHNA share. See Assemb. B. 2348, 2003–2004 Gen. Assemb. (Cal. 2004) (adding CAL. GOV'T CODE § 65583.2 (West 2019)). Similarly, in New Jersey, localities seeking immunity from the builder's remedy must zone at minimum densities for 20%-BMR projects. See *In re Adoption of N.J.A.C. 5:96 & 5:97*, 6 A.3d 445, 461–64 (N.J. Super. Ct. App. Div. 2010), *aff'd In re Adoption of N.J.A.C. 5:96 and 5:97*, 74 A.3d 893, 897 (N.J. 2013) (invalidating regulation which, in the court's view, would have allowed local governments to comply with their *Mt. Laurel* obligations by zoning land at insufficient density and with excessive BMR requirements). In Oregon and Washington, state agencies have derived minimum zoning densities from the principle of confining growth within urban boundaries. Oregon's latest regulation, issued in 2009, spells out density safe harbors for local governments throughout the state that seek to adjust their growth perimeter. OR. ADMIN. R. § 660-024-0040(8) (2018). The Washington Supreme Court invalidated the Growth Management Hearing Board's attempt to create "bright line" minimum urban densities. See *Viking Properties, Inc. v. Holm*, 118 P.3d 322, 329 (Wash. 2005) (en banc). However, observers see Washington as having *de facto* density requirements for land within the growth boundaries. See Egon Terplan, *Learning from Washington's Growth Management Act*, THE URBANIST (July 31, 2017), <https://www.spur.org/publications/urbanist-article/2017-07-31/learning-washington-s-growth-management-act> ("Within urban areas, most growth must be allocated with minimum densities of four units per acre.").

288. See Margaret F. Brinig & Nicole Stelle Garnett, *A Room of One's Own: Accessory Dwelling Unit Reforms and Local Parochialism*, 45 URB. LAW. 519, 541–67 (2013).

289. *Id.* at 541 (quoting 1982 Cal. Stat. 5502).

290. See ASSEMBLY FLOOR ANALYSIS, Assemb. B. 1866, 2001–2002 Leg. (Cal. Aug. 28, 2002).

291. See Assemb. B. 1866; Brinig & Garnett, *supra* note 288, at 541–43.

applicable to residential construction in the zone in which the property is located.”<sup>292</sup>

Studying the response to this statute, Margaret Brinig and Nicole Garnett collected the zoning ordinances of every California municipality with more than 50,000 people, as well as public-meeting minutes and news stories. They found that most California cities—including Los Angeles, San Diego, and San Francisco—effectively thwarted the new mandate with a “thousand paper cuts.”<sup>293</sup> Cities discouraged ADU construction via design review, costly building-material mandates, rental restrictions, owner-occupancy requirements, minimum lot sizes, conditional use permits, permit-filing fees, impact fees, and tight allowances for the permissible size of an ADU.<sup>294</sup> Some of these requirements probably violated state law, but anti-ADU local governments had few compunctions about pushing the envelope of their reserved authority.<sup>295</sup>

Frustrated by local intransigence, California enacted additional ADU bills in 2016, 2017, and 2019. The 2016 statute further constrains local requirements for parking, unit size, fire sprinklers, utility-connection fees, and lot-line setbacks.<sup>296</sup> Additional tweaks were made in 2017,<sup>297</sup> and in 2019 the legislature created an essentially unqualified right for every homeowner in the state to add a freestanding backyard ADU of up to 800 square feet, plus a “junior ADU” of up to 500 square feet within the envelope of an existing structure.<sup>298</sup> The 2019 legislation also preempted local impact fees on ADUs of up to 750 square feet.<sup>299</sup> The new measures seem to have generated a flood of ADU applications,<sup>300</sup> which suggests that local intransigence can be overcome *if* the legislature is willing to preempt a ton of local law and terminate local permitting discretion.

292. See Assemb. B. 1866 § 2 (amending CAL. GOV'T CODE § 65852.2(b)(1)(G) (West 2019)).

293. Brinig & Garnett, *supra* note 288, at 546–47; see also John Infranca, *Housing Changing Households: Regulatory Challenges for Micro-Units and Accessory Dwelling Units*, 25 STAN. L. & POL'Y REV. 53, 70–86 (2014) (detailing regulatory barriers to ADUs in five cities across the country).

294. Brinig & Garnett, *supra* note 288, at 543–66.

295. The death by a thousand cuts story also applies to so-called micro-units, an attempt to provide more affordable housing through small, dorm-like units. See David Neiman, *How Seattle Killed Micro-Housing*, SIGHTLINE INST. (Sept. 6, 2016), <https://www.sightline.org/2016/09/06/how-seattle-killed-micro-housing/>.

296. S.B. 1069, 2015–2016 Leg. (Cal. 2016) (enacted).

297. S.B. 229, 2017–2018 Leg. (Cal. 2017) (enacted) (clarifying, *inter alia*, that the restriction on utility fees applies to fees charged by special districts and water corporations).

298. See Dylan Casey, *How to Make Your Home a Triplex*, CARLA (Oct. 9, 2019), <https://carlaef.org/2019/10/09/how-to-make-your-home-a-triplex/>; Dylan Casey, *Making Sense of This Year's ADU Legislation*, CARLA (Sept. 13, 2019), <https://carlaef.org/2019/09/13/making-sense-of-this-years-adu-legislation/>.

299. S.B. 13, 2018–2019 Leg. (Cal. 2019) (enacted).

300. See David Garcia, *ADU Update: Early Lessons and Impacts of California's State and Local Policy Changes*, TERNER CTR. FOR HOUS. INNOVATION (Dec. 21, 2017), <https://turnercenter.berkeley.edu/blog/adu-update-early-lessons-and-impacts-of-californias-state-and-local-policy> (“across the board cities are seeing significant increases in ADU applications, with many cities doubling, tripling, or even quadrupling their totals from 2016”); Liam Dillon, *How Lawmakers Are Upending the California Lifestyle to Fight a Housing Shortage*, L.A. TIMES (Oct. 10, 2019) <https://www.latimes.com/california/story/2019-10-10/california-single-family-zoning-casitas-granny-flats-adus> (noting that Los Angeles has received 13,300 requests to build ADUs since 2017 legislation, a twenty-fold increase over previous application rate).

And yet, it's hard to imagine an upzoning-near-transit bill passing if the bill knocks out discretionary local control over development permitting. Notably, Senator Wiener's bills would have left in place local authority over demolition control, design standards, permitting procedures, fees, and much more.<sup>301</sup> If a similar bill is eventually enacted, local governments will have a field day inventing ways to evade it.<sup>302</sup>

### C. CONCLUSION

Spurred by the YIMBY movement, legislatures in the high-cost coastal states are showing new interest in local governments' land-use policies and are intervening in new and unambiguously pro-housing ways. There is clearly a receptive audience among state policymakers for ideas about how to overcome local NIMBYism and increase the supply of market-rate as well as BMR housing, particularly near mass transit. But there also seems to be some uncertainty about how best to proceed. Just about everything is on the table: new ways of setting housing-supply targets (national norming); new density requirements (ADUs and beyond); new tools for pressing local governments to follow their own rules (attorney's fees, evidentiary standards, time limits, as-of-right permitting, and permitting on the basis of the housing element); and more prescriptive requirements for the housing plan itself (imminently developable sites).

### IV. A WAY FORWARD: "HOUSING ELEMENTS" AS TOP-DOWN AND BOTTOM-UP DEVICES FOR OVERCOMING LOCAL BARRIERS TO HOUSING

This Part takes up the "how best to proceed" question. Without purporting to offer a universal answer—there probably is none—I will suggest a variation on the emerging California model of the housing element as a preemptive intergovernmental compact for development permitting. The argument sounds in political economy, not normative theory. I take it as given that economically productive metro areas should allow a lot more housing to be built, especially in high-density forms near transit. The question is how to get them to allow it.

Today the California model, like its West Coast antecedents, represents a largely top-down strategy for controlling local barriers to housing supply.<sup>303</sup> The state tells local governments how much new housing they must accommodate through their housing elements, and the state uses the threat of fiscal and

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301. For an explanation from its author, see Scott Wiener, *S.B. 827 Retains an Awful Lot of Local Control and Community Planning*, MEDIUM (Apr. 8, 2018), [https://medium.com/@Scott\\_Wiener/sb-827-retains-an-awful-lot-of-local-control-and-community-planning-b1d111fc1007](https://medium.com/@Scott_Wiener/sb-827-retains-an-awful-lot-of-local-control-and-community-planning-b1d111fc1007).

302. That said, a statewide upzoning-near-transit bill would probably accomplish more in California than in most other states, because California's Housing Accountability Act makes it difficult for local governments to impose discretionary conditions on otherwise permissible projects whose effect is tantamount to reducing the project's density. See *supra* notes 248–256 and accompanying text. But local governments could still impose nondiscretionary fee, design, labor, and affordability requirements that make many transit-near-density projects uneconomic to build.

303. See *supra* Subpart III.A.2.

regulatory sanctions to induce local governments to adopt compliant housing elements.<sup>304</sup> It is a fair question, though, whether any high-cost state will be able to expand the supply of housing substantially without changing the *local* politics of housing—the political dynamics in cities and suburbs that led to decades of underproduction.

A central contribution of this Part is to show that the emerging California model can readily be adapted to put bottom-up as well as top-down pressure on local barriers to housing supply. Specifically, with a few modest extensions, the California framework could be used to increase the political leverage and policymaking discretion of relatively pro-housing factions in city politics, and to facilitate regional housing deals by enabling local governments to make credible commitments to one another.

Boiled down to essentials, the proposed variation on the California model combines a procedure for periodically (and unobtrusively) redefining the local regulatory baseline for housing development, in keeping with the state's goals; a mechanism to guard the new baseline against the retrogressive tactics of local governments; and interventions that redistribute policymaking authority toward relatively pro-housing factions at the local level.

In defending this approach, I develop a historical analogy to Jim Crow and the federal Voting Rights Act (VRA). The problem states now face in trying to control local barriers to housing supply is structurally quite similar to the problem the federal government faced in the 1960s when it undertook to dismantle the regime of publicly enforced racial hierarchy that prevailed throughout the South. In both cases, a central government seeks to control the behavior of local officials whose political incentives operate at cross purposes with the objectives of the central government. In both cases, the central government lacks the political will or administrative resources to entirely subsume the local government's functions.

The VRA tackled the local-political-incentives problem by defining a new regulatory baseline for voting, one which enfranchised black citizens *en masse*.<sup>305</sup> White office holders then had to answer to black preferences—or else find some new way to keep blacks from voting.<sup>306</sup> To forestall local evasion of the new regulatory baseline, VRA provided for centralized, pre-implementation review of all future changes to voting standards and procedures.<sup>307</sup> My variation on the California model embodies the same basic ideas—new regulatory baselines, preclearance to guard against retrogression, and redistribution of political power—but adapts them to deal with a context in which there is no general consensus about what the new baseline should be, doubtful support for centralizing control over the traditionally local government function in question,

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304. See *supra* Subpart III.A.2.

305. See *infra* Subpart IV.B.1.

306. See *infra* Subpart IV.B.1.

307. See *infra* Subpart IV.B.1.

and no easy enfranchisement-oriented solution for the political incentive problem.<sup>308</sup>

Subpart IV.A lays out the elements of my proposal, and briefly explains what further reforms would be needed to fully realize it in the state that's come closest to date, California. Subpart IV.B explains the model's top-down and bottom-up mechanisms for inducing local governments to relax locally erected barriers to new housing.

#### A. ELEMENTS OF THE MODEL

Extending California's recent innovations, the model I shall defend has the following components:

(1) The state, through a housing agency under control of the governor, periodically determines the minimum amount of new housing that each region of the state shall accommodate over the planning cycle. The agency or a regional council of governments then divvies up the regional need among local governments. Both the need determination and the divvying should be grounded in economic conditions—not population projections—so that new housing is added where it would be more valuable, and so that escalating prices result in higher housing quotas. (Alternatively, the state might just require all economically significant regions to maintain a substantial potential-housing buffer, such as, capacity to accommodate a 30–50% increase in the housing stock over the course of a decade.)<sup>309</sup>

(2) After receiving their housing targets, local governments must draft and submit to the state housing agency a parcel-specific “housing element,” in which the locality explains how it will accommodate its share of state-determined housing need, or the housing buffer, over the planning cycle. The housing element may spell out or incorporate by reference zoning, fees, and development standards and procedures applicable to the parcels. It must also identify local constraints to development of the planned-for housing, and set forth a schedule of actions to mitigate or remove unreasonable constraints.

(3) A state-certified housing element, once enacted by the local government, becomes the local government's highest law with respect to land use, at least until the local government has produced its quota of housing for the cycle.<sup>310</sup> It supersedes any contrary provisions found in local regulations, ordinances, ballot measures, the general plan, or the city or county charter. (This is the sense in which the model establishes a preemptive compact. A state-law framework empowers the local legislative body and the state agency *acting together* to preempt contrary local law, including law that the municipal legislature cannot override on its own, such as the city charter.)

(4) To reduce information costs for developers and planning department staffers, housing elements should include an appendix listing any local ordinances, regulations, or charter provisions that the local government and the state agency agree to deem preempted by the housing element. Some such

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308. Local officials might be less resistant to new housing if potential future residents were enfranchised to vote in local-government elections, but this would require a radical break with traditional civic arrangements.

309. See *supra* Subpart IV.A.

310. The state might allow local governments to restrict development in ways that contravene commitments made in the housing element after the local government has produced its quota of housing for the cycle.

measures may be preempted as of the date of the housing element's enactment, while others may be preempted prospectively. (For example, the housing element might deem an identified constraint to be preempted in the future if it is not reformed by the date listed in the housing element's schedule of actions to ameliorate constraints.)

(5) To discourage local hamstringing of projects that comply with size and density conditions specified in the housing plan, the state should authorize developers and third-party interest groups to bring as-applied challenges to local regulations and procedures, while flipping the traditional presumption of consistency. Thus, just as California's HAA now stipulates that housing projects shall be deemed compliant with applicable standards if there is substantial evidence in the record that would allow a reasonable person to find the project compliant, housing projects should also be deemed *exempt* from any local procedure, fee, or other requirement if there is substantial evidence in the record that would allow a reasonable person to find the requirement, as applied to the project in question, inconsistent with the housing element.

(6) A housing element "substantially complies" with state law if (a) the state agency determines that the local government, operating with the housing element in place, is substantially certain to meet its housing quota, or (b) the agency concludes that achievement of the quota is uncertain, or infeasible without public subsidy, but that the housing element removes or appropriately commits the local government to removing all unreasonable or unnecessary regulatory and procedural constraints to meeting the housing target.<sup>311</sup> Courts should defer to the agency's certification decision if supported by substantial evidence.<sup>312</sup> The housing agency should have authority to establish, by regulation, classes of presumptively unreasonable constraints.

(7) A local government may amend its housing element during the planning cycle if the locality gives the state agency proper notice including written findings about whether the amendment would or would not render the housing element noncompliant.<sup>313</sup> The agency may respond with suggestions, requests for further information, and, as appropriate, warnings about decertification. The local government shall again notify the agency upon adoption of the amendment, at which point the agency shall either recertify or decertify the housing element.<sup>314</sup> Decertification would strip the housing element of its preemptive force *vis-à-vis* provisions of local law that

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311. Here, a slight variation in word choice ("unreasonable" vs. "unnecessary") may end up being consequential, as "necessity" connotes a stricter standard than "reasonable." Note also that if the state adopts the "potential-housing buffer" approach at step (1), then housing element validity will usually be evaluated under (4)(b), because market conditions will not usually support a 30–50% expansion of the housing stock over the planning cycle even in the absence of regulatory constraints.

312. If the agency fails to act on a housing element within a brief period of time (say, sixty days), the element shall be deemed certified by operation of law.

313. If it proves necessary, the state could further strengthen the framework by stipulating that housing elements and housing-element amendments to which the state agency has properly objected may be adopted only through an exceptional local legislative procedure such as, for example, supermajority vote of the city council, or supermajority council vote followed by referendum approval.

314. If the agency fails to act within a reasonable period of time (say, sixty days), the housing element would be deemed recertified as a matter of law.

take precedence over ordinary municipal legislation (such as provisions found in the charter or adopted by popular vote).

(8) Local governments shall report annually to the state housing agency on development applications received, applications approved and denied, time from submittal of application to final approval/denial, and anything else that the state agency deems reasonably necessary for monitoring implementation of housing elements.

(9) Local governments that lack a current, state-approved housing element, or whose housing element has been decertified, should face substantial and prompt pecuniary sanctions.

(10) If a local government fails to enact a certified housing element by the statutory deadline, the mayor, with the approval of the state housing agency, should be authorized to issue an interim housing element.<sup>315</sup> An interim housing element would have the same legal effect as a regularly adopted housing element, but shall lapse in (say) 180 days, unless reissued by the mayor and reconfirmed by the housing agency at that time. Development proposals submitted while an interim housing element is in effect shall be permitted on the basis of it, even if the permitting decision occurs after the interim element has lapsed or been replaced.

To be clear, neither California nor any other state has fully realized this model. As of this writing, California still falls short in several significant respects:

*First*, California has just begun to wrestle with the inadequacies of the population-forecast approach to determining housing need.<sup>316</sup> The state is feeling its way toward an alternative, but the shape of what's to come is not yet apparent.

*Second*, it's doubtful that local governments may use the housing element to suspend constraints found in the city charter or adopted by voters, outside of extreme cases where the measure at issue unequivocally disables the local government from meeting its RHNA target.<sup>317</sup> Courts have done backflips to

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315. For cities without a mayor-council form of government, the state could delegate authority to issue interim housing elements to the city manager, or to the president of the city council. Also, a state-approved interim housing element should either be exempt from review under the California Environmental Quality Act (CEQA), or subject to review but not subject to being enjoined if environmental review has not been completed prior to issuance of the housing element. CEQA-induced delays would defeat the whole point of interim housing elements—namely, ensuring that local governments have an up-to-date, compliant housing element in place, and thereby avoiding the environmental and social harms associated with a lack of sufficient, appropriately located new housing.

316. See *supra* notes 211–222 and accompanying text.

317. The main source of the doubt is a provision stating, “Nothing in this article shall be construed to be a grant of authority . . . with respect to measures that may be undertaken or required by a local government to be undertaken to implement the housing element of the local general plan.” CAL. GOV'T CODE § 65589(c) (West 2019). Since municipal legislative bodies ordinarily lack authority to override voter-adopted or charter-embedded measures, treating the housing element as superseding such measures would be tantamount to treating the housing element article of the government code as a “grant of authority” to municipal legislatures. For examples of extreme cases where voter-adopted measures were found to be preempted, see *Bldg. Indus. Ass'n v. Oceanside*, 33 Cal. Rptr. 2d 137 (Ct. App. 1994); *Urban Habitat Program v. Pleasanton*, No. RG06-293831 (Cal. Super. Ct. Mar. 12, 2010).

preserve voter-adopted measures that make it difficult, if not facially impossible, for the local government to accommodate its RHNA share.<sup>318</sup>

*Third*, local governments can still throw up lots of barriers to housing-element-compliant projects. While recent reforms to the HAA prevent local governments from denying or reducing the density of a project on the basis of zoning that a reasonable person could deem inconsistent with the plan (including the housing element),<sup>319</sup> the HAA does not exempt projects from fees, procedures, and other non-zoning constraints at cross purposes with the plan. Finally, there is no established convention, such as a “preemption appendix,” for giving low-cost notice to developers and planning staff about any features of the local development process that the local government agrees to deem preempted by the housing element.

*Fourth*, California has no provision for interim housing elements. One city, Encinitas, has gummed up the state framework with a charter provision requiring housing elements to be enacted by referendum vote.<sup>320</sup> The city’s voters have consistently rejected the housing elements presented to them.<sup>321</sup> As the housing element becomes more legally consequential under state law, other cities are likely to parrot Encinitas unless the state neutralizes their efforts.

*Fifth*, the state legislature has not adopted an explicit, functional definition of what constitutes a “substantially compliant” housing element—although the definition proposed here is similar to the definition that HCD now uses,<sup>322</sup> and it’s arguable that HCD’s definition has been tacitly ratified by the legislature.<sup>323</sup>

These caveats notwithstanding, California has certainly taken big steps toward the model I have sketched. The state has strengthened the preemptive force of the housing element and made it self-executing in key respects;<sup>324</sup>

318. See, e.g., *Shea Homes Ltd. v. Alameda*, 2 Cal. Rptr. 3d 739 (Ct. App. 2003) (rejecting preemption claim because it was possible that the measure would not conflict with housing element, at least if voters approved certain measures in the future); cf. *Bldg. Indus. Ass’n of San Diego v. Encinitas*, No. 37-2017-00023267-CU-WM-NC (Cal. Super. Ct. Dec. 12, 2018) (declining to enjoin voter-approval requirement for future housing elements because the city’s voters might behave reasonably in the future, notwithstanding their rejection of every housing element considered in the previous thirty years).

319. See *supra* text accompanying notes 238–242.

320. *Bldg. Indus. Ass’n of San Diego*, slip op. at 4; *Judge Orders the City of Encinitas to Adopt a Housing Element; City’s First Since 1992*, PUB. INTEREST LAW PROJECT (Jan. 9, 2019), <http://www.pilpca.org/2019/01/09/encinitas-housing-element-order/> (noting that city has not enacted a housing element update for nearly thirty years). While the court order in *Bldg. Indus. Ass’n of San Diego* counts as a one-time success, the court refused to enjoin Encinitas’s voter-approval requirement prospectively, so the strategy of embedding voter- or supermajority-approval requirements in city charters may still be attractive to NIMBY activists hoping to gum up the housing-element process or pressure HCD into approving weak housing elements.

321. Barbara Henry, *Encinitas Voters Turn Down City’s Latest Housing Plan Ballot Measure*, THE SAN DIEGO UNION-TRIBUNE (Nov. 7, 2018) <https://www.sandiegouniontribune.com/sd-no-housing-plan-20181107-story.html>.

322. See Kautz, *supra* note 224 (“the Department’s review considers the adequacy of information, program commitments and timeframes to meet various statutory goals and objectives”).

323. Compare *supra* notes 182–184 and accompanying text (explaining traditional standard of review), with notes 222–229 and accompanying text (arguing that recent legislation supports functional compliance standard, and noting HCD’s gloss on substantial compliance).

324. See *supra* Subpart III.A.2.

housing-need determinations are now supposed to reflect national norms concerning “healthy housing markets;”<sup>325</sup> the housing agency and (more tacitly) the legislature have pushed back against the traditional, deferential-to-local-governments conception of “substantial compliance”;<sup>326</sup> and the legislature has subjected local governments that remain out of compliance to a schedule of escalating fiscal penalties.<sup>327</sup>

#### B. THE CASE FOR THE MODEL

The case for my proposal depends on the nature of the problem to be solved. From the point of view of a YIMBY state legislator who, let us assume, is well versed in the relevant economics, political science, and legal-academic literatures, the problem of overcoming locally-erected barriers to housing has the following salient features: extreme but geographically uneven preference conflict between state and local officials; substantial intracity conflicts over housing policy, at least in larger cities; asymmetric information (local governments have the advantage); a tradition of local control over land use; and weak or uncertain support in the statewide electorate for transferring control to the state.

(1) Extreme but geographically uneven preference conflict between the state government (which wants more housing) and the municipal actors responsible for zoning and project permitting, many of whom want to preserve the status quo.

As Part I explained, many local governments in expensive regions of the nation are dominated by homevoters who have strong financial interests in opposing new housing—especially housing in their neighborhoods—and who vote accordingly. Making the state/local conflict all the more intense is the fact that new housing can change local electorates in ways that threaten incumbent officeholders. Imagine a sleepy suburb of single-family homes that is compelled to permit five-story residential buildings within a half mile of transit stations, as a California lawmaker has proposed.<sup>328</sup> In come thousands of new residents whose land-use preferences are likely to be quite different than those of the existing homeowners.<sup>329</sup> Local politicians who’ve built their brands serving

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325. *See supra* Subpart III.A.1.

326. *See supra* Subpart III.A.2.

327. *See supra* Subpart III.A.2. The legislature has also removed some exceptions that charter cities previously enjoyed. *See* S.B. 1333, 2017–2018 Leg. (Cal. 2018) (amending CAL. GOV’T CODE § 65700 to apply consistency and other requirements to charter cities). These amendments respond to *The Kennedy Comm’n v. Huntington Beach*, 224 Cal. Rptr. 3d 665 (Ct. App. 2017) (holding that charter cities are not required to make zoning and specific plans consistent with their housing element).

328. *See supra* text accompanying notes 281–283.

329. If the newcomers are renters, they’ll support the development of more rental housing (though perhaps not in their neighborhoods). *See* Hankinson, *supra* note 69. And even as owners, they’ll probably have a greater taste for density, and less willingness to pay for roads and parking, than existing residents who own dispersed single-family homes.

homogenous, single-family-home neighborhoods will have a strong personal incentive to block the change, not just to put on a show opposing it.

That said, the degree of state/local preference conflict over new housing is geographically uneven. The state wants a lot more housing in some places (near transit and employment centers), but not in others (environmentally sensitive lands, and places where prices haven't escalated). And among the local governments targeted for more housing, opposition to the state's agenda is likely to be much stronger in affluent, homogenous communities where nearly everyone is a homeowner than in mixed polities where renters make up a large share of the electorate.<sup>330</sup> Opposition may also be weaker in communities that elect their local governments at-large rather than by-district.<sup>331</sup>

(2) Intracity conflict over housing policy, the outcome of which may depend on procedural rules and the relative strength of the mayor and the city council.

Particularly in cities that are socioeconomically and housing-tenure diverse, housing policy is likely to be an ongoing source of political conflict and compromise rather than an issue on which homevoters always get their way. Business interests may be forceful advocates for pro-growth policies,<sup>332</sup> while neighborhood groups will favor local restrictions. Mayors, to a first approximation, are likely to be more supportive of liberal housing policies than city councilpersons elected from territorial districts.<sup>333</sup> This is so because mayors answer to city-wide electorates, not district-specific constituencies (where neighborhood groups are well organized), and because mayors run in relatively expensive elections (making them more dependent on deep-pocketed business interests).<sup>334</sup> As well, because of their higher profile, mayors have a better

330. But as Subpart I.B. explained, many big cities are also showing "NIMBY" characteristics.

331. See Michael Hankinson & Asya Magazinnik, *How Electoral Institutions Shape the Efficiency and Equity of Distributive Policy* (Sept. 17, 2019) (unpublished working paper), [http://mhankinson.com/assets/hankinson\\_magazinnik.pdf](http://mhankinson.com/assets/hankinson_magazinnik.pdf) (finding that shifts from at-large to by-district elections induced by the California Voting Rights Act caused substantial reductions in number of housing permits issued citywide). Researchers have also found that zoning was adopted earlier in cities that elected their councils by-district rather than at-large, and that cities with by-district elections have more exclusionary zoning codes. See James Clingermayer, *Distributive Politics, Ward Representation, and the Spread of Zoning*, 77 PUB. CHOICE 725, 730, 733–34 (1993); James Clingermayer, *Electoral Representation, Zoning Politics, and the Exclusion of Group Homes*, 47 POL. RES. Q. 969, 975–78 (1994). This is consistent with the idea that neighborhood/homevoter interests have more power under districted than at-large electoral systems. See Aaron Deslatte et al., *Policy of Delay: Evidence from a Bayesian Analysis of Metropolitan Land-Use Choices*, 46 POL'Y STUD. J. 674, 689–90 (2018) (finding that in cities with districted elections, the degree of building-industry concentration has weaker influence on permitting delays).

332. An increase in housing supply that brings down prices would raise the effective (real) wage paid to workers, at no cost to employers.

333. See Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 112–15, 124–29 (2015) [hereinafter Hills, Jr. & Schleicher, *Planning*]. Notably, the pending California bills to upzone all land in the state near transit and job centers for four-to-five story buildings has (as of this writing) been endorsed by the mayors of San Francisco, Oakland, San Jose, Sacramento, and Stockton, but no endorsements from city council members have been announced. Scott Wiener (@Scott\_Wiener), TWITTER (Jan. 17, 2019, 8:20 AM), [https://twitter.com/Scott\\_Wiener/status/1085934772717641728](https://twitter.com/Scott_Wiener/status/1085934772717641728).

334. Hills, Jr. & Schleicher, *Planning*, *supra* note 333, at 112–15, 124–29.

chance than city members of developing a personal brand known to voters,<sup>335</sup> which may provide some buffering against the discontent of homevoters reacting to neighborhood change.

One consequence of these intracity conflicts (coupled with a lack of strong parties in municipal legislatures) is that the procedures through which land-use policy is developed can have big consequences for housing outcomes.<sup>336</sup> Specifically, as Rick Hills and David Schleicher have argued, a city's policy is likely to be more accommodative of new housing if it is forged through citywide grand bargains, rather than worked out seriatim through project- or site-specific decisions.<sup>337</sup> The seriatim, project-specific approach privileges the interests of those who have the most at stake in individual projects (like the neighborhood NIMBYs),<sup>338</sup> whereas the prospect of a grand bargain can activate groups that would benefit from a big citywide or regional increase in the supply of housing (such as employers and municipal labor unions), particularly if the mayor plays an agenda-setting role.<sup>339</sup>

(3) Asymmetric information about how best to reconcile the state's desire for more housing with local preferences over urban form and community character.

YIMBY state legislators know they want a lot more housing, and higher density housing, in expensive regions of the state. But they probably have little if any idea about how to assemble a given number of units into a built-form package that minimizes public opposition in any given locale. The local officials who make project-approval decisions on a daily basis are likely to have a much better sense of this.

(4) A deeply rooted tradition of discretionary local control over land use, such that local governments have an enormous variety of tools with which to vitiate prescriptive mandates from the state.

We saw in Part III that state legislators are increasingly willing to tell local governments that they must allow certain types of housing (like ADUs), or certain densities of housing. But as evidenced by the nearly forty-year game of cat and mouse that California has played with local governments over ADUs, it's doubtful that nondiscrimination requirements ("treat housing type X the

335. See Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2 U. ILL. L. REV. 363, 398–403 (2013).

336. More specifically, it is internal conflict plus the lack of meaningful partisan competition for control of city government that makes the procedural rules so important. See Roderick M. Hills, Jr. & David Schleicher, *Balancing the "Zoning Budget"*, 62 CASE W. RES. L. REV. 81, 124–27 (2011) [hereinafter Hills, Jr. & Schleicher, *Balancing*].

337. See *id.*; Hills, Jr. & Schleicher, *Planning*, *supra* note 333.

338. Cf. Katherine Levine Einstein et al., *Who Participates in Local Government? Evidence from Meeting Minutes*, 17 PERSP. ON POL. 28, 28–46 (2019) (studying minutes of planning and zoning board meetings in the Boston area and finding that homeowners are vastly overrepresented among people who comment on land-use issues, and nearly always speak in opposition to proposed developments).

339. Business interests are hard to engage on individual projects (which considered in isolation have no tangible effect on the regional housing market), but will be highly motivated to lobby on proposals that would materially increase the total supply of housing in the labor markets from which they hire. See *supra* note 332.

same as housing type Y”) or narrow mandates (“allow housing type X on parcels zoned for single-family homes”) will actually result in local governments permitting a lot more housing. Such requirements do not prevent local agencies from exercising their permitting discretion to stymie projects they dislike,<sup>340</sup> or from enacting facially neutral ordinances that make the state-favored housing type tough to develop.

To be sure, California’s HAA generally prevents local governments from denying or reducing the density of projects that comply with objective standards, but the Act does not prevent local governments from otherwise *conditioning* projects in extremely subjective ways.<sup>341</sup> So it was that San Francisco’s planning commission recently demanded changes to an infill condo development because the windows looked too upscale,<sup>342</sup> and turned back a small ADU-and-an-addition project because the commission thought the architect could improve the unit’s internal layout.<sup>343</sup> This kind of nitpicking leads to interminable delays, and positions anti-development factions to weigh down projects with uneconomic conditions.<sup>344</sup>

(5) Weak or (at best) highly uncertain support in the statewide electorate for consolidating state control over zoning and development permitting.

Strong conflicts between state and local preferences often give rise to field preemption,<sup>345</sup> so perhaps it’s not surprising that California has cut off most local discretion with respect to ADUs. Yet thoroughgoing state control over ADUs is probably tenable only because ADUs pose such trivial threats to neighborhood character and homeowner wealth. No interest group cares enough to wage a big battle against ADU mandates. At some point, though, strong pro-housing interventions by the state may engender serious pushback, such as a ballot initiative to constitutionalize local control over land use.<sup>346</sup> Should that occur,

340. See sources cited, *supra* note 36.

341. See CAL. GOV’T CODE § 65589.5(j)(1) & (5) (West 2019).

342. See Laura Wenus, *Development Delayed as SF Commission Wants Less Aggressive Design*, MISSIONLOCAL (Feb. 24, 2017), <https://missionlocal.org/2017/02/development-delayed-as-sf-commission-wants-less-aggressive-design/> (quoting planning commissioner Myrna Melgar, “Big windows, to me, are a statement of class and privilege”).

343. See Scott Feeney (@grauc), TWITTER (Aug. 23, 2018, 6:16 P.M.), <https://twitter.com/grauc/status/1032798736160718849>.

344. The HAA’s distinction between density-reducing and non-density reducing conditions is rather arbitrary, because a significant risk of substantial conditions or delays will deter developers from even proposing redevelopment projects that are only modestly more profitable than the next best use of the land.

345. See generally Richard Briffault, Essay, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018) (exploring city-level enactment of liberal policies and state-level preemption of those same policies in states with Republican-dominated legislatures and Democratic cities).

346. In California, an umbrella organization of anti-housing activists recently formed to lobby the state and support allied candidates for local and state offices. See *Livable California Celebrates Candidates*, LIVABLE CAL. (Nov. 10, 2018), <https://www.livablecalifornia.org/second-post/> (documenting the group’s actions). As of this writing, there are two pending state-constitutional “home rule” challenges to SB 35—the 2017 state statute which requires expedited, by-right permitting of certain projects—if the local government has failed to meet its housing targets. See generally *Petition for Writ of Mandamus and a Complaint for Declaratory Relief and Injunctive Relief, Huntington Beach v. State*, No. 30-2018-00984280-CU-WM-CJC (Cal. Super. Ct. Apr. 4,

it's not at all clear that YIMBYs would prevail. Some recent opinion polls suggest that a supermajority of the California electorate objects to giving the state more authority over development permitting,<sup>347</sup> although other polls find broad support for higher density housing near transit.<sup>348</sup> Public opinion outside of California appears to be quite protective of local control, but there has not been much work on the subject.<sup>349</sup>

\* \* \*

To sum up, the housing problem is a very tough nut: the preferences of local officials tend to diverge sharply from the preferences of the pro-housing faction in state government; local governments can vitiate state mandates by exploiting their permitting discretion, residual regulatory authority, and superior information; and state lawmakers who would like to wrest control of zoning and development permitting from local governments cannot count on support from the statewide electorate.

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2018); Letter from Dee Williams-Ridley, City Manager, City of Berkeley Planning & Dev. Dep't, to Dana Ellsworth (Sept. 4, 2018), [https://www.cityofberkeley.info/uploadedFiles/Clerk/Level\\_3\\_-\\_General/1900%20Fourth%20Street%20090418.pdf](https://www.cityofberkeley.info/uploadedFiles/Clerk/Level_3_-_General/1900%20Fourth%20Street%20090418.pdf) (denying SB 35 permit application on ground that state law is unconstitutional). I expect the SB 35 challenges to fail, but their failure could catalyze a ballot initiative to expand cities' home rule powers over land use.

347. See USCDORNSLIFE, USC DORNSIFE/LOS ANGELES TIMES CALIFORNIA POLL (2018), <https://dornsife.usc.edu/unruh/past-polls/>. The study found that, by a 3:1 margin, registered and likely California voters endorsed proposition that “[t]he authority to approve housing developments should remain primarily with cities and counties,” as opposed to “[t]he state should have greater authority to approve housing developments than it does now.” *Id.* at 8. It also found that voters are more than twice as likely to attribute housing unaffordability to “lack of rent control” and “lack of funding for low income housing,” than to “too little homebuilding” or “restrictive zoning rules.” *Id.* at 7. For more on this, see Carson Bruno, *Californians See the Housing Affordability Crisis as a Threat to the California Dream*, EUREKA (May 19, 2015), <https://www.hoover.org/research/californians-see-housing-affordability-crisis-threat-california-dream> (reporting results of Hoover Institution poll, finding that (1) while most Californians see housing affordability as a big problem, only about a third favor relaxing zoning or open-space requirements to accommodate more housing; and (2) that when respondents were asked about “new housing in your area,” the only type of housing to receive majority support was single family homes with large yards).

348. See *Californians & Their Government*, *supra* note 69, at 5 (finding that “62 percent [of likely voters] favor requiring local governments to change zoning for new development from single-family to multi-family housing near transit and job centers”).

349. Marble & Nall, *supra* note 69. The authors recently surveyed residents of the nation's twenty largest metro areas and found overwhelming support for “giving neighborhoods more voice over development proposals.” *See id.* at 13, tbl.A-5. Conversely, they found a lack of support for “changing local laws to allow more construction.” *See id.* They also asked about a hypothetical state law to require local governments to allow apartment buildings and found majority support only among those renters who also favor a national housing guarantee. *See id.* While one might think that liberal homeowners would be moved to support high-density housing, the authors show that self-interest trumps ideology. For a useful comparison, see Hankinson, *supra* note 69, at 491, figs. C8 & C9 (reporting results from national survey showing that in average-to-expensive cities, only about 25% of homeowners would support a 10% increase in the citywide housing supply, whereas about 50%–60% of renters in the same cities would support the policy); *see also* Andrew H. Whittemore & Todd K. BenDor, *Exploring the Acceptability of Densification: How Positive Framing and Source Credibility Can Change Attitudes*, 10 URB. AFF. REV. 1, 24–28 (2018) (finding in a national survey that several positive frames reduced, rather than increased, homeowners' support for a denser-than-typical residential project in their neighborhood).

As the balance of this Subpart will explain, the model I have outlined—building on and extending the recent California reforms—aims to crack the housing nut with complementary top-down and bottom-up forces. Applying pressure from above, the state would use the threat of fiscal penalties to get local governments to periodically revisit and liberalize their entire framework for housing development, including zoning maps, development standards and fees, permitting procedures, and anything else that might stand in the way of achieving the local government’s quota of new housing. This periodic redefinition of the local regulatory baseline would occur in a manner that is politically discreet, sensitive to information asymmetries, and resistant to backsliding. The complementary, bottom-up strategy is to subtly shift the balance of local policymaking authority toward more housing-tolerant factions, while giving these factions the ability to use state law to make credible regulatory-reform commitments.

*1. From the Top Down: Baseline Change and Lock-In, Done Discreetly*

It should now be clear that if states are to curtail local barriers to the supply of housing, it is not enough to preempt discrete local rules, such as height and density limits near transit stations. Changes to the regulatory status quo must be backstopped against the evasive tactics of local governments wielding residual regulatory authority and permitting discretion. The bigger the intervention, the greater the need for backstopping.

There is one seminal example of a higher-level government acting under conditions of extreme preference conflict to change the regulatory status quo among lower-level governments, while effectively backstopping the new regulatory baseline against evasion: the Voting Rights Act of 1965 (VRA),<sup>350</sup> through which Congress overcame generations of black disenfranchisement in the South.<sup>351</sup> The variation on the California model I have sketched represents an effort to borrow and adapt the VRA paradigm.

Structurally, the problem facing Congress in 1965 was in key respects quite similar to the problem faced today by state lawmakers trying to induce local governments to allow a lot more housing in areas of economic opportunity. In both cases, the central government wants local governments to heed the interests of a class of outsiders (blacks in the VRA example, would-be residents in the housing example), but the local governments don’t allow the outsiders to vote in their elections, and the interests of the excluded outsiders are at war with the interests of those who do vote.<sup>352</sup> In both cases, adherence to the central

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350. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (1965).

351. See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 206–17 (2009); J. MORGAN KOUSSER, *COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION* (1991).

352. There is also considerable evidence that opposition to new, higher-density housing is exacerbated by cultural or racial hostility to would-be newcomers, particularly among conservatives. See Jonathan Mummolo & Clayton Nall, *Why Partisans Do Not Sort: The Constraints on Political Segregation*, 79 J. POLITICS 45, 48–49 (2017) (showing that conservatives prefer racially homogenous neighborhoods); Trounstine, *supra* note 76,

government's policies would transform local electorates in ways that could jeopardize incumbent politicians' hold on office.<sup>353</sup> In both cases, preference conflict between the central government and local governments varies with geography. By the mid-20th century, black disenfranchisement was mostly a Southern phenomenon, and within the South, blacks were geographically concentrated.<sup>354</sup>

So, what did the federal government do about black disenfranchisement? Initially, it tried to enforce the 15th Amendment with affirmative litigation.<sup>355</sup> By the 1950s, many federal courts stood ready to enjoin unconstitutional discrimination against black voters, but prescriptive mandates in the form of injunctions didn't achieve much black enfranchisement.<sup>356</sup> When one discriminatory law was invalidated, another would be enacted to take its place.<sup>357</sup> When voting registrars were personally enjoined from violating the rights of African Americans, they would resign and the jurisdiction would move to have the injunction lifted, thus positioning a newly appointed registrar to continue his predecessor's unconstitutional conduct.<sup>358</sup>

But with the VRA, the cat finally caught the mouse. Congress's solution for Jim Crow disenfranchisement was to ban one particularly damaging instrumentality of racial discrimination—tests of literacy and moral character as a prerequisite to voting<sup>359</sup>—and to backstop the ban by *conditionally preempting all changes* to state and local electoral practices in the South.<sup>360</sup> No electoral reform in the so-called “covered jurisdictions” could take effect unless approved by the U.S. Department of Justice or the District Court for the District of Columbia.<sup>361</sup> The burden of proof in these preclearance proceedings was on the covered jurisdiction to show that the change was neither intended to make minority voters worse off (“retrogression”), nor likely to have that effect.<sup>362</sup> In

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at 10 (showing that “whiteness” of precinct is strongly correlated with support for growth controls, and that restrictive land use policies exacerbate racial segregation).

353. Cf. *supra* text accompanying notes 328–329 (describing transformation of local electorate's land-use preferences that may result from introduction of dense residential buildings, especially rental buildings, into neighborhoods of single family homes).

354. On Southern politics and racial conflict at the time, see V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* (1949). Among jurisdictions covered by the Voting Rights Act of 1965, the share of the adult population that voted in the presidential election of 1964 was at least twelve percentage points lower than the national average. *South Carolina v. Katzenbach*, 383 U.S. 301, 300 (1966).

355. See SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 715–17 (5th ed. 2016); KEYSSAR, *supra* note 351; BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* (2007).

356. ISSACHAROFF, ET AL., *supra* note 355; KEYSSAR, *supra* note 351; LANDSBERG, *supra* note 355.

357. ISSACHAROFF, ET AL., *supra* note 355; KEYSSAR, *supra* note 351; LANDSBERG, *supra* note 355.

358. ISSACHAROFF, ET AL., *supra* note 355; KEYSSAR, *supra* note 351; LANDSBERG, *supra* note 355.

359. Voting Rights Act § 4.

360. Voting Rights Act § 5.

361. *Id.*

362. *Id.* The retrogression standard is a judicial gloss. See *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 328 (2000); *Beer v. United States*, 425 U.S. 130, 141 (1976).

short, Congress both changed the regulatory baseline for voting and locked in the new baseline with the preclearance mechanism.

It was an elegant solution. The ban on literacy and moral-character tests knocked out the principal source of local discretion with respect to voter registration, and thus the channel of *sub rosa* discrimination.<sup>363</sup> Meanwhile, the preclearance framework adroitly navigated between two competing dangers: the risk that a covered jurisdiction would invent some discriminatory substitute for literacy tests, and the risk that the federal administrator would push the covered jurisdictions too hard, inducing so much local opposition as to inadvertently fell the whole regime. The substantive modesty of the retrogression standard, which allowed local governments to change their practices in any way that did not make minority voters worse off, limited the risk of administrative overreach.<sup>364</sup> Conversely, the procedural requirement that covered jurisdictions bear the burden of proving that proposed changes were non-retrogressive made it difficult for subnational governments to exploit asymmetric information about the likely effects of a change. If the federal administrator couldn't tell whether a change would make minority voters worse off, the law required her to block it, unless or until the subnational government revealed why the change would not be retrogressive.<sup>365</sup>

The VRA was enormously successful. Registration and turnout rates among African Americans in the South surged almost overnight.<sup>366</sup> Several studies comparing adjacent “covered” and “noncovered” counties show that blacks in the covered jurisdictions realized huge gains in non-electoral domains as well, such as labor market outcomes.<sup>367</sup> Once blacks could vote, Southern politicians paid attention to their interests.<sup>368</sup>

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363. See Daniel S. Goldman, Note, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 620 (2004), and sources cited therein.

364. It's not clear whether “retrogression” was the standard envisioned by Congress in 1965, but as glossed by the courts, see *supra* note 362, the VRA limits the risk of administrative overreach.

365. *Reno*, 528 U.S. at 320; *Beer*, 425 U.S. at 120.

366. See KEVIN J. COLEMAN, CONG. RES. SERV., THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 12–13 (2014); see also Desmond Ang, *Do 40-Year-Old Facts Still Matter? Long-Run Effects of Federal Oversight under the Voting Rights Act* (Harv. Kennedy Sch., Working Paper No. 18-033, 2018), <https://ssrn.com/abstract=3271907> (estimating that long-run voter turnout in the covered jurisdictions increased by four-to-eight percentage points).

367. See generally Elizabeth U. Cascio & Ebonya Washington, *Valuing the Vote: The Redistribution of Voting Rights and State Funds Following the Voting Rights Act of 1965*, 129 Q. J. ECONOMICS 379 (2014) (estimating effects on state spending on counties with large black populations); Abhay Aneja & Carlos Avenancio-Leon, *Labor Market Effects of Minority Political Power: Evidence from the Voting Rights Act of 1965* (Oct. 2017) (unpublished manuscript) (on file with author) (estimating effects on black wages); Ang, *supra* note 366 (documenting long-run effects on voter turnout); Andrea Bernini et al., *Race, Representation and Local Governments in the US South: The Effect of the Voting Rights Act* (CEPR Discussion Paper No. DP12774, Mar. 13, 2018) (estimating that VRA doubled black representation in local government in covered jurisdictions, relative to control counties).

368. In addition to the studies cited *supra* note 367, see Sophie Schuit & Jon C. Rogowski, *Race, Representation, and the Voting Rights Act*, 61 AM. J. POL. SCI. 513, 524 (2017) (showing effects on roll call votes of Members of Congress on civil rights legislation).

The model I have sketched for housing is akin to the VRA, in that it combines baseline change with a preclearance-type lock-in mechanism.<sup>369</sup> A new regulatory baseline is periodically established through housing elements, and retrogression is controlled through centralized, pre-implementation review of housing-element amendments.

But there are also some significant differences. Most important, the new regulatory baseline for housing is negotiated administratively on a case-by-case basis, and periodically revisited, rather than prescribed by statute once and for all.<sup>370</sup> And whereas the VRA categorically eliminated the principal source of local “permitting discretion” with respect to voting, the housing framework tacitly delegates the analogous question to an administrative agency, which must decide whether the discretionary permitting arrangements of any given local government constitute unreasonable constraints on housing development.<sup>371</sup>

The lock-in mechanism also diverges somewhat from the VRA paradigm. Whereas the VRA conditionally preempted the field of electoral regulation, barring local governments from changing any standard, rule, or procedure without federal preapproval, the California model for housing is much less draconian, even with the extensions I have proposed. Local governments remain free to enact or modify any rule or regulation that is subordinate to the housing element, without pre-implementation review. Indeed, local governments may unilaterally amend the preemptive compact itself (the certified housing element), putting the onus on the state to decertify the housing element or accede to the amendment. The regulatory baseline defined by the original compact is therefore “locked in” only to the extent that the local governing body fears the sanctions associated with decertification or wants to maintain the suspension of charter provisions or voter-approved measures that the certified housing element has superseded.<sup>372</sup>

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369. One might suppose that the Fair Housing Act (FHA)—the federal government’s 1960s-era response to discrimination in the housing market—would offer a better model than the VRA. But the FHA (in contrast to the VRA) effected neither a clear revision to the regulatory baseline for new housing, nor a mechanism to prevent retrogression. At best, the FHA expressed an aspiration: no unnecessary, racially disparate impacts. *See* Tex. Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507, 2522 (2015). But the FHA depends entirely on case-by-case litigation (like 15th Amendment enforcement prior to the VRA), and the goal that informs FHA disparate-impact analysis can be understood in two different and often mutually contradictory ways. *See id.* at 2548–50 (Alito, J., dissenting). Therefore, it’s not surprising that the FHA’s impact has been very limited. *See* Stacy E. Seicshnaydre, *Is Disparate Impact Having Any Impact? An Appellate Analysis of Forty Years of Disparate Impact Claims under the Fair Housing Act*, 63 AM. U. L. REV. 357, 421 (2013) (reviewing decades of case law and finding that housing-barrier challenges under the FHA almost never succeed).

370. *See supra* Subpart IV.A.

371. *See supra* Subpart IV.A (proposing definition of “substantial compliance,” which calls for administrative review of reasonableness of any local barrier to achieving a locality’s housing quota if achievement of the quota is uncertain).

372. Under both current California law and the extension that I have sketched, the state agency lacks authority to impose a housing element of its own design on a local government which is out of compliance. This distinguishes the model from standard “cooperative federalism” arrangements, which often authorize a federal agency to promulgate implementation plans on a state’s behalf if the state fails to enact its own, federally

These departures from the VRA paradigm have an underlying logic: they accommodate the absence of a political consensus about metropolitan land use. By the mid-1960s, when Congress passed the VRA, there had emerged an elite national consensus that blacks should be able to vote on the same terms as whites, and that no one should have to surmount a test of literacy or moral character, or pay a tax, as a prerequisite to voting.<sup>373</sup> By contrast, there is today no readily articulable, state-level consensus about how much new housing should be planned for and where it should go. Nor has local discretion in development permitting come to be regarded as illegitimate. No doubt many homeowners are quite happy that their planning commission and city council can impose ad hoc limitations on nearby projects. The mantra of “local control over land use” elicits broad support in statewide surveys of public opinion.<sup>374</sup>

Under these circumstances, the political genius of the emerging California model is that it should soon enable the state to bring about something functionally similar to a statewide zoning and development code, without quite appearing to do so. More precisely, the governor will be well positioned to bring this about *if* California authorizes the housing agency to plump up regional housing quotas on the basis of market conditions; settles on a functional definition of housing element “substantial compliance”; clarifies that certified housing elements supersede all local law to the contrary, including charter and voter-enacted provisions; and establishes evidentiary and procedural rules (such as the proposed extension of the Housing Accountability Act) that make it feasible for developers to get plan-compliant projects exempted from cumbersome local rules that were not authorized by the housing element.<sup>375</sup> The first two steps are necessary to prevent restrictive local governments from dodging meaningful administrative scrutiny of their housing restrictions (by showing either that their housing element notionally “contains the elements mandated by statute,”<sup>376</sup> or that they will meet a trivial housing target even with substantial constraints in place). The third and fourth steps are necessary to make the theoretical preemptive effect of the housing plan a practical reality.

Once California completes these steps, the set of local housing elements, viewed as a whole, will be akin to a statewide zoning and development code for an ample quantity of new housing. The housing elements, locally drafted but approved by a state agency, will control the basic size-and-density terms for development. The state agency, under control of the governor, can be expected to establish fairly aggressive housing targets, and generally to review housing elements with an exacting eye. This is so because the governor, of all the state’s

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approved plan. Cf. Dave Owen, *Cooperative Subfederalism*, 9 U.C. IRVINE L. REV. 177, 186–88 (2018) (discussing federal Clean Water Act in relation to state-local cooperative programs).

373. See Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 72 (2009).

374. See *supra* notes 347–349 and accompanying text.

375. These conditions correspond to Elements of the Model (1), (6), (3), and (5) respectively, per *supra* Subpart IV.A.

376. See *supra* notes 182–184 and accompanying text.

elected officials, is likely to be the most reliably supportive of pro-housing policies. The governor answers to the statewide electorate, not just to homeowners in the high-cost regions. The governor runs in expensive statewide elections, which means that deep-pocketed business interests are likely to have her ear as well.<sup>377</sup> Gubernatorial elections are also relatively high-turnout and high-information affairs, which makes them hard for homevoters to control.<sup>378</sup> And because the governor's capacity to carry out her non-housing agenda depends on tax revenue, the governor should be quite sensitive to housing bottlenecks on economic growth.<sup>379</sup>

Yet even as housing elements in the aggregate would function like a preemptive statewide zoning and development code, the rules that apply within the territory of a local government will have been proposed initially by that government, negotiated with the state in a low-limelight administrative setting, and codified as a component of the locality's own general plan, rather than as state law. The housing element's *de jure* status as local law, and the obscure process through which state approval is obtained, should help state legislators parry any accusation that they have imposed a statewide zoning map.

The local prerogative to draft the housing element means that local governments have substantial leeway to decide how best to reconcile the state's housing objectives with local preferences over the built environmental and community character. Importantly though, under the test for substantial compliance that I have proposed, a local government could only avoid administrative scrutiny of the reasonableness of its zoning, development standards, procedures, and fees if the local government persuades the state agency that the locality is "substantially certain" to meet its housing target.<sup>380</sup> Much as the VRA's evidentiary standards encouraged covered jurisdictions to come forward with evidence about the likely effects of a proposed election-law change,<sup>381</sup> so too does the proposed test for substantial compliance encourage local governments to rectify information asymmetries in housing element review, either by sharing information about local conditions with the state or by committing to development standards and procedures that render

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377. Cf. Liam Dillon, *How California's Candidates for Governor Want to Fix the State's Housing Problems*, L.A. TIMES (May 10, 2018), <https://www.latimes.com/politics/la-pol-ca-governor-housing-roundup-20180510-htmlstory.html>. (summarizing housing positions platforms of leading candidates for Governor of California in 2018, nearly all of whom took strong positions in favor of expansion of supply).

378. See Elmendorf & Schleicher, *supra* note 335, at 398–403 (reviewing literature); J. Eric Oliver & Shang E. Ha, *Vote Choice in Suburban Elections*, 101 AM. POL. SCI. REV. 393, 404 (2007) (finding that homeowners are vastly overrepresented in suburban local government elections relative to their share of the voting-eligible population, and that their vote choice in these elections is informed more by particular issues or personal knowledge of candidates rather than partisanship); Joseph T. Ornstein, *Municipal Election Timing and the Politics of Urban Growth* (Apr. 30, 2018) (unpublished manuscript) (on file with author) (finding that off-cycle local government elections, which result in lower turnout, lead to more restrictive housing policies).

379. See *supra* Subpart I.C.3.

380. See *supra* Subpart IV.A. (element #6).

381. See Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act after Shelby County*, 115 COLUM. L. REV. 2143, 2154 (2015).

inconsequential phenomena that are hard for the state to see.<sup>382</sup> Similarly, the proposed evidentiary standard for project-specific preemption challenges would give local officials a strong incentive not to hide local development requirements by omitting them from the housing element’s analysis of constraints. If a state-certified housing element openly acknowledges and justifies a restriction, the local government would have a strong argument that no reasonable person could deem normal applications of that restriction inconsistent with the housing element. But if the constraint is not acknowledged in the housing element, and if it materially delays, downsizes, or raises the cost of a developer’s plan-compliant project, project proponents would have a strong case for an exemption and the local government would be on the hook for proponents’ legal fees.

Notice also that to the extent that there does emerge a political consensus about unacceptable land-use controls—either in general or as to certain retrograde local governments—the state housing agency could easily incorporate these norms into its review of housing elements. For example:

- The agency could announce that, as a general matter, it will deem housing elements not to have “remov[ed] all unreasonable regulatory and procedural constraints”<sup>383</sup> unless the housing element requires local authorities to process development applications exclusively on the basis of procedures, standards, and fee schedules that were published on the planning department’s website prior to date on which the developer’s application was deemed complete.<sup>384</sup> The informational costs and project risks generated by a local government’s failure to commit to this transparency principle arguably represent an unreasonable constraint on housing production.
- The agency could announce that, as a general matter, discretionary permitting of housing-element-compliant projects will be deemed to be an “unreasonable constraint” *if* the jurisdiction failed to meet its housing target during the previous planning cycle.<sup>385</sup> This would put pressure on local governments to commit to ministerial permitting through their housing element.<sup>386</sup>
- The agency could push local governments whose development permitting is unusually slow to enact, through their housing elements, a

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382. For example, the preferences of local officials who review permit applications.

383. *See supra* Subpart IV.A. (element #6).

384. SB 330, enacted just before this Article went to press, prohibits local governments from applying to a project “ordinances, policies, and standards” not in effect when the developer’s preliminary application was submitted. *See* S.B. 330, 2018-2019 Leg. (Cal. 2019) (adding CAL. GOV’T CODE § 65589.5(o) (West 2019)). Because of SB 330, there’s no longer much reason for HCD to try to bring about similar local commitments through housing element review. I retain the example mainly to illustrate how reforms that housing advocates have pursued through the legislature could just as easily (and often more easily) be pursued in the administrative arena, under a robust housing element / state review framework.

385. Oregon’s state planning agency has ordered local governments to eliminate discretionary approval standards *vis-a-vis* “needed housing.” *See, e.g.*, BILL KLOOS, FAIR HOUSING COUNCIL OF OREGON—PLANNING FOR HOUSING: DON’T FORGET THE BASICS 18 (May 15, 2008) (citing LCDC Compliance Order (Aug. 23, 1982) and Staff Report (Aug. 19, 1982) at 28-19); *id.* (citing LCDC Work Task Order 02-WKTASK-001412, at 4 (June 27, 2002) (faulting planned development overlay zoning for insufficient clarity).

386. The commitment would be credible since the housing element is the highest law of the local government, and because amending the housing element risks decertification.

local fix for gaping loopholes in the Permit Streamlining Act.<sup>387</sup> This California statute stipulates that if a public agency fails to complete its review of a project within a designated period of time, the project shall be deemed approved as a matter of law. But the clock starts to run only after the agency has completed environmental reviews,<sup>388</sup> and the clock is tolled by internal appeals. With an eye to chinking these gaps, the housing agency might announce that as to jurisdictions whose permitting times were very slow during the previous cycle (and which failed to meet their targets), the agency will deem the local government to have “unreasonable constraints” *unless the housing element includes a deemed-approved proviso* limiting review of plan-compliant projects to (say) twelve months, inclusive of environmental studies and internal appeals.<sup>389</sup>

As valuable as it would be to empower the housing agency to establish such norms by regulation, it is equally important that the framework not *require* any of this. The agency should be allowed to proceed case-by-case rather than by general rule if it wishes. The agency should be able to issue loose guidelines rather than firm rules, or rules that establish only rebuttable presumptions, thereby retaining flexibility to make politically informed judgements about what different local governments will tolerate. Because the strength of state/local preference conflict over housing varies geographically, and because some communities have greater political resources for pushing back than others, a state-law framework for boosting the supply of housing needs this flexibility.

## 2. *From the Bottom Up: Strengthening Pro-Housing Actors in City Politics, and Facilitating Regional Deals*

While top-down pressure applied through housing-element review and preclearance of amendments is central to the framework I have sketched, it is not everything. My extension of the California model would also strengthen the hand of *local* actors who favor more accommodative housing policies, in ways that go considerably beyond what California has achieved to date.

For example, city councils would be able to unfetter themselves from voter-enacted growth controls and permitting rigmarole—and to do this without going to the voters, and while deflecting blame to someone else. A council would need only to obtain the state agency’s approval of a housing element that conflicts with the problematic voter-adopted constraints. If homevoters complain, the city council can respond, “The state pushed us to do it; we had to or else we’d lose funding.” And if homevoters gripe to the governor or the

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387. For citations to the provisions of the Permit Streamlining Act mentioned in this paragraph, see *supra* note 195.

388. That is, environmental review under CEQA. See *supra* note 195.

389. To be sure, a housing element’s “deemed approved” provision could not, as such, exempt the local government from otherwise applicable state law such as CEQA. But CEQA review is only triggered by discretionary government actions. See BARCLAY & GRAY, *supra* note 192, at 144. And if the housing element commits the local government to approving projects ministerially (at least after a certain period of time following project submission), then CEQA would become inapplicable at that time.

housing agency, the state-level actors can answer in kind: “All we did was approve *your city council’s* proposal for accommodating a reasonable amount of new housing. If you want it done differently, tell them, but don’t complain to us.”

Notice also that the proposed framework gives the city council a menu of options, varying in certainty and transparency, for displacing problematic local constraints to new housing. At one end of the spectrum, the council could list a local rule or practice in the housing element’s appendix as one which is “deemed preempted” as of the date of the housing element’s enactment. This would be tantamount to voting to repeal the constraint, except that doing it through the housing element may help shift some blame to the state. At the other end of the spectrum, the council could simply omit certain known constraints from the list of constraints that the housing element acknowledges and justifies. This would set up developers to argue for project-specific exemptions on the theory that a reasonable person *could* deem the constraint inconsistent with the housing element. At the same time, city lawmakers could plausibly deny that they ever intended to preempt the constraint. An intermediate option is to list the constraint in the housing element’s appendix with a future date of preemption, stipulating that it shall then be preempted if not reformed beforehand.<sup>390</sup> This would shift the burden of legislative inertia to defenders of the constraint while foisting political responsibility for the tough choice of what to do about it onto a future city council. In sum, the menu of options allows the city council to tailor its constraint-alleviation strategy to the political exigencies of the moment.

To be sure, city councils are not reliably pro-housing actors.<sup>391</sup> Given the choice, some will jealously defend local constraints on housing development. Still, survey evidence suggests that many city council members understand the housing-supply problem and would like to do something about it, but feel hemmed in politically.<sup>392</sup> A state-law framework that positions city councils to remove constraints while dodging blame should do some good, perhaps especially with respect to older, voter-adopted constraints whose undoing may seem less an affront to today’s electorate.

My adjustments to the California model would also bolster mayors *vis-à-vis* city councils in negotiations over the housing element. (As explained above,

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390. To similar effect, the housing element could state that certain densities or floor-to-area ratios for designated sites will be made available by a specified future date. *See supra* note 242 (arguing that such commitments are already directly enforceable through project-specific litigation under the HAA).

391. If elected from territorial districts, they will tend to be responsive to homeowner interests in the neighborhood. *See supra* note 333 and accompanying text.

392. *See* PAUL G. LEWIS & MAX NEIMAN, CITIES UNDER PRESSURE: LOCAL GROWTH CONTROLS AND RESIDENTIAL DEVELOPMENT POLICY 41–51 (2002) (concluding, based on survey of local officials in California, that most city members have neutral or pro-growth attitudes toward housing, but are often cowed by grassroots, anti-growth factions); *see also* Michael Manville & Taner Osman, *Motivations for Growth Revolts: Discretion and Pretext as Sources of Development Conflict*, 16 CITY & COMMUNITY 66, 70 (2017) (arguing, based on several case studies, that voter-adopted growth controls often result from perception that city councils too readily grant variances and rezonings to accommodate developers).

mayors are likely to be more supportive of liberal housing policies.)<sup>393</sup> The key move is to authorize mayors to promulgate interim housing elements if the state's deadline has passed without the local government enacting a compliant housing element using the normal, locally prescribed procedures. Once mayors have this power, city councils will make generous concessions *ex ante* to the mayor, in the hopes of avoiding a veto or other mayorally induced delay of the council's housing element.

Notice finally that my extension of the California framework would powerfully support bottom-up initiatives to plan for more housing in a region. Consider by way of illustration the recent efforts of the Metro Mayors Coalition in Greater Boston and the Committee to House the Bay Area ("CASA") in the San Francisco Bay Area.<sup>394</sup> In each case, a regional planning entity convened a consortium of elected officials,<sup>395</sup> and the consortium developed quantitative targets for new housing in the region as well as guidelines for zoning and development-permitting reforms.<sup>396</sup> These efforts build on Rick Hills and David Schleicher's important insight that land-use policy is likely to be more accommodative of new housing if it can be forged through grand bargains on citywide or larger scales, rather than worked out seriatim through project- or site-specific upzonings and downzonings.<sup>397</sup>

As Hills and Schleicher acknowledge, the central challenge for the grand-bargain approach is "designing an enforcement mechanism."<sup>398</sup> What is to keep individual members of a city council from defecting, once community groups and nearby homeowners start complaining about specific projects in the councilmember's district? Or, at the regional level, what is to keep the municipalities that forge a Greater Boston or Greater Bay Area plan from renegeing on their commitments to one another? California's experience since the early 1980s with its RHNA process suggests that regionally coordinated plans are worthless if the plans don't actually compel local governments to remove development constraints or issue building permits.<sup>399</sup>

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393. See *supra* text accompanying notes 333–335.

394. See Tim Logan, *Citing "Housing Emergency," 15 Mayors Pledge to Boost Construction*, BOS. GLOBE (Oct. 2, 2018), <https://www.bostonglobe.com/business/2018/10/02/citing-housing-emergency-local-mayors-pledge-dramatically-boost-construction/plYlzBr3OoM6W6la3L1zTL/story.html> (reporting on announced goal of 185,000 new units by 2030, a tripling of the rate of housing relative to the previous decade); Rachel Swan, *Bay Area Leaders Propose Aggressive Housing Fix, and New Agency to Get It Done*, S.F. CHRONICLE (Dec. 12, 2018), <https://www.sfchronicle.com/bayarea/article/Bay-Area-leaders-propose-aggressive-housing-fix-13461969.php>.

395. The CASA consortium includes business, labor, and interest group leaders, as well as elected officials. See *CASA Membership Roster*, METRO. TRANSP. COMM'N, <https://mtc.ca.gov/our-work/plans-projects/casa-committee-house-bay-area/casa-membership-roster> (last visited Nov. 6, 2019).

396. See *supra* note 394.

397. See Hills, Jr. & Schleicher, *Planning*, *supra* note 333, at 170; Hills, Jr. & Schleicher, *Balancing*, *supra* note 336, at 90–96.

398. Hills, Jr. & Schleicher, *Planning*, *supra* note 333, at 125.

399. See *supra* Subpart II.B.2.

But consider how the Metro Mayors and CASA undertakings could play out if the parent state had the legal framework I have sketched in place. Quantitative housing goals set by the collaborative would probably become *de facto* floors for the state's housing-need assessment for the region. Knowing that there's a regional-elite consensus for a certain amount of new housing, the state's housing agency would have little reason to demand less.<sup>400</sup>

Similarly, the collaborative's guidelines for zoning and regulatory reform would inform the agency's review of "constraints" under housing elements submitted by local governments in the region. If most of the region's local governments have, through the collaborative, condemned a particular barrier to development, the state housing agency would have a strong political and legal basis on which to disallow it *in that region*, if not elsewhere.<sup>401</sup> Moreover, commitments made in housing elements to remove such constraints would be credible, both because constraints listed in the preemption appendix would automatically sunset on the specified date, and because any later-adopted substitute for such constraints would be vulnerable to an as-applied preemption challenge.

If the understandings reached through Metro-Mayor type collaboratives can be enforced in these ways, it should be much easier to motivate local officials to join the regional planning efforts in the first instance. As well, the interest groups that stand to benefit from a big increase in the regional housing supply, such as chambers of commerce and municipal unions, would have strong incentives to lobby the collaborative.<sup>402</sup>

### 3. Caveats

The model I have sketched holds considerable promise, and to operationalize it in the West Coast Model states (especially California) would require only modest tinkering with extant state-law frameworks. But the model's limitations should be acknowledged, too. Some NIMBY governments may manage to exploit their superior information about local conditions to bamboozle the state agency into certifying dysfunctional housing elements.<sup>403</sup> Other NIMBY localities may be able to get the agency to approve transparently

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400. This assumes there's some play in the joints of the housing need determination. As explained above, California recently revised the statutory framework governing this determination in ways that give considerable discretion to the housing agency. *See supra* Subpart III.A.1.

401. Opposition to the constraint by leaders of a supermajority of the local governments suggests that it is probably unreasonable in light of regional housing needs.

402. No doubt NIMBY groups will organize to lobby the collaborative too, but it may be harder for them to get homeowners riled up by the collaborative's policy proposals, as opposed to tangible projects in the homeowner's neighborhood.

403. This risk is exacerbated by resource shortages at the California housing agency. *See* LAO, DO COMMUNITIES ADEQUATELY PLAN, *supra* note 244, at 7 (noting that as of 2017, HCD had only a \$1 million budget line and seven staff persons for housing element review). The main advantage of state-mandated upzoning (for example, requiring local governments to allow four-to-five story buildings on all parcels near transit), relative to the housing-element approach, is that state-mandated upzoning obviates the risk of local governments "complying" by assigning their quota to hard-to-develop sites.

awful housing elements by arguing that the dysfunctional features are necessary to forestall a local insurrection.<sup>404</sup> Finally, as economists and legal scholars have long argued, there is always some risk that state institutions for regulating land use will end up serving regional homevoter cartels.<sup>405</sup> This risk must be weighed, however, against the reality of extreme supply constraints in the absence of state control, and the potential payoff from using state law to empower a relatively pro-housing set of actors at the local level.

#### CONCLUSION

Fifty years in the making, the problem of local barriers to housing supply in economically productive regions is finally having its moment in the sun. To the present moment of possibility, this Article has contributed both a descriptive account of the state frameworks for controlling local housing-supply restrictions, and an extension and defense of the model toward which our nation's most expensive and supply-constrained state, California, seems to be evolving.

The model is one of preemption by intergovernmental compact. The state periodically establishes regional housing-production targets, which are divided up among local governments. Local governments must submit to the state housing agency a parcel-specific plan for how they will meet their quotas, including a schedule of actions to remove local constraints on the development of housing. Once approved by the agency and enacted as a local ordinance, this plan—the “housing element”—becomes the highest law of the local government with respect to land use. Developers may apply for building permits on the authority of the housing element itself. Local governments seeking to amend their housing element must provide notice and a written justification to the state's housing agency, and the agency may respond by decertifying the housing element, exposing the local government to pecuniary and possibly regulatory sanctions.

While “double vetoes”—opportunities under state law to overturn locally approved development permits—are certainly one legacy of the states' land-use interventions since the 1960s, they're no longer the whole story. The statutory evolution charted in this Article is now positioning advocates to use state law, and state-approved housing plans, to challenge not project approvals, but the local regulations and exercises of permitting discretion that stand in the way of desperately needed new housing.

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404. For example, San Francisco's (HCD-approved) housing element tries to justify extant constraints that “conserve and protect existing housing and neighborhood character” by arguing that without such constraints, “an even greater check on new housing construction could result from public opposition to new development.” 2014 HOUSING ELEMENT, *supra* note 178, at I.86.

405. See *supra* text accompanying notes 205–209.