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Beyond the Double Veto: Land Use Plans as Preemptive Intergovernmental Compacts

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Beyond the Double Veto:
Land Use Plans as Preemptive Intergovernmental Compacts

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Abstract. 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 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 political leverage and policymaking discretion and also 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.[2] 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."[3] 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[4]—what economist William Fischel dubbed "the double veto."[5] 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."[6] 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. In the coastal states that led the "quiet revolution," the supply of new housing was throttled, with devasting equity, economic and environmental repercussions.[7]

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.[8] 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.

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[2] FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

[3] David L. Callies. *The Quiet Revolution Revisited*, 46 J. AM. PLANNING ASS'N 135, 142 (1980).

[4] *See generally* David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 16 URB. LAWYER 197 (1994).

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

[6] Callies, *supra* note 3, at 142.

[7] *See infra* Part I.

[8] *See infra* Part III.A.

These quotas are to be accommodated by local governments through the "housing elements" of their general plans.[9] 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. A local government must provide advance notice to the state before amending its housing element, 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.[10] Pro-housing lawmakers have won national media acclaim for bills to upzone land near transit stations; to authorize duplexes or accessory dwelling units (ADUs) on parcels that local governments zoned for single-family homes; and to make local governments zone "reasonable" quantities of land for multifamily housing.[11] Save for the ADU measures, most such bills have died. Yet out of the spotlight, state housing agencies are using rulemaking and general-plan review to advance an upzoning agenda.[12]

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 which 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.

Local government have, by tradition, very broad authority over land use and housing development, which has come to be exercised through discretionary permitting regimes. This makes it easy for local governments to comply with the letter of a state's density mandates while defeating the state's policy in practice. If the state tells localities to allow accessory dwelling units on parcels zoned for single family homes (for example) and the localities don't want them, the local governments can bring their zoning into compliance while using discretionary review to saddle ADU projects with expensive, ad hoc, and unpredictable conditions. Local governments can also use their residual regulatory authority to

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[9] For citations to the code provisions relevant to this paragraph, see *infra* Parts II.B & III.A.

[10] *See infra* Part III.B

[11] *Id.*

[12] *Id.*

enact more systematic barriers to ADUs, such as costly building code amendments, setback or parking requirements, fees, layers of internal appeals, and so on. The history of California's ADU statute illustrates this dynamic all too vividly.[13]

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 *lock in* the new baseline against the retrogressive tactics 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.[14] The baseline change occurs not by state legislative command, but through *the local government's* designation in its housing element of specific developable parcels to accommodate its share of regional housing need, and through *the local government's* articulation in the housing element of 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 locally adopted ordinance, 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 other local law a matter of state law, the aggregate set of housing elements should 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, but doing so is costly. The locality must provide advance notice and a justification, and the agency may respond by

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[13] *Id.*

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

decertifying the housing element, exposing the local government to fiscal and possibly regulatory sanctions. Much like the procedure for periodically redefining the regulatory baseline (with negotiated housing elements), this 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 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.[15]

One should not be too Pollyannaish though. The California model is still evolving, and its full realization will require changes to the legal standard for a "substantially compliant" housing element.[16] Legislation may also be needed to refine test for local ordinances' consistency with the housing element, and to clarify that a certified housing element supersedes local laws adopted by popular vote or as charter amendments. And then there is the matter of projecting housing need. The traditional methods reward exclusionary locales with small housing quotas, and although California's new "healthy housing markets" approach sounds promising, in the statutory particulars it leaves much to be desired. 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 points up 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 outsiders they now ignore (prospective residents).[17] I shall argue, however, that with a few modest tweaks, the California model could 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. 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.[18] In sum, the California framework could easily evolve into a source of bottom-up as well as top-down attacks on local

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[15] The acronym NIMBY stands for Not In My Backyard, and is an epithet used to describe anti-development activists who parochially defend current land-use patterns in their neighborhoods.

[16] The reforms previewed in this paragraph are fleshed out in Part IV, *infra*.

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

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

barriers to new housing, and without the need for radical measures such as allowing nonresidents to vote in local elections.

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 its social, economic and environmental consequences. This story will be familiar to many readers, who are invited to skip ahead. Part II provides an overview of state frameworks 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, focusing on California but also 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. The leitmotif of Part IV is an argument that the problem of overcoming local barriers to housing supply is, structurally, very similar to the problem the federal government faced in the 1960s when it undertook to dismantle Jim Crow. 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.[19] A new technology or discovery would make certain places suddenly valuable. Entrepreneurs would locate in the 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.[20]

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[19] The story briefly summarized here is told in much greater depth in David Schleicher, *Stuck! The Law and Economics of Residential Stagnation*, 127 YALE L.J. 78 (2017), and Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the US Declined?*, 102 J. URB. ECON. 76 (2017).

[20] On the relationship between housing costs, construction costs, and land costs, see generally Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSP. 3 (2018).

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 little population growth.[21] The population influx that has occurred in these economically fortunate places is concentrated among high earners. Wages for low-skilled labor have been bid up too, yet without occasioning the usual inflow of working-class people seeking a better life. The long-term trend toward interstate convergence in wages slowed in the 1980s and has now stopped.[22] A big part of the story is that local land-use restrictions have prevented the housing supply in economically successful regions from expanding to accommodate more workers.[23] The price of the existing stock of dwelling units was bid up by high-human-capital types to the point that it's no longer worthwhile for low-skill workers to emigrate from low-wage regions.

Proving the point that the escalation of metro-area 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 exceeding 1.25 times the cost of production.[24] By 2013, it had doubled to 13%, still only a modest fraction of the nation's metro regions as a whole.[25] Yet the small subset of metro regions 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 bins.[26] They 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.[27]

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 barrier to expanding the housing supply in high-cost regions.[28] 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.[29]

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

[22] Ganong & Shoag, *supra* note 19.

[23] While a big part of the story, this is not all of it. *See* Schleicher, *supra* note 19 (discussing other barriers to migration).

[24] Glaeser & Gyourko, *supra* note 20, at 13 tbl. 2.

[25] *Id.*

[26] *Id.* at 14 n. 8.

[27] *Id.* at 19 fig. 3.

[28] *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).

[29] Edward L. Glaeser et al., *Why Have Housing Prices Gone Up?*, 95 AM. ECON. REV. 329 (2005).

The scholarly consensus holds that regulatory barriers to new housing have become much more stringent in the high-cost regions since the late 1960s or early 1970s.[30] 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-workface labor requirements, and so forth.

Moreover, while the original theory of zoning presupposed that conforming projects would be approved as of right, development permitting in the high-cost states has become thoroughly discretionary, requiring project-by-project negotiations over design, scale, public benefits, affordable housing set asides, and so much more.[31] 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.[32] The actual intensity of land-use regulation is a function not just of the rules that exist on paper, but of the interest groups that have organized to enforce them, and the attitudes and priorities of the local officials who implement them.[33]

In an attempt to quantify and compare land-use regulations, economists have surveyed nationally representative samples of local public officials and aggregated the results into indices.[34] The general finding, unsurprisingly, is that metro areas with more stringent regulations also have higher housing prices.[35] In theory, this could reflect the internalization of aesthetic and congestion externalities from new development, but studies that attempt to quantify benefits

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[30] For leading reviews, see FISCHEL, *supra* note 5; Joseph Gyourko & Raven Molloy, *Regulation and Housing Supply*, 5 HANDBOOK OF REGIONAL & URBAN ECON. 1289 (2015).

[31] *See generally* Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591 (2010). For an in-depth look at discretionary development permitting in the San Francisco Bay Area, see Moira O'Neill, Giulia Gualco-Nelson & Eric Biber, *Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates*, 25 HASTINGS ENVT'L L.J. 1 (2019).

[32] *Id. See also* Edward L. Glaeser & Joseph Gyourko, The Impact of Zoning on Housing Affordability (NBER Working Paper No. 8835, Mar. 2002), https://www.nber.org/papers/w8835.

[33] *Cf.* Glaeser & Ward, *supra* note 28, 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").

[34] For a review, see Gyouko & Molloy, *supra* note 30.

[35] *Id.*

as well as costs have largely found that the costs of density restrictions far outweigh the benefits.[36]

There is no national time-series dataset on land use regulation in metro areas, 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.[37] The over-time studies also confirm that there was a dramatic upswing in the number and variety of land-use regulations at the local level starting in the late 1960s or 1970s, in what are now the expensive coastal regions.[38] Other studies have shown that state environmental review laws (of similar vintage) are used by neighboring homeowners, unions, and other non-environmental interests to stop, slow, or extract concessions from housing developers.[39]

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 Southwest: Extant residential neighborhoods have experienced little "densification," except by filling in vacant lots.[40] This represents a significant

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[36] *See* David Albouy & Gabriel Ehrlich, *Housing Productivity and the Social Cost of Land-Use Restrictions*, J. URB. ECON. (forthcoming 2018), and sources cited therein.

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

[38] *See, e.g.*, Glaeser & Ward, *supra* note 28, at 269-71; Jackson, *supra* note 37. 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 shoot upward after then. *See* FISCHEL, *supra* note 5, at 194-96.

[39] Jennifer L. Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 HASTINGS ENVT'L L.J. 21 (2018); Stephanie M. DeHerrera et al., In the Name of the Environment: Litigation Abuse Under CEQA, Holland & Knight (Aug. 2015), https://perma.cc/SV3V-F5L2. These studies show that roughly 80% CEQA suits are filed against infill housing. They have been criticized for implying that CEQA litigation is frequent, notwithstanding that the studies do not estimate the probability of an infill (or other) project facing a CEQA suit. *See, e.g.*, Moira O'Neill, Giulia Gualco-Nelson & Eric Biber, *Developing Land Use Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates*, 25 HASTINGS ENVT'L L.J. 1, 34-35 (2019). However, even if only a small fraction of infill projects are litigated on CEQA grounds (as O'Neill et al. find), it doesn't follow that CEQA is an insignificant source of delay and costs. The litigation rate may be low precisely because developers go to great lengths to "bulletproof" environmental review documents or to pay off groups that could bring a CEQA suit. *Cf.* Vicki Been, *Community Benefits: 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).

[40] Issi Romen, *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-

change from patterns of development prior to the Great Depression, as it used to be common for single-family homes in growing regions to be torn down and replaced by small apartment buildings.[41] When housing starts picked up again after World War II, the old pattern of intensification did not materialize. Whether due to the spread of Euclidian zoning,[42] the interstate highway system,[43] or the increasing popularity of private covenants,[44] housing development since the 1940s and especially post-1970 has occurred mostly through building on vacant land.[45]

The principal difference in the pattern of development between expensive coastal metro regions and their affordable inland counterparts is that less raw land has been converted from non-housing uses in the former areas. Oregon and Washington have had some success prodding cities to repurpose residentially-zoned lots for denser housing, 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."[46] As for the much-ballyhooed "return to the cities" that started in the 1990s, the cities that increased their housing supply have done so largely by accommodating denser development in a few small pockets, often in formerly commercial or industrial zones, rather than by permitting higher-density construction in extant residential neighborhoods.[47]

B. Causes

Why did some metro regions 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*, is that suburban governments are de facto homeowner cartels, dominated by "homevoters" who seek to restrict

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interior. Romem notes that the 1960s saw a modest upswing in densification, but this was choked off by the 1970s.

[41] *Id.*

[42] On which see William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URBAN STUD. 317 (2004).

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

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

[45] Romem, *supra* note 40, notes that some densification did occur in the 1960s but this was largely choked off by the 1970s.

[46] 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.

[47] *See* Romen, *supra* note 40.

development as a way of avoiding changes that might jeopardize the value of their most important asset.[48] There are some puzzles though. No one suburb can exercise much power over the overall supply (and hence price) of housing in a metro region composed of numerous suburbs. And why would suburban homeowner "cartels" vote *en masse* against 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, largely explain the 1970s inflection point. Inflation made homes into more economically important assets.[49] 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. This may have triggered a vicious spiral, as homeowners observing rising prices became more focused on protecting the value of their ever-more-important asset. 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.[50] 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.[51]

Empirically, the enactment of growth controls in a given suburb makes it more likely that nearby suburbs will do the same.[52] Thus do the decentralized decisions of many politically independent subdivisions cumulate into region-wide barriers to new housing. Developers are pushed outward, into rural exurbs where owners of undeveloped land (farms) tend to have more political power,[53] or inward, into central cities, which were long thought to be controlled by "growth machine" business coalitions.[54]

If growth machines truly dominated urban politics, the deflection of development pressure from the suburbs might not constrain the region-wide supply of housing very much. But in economically productive coastal cities, the

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[48] WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001).

[49] For homeowners who purchased with a fixed rate mortgage and are still leveraged, a nominal increase in the price of housing translate into real increases in the homeowner's wealth.

[50] Albert Saiz, *The Geographic Determinants of Housing Supply*, 125 Q.J. ECON. 1253, 1272-82 (2010).

[51] FISCHEL, *supra* note 5, at 163-218.

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

[53] Michelle Wilde Anderson, *Sprawl's Shepherd: The Rural County*, 100 CAL. L. REV. 365 (2012).

[54] FISCHEL, *supra* note 5, at 296-98.

growth machine ran out of steam.[55] In 1960, Los Angeles was zoned for four times its then-current population.[56] Today, it's zoned for the number of people it has.[57] Using parcel-level data from New York, Been and colleagues find that the probability of a parcel being upzoned for higher-density development is inversely correlated with the proportion of owner-occupied parcels nearby.[58] Anti-development "homevoters" are clearly exercising sway in the central city, not just in little homogeneous suburbs.[59]

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,[60] and though renters are generally more pro-development than homeowners—consistent with the homevoter hypothesis[61]—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.[62] Alas their neighborhood-level preferences are likely to be more consequential for new development (or its absence), since upzoning and project-approval decisions tend

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[55] *See generally* Vicki Been, *City NIMBYs*, 33 J. LAND USE & ENVTL. L. 217 (2018); Schleicher, *supra* note 21.

[56] Greg Morrow, The Homeowner Revolution: Democracy, Land Use and the Los Angeles Slow-Growth Movement, 1965-1992, fig. 3 (UCLA Electronic Theses and Dissertations, 2013), https://escholarship.org/uc/item/6k64g20f#page-1.

[57] *Id.* (more precisely, for 92% of the number of people that it has).

[58] Vicki Been, Josiah Madar & Simon McDonnell, *Urban Land-Use Regulation: Are Homevoters Overtaking the Growth Machine?*, 11 J. EMPIRICAL LEG. STUD. 227 (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. PLANNING EDUC. & RESEARCH 289 (2018).

[59] *See* Morrow, *supra* note 56, 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.

[60] For a review of the literature and new estimates that plausibly identify the causal effect of homeownership on turnout, see Andrew Hall & Jesse Yoder, Does Homeownership Influence Political Behavior? Evidence from Administrative Data (working paper, 2018). *See also* Brian J McCabe, *Are Homeowners Better Citizens? Homeownership and Community Participation in the United States*, 91 SOC. FORCES 929 (2013) (finding that homeownership positively correlates with turnout in elections but not with forms of civic participation that do not affect value of home).

[61] Michael Hankinson, *When Do Renters Behave Like Homeowners? High Rent, Price Anxiety, and NIMBYism*, 112 AM. POL. SCI. REV. 473 (2018); William Marble & Clayton Nall, Where Interests Trump Ideology: Homeownership's Persistent Role in Local Housing Development Politics (Oct. 4, 2018).

[62] Hankinson, *supra* note 61.

to be made on a neighborhood-by-neighborhood basis, with councilmembers deferring to one another on projects in their districts.[63]

Finally, anti-gentrification activists have become a fixture of urban politics in expensive cities,[64] and have used discretionary permitting regimes and state environmental review laws as leverage to demand expensive "community benefit agreements" from developers.[65] 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.

C. Consequences

Barriers to housing development in the expensive coastal metro areas 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 runup in housing costs in economically productive coastal regions has made incumbent homeowners rich.[66] One study finds that returns to housing account for nearly all of the much-discussed increase in capital's share of national income since 1970.[67] Other studies show that land-use restrictions exacerbate segregation within metropolitan regions.[68]

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[63] Schleicher, *supra* note 21.

[64] Nancy H Kwak, *Anti-Gentrification Campaigns and the Fight for Local Control in California Cities*, 12 NEW GLOBAL STUDIES 91 (2018).

[65] Been, *supra* note 39.

[66] *See, e.g.*, Glaeser & Gyourko, *supra* note 20, at 20-23 ("The big winners from the reduction in housing supply are a small number of older Americans who bought when prices were much lower"); David Albouy & Mike Zabek, Housing Inequality (NBER Paper No. w21916, 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).

[67] *See* Matthew Rognlie, *Deciphering the Fall and Rise in the Net Capital Share: Accumulation or Scarcity?*, 2015 BROOKINGS PAPERS ECON. ACTIVITY 1. 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.

[68] Michael C. Lens & Paavo Monkkonen, *Do Strict Land Use Regulations Make Metropolitan Areas More Segregated by Income?*, 82 J. AM. PLANNING ASS'N 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 (July 2018) (showing that restrictive land use policies exacerbate racial segregation).

There are also serious implications for intergenerational socioeconomic mobility. Using income-tax microdata, Raj Chetty and co-authors have shown that intergenerational mobility in the United States varies greatly with geography.[69] "Some [locales] have . . . 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."[70] 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, Chetty and Hendren estimate that one-half to two-thirds of the geographic variation is causal.[71] Children who had the bad luck of growing up in a low-opportunity community would have fared much better if their parents had relocated to a high-opportunity region.[72]

Many of the high-opportunity communities are found in the expensive coastal areas.[73] 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.

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.[74] 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. Within metro regions, 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.[75]

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

[70] *Id.* at 1556.

[71] Chetty & Hendren, *supra* note 69, at 2-4.

[72] Chetty & Hendren, *supra* note 69, at 6.

[73] Arthur Acolin & Susan Wachter, *Opportunity and Housing Access*, 19 CITYSCAPE 135 (2017).

[74] *See generally* EDWARD GLAESER, TRIUMPH OF THE CITY (2011).

[75] NATHANIEL DECKER ET AL., RIGHT TYPE, RIGHT PLACE: ASSESSING THE ENVIRONMENTAL AND ECONOMIC IMPACTS OF INFILL RESIDENTIAL DEVELOPMENT THROUGH 2030 (Mar. 10, 2017), https://ternercenter.berkeley.edu/right-type-right-place.

California is famous in environmental circles for its ambitious greenhouse-gas emission targets. So far, the state is making impressive progress—except in the transportation sector.[76] 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.[77]

3. National Economic Welfare

As David Schleicher and others have emphasized, barriers to new housing in economically successful metropolitan regions have national economic consequences.[78] 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 many 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 who are similarly engaged.[79] Schleicher also observes that mobility barriers make it harder for the Federal Reserve Bank to establish sensible monetary policies.[80] 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. 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.[81]

Finally, there is some evidence that people underestimate losses to their own welfare from long commutes.[82] Causal claims about this alleged cognitive bias

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[76] CALIFORNIA AIR RESOURCES BOARD, 2018 PROGRESS REPORT: CALIFORNIA'S SUSTAINABLE COMMUNITIES AND CLIMATE PROTECTION ACT, https://ww2.arb.ca.gov/sites/default/files/2018-11/Final2018Report_SB150_112618_02_Report.pdf.

[77] 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; David Roberts, *California Has a Climate Problem, and Its Name Is Cars*, VOX, Aug. 22, 2017.

[78] *See, e.g.*, Schleicher, *supra* note 19; Glaeser & Gyourko, *supra* note 20; Chang-Tai Hsieh & Enrico Moretti, Why Do Cities Matter? Local Growth and Aggregate Growth (2015).

[79] *Id.*

[80] Schleicher, *supra* note 19, at 88-96.

[81] *See* Glaeser & Gyourko, *supra* note 20 (reviewing literature).

[82] The seminal paper is Alois Stutzer & Bruno S. Frey, *Stress that Doesn't Pay: The Commuting Paradox*, 110 SCAN. J. ECON. 339 (2008).

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.

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'll 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.[83]

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 population growth across all income categories. Local governments are required to enact and periodically update a comprehensive plan with a "housing element" that explains how the jurisdiction will permit enough housing for 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 have not been exposed to strong builders' remedies.

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[83] For an overview of the model as embodied in the law of Connecticut, Massachusetts, New Jersey, and Rhode Island, 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 (2000). Regarding Illinois, see Ill. Housing Development Authority, Affordable Housing Planning and Appeal Act: 2013 Non-Exempt Local Government Handbook(rev'd Jan. 7, 2014), https://www.ihda.org/wp-content/uploads/2016/03/Final2013AHPAANELGHandbook.pdf (hereinafter, "Ill. Handbook").

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 states only addresses income-restricted housing.

The Northeastern and West Coast Models are not the only ways in which states have acted to accommodate more housing, denser housing, or more below-market-rate housing units. A few states have created incentive programs to encourage denser housing near mass transit,[84] and many more provide for tax abatements or tax increment financing to encourage redevelopment of deteriorating areas.[85] I focus here on the Northeastern and West Coast Models, however, because they capture the principal means by which parent states of the expensive metro regions 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.[86] Civil rights activists demanded state intervention to make the "tight little islands" of suburbia accept their fair share of low-income housing.[87] The aim was to dismantle concentrated urban

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[84] *See* ROBERT H. FREILICH ET AL., FROM SPRAWL TO SUSTAINABILITY: SMART GROWTH, NEW URBANISM, GREEN DEVELOPMENT, AND RENEWABLE ENERGY 247 (2010) (discussing Massachusetts and Connecticut programs).

[85] *See id.* at 248-49.

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

[87] Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1968).

poverty and racial isolation, giving poor black families in the central cities access via housing to the good schools and increasingly bountiful employment opportunities of the suburbs.[88]

New Jersey's courts in the *Mt. Laurel* line of cases famously converted this civil rights demand into state-constitutional doctrine.[89] In Massachusetts, Connecticut, Rhode Island, and Illinois, the legislature answered the call.[90] But all of these states eventually settled on a similar strategy for opening up the suburbs. First, 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. Deed restrictions on these units allow them to be sold or rented only to persons who earn no more than a state-determined share of the Area Median Income, and at restricted prices.[91] In New Jersey, BMR quotas emerge from a complicated and contentious process of periodically determining regional "needs" and then jurisdiction-specific "fair shares,"[92] whereas Massachusetts, Rhode Island, Connecticut, and Illinois have

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[88] *See* CHARLES M. HAAR, SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES 3-11 (2d. ed. 1996) (describing background to the *Mt. Laurel* litigation).

[89] S. Burlington Cnty. NAACP v. Twp. of Mount Laurel (Mount Laurel I), 67 N.J. 151, 179, 187, 336 A.2d 713, *appeal dismissed and cert. denied*, 423 U.S. 808, 96 S.Ct. 18, 46 L.Ed.2d 28 (1975); S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mount Laurel (Mount Laurel II), 92 N.J. 158, 205, 456 A.2d 390 (1983).

[90] 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, *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. HANDBOOK, *supra* note 83. About Rhode Island, whose framework dates to 1991, see *Town of Burrillville v. Pascoag Apartment Assocs., LLC*, 950 A.2d 435, 438-39 (R.I. 2008).

[91] *See* Rachel G Bratt & Abigail Vladeck, *Addressing Restrictive Zoning for Affordable Housing: Experiences in Four States*, 24 HOUSING POL'Y DEBATE 594, 598 (2014) (comparing BMR housing definition in several states).

[92] 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 generally* Roderick M. Hills, Jr., *Saving* Mount Laurel, 40 FORDHAM URB. L.J. 1611, 1619-23 (2012) (discussing controversy); In re Declaratory Judgment Actions Filed by Various Municipalities, 227 N.J. 508 (2017) (instructing lower courts on housing-need calculation).

simply declared that 10% of the housing stock of each locality should consist of BMR units.[93]

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%,[94] the developer may appeal to a state tribunal *and obtain an exemption from otherwise-applicable local ordinances*.[95] 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.[96] 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.[97] (However, only nonprofit or limited-profit developers are entitled to speedy permitting, which limits the disruptive potential of the "deemed approved" proviso.[98])

The final component of the Northeastern Model is the safe harbor. Local governments that have produced their target number (share) of BMR units, or that have received state approval of their plan to produce them, are immune from

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[93] *See* Stonefield, *supra* note 83, at 339. Massachusetts hasn't sidestepped it entirely, however, in that jurisdictions below the 10%-of-housing-stock threshold which seek an exemption from the builder's remedy (on which *see infra* notes 99-101 and accompanying text) must submit an affordable housing plan tied to projected population growth in various income categories. *See* MASS. DEP'T OF HOUS. & COMMUNITY DEV., G.L.C. 40B GUIDELINES II-8 – II-10 (Dec. 2014), https://www.mass.gov/files/documents/2017/10/10/guidecomprehensivepermit.pdf.

[94] *See, e.g.*, R.I. § 45-53-4(a) (25%); Stuborn Ltd. Partnership v. Barnstable Bd. of Appeals, Decision of Jurisdiction, No. 98–01, at 6–7 (Mass. Hous. App. Com'n, Mar. 5, 1999) (25%); In re Adoption of N.J.A.C. 5:96 & 5:97, 416 N.J. Super. 462, 491, 6 A.3d 445, 463 (App. Div. 2010), *aff'd as modified sub nom.* In re Adoption of N.J.A.C. 5:96, 215 N.J. 578, 74 A.3d 893 (2013) ("a 20% set-aside requirement has been considered the norm in the administration of the Mount Laurel doctrine").

[95] These proceedings take place before an administrative tribunal in Massachusetts, Rhode Island, and Illinois, and courts in Connecticut. See sources cited in note 90, *supra*. In New Jersey, the proceedings took place before courts initially, then an agency, and most recently before courts again, since he agency was declared "defunct." *See* In re Declaratory Judgment Actions Filed by Various Municipalities, 152 A.3d 915, 918-22 (NJ 2017) (summarizing history). Additionally, Rhode Island restricts the builder's remedy to projects that are publicly subsidized, 45 R.I. Gen. Laws Ann. § 45-53-3 (West), and Massachusetts restricts it to projects proposed by public agencies, nonprofits, and "limited divided" organizations, Mass. Gen. Laws Ann. ch. 40B, § 21 (West).

[96] See sources cited in note 90, *supra*

[97] Regarding the expedited, "comprehensive permit" procedure in Massachusetts and Rhode Island, see, respectively, 28 ARTHUR L. ENO, JR. ET AL., MASS. PRACTICE SERIES § 23.30 (4th ed. Supp. 2016); 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 (2011).

[98] 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 (2017) (describing and critiquing this limitation).

the builder's remedy.[99] To obtain the plan-based immunity, localities typically must adopt an inclusionary-zoning ordinance, which requires developers of multi-unit projects to dedicate some percentage of the units to the BMR program or pay an in-lieu fee.[100] 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.[101]

The underlying premises of the Northeastern Model seem to be (1) that 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

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[99] Regarding New Jersey, see N.J.S.A. 52:27D–313 –317; *see also* Hills Dev. Co. v. Twp. of Bernards, 103 N.J. 1, 19–20, 33–35, 510 A.2d 621 (1986) (explaining certification procedure); In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous., 221 N.J. 1, 24, 110 A.3d 31, 45 (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").

Regarding Massachusetts, see 70 CMR 56.03 (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); Mass. Dep't of Hous. & Community Dev., G.L.C. 40B Guidelines II-8 – II-10 (Dec. 2014), https://www.mass.gov/files/documents/2017/10/10/guidecomprehensivepermit.pdf (implementing statute).

Regarding Rhode Island, see R.I. Gen. Laws Ann. § 45-53-4 (West) (stating that review board may deny affordable-housing development application if the local government "has an approved affordable housing plan and is meeting housing needs, and the proposal is inconsistent with the affordable housing plan"); Div. of Planning, Rhode Island Department of Administration, State Guide Plan Element 423, Appendix D (June 2016) (reprinting guidelines for affordable housing plans).

Regarding Illinois, see ILL. HANDBOOK, *supra* note 83, at 13 (noting, inter alia, that local governments are exempt from builder's remedy if they adopt an affordable housing plan establishing goal that 15% of all new housing consist of affordable units).

In contrast to the other Northeastern states, Connecticut does not appear to offer a plan-based immunity. Instead, it limits the threat of the builder's remedy by allowing local governments to adopt temporary affordable-housing moratoria provided that certain criteria are met. *See* Conn. Gen. Stat. Ann. § 8-30g(l) (West).

[100] *See* Stoneman, *supra* note 83, 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).

[101] *See* 42 R.I. Gen. Laws Ann. § 42-128-8.1(g) (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, Appendix D (June 2016) (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. App. Div. 2010), *aff'd as modified sub nom.* In re Adoption of N.J.A.C. 5:96, 74 A.3d 893 (NJ 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).

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 track record or plan for producing BMR units, and they provide the remedy *solely* for builders of BMR units. 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,[102] the state's courts have resisted efforts to account for market-supply effects in the calculation of regional housing needs.[103] A New Jersey municipality that meets its fair-share obligation for BMR units may zone the rest of its land as restrictively as it wishes.[104]

2. *Critiques*

The Northeastern Model has been bashed from many directions.[105] 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 an unwillingness on the part of governments throughout expensive metro regions to allow enough market-rate housing, especially dense housing near transit. As the gentrification fights attest,

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[102] *See* In re Adoption of N.J.A.C. 5:94 & 5:95 by the N.J. Council on Affordable Hous., 914 A.2d 348, 362 (N.J. Super. Ct. App. Div. 2007) (stating that the the housing agency had "recognized filtering as the most significant market force in reducing housing need").

[103] *See id.* at 372-75 (N.J. Super. Ct. App. Div. 2007) (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, *In re Adoption of N.J.A.C. 5:96 & 5:97 ex rel. New Jersey Council on Affordable Hous.*, 110 A.3d 31 (NJ 2015), and the housing-need determinations since then have not adjusted for filtering. *See* Matter of Application of Twp. of S. Brunswick, 153 A.3d 981, 994 (N.J. 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 Municipality of Princeton*, No. MERL155015, 2018 WL 1352272, at *40-42 (N.J. Super. Ct. Law Div. 2018) (same).

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

[105] Some critics complain that deed-restricted BMR units are a terribly inefficient way to subsidize housing for poor people, e.g., Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 893 (2009); others fault the states for inadequate commitment, see http://fairsharehousing.org/mount-laurel-doctrine; 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 92, at 1639-44.

there are now plenty of affluent whites who are willing live near poor people and minorities,[106] but there's 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.[107] Because Northeastern Model states (other than New Jersey) define the affordable-housing target as *percentage* of the total housing stock (10%), rather than as an *amount* of new housing units to be built over a planning period, they effectively punishes 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.[108]

On the other hand, the Northeastern Model may have induced some local governments to accommodate reasonably dense housing projects they would otherwise have rejected. This is so because the least fiscally burdensome way for a local government to meet its affordable-housing obligations is to make it profitable for developers to build while setting aside a substantial fraction of the units as BMR housing. Courts in New Jersey have also put some pressure on local governments to zone for fairly dense, low-cost housing forms, and have pushed back against BMR requirements that are so onerous as to render development unprofitable.[109]

The few empirical studies that have tried to sort out how the Northeastern Model has affected total housing supply are inconclusive.[110] About the best that

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[106] 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).

[107] *See, e.g.*, FISCHEL, *supra* note 5, at 359-62.

[108] *See* FISCHEL, *supra* note 5, at 359-60.

[109] *Id.*

[110] 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. PLANNING EDUC. & RES. 1 (2018): Another 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 ET AL., SMART GROWTH POLICIES, ch. 6 (2009). In Connecticut, adoption of the Northeastern Model did not reduce housing production in Connecticut suburbs relative to nearby "control" suburbs in New York (which has not adopted the model). *See* Nicholas J. Marantz & Harya S. Dillon, *Do State Affordable Housing Appeals Systems Backfire? A Natural Experiment*, 28 HOUS. POLICY DEBATE 267 (2018).

can be said for the model is that while aims at the wrong target, it has induced the 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.[111] Housing wasn't the focus of the initial planning mandates,[112] but it became much more central in the 1980s and 1990s.[113] By 1991, when Washington enacted its 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 7-10 years[114]), for enough new housing to accommodate projected population growth.[115] Second, the local comprehensive

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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 with 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. AFFAIRS REV. 92 (2009): 92-118.

[111] *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).

[112] *Id.*

[113] California's framework legislation dates to 1968, but the RHNA and state-review requirements were not established until the early 1980s. *See* Baer, *supra* note 113, at 54-61. Oregon's framework dates to 1973 and acquired its modern form by 1979. *See* Robert L. Liberty, *Oregon's Comprehensive Growth Management Program: An Implementation Review and Lessons for Other States*, 22 ENVT'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 (2011); Paul A. Diller & Edward J. Sullivan, *The Challenge of Housing Affordability in Oregon: Facts, Tools, and Outcomes*, 27 J. AFFORDABLE HOUS. 183 (2018). Washington's framework, the Growth Management Act, dates to 1990. *See* Paul Marshall Parker, The Evolution of Growth Management in Washington: 25 Years and Counting (2015), 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 not mandatory until the mid 1980s. *See* Stroud, *supra* note 116, at 400-06.

[114] Cal. Gov't Code § 65588 (8-year cycle) (West 2018); Or. Rev. Stat. § 197.629 (West 2018) (7-10 years); Fla. Stat. Ann. § 163.3191 (West 2018) (7 years); Wash. Rev. Code Ann. § 36.70A.130 (West 2018) (8 years).

[115] In Washington, "County officials [select a] 20-year [] planning target from within the range of high and low prepared by [the state finance agency;] then within each county, population planning targets for cities, towns, and unincorporated areas are developed among

all affected local jurisdictions." https://www.ofm.wa.gov/washington-data-research/population-demographics/population-forecasts-and-projections/growth-management-act-county-projections. 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." RCW 36.70A.070(2) (West).

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). "Needed housing," in turn, "means 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. "Needed housing" is determined using a 20-year population forecast. *See* Or. Rev. Stat. § 197.296(6) (requiring cities to adjust growth boundaries and / or density to accommodate needed housing per 20-year forecast); Or. Admin R. 660-024-0040 ("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 assignment 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. LAWYER 47 (2016).

The California process for determining housing need is described in the text accompanying notes 121-124, *infra. See also* CAL. AFFORDABLE HOUS. LAW PROJECT, CALIFORNIA HOUSING ELEMENT MANUAL 18-21 (3d ed. June 2013) (hereinafter, "CAL. MANUAL"); Cal. Gov't Code §65584 et seq. (West 2018).

In Florida, "[t]he 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 (West)).

plans, or at least their "housing elements," must be submitted to a state agency for review.[116] Third, local land-use regulations and by extension local permitting decisions must conform to the plan.[117]

Population forecasts are made by a state agency and forwarded to local planners.[118] Oregon, Washington, and Florida instruct their local governments

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[116] Oregon requires local governments to have their comprehensive plans and implementing regulations "acknowledged" by the state agency. *See* Sullivan, *supra* note 111, at 370-71. This process was completed by 1986. *Id.* Amendments to an acknowledged plan must be submitted for state review, see Or. Rev. Stat. § 197.610; additionally, plans covering urban areas (with a few exceptions) must be updated and submitted for state review every 7-10 years, see Or. Rev. Stat. § 197.633. For a comparison of the post-acknowledgment amendment and periodic review processes, see Sullivan, *supra* note 111, at 370-72, 392-93.

In California, local governments must submit draft housing elements and amendments to HCD for review. If HCD objects, the local government may enact the element or amendment anyway but must make findings about 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. MANUAL, *supra* note 115, at 15; Cal Gov't Code § 65585.

In Washington, plans and plan amendments must be submitted to the state Department of Commerce for review at least 60 days before adoption. *See* Wash. Rev. Code § 36.70A.106 (West); WAC 365-196-630. 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.

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 45 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. Ann. § 163.3184(4) (West); for a history of earlier incarnations of the Florida plan-review process, see Nancy Stroud, *A History and New Turns in Florida's Growth Management Reform*, 45 J. MARSHALL L. REV. 397 (2012).

[117] California's consistency requirements are codified as Cal. Gov't Code §§65860, 66473.5 & 65583(c) (West 2018). Regarding Florida, see Stroud, *supra* note 116, at 400-01, 14 (describing emergence of consistency requirement in the early 1970s, and its preservation even during the 2009-11 "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 (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. Ann. § 197.636 (West 2018); Liberty, *supra* note 111, at 10372.

[118] In Washington and California, the population projections are made by the state's department of finance. See RCW 43.62.035; Cal. Gov't Code §65584 et seq. In Oregon, they are made by a state university, see Or. Rev. Stat. 195.033, and in Florida, they are made by the state's Office of Economic and Demographic Research, see Fla. Stat. Ann. § 163.3177 (West 2018).

convert these population forecasts into estimates of needed housing for "all economic segments of the community."[119]

California goes a step further.[120] 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 Government.[121] Though HCD ultimately determines the size of each region's quota (called 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.[122] The RHNAs 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.[123] ("Above-moderate" is code for market-rate housing.[124]) Councils of Government then allocate their region's quotas among the member governments. 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 confederations of local governments.[125]

Beyond the essential "West Coast" 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 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.[126] In

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[119] *See supra* note 115.

[120] *See generally* CAL. MANUAL, *supra* note 115, at 18-21.

[121] 1980 Stat. Ch. 1143 § 3 (adding Cal. Gov't Code §§ 65580 et seq.).

[122] *Id.*

[123] *Id.*

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

[125] 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).

[126] Regarding Washington, see https://www.commerce.wa.gov/serving-communities/growth-management/submitting-materials/; Wash. Rev. Code Ann. § 36.70A.340-.345 (West).

Washington, this appears to be the only consequence, and it is suffered only in the discretion of the governor.[127] 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.[128] In Oregon, permits issued by local governments that lack an approved comprehensive plan may also be invalidated for not conforming to the state's nineteen land-use goals.[129] Though no West Coast state has established a full-blown builder's remedy to enforce the planning duty—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 decisionmaker—California has recently taken some steps in this direction,[130] and Oregon's state-oversight body may remedy planning defaults by ordering development projects approved.[131]

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.[132] The LCDC also has broad rulemaking authority, which it has used to establish minimum zoning densities.[133] By contrast, Washington's oversight entity, the Growth Management Hearing Board (GMHB), has no authority to

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Regarding Calforonia, see Dep't Hous. and Cmty. Dev., Incentives for Housing Element Compliance (2009), *available at* http://www.hcd.ca.gov/hpd/hrc/plan/he/loan_grant_hecompl011708.pdf.

Regarding Oregon, see Or. Rev. Stat. §§ 197.319-.335 (2011); Or. Admin. R. 660-045. Sullivan, *supra* note 111, at 391, notes that these powers are "now largely unused."

[127] *See* RCW §§ 36.70a.330, 36.70a.340, 36.70a.345.

[128] 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 Or. Rev. Stat. §§ 197.319-.335 (2011); Or. Admin. R. 660-045 (2011).

[129] 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. Ann. § 197.835(5) (West); Liberty, *supra* note 111, at 10371

[130] *See infra* notes 210-212 and accompanying text.

[131] 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. Ann. § 197.636 (West). 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. Ann. § 197.335 (West) (emphasis added). Oregon's Land Use Board of Appeals also has authority to order projects approved *See* Or. Rev. Stat. 197.835(10); Walter v. City of Eugene, Or. LUBA No. 2016-024.

[132] *See* Or. Rev. Stat. Ann. § 197.636(2). For examples, *see infra* note 360.

[133] Or. Admin. R. 660-07-035 (adopted 1981).

establish minimum densities or any other "public policy,"[134] and its remedial powers are very limited. 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.[135] In California, the HCD lacks general rulemaking authority and has had virtually no oversight role with respect to plan implementation,[136] although recent reforms are starting to change this.[137]

California and Oregon have also taken some steps to thwart local evasion of the plan at the project-permitting stage. Both states set time limits within which local governments must act on permit applications,[138] and local governments may deny permits only on the basis of objective standards.[139] (Washington and Florida do not have such requirements.) In California, the housing element must include an analysis of governmental and private constraints upon "development of housing for all income levels,"[140] and a "schedule of actions" to "[a]ddress and, where appropriate and legally possible, remove constraints."[141]

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.[142] 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.[143]

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[134] Viking Properties, Inc. v. Holm, 118 P.3d 322, 329 (Wash. 2005) (en banc).

[135] See RCW §§ 36.70a.330, 36.70a.340, 36.70a.345.

[136] *See* Baer, *supra* note 113, at 56-60; Cal. Gov't Code § 65585(a) (West 2018).

[137] *See infra* text accompanying note 213.

[138] California's Permit Streamlining Act establishes varying time limits depending on the size of the project. *See* Cal. Gov't Code § 65950 (West 2018).

[139] *See* Honchariw v. Cty. of Stanislaus, 200 Cal.App.4th 1066 (2011) (discussing objective standards requirement, and tracing it to a bill enacted in 1999); Or. Rev. Stat. 197.307(4) ("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.").

[140] Cal. Gov't Code §§ 65583(a)(5) & (6) (West 2018).

[141] Cal. Gov't Code § 65583(c) (West 2018).

[142] *See supra* note 115.

[143] *See* Clallam Cty. v. Dry Creek Coal., 255 P.3d 709, 712 (Wash. 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., Wash. Land Use § 5:12 ("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…") (internal citations and quotation marks omitted).

In Oregon, however, the theory of periodic plan revision has given way to a practice of ad-hoc amendment.[144] Oregon by statute requires most urban communities to revise their plans on a regular cycle,[145] but LCDC regulations have exempted local governments that choose other, simplified procedures for plan amendments.[146] 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.[147]

Florida's abandonment of periodic, state-supervised plan revision has been even more thoroughgoing. A 2011 statute repealed the formerly mandatory duty of local governments to update and submit general plans for state review on a seven-year cycle.[148] Now it suffices for local governments to write a septennial letter reporting their self-assessed need for plan amendments.[149] 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.[150]

2. *Critiques*

Critiques of the West Coast Model are to some extent state-specific, which should hardly be surprising given the differences I have described. They 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.[151] 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."[152] And despite the Oregon LCDC's unique authority to establish minimum densities and direct the

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[144] *See* Sullivan, *supra* note 111, at 392-93.

[145] Or. Rev. Stat. § 197.629.

[146] *See* Or. Admin. R. 660-038-0020(15), 660-038-0210(2).

[147] Telephone interview with Ed Sullivan, Oct. 1, 2018.

[148] Fla. Stat. Ann. § 163.3191 (West); Stroud, *supra* note 116, at 412.

[149] Fla. Stat. Ann. § 163.3191(1).

[150] Telephone interview, Oct. 2, 2018.

[151] 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.

[152] Romem, *supra* note 151.

implementation of comprehensive plans, ninety percent of the residential land in the state's largest city remains zoned for single-family homes.[153]

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 the noncompliant jurisdictions, controlling for observable jurisdiction-level characteristics.[154] 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.[155]

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 substantially expand the housing supply. I would venture, however, that the failures of the West Coast Model at least partly reflect (1) the setting of housing-supply targets on the basis of projected population growth, rather than market conditions; and (2) a misplaced presumption of local good faith with respect to the design and implementation of land use plans.

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. It also furnishes a procedural framework for negotiating regional (California[156]) or countywide (Washington and Oregon[157]) housing goals in advance of discrete rezoning and project-

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[153] Diller & Sullivan, *supra* note 113, at 225 n. 224 (reporting figures as of Dec. 23, 2017).

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

[155] *See* Ramsey-Musolf, *supra* note 124 (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).

[156] *See supra* note 115, and text accompanying.

[157] *Id.* 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 115.

permitting decision.[158] But the West Coast Model launches these negotiations with a specific target in mind, and the target is perverse: accommodating *projected* population growth.[159]

A county or a region that has permitted very little new housing for many years will have experienced low population growth. Projecting that low rate of growth into the future leads to the conclusion that little new housing is needed—even if demand and prices are sky high. Population growth in high-demand regions is obviously endogenous to housing supply, so it makes no 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 in zoning designations or density," and "[a]dopted policies regarding population growth."[160] Yet other Oregon laws tell local governments to guage their housing needs and draw urban boundaries on the basis of the population forecast.[161] Thus does the planning dog chase its own tail.

The absurdity of basing housing-need determinations on population projections 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[162]—received an affordable housing quota of precisely three units, and a market-rate quota of *zero* units.[163] When journalists noticed this and began asking snarky questions, the city's leadership responded that the tiny allocations were reasonable given the lack of growth in Beverly Hills's population.[164] According to the traditional logic of the West Coast Model, the city's leadership has it exactly right. And this illustrates just how wrong it is to for states to base local housing obligations on population-growth projections. Under any sane regime, a region comprised of Beverly Hills—of cities that have utterly stanched population growth despite astronomical demand—would be presumptively categorized as having enormous unmet housing need.[165]

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[158] 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* Part IV.B.2.

[159] *See supra* note 118 and accompanying text.

[160] PSU Standard 577-050-0050(3), https://www.pdx.edu/prc/opfp. For a history of Oregon population forecasting, see Sullivan, *supra* note 115.

[161] *See supra* note 115.

[162] https://www.zillow.com/beverly-hills-ca/home-values/.

[163] https://www.nytimes.com/2018/02/05/us/california-today-beverly-hills-affordable-housing.html.

[164] *Minneapolis Just Eliminated Single-Family Zoning. Should California Cities Follow Suit?*, GIMME SHELTER PODCAST (Dec. 27, 2018), https://calmatters.org/articles/minneapolis-bans-single-family-zoning-should-california/.

[165] 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.

This is not to say that there is one uniquely best or most defensible housing-supply target. 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 (*e.g.*, housing prices which substantially exceed the usual costs of production[166]), as well as actual or potential access to job centers via convenient, non-greenhouse-gas-intensive modes of commuting.

Or, more simply, the states might simply require *every* region to zone for a substantial increase in housing supply, and then let the market determine which regions will grow. In recognition of the fact that the affordable metro regions of the South and Southwest managed to increase their housing supply by 30%-60% in barely more than a decade,[167] policymakers in a high-cost state might decide that the state's metro regions 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 which fail to demonstrate potential for 50% growth (relative to the then-current housing stock), or which allocate housing growth to locations that would be difficult to develop while restricting development of better, more transit-accessible 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 own housing quotas by enacting onerous controls that curtail population growth notwithstanding high demand.

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 regions. 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 the housing element, 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

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[166] *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).

[167] *See supra* note 27.

that other legislation enjoys—even if the state agency has rejected the housing element in question.[168] So long as the housing element "contains the elements mandated by the statute," the courts will uphold it.[169] Whether it will actually enable construction of the required number of units has been regarded as a question of "workability" or "merits," and *irrelevant as matter of law* to the housing element's validity.[170]

In Washington and Florida, the reviewing state agency cannot make binding determinations about the validity of a housing element, but may challenge the plan before an administrative tribunal.[171] In both states, "comprehensive plans and development regulations . . . are presumed valid upon adoption,"[172] and the burden of proof is on the party challenging them.[173] Washington's administrative tribunal "shall find compliance" unless it determines that the plan or development regulation at issue "is clearly erroneous."[174]

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,[175] and Oregon courts give LCDC determinations the usual deference afforded to agencies' rules and orders.[176]

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[168] *See, e.g.*, Fonseca v. City of Gilroy, 148 Cal.App.4th 1174, 1191 (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., 175 Cal.App.3d 289, 298-99, 300-02 (1985) (stating that "the appropriate standard of appellate review is whether the [local government] has acted arbitrarily, capriciously, or without evidentiary basis") (internal citations and quotation omitted," and upholding housing element notwithstanding state agency's rejection of it for want of, *inter alia*, a "comprehensive five-year schedule of actions"). For a review of other cases to similar effect, see Field, *supra* note 128, at 54-61.

[169] *Forseca*, 148 Cal.App.4th at 1191-92.

[170] *See, e.g.*, *Fonseca*, 148 Cal.App.4th at 1185 ("judicial review of a housing element for substantial compliance with the statutory requirements does not involve an examination of the merits of the element[, of] whether the programs adopted are adequate to meet their objectives") (internal citations and quotation marks omitted); *Buena Vista Gardens*, 175 Cal.App.3d at 298-302 (treating agency's view of workability of plan as a "merits" question not for courts to consider in judging plan's validity).

[171] In Washington, this adjudicator is the specialized Growth Management Hearing Board. *See* 24 Wash. Prac., Envtl. Law & Practice § 18.3 (2d ed., July 2017 Update). In Florida, it's the general-purpose Department of Administrative Hearings. *See* Fla. Stat. § 163.3184.

[172] Wash. Rev. Code Ann. § 36.70A.320(1) (West). There is an exception for certain coastal development regulations. *See id.*

[173] Wash. Rev. Code Ann. § 36.70A.320(2) (West). *See also* Fla. Stat. Ann. § 163.3184 (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).

[174] RCW 36.70A.320(3).

[175] *See supra* note 116.

[176] *See, e.g.*, City of Happy Valley v. LCDC, 677 P.2d 43 (Or. 1984) (applying abuse-of-discretion review to LCDC decision rejecting plan); 1000 Friends of Oregon v. Land

Beyond the legal standards for housing element 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,[177] and courts strongly defer to local governments when evaluating consistency.[178] If the court deems the ordinance inconsistent, it may remand to the local government to fix the inconsistency,[179] and if the remand is coupled with an injunction, it is customarily an injunction *against* issuing permits on the basis of the inconsistent ordinance.[180] The working assumption is that local governments will honor the plan and resolve any inconsistency which may arise promptly and in good faith.

In addition to the consistency requirement, 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,[181] and to act on project applications within a fixed, reasonably short period of time.[182] 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

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Conservation & Dev. Comm'n, 301 Or. 447, 469, 724 P.2d 268, 284 (1986) (extending deference to LCDC interpretations of law).

[177] *See* Cal. Gov't Code § 65860(b) (West 2018) (90 days).

[178] *See* CECILY TALBERT BARCLAY & MATTHEW S. GRAY, CALIFORNIA LAND USE & PLANNING LAW 25-26, 46-47 (36th ed. 2018) (discussing "arbitrary and capricious" / "no reasonable person" standard in California). *See also* Marracci v. City of Scappoose, 552 P.2d 552, 553 (Or. Ct. App. 1976) (rejecting developer's argument that project which complied with 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").

[179] *Compare* Baker v. Milwaukie, 533 P.2d 772, 779 (Or. 1975) ("plaintiff has stated a cause of action in seeking to compel the City of Milwaukie to conform its zoning ordinances to the comprehensive plan") *with* Lesher Commc'n, Inc. v. Walnut Creek, 52 Ca. 3d 531, 544-47 (Cal. 1990) (holding that zoning ordinance inconsistent with the plan is invalid *ab initio*, and therefore properly remedied by writ compelling invalidation rather than compliance decree).

[180] *See, e.g.*, *Baker*, 533 P.2d at 779 ("plaintiff has stated a cause of action . . . to suspend the issuance of building permits in violation of the plan"); Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cty., 958 P.2d 962, 971–972 (Wash. 1998) ("If a . . . development regulation is found to be inconsistent with the plan, the validity of any permits issued by the local government under the authority of those development regulations will be called into question"). *See also* Edward G. Diener, *Defining and implementing local plan-land use consistency in California*, 7 ECOLOGY L.Q. 753 (1978) (examining consistency requirement as grounds for blocking projects).

[181] *See supra* note 139 and accompanying text.

[182] *See supra* 138.

Permit Streamlining Act kick in only *after* the local government has completed any environmental reviews and resolved any internal appeals.[183] Environmental appeals of municipal decisions are heard by the city council.[184] So if a city councilmember wants to kill a housing project in her district, she can always insist on further / better / 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, 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,[185] and in any event California's objectivity requirement only applies if the conditions reduce a project's density or render it "infeasible."[186]

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.[187] 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.[188]

In principle, housing agencies in the West Coast states could incentivize local follow-through by announcing that the agency will review the *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 housing element 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 element because it's unlikely to work, given the jurisdiction's track record. California law historically would not allow

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[183] *See* Cal. Govt. Code 65950(a); Eller Media Co. v. City of Los Angeles, 105 Cal. Rptr. 2d 262, 264 (Cal. App. 4th 2001).

[184] Cal. Pub. Res. Code § 21151(c).

[185] *Cf.* Rogue Valley Ass'n of Realtors v. City of Ashland, Or., LUBA No. 97-260, at 17 (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.")

[186] *See* Cal. Gov't Code § 65589.5(d) (West 2018).

[187] *See supra* Part II.A

[188] *See supra* note 99. (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.)

this, and the "presumption of validity" in Washington and Florida works against it too.[189]

Putting all these pieces together—the inane, population-forecast norm for housing need; the deference to local governments on the substance of their plans; the failure to punish or reward local governments on the basis of housing outcomes; and the lack of an expeditious procedure for permitting projects that conform to the plan notwithstanding contrary local ordinances—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?[190]

III. THE NEW YIMBY MEASURES

Legal scholars and economists who write about housing-supply barriers have tended to regard state-level interventions skeptically (or not at all).[191] 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.[192] In the absence of state control, the argument goes, developers are generally able to buy off *some* local governments in a region and thereby increase the regional housing supply.[193] But once the state gets involved, antidevelopment interests can wield state law to make every local government establish rigid growth boundaries,

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[189] *See supra* notes 168-173 and accompanying text.

[190] 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 124 (finding, during study period, that jurisdictions with approved housing elements produce more BMR housing, but less market-rate housing, than jurisdictions without).

[191] *See, e.g.*, FISCHEL, *supra* note 5, 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 a forthcoming paper 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. (forthcoming 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.

[192] *See, e.g.*, FISCHEL, *supra* note 5, 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).

[193] *See* Ellickson, *supra* note 192, 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 regions).

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[194]—but the traditional Northeastern and West Coast Models do not inspire much confidence in the states' ability to intervene constructively in local land use. Interestingly, though, as housing prices in the expensive metro regions 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 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.[195] YIMBY groups are springing up around the country to lobby for more housing at the state as well as local levels.[196] 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. Finding a Better Target

Senate Bill 828, enacted in 2018, begins to establish a new ground norm for regional housing needs assessments (RHNAs).[197] 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

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[194] *See supra* Part I.

[195] For an introduction to the movement, see Kenneth Stahl, *"Yes in My Backyard": Can a New Pro-Housing Movement Overcome the Power of NIMBYs?*, 41 ZONING & PLANNING L. REP. 1 (2018).

[196] *Id. See also* https://en.wikipedia.org/wiki/YIMBY.

[197] 2018 Cal. Stat. ch. 974 (hereinafter, "SB 828"). SB 828 builds on a measure passed a year earlier, AB 1068, which curtailed 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* 2017 Cal. Legis. Serv. Ch. 206, Digest & § 2 (A.B. 1086) (West).

goal.[198] 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."[199] The "healthy housing market" standard is in turn defined as a cost-burdened rate "no more than the average [such rate] in comparable regions throughout the nation."[200] Similarly, the "overcrowding rate [among renter households] [should be] no more than the average overcrowding rate in comparable regions throughout the nation.[201]

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.[202] And 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.

But there's a significant problem lurking in the details: the "percentage of cost burdened households" is a dubious indicator of a housing market's ill-health, because it fails to account for 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.[203] This tends to equalize the share of cost-burdened households across supply-constrained and unconstrained regions.[204] Indeed, in economic models with

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[198] 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.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201720180SB828.

[199] SB 828, § 2 (amending Cal. Gov't Code s. 65584.01(b)).

[200] *Id.*

[201] *Id.*

[202] SB 828, § 3 (amending Cal. Gov't Code s. 65584.04(f)) (stating that neither "[p]rior underproduction of housing . . . from the previous regional housing needs allocation" nor "[s]table population numbers" shall not be "a justification for a determination or a reduction in a jurisdiction's share of the regional housing need").

[203] *See, e.g.*, Issi Romem & Elizabeth Kneebone, *Disparity in Departure: Who Leaves the Bay Area and Where Do They Go?*, BUILDZOOM (Oct. 4, 2018), https://www.buildzoom.com/blog/disparity-in-departure-who-leaves-the-bay-area-and-where-do-they-go (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 regions in the United States).

[204] Tellingly, the share of cost-burdened households in the San Francisco metro area is smaller than that in the Riverside-San Bernardino metro area, see https://lao.ca.gov/Infographics/californias-high-housing-costs, even though the price of housing relative to replacement cost in the San Francisco metro area is almost twice is high as in the San Bernardino-Riverside metro area, *see* Romem, *supra* note 166.

costless mobility, an interregional disparity in the percentage of income spent on housing will persist only if certain regions offer locational amenities not found elsewhere.[205] 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.

Then again, despite the conceptual problem with treating the share of cost-burdened households as a proxy for housing-market health, California may still manage to ramp up housing quotas using the authority granted by SB 828. Specifically, the housing agency could try to convert temporary, disequilibrium changes in the share of cost burdened households into big RHNAs for the state's expensive, supply-constrained metro areas. Because moving between regions is costly, supply-constrained regions experiencing positive economic shocks may also experience a big, short-term increase in the share of cost-burdened households.[206] A short-term runup in the share of cost-burdened households, followed by socioeconomically skewed population flows (rather than a large increase in the housing stock) is certainly an indicator of an unhealthy housing market, and it's one that HCD arguably has statutory authority to use.[207]

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

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[205] *See, e.g.*, Albouy et al., *supra* note 36 (presenting model in which high housing costs relative to wage persist in equilibrium only because of locational amenities).

[206] Price controls—rent control and BMR deed restrictions—may mute this.

[207] Here is the strategy in a little more detail: First, HCD would define the statutory term "comparable region" as metro regions which were economically similar to the target region some years previously, e.g., at the beginning of the previous planning cycle. To illustrate, HCD would pick comparators for the San Francisco Bay area by identifying regions that eight years ago (at the start of the previous cycle) had similar economies measured by size and composition.

Having identified the relevant regions, HCD would then compare the change in the percentage of cost-burdened households in the target region, with the change in the percentage of cost-burdened households in the comparators. If the target region's cost-burdened share increased more than was typical of the comparator regions, HCD could "top off" the target region's baseline, population-forecast RHNA for the next cycle with a cost-burden adjustment which accounts for the region's failure to produce enough housing to accommodate demand in the previous cycle.

The remaining question is how big the top off should be. SB 828 provides no specific instruction, but building on the statute's national norming idea, HCD might define the appropriate top-off as the difference between (1) the average housing stock expansion over the previous cycle in the comparator regions, and (2) the actual housing stock expansion over the previous cycle in the target region. No longer would regions comprised of Beverly Hills lookalikes be able to leverage their exclusionary policies into small housing quotas.

HCD may also be able to boost housing quotas for regions that over the previous cycle experienced significant job growth without commensurate housing growth, relying on the "jobs-housing imbalance" factor. *See* Cal. Gov't Code § 65584.01(b)(1)(G). This factor was added to statutory framework in 2008, by SB 375, but has not yet been used by HCD to set regional quotas.

governments' housing elements, and if even the best of plans come to naught because there are no controls 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 policy, 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 own, adopted plans. California is starting to take this idea to heart.

The standard for a "substantially compliant" housing element. California hasn't expressly abrogated the courts' deferential, check-the-boxes test for housing element validity—to wit, a housing element "substantially complies" with state law if it "contains the elements mandated by the statute," regardless of whether it's likely to work.[208] But local governments can no longer count on judicial or administrative deference to dysfunctional housing elements.

One reason is that in 2005, the legislature created a builder's-remedy incentive for developers of 20% (and greater) BMR projects to challenge the adequacy of a housing element's program to accommodate affordable housing.[209] If the developer prevails, the local government may not deny project on the basis of local zoning ordinances or the general plan.[210] In these proceedings, "*the burden of proof shall be on the local [government]* to show that its housing element does identify adequate sites," with "appropriate zoning and development standards and with services and facilities to accommodate [the jurisdiction's] share of the regional housing need [for low- and moderate-income households]."[211]

The upshot is that in a conventional facial challenge to a housing element, courts may continue to apply the traditional, very deferential standard of review, but if the housing element is challenged by a developer seeking to build a 20%-BMR project that violates local zoning or development standards, the courts

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[208] *See supra* notes 168-170 and accompanying text.

[209] *See* Cal. Gov't Code 65589.5(d)(5)(B); 2005 Cal. Legis. Serv. Ch. 601 (S.B. 575) (West).

[210] The only allowable ground for denial in most cases is that the project would have a "specific, adverse effect on public health or safety." Cal. Gov't Code § 65589.5(d)(2).

[211] Cal. Gov't Code § 65589.5(d)(5).

should take a careful look at whether the housing element realistically accommodates the jurisdiction's RHNA shares.[212]

Furthermore, the legislature in 2017 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.[213] This new emphasis on implementation is hard to square with the courts' longstanding position that "substantial compliance" is just a matter of whether the housing element "contains the elements mandated by the statute."[214] It's conceivable that the California Supreme Court, which hasn't addressed the meaning of substantial compliance since housing element / RHNA framework was enacted in 1980, will eventually rule that the lower courts' deference to local governments on housing element validity has been abrogated by the evolution of the framework as a whole.[215]

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.[216] In California, a consistency challenge had to be brought within ninety days of enactment of the ordinance or it was forever barred. But a little-noticed reform adopted in 2004 and extended in 2018 essentially obviates this statute of limitations. The 2004 legislation requires local governments to

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[212] To be clear, this is my gloss on a statutory provision which has not yet been interpreted by the courts. It is possible that the courts will interpret it to mean only that the local government must carry the burden of showing that its housing element is not irrational vis-à-vis the RHNAs. But that gloss would go against the thrust of SB 575, and the legislature's instructions about how the Housing Accountability Act should be interpreted. *See* Cal. Gov't Code § 65589.5(a)(2)(L) (West 2018) ("It is the policy of the state that this section should be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.")

[213] 2017 Cal. Legis. Serv. Ch. 370 (A.B. 72) (West) (adding Cal. Gov't Code § 65585(i)(1)(a)) (West 2018). *See also* Cal Gov't Code § 65583.1(a) (added in 2002 per AB 1866), which states that HCD may allow a city or county to identify sites for second units *based on the number of second units developed in the prior housing element planning period*—a standard that's clearly focused on outcomes rather than formalities. The first enforcement action under AB 72 was filed against a city which amended a specific plan in a manner that conflicted with the housing element. *See* Complaint, Ca. Dep't of Hous. & Community Dev. v. City of Huntington Beach, No. 30-2019-01046493, Jan. 25, 2019 (Cal. Sup. Ct., Cty. of Orange).

[214] *See supra* notes 168-170.

[215] When the "substantial compliance" standard was added to the housing element law in 1984, the legislature expressed its intent to codify the standard applied in *Camp v. Bd. of Supervisors*, 123 Cal. App. 3d. 334 (Cal. Ct. App. 1981). *See* Hernandez v. City of Encinitas, 28 Cal. App. 4th 1048, 1058 (Cal. Ct. App. 1994) (quoting the legislative declaration). *Camp* is actually a better decision than many of the "substantial compliance" cases since, as 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* 123 Cal. App. 3d. at 349-51. 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 have the lower courts have to date.

[216] This paragraph restates a point explained *supra* in the text accompanying notes 178-180.

approve 20%-BMR projects whose location and density comport with the housing element, "notwithstanding any zoning ordinances or general-plan land use designations to the contrary."[217] The 2018 bill put developers of 100% market-rate projects on similar footing.[218] In effect, the housing element is becoming self-executing. Developers can apply for permits on the authority of the housing element, and the local officials who review the project must disregard inconsistent ordinances.

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.[219] The builder's remedy enacted in 2005 puts some pressure on local governments not to do this, and in 2017, California took another big step, ordering local governments to accommodate their RHNA allocations on imminently developable sites.[220] 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

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[217] 2004 Cal. Legis. Serv. Ch. 724 (A.B. 2348) (amending Cal. Gov't Code § 65589.5(d)(5)).

[218] *See* 2018 Cal. Legis. Serv. Ch. 243 § 1 (A.B. 3194) (West) (adding Cal. Gov't Code § 65589.5(j)(4), which requires approval of projects that comply with the general plan--which the housing element amends--notwithstanding "zoning standards and criteria" to the contrary). In contrast to the 2004 amendments for 20% 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, e.g., by amending the conflicting component of the plan. *See* Friends of Aviara v. City of Carlsbad, 210 Cal. App. 4th 1103, 1112-13 (2012).

[219] 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 multi-family construction in the corresponding housing element. *See* LAO, DO COMMUNITIES ADEQUATELY PLAN FOR HOUSING? 8-9 (Mar. 8, 2017), 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.

[220] *See* Fonseca v. City of Gilroy, 148 Cal.App.4th 1174, 1194-1202 (2007) (discussing 2005 amendments, while applying previous standards which did not require parcel identification); 2017 Cal. Legis. Serv. Ch. 375 (A.B. 1397) (delineating criteria for what counts as an available site).

to take to remove those constraints.[221] If the local government assigns more than 50% 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.[222]

An end to deference on project denials and density reductions. As far back as 1982, with the first iteration of its Housing Accountability Act, California has 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. The original Housing Accountability Act 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 filed only if the decisionmaker makes "written findings supported by substantial evidence" that the project would have a "specific, adverse [and non-mitigable] effect on public health or safety."[223] Subsequently the legislature clarified that only "objective" standards could be used to deny or reduce the density of a project.[224]

The difficulty with this requirement is that development standards are never perfectly clear, and it's hard for judges who lack intimate familiarity with legislative negotiation and drafting to say whether a standard is sufficiently or reasonably clear. 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*" that the project conforms to the standards.[225] 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 the discretion local governments previously enjoyed to reject 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.[226] Going forward, the local government must show *by a preponderance of the evidence* that the project would have a

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[221] 2017 Cal. Legis. Serv. Ch. 375 (A.B. 1397) (West) (amending Cal. Govt Code Code § 65883.2(c))).

[222] *Id.*

[223] 1982 Stats. ch. 1438, s. 2 (adding Cal. Gov't Code § 65589.5).

[224] 1999. Cal. Legis. Serv. Ch. 968 (S.B. 948) (West).

[225] 2017 Cal. Legis. Serv. Ch. 368 (S.B. 167) (amending Cal. Gov't Code § 65589.5(f)).

[226] The Housing Accountability Act originally required "written findings supported by substantial evidence [that the project would have] a specific, adverse [and not feasibly mitigable] effect on public health or safety." 1982 Stats. Ch. 1438, § 2.

"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."[227] The local government must make these findings in writing within 30-60 days of its decision,[228] and if the decision is challenged in court, the local government must carry the burden of proof.[229] Lest courts fail to get the message, the legislature in 2018 declared that adverse health and safety impacts from new housing "arise infrequently."[230]

Finally, recent amendments to the Housing Accountability Act extend standing to sue to "housing organizations" and potential residents, and require defendants to pay the attorneys' fees of prevailing plaintiffs.[231] Developers who have ongoing relationships with a local government may be wary of litigating, say, a modest density reduction. The attorney's fee and liberal standing provisions enable other parties to step in and make local governments follow their own rules.

Statutory consequences for failing to meet housing targets. With the passage of SB 35 (2017), California became the first West Coast state to make local governments liable for failing to meet state housing targets, not just for failing to plan.[232] SB 35 requires local governments to report annually to HCD on housing outcomes: the number of project applications received, entitlements and building permits granted, and certificates of occupancy issued.[233] SB 35 also directs HCD to issue mid-period and end-of-period evaluations of whether each local government is meeting or has met its RHNA allocations.[234] And here's the kicker: if a local government falls short of its RHNA targets, it must allow by-right development, with no environmental review, of projects that comply with zoning and development standards that were in effect when the application was submitted.[235] 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.[236]

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[227] 2017 Cal. Legis. Serv. Ch. 368 (S.B. 167) (West); Cal. Gov't Code § 65589.5(j)(1) (West 2018).

[228] Cal. Gov't Code § 65589.5(j)(1) (West 2018).

[229] Cal. Gov't Code § 65589.6 (West 2018).

[230] 2018 Cal. Stat. ch. 243, § 1 (adding subdivision (a)(3) to Gov. Code § 65585.5).

[231] *See* 2017 Cal. Legis. Serv. Ch. 368 (S.B. 167) (amending Cal. Gov't Code § 65589.5(k)).

[232] 2017 Cal. Legis. Serv. Ch. 366 (S.B. 35) (West 2018).

[233] These requirements are codified at Cal. Govt Code Code § 65400 (West 2018). They firm up earlier, much less specific reporting requirements.

[234] Cal. Gov't Code §§ 65913.4(a)(4) & (h)(7) (West 2018).

[235] 2017 Cal. Legis. Serv. Ch. 366 (S.B. 35) (West), § 3 (hereinafter "SB 35") (now codified as Cal. Gov't Code Code § 65913.4(a)(4)).

[236] SB 35, *supra* note 235, § 3 (now codified as Cal. Govt Code § 65913.4(b) & (c).

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, or design review standards . . . a development shall be deemed consistent [within the meaning of this section] if the development is consistent with the standards set forth in the general plan."[237]

Though SB 35 projects must meet several other criteria which may blunt the statute's impact,[238] the statute nonetheless advances an important principle: that local governments' prerogative to use cumbersome, discretionary development procedures is conditional on their producing the amount of new housing—including market-rate housing—that the state expects of them.[239]

California may soon make local governments that fail to meet their housing target pay a serious fiscal price, too. In early 2019, Gov. Gavin Newsom announced that he intends to withhold transportation funding from local governments that fall short of their targets.[240]

* * *

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 developing a nationally-normed, "healthy housing market" standard, and will set regional quotas for new housing accordingly. California has also taken important steps to make the housing element self-executing, so that developers can get permits for compliant projects notwithstanding inconsistent local ordinances and standards. California has terminated judicial deference to local governments on the question of whether development proposals comply 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. These are unabashedly pro-housing reforms, applicable to market-rate as well as affordable projects.

One can also discern in the recent California legislation a more tentative movement to require local governments to allow some by-right development, at

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[237] *Id.* (now codified as Cal. Govt Code Code § 65913.4(a)(5)(B)).

[238] The project must have at least 10% 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. *See id.* (now codified as Cal. Govt Code 65913.4(a)(4), (7) & (8)).

[239] 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* 2017 Cal. Legis. Serv. Ch. 375 (A.B. 1397) (West) (amending Cal. Govt Code § 65883.2(c)).

[240] *See* Liam Dillon, *Gov. Gavin Newsom Threatens to Cut State Funding from Cities that Don't Approve Enough Housing*, L.A. TIMES, Jan. 10, 2019.

state-prescribed minimum densities, under quick timeframes, and without project-specific environmental reviews. SB 35 is the leading example of this; another is a new requirement local governments which must liberalize their zoning ordinances to plausibly accommodate their RHNA shares do so by zoning for by-right development at specified minimum densities.[241]

Taken together, the California reforms are redefining the character and function of the comprehensive plan. Rather than serving as an "impermanent constitution" for zoning and development ordinances,[242] or as a statement of a community's aspirations for its built environment,[243] 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 potentially developable or redevelopable parcels within their territory, and commit to a schedule of actions to remove development constraints. In return for making these promises, the local government maintains its eligibility for certain funding streams and avoids builder's remedy lawsuits. 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 an amendment to 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 impose housing elements of its own design on local governments that fail to revise their housing elements 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

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[241] *See supra* note 239.

[242] For the canonical accounts of this ideal, see Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); Mandelker, *supra* note 111.

[243] On plans as dreamy visions for the future, see ROBERT C. ELLICKSON ET AL., LAND USE CONTROLS: CASES AND MATERIALS 69-72 (4th ed. 2013).

government without the concurrence of the state—albeit at the price of risking pecuniary and regulatory sanctions.

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.[244] Ever since, land-use scholars have regarded the rule with a kind of wry bemusement, as if to say, "Oh, leave it Oregon's urban-boundary enthusiasts to try something way too zany for any other state."[245] 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,[246] and because even West Coast states often privilege projects with a large share of BMR units.[247] (Whether density mandates will actually result in more housing is less clear, a point I take up below.)

To date, most of the new density interventions have focused on so-called accessory dwelling units (ADUs), small homes which may be developed in an under-utilized garage or basement, or added in the backyard of existing or proposed dwelling.[248] Washington, California, Oregon, New Hampshire, and Vermont now require local governments to permit ADUs on parcels zoned for single family homes.[249] Connecticut, Florida and Rhode Island have proceeded a bit more indirectly, encouraging ADUs by allowing local governments to count

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[244] The rule is codified at OAR 660–07–000 to 660–07–360. For discussion of its history, see *City of Happy Valley v. Land Conservation & Dev. Comm'n*, 677 P.2d 43, 44 (Or. 1984).

[245] *See, e.g.*, FISCHEL, *supra* note 5, at 303-07 (describing Portland), 366-67 ("[I]t is Oregon's boat to float"); Hills, *supra* note 92, 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]").

[246] *See supra* Part II.A.

[247] *See supra* Part III.B (describing reforms in California).

[248] ADUs are typically defined by statute as a small dwelling (e.g., less than 800 or 1200 square feet) contained within, or located in close proximity to, another existing or zoning-authorized structure. See sources cited in note 249, *supra*.

[249] *See* Cal. Gov't Code § 65852.2 (West 2018); Wash. Rev. Code Ann. § 43.63A.215 (West 2018); http://mrsc.org/getmedia/3ccc6c5e-0cc9-43c1-8936-b0017c7c161e/ADUordrecommendations.pdf.aspx (model ADU ordinance which local governments of a certain size in Washington must conform to); Vt. Stat. Ann. tit. 24, § 4412(1)(E) (West 2018); 2017 Oregon Laws Ch. 745 (S.B. 1051); N.H. Rev. Stat. Ann. § 674:72(I) (West 2018).

them toward the locality's fair-share obligation for affordable housing.[250] Several other states have enacted modest ADU incentive programs.[251]

More aggressive density mandates are also on the table. In 2016, one house of the Massachusetts legislature passed a bill that would have required every local government to zone at least one district "of reasonable size" for multi-family housing "as of right."[252] The bill spelled out minimum densities,[253] and authorized the state housing agency to implement the new mandate through rulemaking.[254] Oregon considered a bill in 2017 that would have banned single-family-home zones within urban growth boundaries.[255] Though the bill failed, the speaker of the Oregon house announced in December 2018 that she is drafting a new measure to allow fourplexes statewide on land zoned for single family use.[256] In Washington, a state senator has begun circulating a bill to establish tiered minimum densities near transit stations in the Seattle region.[257]

The granddaddy of the state upzoning bills is California's SB 827. Introduced in early 2018 by state senator Scott Wiener, SB 827 would have authorized 8-10 story residential buildings on all transit-accessible parcels that local governments have zoned for residential or mixed use.[258] The bill was soon watered down and then defeated, but not before drawing national attention to the connections between housing density, socioeconomic mobility, mass transit, and climate change.[259] The legislature did pass a more modest measure to upzone

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[250] Fla. Stat. Ann. § 163.31771 (West 2018); R.I. Gen. Laws § 42-128-8.1(b)(5) (West 2018); Conn. Gen. Stat. § 8-30g (West 2018).

[251] *See, e.g.*, Md. Code Ann., Hous. & Cmty. Dev. § 4-926 (West 2018) (providing for loan program for affordable housing including ADUs).

[252] *See* Bill S.2311, s. 6 (189th session, 2015 - 2016), https://malegislature.gov/Bills/189/Senate/S2311?pg=1&perPage=100&section=Amendments&filter=Senate&sortOption=; http://www.telegram.com/news/20180227/chandler-state-senate-ready-to-go-on-housing-bill.

[253] *Id.* (minimum densities of 8-15 units per acre).

[254] *Id.* ("The department shall promulgate regulations which shall be used to determine if a city or town has satisfied the requirements established in this subsection.").

[255] HB 2007 (79th Or. Legis. Assembly, 2017), https://gov.oregonlive.com/bill/2017/HB2007/.

[256] Rachel Monahan, *Could Oregon Become the First State to Ban Single Family Zoning?*, WILLIAMETTE WEEK, Dec. 18, 2018, https://www.wweek.com/news/state/2018/12/14/could-oregon-become-the-first-state-to-ban-single-family-zoning/.

[257] 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/.

[258] Scott Wiener, *My Transit Density Bill (SB 827): Answering Common Questions and Debunking Misinformation*, EXTRANEWSFEED, Jan. 16, 2018.

[259] *See, e.g.*, Dante Ramos, *Go on, California — Blow up Your Lousy Zoning Laws*, BOSTON GLOBE, Jan. 24, 2018; David Roberts, *The Future of Housing Policy Is Being Decided in California*, VOX, Apr. 4, 2018; Megan McArdle, *Democrats' Housing Problem*, WASH.

certain parcels near Bay Area Rapid Transit (BART) stations,[260] and as of this writing, Sen. Wiener has just introduced a successor to SB 827, with bipartisan cosponsors and the backing of significant interest groups.[261] The successor bill, SB 50, would authorize 4-5 story buildings near centers of employment as well as mass transit.[262]

Upzoning by statute is an exciting idea, but it remains a difficult sell. Outside of the ADU context, the BART upzoning bill is the only such measure to have passed, and it is exceedingly narrow.[263] Most of the density mandates that have actually made it into law operate indirectly, as a byproduct of other requirements, and have been established or applied through administrative proceedings. Thus, as mentioned in the last section, California now requires minimum densities if a local government must rezone land to accommodate its share of lower-income housing.[264] Similarly, in New Jersey, localities seeking immunity from the builder's remedy must zone at minimum densities for 20%-BMR projects.[265] In Oregon and Washington, state agencies have derived minimum zoning densities from the principle of confining growth within urban boundaries.[266] Oregon's latest regulation, issued in 2009, spells out density safe harbors for local governments throughout the state which seek to adjust their growth perimeter.[267] And though Washington's supreme court invalidated the Growth Management

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POST., Apr. 19, 2018; Conor Dougherty & Brad Plumer, *A Bold, Divisive Plan to Wean Californians From Cars*, NY TIMES, Mar. 16, 2018; *Conor Dougherty, California Lawmakers Kill Housing Bill After Fierce Debate*, NY TIMES, Apr. 17, 2018.

[260] 2018 Cal. Stat. ch. 1000 (A.B. 2923).

[261] Scott Wiener, *Senator Wiener Introduces Zoning Reform Bill to Allow More Housing Near Public Transportation and Job Centers*, MEDIUM, Dec. 4, 2018.

[262] S.B. 50, Cal. Legis., 2019-20 Regular Session, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB50; Matthew Yglesias, *Gavin Newsom Promised to Fix California's Housing Crisis. Here's a Bill that Would Do It*, VOX, Dec. 7, 2018.

[263] The bill only covers parcels owned by BART as of the date of enactment; it requires by-right permitting only of structures no more than one story taller than the height for which surrounding parcels have been zoned by local governments; and it contains extensive union-labor and BMR requirements. *See* 2018 Cal. Stat. ch. 1000 (A.B. 2923).

[264] *See supra* Part III.A.

[265] *See* In re Adoption of N.J.A.C. 5:96 & 5:97, 6 A.3d 445, 461-64 (N.J. App. Div. 2010), *aff'd as modified sub nom.* In re Adoption of N.J.A.C. 5:96, 74 A.3d 893 (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).

[266] *See infra* notes 267-269.

[267] Or. Admin. R. 660-024-0040(8) & Tables. The rule was promulgated as LCDD 2-2009, f. 4-8-09, cert. ef. 4-16-09. It has been used by LCDC and advocacy groups to induce upzonings in small cities and towns far away from the liberal bastion of Portland. *See* Andrew Ainsworth & Edward Sullivan, *Regional Problem Solving in Action: Lessons from the Greater Bear Creek Valley RPS Process*, 46 URB. LAW. 269 (2014) (showing that the density safe harbors and threat of litigation or LCDC disapproval led to revision of originally-proposed growth boundaries and planning for greater density).

Hearing Board's attempt to create "bright line" minimum urban densities,[268] observers see Washington as having *de facto* density requirements for land within the growth boundaries.[269]

In addition to being hard to enact, statutory density mandates are generally easy for local governments to vitiate. This is well illustrated by California's relatively long experience with ADUs.[270] 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."[271] Many local governments responded by "authorizing" ADUs while requiring ADU applicants to obtain onerous, discretionary permits.[272] 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); enacted 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.[273] The 2002 bill did not, however, displace "height, setback, lot coverage, architectural review, site plan review, fees, charges, and other zoning requirements *generally applicable* to residential construction in the zone in which the property is located."[274]

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."[275] Cities discouraged ADU construction via design review, costly

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[268] Viking Properties, Inc. v. Holm, 118 P.3d 322, 329 (Wash. 2005) (en banc).

[269] Egon Terplan, *Learning from Washington's Growth Management Act*, THE URBANIST, June 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.").

[270] *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).

[271] *Id.* at 541 (quoting Act of Sept. 27, 1982, ch. 1440, § 1, 1982 Cal. Stat. 5500).

[272] *See* Assembly Floor Analysis, A.B. 1866, Aug. 28, 2002, *available at* https://leginfo.legislature.ca.gov.

[273] *See* 2002 Cal. Legis. Serv. Ch. 1062 (A.B. 1866); Brinig & Garnett, *supra* note 270, at 541-43.

[274] 2002 Cal. Legis. Serv. Ch. 1062 (A.B. 1866), § 2 (West) (amending Cal. Gov't Code § 65852.2(a)) (emphasis added).

[275] *Id.* 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).

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.[276] Some of these requirements probably violated state law, but anti-ADU local governments had few compunctions about pushing the envelope of their reserved authority.[277]

Frustrated by local intransigence, California enacted additional ADU bills in the 2016 and 2017. The 2016 statute further constrains local requirements for parking, unit size, fire sprinklers, utility-connection fees, and lot-line setbacks.[278] Additional tweaks were made in 2017,[279] and in 2018 a bill that would have nearly occupied the field of ADU regulation passed one house of the state legislature.[280] The new measures seem to have generated a flood of ADU applications,[281] which suggests that local intransigence can be overcome—*if* the legislature is willing to preempt a ton of local law and terminate permitting discretion.

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

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[276] *Id.* at 543-66.

[277] 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 https://www.sightline.org/2016/09/06/how-seattle-killed-micro-housing/.

[278] 2016 Cal. Legis. Serv. Ch. 720 (S.B. 1069) (West).

[279] 2017 Cal. Legis. Serv. Ch. 594 (S.B. 229) (West) (clarifying, *inter alia*, that the restriction on utility fees applies to fees charged by special districts and water corporations).

[280] The 2018 bill would have, among other things: (1) prohibited local governments from applying minimum lot sizes to ADU projects, and from counting the square footage of ADUs when calculating the floor-to-area ratio of a housing project; (2) exempted ADUs from nearly all development fees; (3) banned owner-occupancy requirements; (4) prohibited local agencies from requiring replacement of parking spaces in garage-to-ADU conversions; (5) preempted local limits on the number of ADUs that may be constructed within existing multifamily buildings; and (6) compelled local governments to decide ADU permit applications within 60 days ("deeming approved" every application not so decided). *See* S.B. 831, Cal. Legislature, 2017-18 Regular Session, https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB831.

[281] *See* DAVID GARCIA, ADU UPDATE: EARLY LESSONS AND IMPACTS OF CALIFORNIA'S STATE AND LOCAL POLICY CHANGES (Terner Center, UC Berkeley, Dec. 2017), http://ternercenter.berkeley.edu/uploads/ADU_Update_Brief_December_2017_.pdf.

(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 element 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.

Today the California model, like its West Coast antecedents, represents a largely top-down strategy for controlling local barriers to housing supply. 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 regulatory sanctions to induce local governments to adopt compliant housing elements. 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 can 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, my variation on the California model combines a procedure for periodically (and unobtrusively) redefining the local regulatory baseline for new housing, in keeping with the state's goals; a mechanism to guard the new baseline against the retrogressive tactics of local governments; interventions that redistribute political power at the local level; and finally some accommodations for politically powerful NIMBY jurisdictions which might otherwise bring down the whole regime.

I defend this general approach as facially well tailored to the political economy of the housing-supply problem. I also develop a historical analogy to the Voting Rights Act. 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 Jim Crow. The VRA created a new regulatory baseline for voting, which in turn

changed the distribution of political power in the former Jim Crow jurisdictions. The VRA also locked in the new baseline with centralized, pre-implementation review of changes to voting standards and procedures. My variation on the California model embodies the same 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, and doubtful political support for centralizing control over the "traditionally local" governmental function in question.

Part IV.A fixes ideas. It 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. Part 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, *e.g.*, capacity to accommodate a 30%-60% increase in the housing stock over the course of a decade.[282])

(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 must spell out or incorporate by reference zoning, fees, and development standards and procedures applicable to the parcels. It must also identify local constraints to

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[282] *See supra* Part III.A.1.

development of the planned-for housing, and set forth a schedule of actions to alleviate 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. 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.) Courts shall not defer to local governments on whether a disputed provision of local law conflicts with the housing element.

(4) A housing element "substantially complies" with state law and shall be certified by the state agency if (a) the 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 (unnecessary) regulatory and procedural constraints to achieving the housing quota.[283] Courts shall defer to the agency's certification decision if supported by substantial evidence. If the agency fails to act on a housing element within a reasonable period of time (say, 60 days), the element shall be deemed certified as a matter of law.

(5) The housing agency may by guidance or regulation establish classes of presumptively unreasonable constraints.

(6) The housing element is self-executing with respect to project permitting, meaning that developers can apply for permits on the authority of the housing element itself, irrespective of contrary local

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[283] Here a slight variation in word choice ("unreasonable" vs. "unnecessary") may end up being consequential, as "necessity" connotes a stricter standard than "reasonableness." 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%-60% expansion of the housing stock over the planning cycle even in the absence of regulatory constraints.

law, at least until the local government has produced its quota of housing for the cycle. The self-execution principle should also cover discrete, removable governmental constraints that the housing element has identified and targeted for reform.[284] If not fixed by the date listed in the housing element's schedule of actions to alleviate constraints, such constraints would become legally inoperative.

(7) A local government may amend its housing element during the planning cycle if the locality gives the state agency 60-day notice, a copy of the proposed amendment, and written findings about whether the amendment would or would not render the housing element noncompliant.[285] 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.[286] Decertification would strip the housing element of its preemptive force vis-à-vis provisions of local law that take precedence over ordinary municipal legislation, *e.g.*, provisions found in the charter or adopted by the voters.

(8) Local governments must 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 the issuance of certificates of occupancy.

(9) Local governments that lack a current, state-approved housing element, or whose housing has been decertified, should face substantial pecuniary sanctions. However, the state agency shall have no authority to impose a housing element of its own design on a local government that has failed to timely adopt a substantially compliant housing element.

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[284] A "discrete, removable" constraint is one that can be lined out while leaving the rest of the local government's land-use apparatus intact and functional—*e.g.*, an allowable use, density, or setback limitation in the zoning code, or a discretionary review or internal appeal procedure. For an example of a constraint that does not fit the "discrete, removable" category, see *infra* text accompanying notes 350-351.

[285] 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, *e.g.*, supermajority vote of the city council, or supermajority council vote followed by referendum approval.

[286] If the agency fails to act within a reasonable period of time (say, 60 days), the housing element would be deemed recertified as a matter of law.

(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, may issue an interim housing element. An interim housing element shall 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 the several significant respects:

First, California has not adopted an explicit, functional definition of what constitutes a "substantially compliant" housing element, and the courts have not deferred to the housing agency's judgment about the validity of contested housing elements.[287]

Second, California has just begun to wrestle with the inadequacies of the population-forecast approach to determining housing need.[288] The state is groping toward an alternative, but the shape of what's to come is not yet apparent.

Third, the California housing element is not fully self-executing, in the sense of providing developers with a right to permits for housing-element-compliant projects notwithstanding contrary local law. While recent reforms to the Housing Accountability Act prevent local governments from denying or reducing the density of projects on the basis of zoning which conflicts with the housing element,[289] the state has not yet extended this principle to fees, procedures, and other non-zoning constraints.[290] Nor has the state made governmental constraints identified in the housing element but not reformed on schedule inoperative as a matter of state law. And while California courts no longer defer to local governments on the question of whether a development proposal complies with

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[287] *Compare supra* notes 168-170 and accompanying text, *supra* (restating conventional, deferential standard of review), *with* notes 209-215 and accompanying text (arguing for greater deference to agency based on recent legislation).

[288] *See supra* notes 197-207 and accompanying text.

[289] *See supra* text accompanying notes 216-218 and 223-231.

[290] The background requirement of horizontal consistency among elements of the general plan may result in housing elements that provide for greater density than the land-use element (which is not subject to state review or periodic updating) not being self-executing as to market-rate projects, at least if the housing element fails to acknowledge the inconsistency and spell out a timeline for revising the land-use element. *See supra* note 218.

applicable standards,[291] the test for whether a local ordinance or regulation complies with the housing element itself (and thus contains "applicable" standards) remains deferential.[292] This saps the housing element of some of its preemptive force, and generates uncertainty for developers who would like to apply for permits on the authority of the housing element.[293]

Fourth, it is not yet clear whether local governments can use the housing element to trump voter-adopted constraints or provisions found in the city charter, outside of extreme cases where the measure at issue unequivocally disables the local government from meeting its RHNA target.[294] Courts have done backflips to preserve voter-adopted measures that make it difficult, if not facially impossible, for the local government to accommodate its RHNA share.[295]

Fifth, California has no provision for interim housing elements. One city, Encinitas, has effectively thwarted the state framework with a charter provision requiring housing elements to be enacted by referendum vote.[296] The city's voters have consistently rejected the housing elements presented to them.[297] As the housing element becomes more legally consequential under state law, other cities are likely to parrot Encinitas unless the state neutralizes their efforts.

These caveats notwithstanding, California has certainly taken big steps toward the model I have sketched. The state has strengthened the preemptive

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[291] *See supra* text accompanying notes 223-230.

[292] *See supra* note 178 (restating "arbitrary and capricious" test for consistency between ordinances and the general plan).

[293] California could fix this problem by extending the Housing Accountability Act's new "reasonable person" standard (described in the text accompanying note 227, *supra*): A development standard or procedure sall be deemed preempted by the housing element if it is not expressly authorized by the element, and the evidence in the record would allow a reasonable person to conclude that the standard or procedure is a material obstacle to realizing the housing element's objectives.

[294] For examples of such extreme cases, see *Building Industry Assn. v. City of Oceanside*, 27 Cal.App.4th. 744 (1994); *Urban Habitat v. City of Pleasanton*, No. RG06-293831 (Cal. Sup. Ct., Alameda Cnty., Mar. 12, 2010), http://ag.ca.gov/globalwarming/pdf/order_granting_writ.pdf.

[295] *See, e.g.*, Shea Homes Ltd. v. Cty. of Alameda, 110 Cal. App. 4th. 1246 (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.* Building Industry Ass'n of San Diego Cty. et al. v. City of Encinitas (Sup. Ct, San Diego Cnty., Dec. 12, 2018, http://www.pilpca.org/wp-content/uploads/2019/01/BIA-SDTU-et-al.-v.-City-of-Encinitas-Order-2018-12-12.pdf) (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).

[296] *Building Industry Ass'n of San Diego Cty., supra* note 295; Terrell Kingwood, *Judge Orders the City of Encinitas to Adopt a Housing Element; City's First Since 1992*, PUBLIC 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).

[297] See sources cited in note 296, *supra*.

force of the housing element and made it self-executing in key respects;[298] courts have been instructed to take a closer look at the housing element's site designations and densities if the developer of a 20%-BMR project claims that the housing element does not provide adequate sites for the jurisdiction's share of lower-income housing;[299] and housing-need determinations are now supposed to reflect national norms concerning "healthy housing markets."[300] The state has also removed some exceptions that charter cities previously enjoyed.[301] Governor Newsom recently announced an ambitious revamp of the process for setting housing quotas, and warned local governments that the state will soon tie transportation funding to their housing-policy compliance.[302]

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 is (let us assume) well versed in the relevant economic, political science, and legal-academic literatures, the problem of overcoming locally erected barriers to housing has the following salient features:

> *(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 a strong financial interest 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 ½ mile of transit stations, as a

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[298] *See supra* Part III.A.2.

[299] *Id.*

[300] *See supra* Part III.A.1.

[301] *See* S.B. 1333, 2018 Cal. Stat. ch. 856 (amending Cal. Gov't Code § 65700 to apply consistency and other requirements to charter cities). These amendments respond to *The Kennedy Comm'n v. City of Huntington Beach*, 224 Cal. Rptr. 3d 665 (Cal. Ct. App. 2017), which held that charter cities were not required to make zoning and specific plans consistent with their housing element).

[302] *See supra* note 240.

California lawmaker has proposed.[303] In come thousands of new residents whose land-use preferences are likely to be quite different than those of the existing homeowners.[304] Local politicians who've built their brands serving homogenous, single-family-home neighborhoods will have a strong personal incentive to block the change, not just to put on a show of 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.[305] Opposition may also be weaker in communities that elect their local governments at-large rather than by-district.[306]

> *(2) Substantial intracity conflict over housing policy, the outcomes 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;[307] neighborhood groups will favor local restrictions. Mayors, to a first approximation, are likely to be more supportive of liberal housing policies than

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[303] *See supra* text accompanying notes 261-263.

[304] If the newcomers are renters, they'll support the development of more rental housing (though perhaps not in their neighborhoods), see Hankinson, *supra* note 61, 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.

[305] But as Part I.B, *supra*, explained, many big cities are also showing "NIMBY" characteristics.

[306] Researchers have 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 (1993); James Clingermayer, *Electoral Representation, Zoning Politics, and the Exclusion of Group Homes*, 47 POL. RES. Q. 969 (1994). This is consistent with the idea that neighborhood/homevoter interests have more power under districted than at-large electoral systems. *See also* Aaron Deslatte, António Tavares & Richard C. Feiock, *Policy of Delay: Evidence from a Bayesian Analysis of Metropolitan Land-Use Choices*, 46 POLICY STUDIES J. 674 (2016) (finding that in cities with districted elections, the degree of building-industry concentration has weaker influence on permitting delays).

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

city councilpersons elected from territorial districts.[308] 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).[309] As well, because of their higher profile, mayors have a better chance than city councilors of developing a personal brand known to voters,[310] 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.[311] 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.[312] The seriatim, project-specific approach privileges the interests of those who have the most at stake in individual projects, *i.e.*, neighborhood NIMBYs,[313] 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 (*e.g.*, employers and municipal labor unions), particularly if the mayor plays an agenda-setting role.[314]

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[308] *See* Roderick M. Hills Jr. & David Schleicher, *Planning an Affordable City*, 91 IOWA L. REV. 101, 112-15, 124-29 (2015) (hereinafter, Hills & Schleicher, *Planning*). Notably, the pending California bills to upzone all land in the state near transit and job centers for 4-5 story buildings has (as of this writing) been endorsed by the mayors of San Francisco, Oakland, San Jose, Sacramento, and Stockton, https://twitter.com/Scott_Wiener/status/1085934772717641728, but no endorsements from city council members have been announced.

[309] *Id.*

[310] *See* Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 398-403.

[311] 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 & Schleicher, *Balancing*)

[312] *See* Hills & Schleicher, *Balancing*, *supra* note 312; Hills & Schleicher, *Planning*, *supra* note 308.

[313] *Cf.* Katherine L. Einstein et al., *Who Participates in Local Government? Evidence from Meeting Minutes* (forthcoming, PERSPECTIVES ON POLITICS), https://doi.org/10.1017/S153759271800213X (studying minutes of planning and zoning board meetings in 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)

[314] 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

> *(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 (*e.g.*, 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 very doubtful that nondiscrimination requirements ("treat housing type X the same as housing type Y") or narrow mandates ("allow ADUs on parcels zoned for single-family homes") will actually result in local governments permitting a lot more housing. Such requirements do little to prevent local agencies from exercising their permitting discretion to stymie projects they dislike,[315] or from enacting facially neutral ordinances that make the state-favored housing type tough to develop.

To be sure, California's Housing Accountability Act prevents local governments from denying or reducing the density of projects except on the basis of objective standards, but the Act does not prevent local governments from *otherwise conditioning* projects in extremely subjective ways.[316] So it was that San Francisco's planning commission recently demanded changes to an infill condo development because the windows looked too upscale,[317] and turned back

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proposals that would materially increase the total supply of housing in the labor markets from which they hire. *See supra* note 307.

[315] See references in note 31, *supra* (describing transformation of local land-use law from a regime of by-right permitting to regimes predicated on project-by-project negotiations).

[316] *See* Cal Gov't Code § 65589.5(j)(1) & (5).

[317] *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-

a small ADU-and-an-addition project because the commission thought the architect could improve the unit's internal layout.[318] This kind of nitpicking leads to interminable delays, and positions anti-development factions to weigh down projects with uneconomic conditions. The Housing Accountability Act's distinction between density-reducing and non-density reducing conditions is ultimately arbitrary, since a significant risk of substantial conditions or delays will deter developers from even proposing redevelopment projects which are only modestly more profitable than the next best use of the land.

California's ADU story is a sobering reminder of the challenges that lie ahead. ADUs are the most innocuous form of residential densification. They affect the character of single-family home neighborhoods only marginally, if at all. Their small size makes them poor substitutes for single family homes, so a proliferation of ADUs wouldn't cause the price of existing houses to crater. A liberal ADU regime would actually create nice investment opportunities for many homeowners, who could add an ADU to their lot at modest cost while leaving their primary residence intact.[319] Yet California's allow-ADUs-and-don't-discriminate-against-them mandate achieved very little—even after the state required local governments to permit ADU's ministerially. It was not until California established a nearly field-preemptive set of ADU regulations that the market responded with a substantial uptick in ADU permit applications and production.[320]

Beyond ADUs, a statewide zoning and development code that entirely displaces local authority is almost unimaginable in the United States.[321] The bold upzoning-near-transit bills that California considered in 2018 and 2019 did not touch local authority over demolition control, design standards, permitting

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commission-wants-less-aggressive-design/ (quoting planning commissioner Myrna Melgar, "Big windows, to me, are a statement of class and privilege").

[318] *See* https://twitter.com/graue/status/1032798736160718849.

[319] By contrast, a law which upzoned a neighborhood of already-developed single-family homes for small apartment buildings would likely reduce the value of existing homes, even if it increases the value of the land itself. (The land value couldn't be realized without tearing down the existing homes.)

[320] *See supra* notes 270-281 and accompanying text.

[321] But Japan successfully nationalized land-use policy in 2002, and Tokyo today is one of the few major cities in which housing supply remains elastic. Scott Beyer, *Tokyo's Affordable Housing Strategy: Build, Build, Build*, FORBES, Aug. 12, 2016.

procedures, fees, and much more.[322] If such a bill is ever enacted, local governments will have had a field day inventing ways to evade it.[323]

(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,[324] 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.[325] Should that occur, it's not at all clear that YIMBYs would prevail. Recent opinion polls suggest that supermajority of the California electorate objects to giving the state more authority over development permitting, and that the California public does not see local land-use regulation as significantly responsible for unaffordable

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[322] For an explanation from its author, see Scott Wiener, *SB 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.

[323] Unless—perhaps—the state housing agency is authorized to review and enforce local compliance with the state's upzoning policy.

[324] *See generally* Richard Briffault, The Challenge of the New Preemption (Feb. 1, 2018), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3091&context=faculty_scholarship (exploring city-level enactment of liberal policies and state-level preemption of the same policies, in states with Republican-dominated legislatures and Democratic cities).

[325] 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* https://www.livablecalifornia.org/1393-2/ (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* Letter from City of Berkeley Planning Dep't to Dana and Ruegg Ellsworth, Sept. 4, 2018, https://www.berkeleyside.com/wp-content/uploads/2018/09/2018-09-04_City-Staff-Denial-of-Application-for-Ministerial-Approval-Pur....pdf (denying SB 35 permit application on ground that state law is unconstitutional); City of Huntington Beach v. State, No. 30-201-01044945-CU-WM-CJC (Cal. Sup. Ct., Orange Cnty, Apr. 4, 2018), https://www.huntingtonbeachca.gov/government/elected_officials/city_attorney/city-of-huntington-beach-vs-state-of-california-ref-sb54.pdf. 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.

housing.[326] Public opinion outside of California appears to be equally protective of local control, although there has not been much work on the subject.[327]

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To sum up, the housing problem is a very tough nut: the preferences of local governments tend to diverge sharply from the preferences of the pro-housing faction in state government (though there are some intralocal conflicts); 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.

As the balance of this section 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 attacks. Applying pressure from above, the state would use the threat of funding cutoffs to get local

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[326] *See* USC Dornsife/L.A. Times Cal. Poll, Oct. 24, 2018, https://dornsife.usc.edu/unruh/past-polls/ (finding 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"; and also finding 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"); Carson Bruno, *Californians See The Housing Affordability Crisis as a Threat To The California Dream*, EUREKA (May 19, 2015) (reporting results of Hoover Institution poll, finding (1) that 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).

[327] Marble & Nall, *supra* note 61, recently surveyed residents of the nation's twenty largest metro regions. They find overwhelming support for "giving neighborhoods more voice over development proposals" (see Table A.1, Model 2, and Fig. 1); and lack of support for "changing local laws to allow more construction" (see Table A.1, Model 8). They also asked about a hypothetical state law to require local governments to allow apartment buildings, finding majority support only among those renters who also favor a national housing guarantee (see Table A.1, Model 9, and Fig. 1). *Cf.* Hankinson, *supra* note 61, 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). One might think that liberal homeowners would be moved to support high-density housing (and possibly state intervention) by egalitarian framing, but the survey experiments of Marble & Nall, *supra* note 61, indicate that self-interest trumps ideology. *See also* Andrew H. Whittemore & Todd K. BenDor, *Exploring the Acceptability of Densification: How Positive Framing and Source Credibility Can Change Attitudes*, 10 URB. AFFAIRS REV. 1 (2018) (finding in national survey that several positive frames reduced, rather than increased, homeowners' support for a denser-than-typical residential project in their neighborhood).

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 which is politically discreet, sensitive to information asymmetries, and resistant to backsliding. It would also occur under more favorable local conditions than exist today, as the proposed state-law framework subtly shifts the balance of local authority toward more housing-tolerant factions, and helps local governments make credible regulatory-reform commitments to one another.

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

It should now be clear that if states are to control local housing supply barriers, 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. This is the Voting Rights Act of 1965 (VRA),[328] through which Congress overcame generations of black disenfranchisement in the South.[329] 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.[330] In both cases, adherence to the central

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[328] PL 89-110, August 6, 1965, 79 Stat. 437 (hereinafter, "VRA").

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

[330] 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* Trounstine, *supra* note 68 (showing that "whiteness" of precinct is strongly correlated with support for growth controls, and that restrictive land use policies exacerbate racial segregation); Jonathan Mummolo & Clayton Nall, *Why Partisans Do Not*

government's policies would transform local electorates in ways that could jeopardize incumbent politicians' hold on office.[331] 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.[332]) And in both cases, the central government could not easily subsume the local governments' responsibilities. The federal government didn't want to operate electoral systems throughout the South, let alone schools and police forces. Rather, it sought to change the manner the extant local governments performed those functions. Similarly, in the housing space, there is no political support for a state takeover of land-use regulation and development permitting. The goal instead is to nudge—or shove—local governments into exercising the own regulatory apparatuses in a more housing-tolerant manner.

So what did the federal government do about black disenfranchisement? Initially it tried to enforce the 15th Amendment with affirmative litigation. 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.[333] When one discriminatory law was invalidated, another would be enacted to take its place.[334] 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.[335]

But with the Voting Rights Act, 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[336]—and to backstop the ban by *conditionally preempting all changes* to state and local electoral practices in the South.[337] No electoral

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Sort: The Constraints on Political Segregation, 79 J. POL. 45 (2017) (showing that conservatives prefer racially homogenous neighborhoods).

[331] *Cf.* text accompanying notes 303-304 (describing transformation of local electorate's land-use preferences which may result from introduction of dense residential buildings, especially rental buildings, into neighborhoods of single family homes).

[332] *See generally* V.O. KEY, SOUTHERN POLITICS IN STATE AND NATION (1949).

[333] *See generally* SAMUEL ISSACHAROFF ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 715-17 (5th ed. 2016); BRIAN K. LANDSBERG, FREE AT LAST: THE ALABAMA ORIGINS OF THE VOTING RIGHTS ACT (2008); KEYSSAR, *supra* note 329.

[334] *Id.*

[335] *Id.*

[336] VRA, *supra* note 328, § 4.

[337] VRA, *supra* note 328, § 5.

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.[338] 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.[339] In 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.[340] 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, too fast, 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.[341] 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 the 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.

The VRA was enormously successful. Registration and turnout rates among African Americans in the South surged almost overnight.[342] Several studies comparing adjacent "covered" and "noncovered" counties show that blacks in the covered jurisdictions realized huge gains in non-electoral domains as well,

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[338] *Id.*

[339] *Id.* The retrogression standard is a judicial gloss per *Beer v. United States*, 425 U.S. 130 (1976), and *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

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

[341] It's not clear whether "retrogression" was the standard envisioned by Congress in 1965, but as glossed by the courts, *see supra* note 339, the VRA limits the risk of administrative overreach.

[342] *See* KEVIN J. COLEMAN, THE VOTING RIGHTS ACT OF 1965: BACKGROUND AND OVERVIEW 12-13 & tbl. 3 (Cong. Res. Service, July 22, 2014).

such as labor market outcomes.[343] Once blacks could vote, Southern politicians paid attention to their interests.[344]

The model I have sketched for housing is kin to the VRA, in that it combines baseline change with a preclearance-type lock-in mechanism.[345] A new regulatory baseline is periodically established through self-executing 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.[346] 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

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[343] 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. ECON. 379 (2013) (effects on state spending on counties with large black populations); Abhay Aneja & Carlos Avenancio-Leon, Political Power, Public Employment, & Private Wage Convergence: The Labor Market Effects of the Voting Rights Act (unpublished manuscript, 2017) (on file with author) (effects on black wages). *See also* ANDREA BERNINI, GIOVANNI FACCHINI & CECILIA TESTA, RACE, REPRESENTATION AND LOCAL GOVERNMENTS IN THE US SOUTH: THE EFFECT OF THE VOTING RIGHTS ACT (CEPR Discussion Paper No. DP12774, Mar. 2018), https://ssrn.com/abstract=3138836 (estimating that VRA doubled black representation in local government in covered jurisdictions, relative to control counties); Desmond Ang, Do 40-Year-Old Facts Still Matter? Long-Run Effects of Federal Oversight Under the Voting Rights Act (2017) (documenting long-run effects on voter turnout).

[344] In addition to the studies cited in note 343, *supra*, see Sophie Schuit & Jon C. Rogowski, *Race, Representation, and the Voting Rights Act*, 61 AM. J. POL. SCI. 513 (2017) (effects on roll call votes of Members of Congress on civil rights legislation).

[345] One might suppose that the Fair Housing Act—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 Comm. Affairs v. Inclusive Comm. Project, Inc., 135 S.Ct. 2507 (2015). But because the FHA depends entirely on case-by-case litigation (like 15th Amendment enforcement prior to the VRA), and because 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), 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 (2013) (reviewing decades of caselaw and finding that housing-barrier challenges under the FHA almost never succeed).

[346] *See supra* Part IV.A.

decide whether the discretionary permitting arrangements of any given local government represent "unreasonable constraints" on housing development.[347]

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 which is subordinate to the housing element, without pre-implementation review.

More strangely yet, 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 pecuniary sanctions associated with decertification, or wants to maintain the suspension of charter provisions or voter-approved measures that the certified housing element has superseded.[348]

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 Voting Rights Act, 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.[349] 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 a homeowner is 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.[350]

Under these circumstances, the political genius of the emerging California model is that it should soon enable the state to bring about something functionally

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[347] *See supra* Part 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).

[348] Under both current California law and the extension 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-approved plan. *Cf.* Dave Own. *Cooperative Subfederalism*, 9 UC IRVINE L. REV. 177, 186-88 (2018) (discussing federal Clean Water Act in relation to state-local cooperative programs).

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

[350] *See supra* notes 326-327.

quite 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 adopts a functional definition of housing element "substantial compliance"; allows the housing agency to plump up regional quotas on the basis of market conditions; and declares that certified housing elements supersede all local law to the contrary, including charter and voter-enacted provisions.[351] The first two steps are necessary to prevent restrictive local governments from dodging meaningful administrative scrutiny of their housing constraints (by showing either that their housing element notionally "contains the elements mandated by statute,"[352] or that they will meet a trivial quota even with substantial constraints in place). The third step is necessary to prevent local governments from defeating the state's housing goals by codifying development constraints in a body of local law which trumps the general plan.

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 will be self-executing, setting the terms for development of identified parcels, and approved by a state agency. The state agency, under control of the governor, can be expected to establish fairly aggressive housing targets, and to review housing elements with an exacting eye (once the law allows it). This is so because the governor, of all the state's elected officials, is likely to be the most reliably supportive of pro-housing policies. She answers to the statewide electorate, not just to homeowners in the high-cost regions. She runs in expensive statewide elections, which means that deep-pocketed business interests are likely to have her ear as well.[353] Gubernatorial elections are also relatively high-turnout and high-information affairs, which makes them hard for homevoters to control.[354] And because the governor's capacity to carry out her non-housing agenda depends on tax revenue,

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[351] These conditions correspond to Elements of the Model (4), (1), and (3), respectively, per Part IV.A, *supra*.

[352] *See supra* note 287 and accompanying text.

[353] *Cf.* Liam Dillon, *How California's Candidates for Governor Want to Fix the State's Housing Problems*, L.A. TIMES, May 10, 2018 (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).

[354] *See* Christopher S. Elmendorf & David Schleicher, *Informing Consent: Voter Ignorance, Political Parties, and Election Law*, 2013 U. ILL. L. REV. 363, 398-403 (reviewing literature); Joseph T. Ornstein, Municipal Election Timing and the Politics of Urban Growth (Feb. 7, 2018) (finding that off-cycle local government elections, which result in lower turnout, lead to more restrictive housing policies); Eric J. Oliver & Shang E. Ha, *Vote Choice in Suburban Elections*, 101 AM. POL. SCI. REV. 393 (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).

the governor should be quite sensitive to housing supply as a bottleneck on economic growth.[355]

Yet even as housing elements in the aggregate would function like a preemptive, statewide zoning and development code, the rules which apply within the territory of each local government will have been proposed initially by that government, negotiated with the state in a low-limelight administrative setting, and codified as a local ordinance, *i.e.*, as the housing element of the locality's general plan, rather than as state law. The housing element's *de jure* status as a locally adopted ordinance, 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, and the absence of state authority write a housing element on behalf of a noncompliant local government, 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" 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 is "substantially certain" to meet its housing target.[356] Much like the VRA's evidentiary standards encouraged covered jurisdictions to come forward with evidence about the likely effects of a proposed election-law change, 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 inconsequential phenomena that are hard for the state to see (*e.g.*, the preferences of local officials who review permit applications).

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. By way of illustration:

- 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"[357] unless the housing element requires local authorities to process development applications exclusively on the basis of procedures, standards, and fee schedules published on the planning department's website prior to date on

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[355] *See supra* Part I.C.3.

[356] *See supra* Part IV.A (element #4).

[357] *Id.*

which the developer's application was deemed complete.[358] 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.[359]

- The agency could announce that non-ministerial (*i.e.*, discretionary) permitting of housing-element compliant projects will generally be deemed to be an "unreasonable constraint" *if* the jurisdiction failed to meet its housing target during the previous planning cycle.[360] This would put pressure on local governments to commit to ministerial permitting through their housing element.[361] (The premise of this move is that what constitutes a "reasonable" constraint depends on the jurisdiction's track record of permitting new housing.)

- The agency could push the worst dawdlers to enact, through their housing elements, a local fix for gaping loopholes in the state's Permit Streamlining Act (PSA).[362] The PSA 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, 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

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[358] A local government that declines to commit to this precept in its housing element would have to show (1) that it's housing element is nonetheless likely to result in production of the RHNA target, or (2) that exceptional local interests or needs justify the local government's decision.

[359] California's Housing Accountability Act disallows local governments from denying or reducing the density of projects on the basis of standards that did not exist at the time the developer's application was deemed complete, *see supra* text accompanying notes 223-230, but does not address fees or procedure. The "CASA Compact"—a recent agreement among local officials and interest group leaders in the San Francisco Bay Area—calls for extending the HAA's anti-retroactivity principle to fees. *See* COMMITTEE TO HOUSE THE BAY AREA, CASA COMPACT 12 (Jan. 2019), https://mtc.ca.gov/sites/default/files/CASA_Compact.pdf.

[360] Oregon's state planning agency has ordered local governments to eliminate discretionary approval standards vis-a-vis "needed housing." *See, e.g.*, LCDC Compliance Order (Aug. 23, 1982) and Staff Report (Aug. 19, 1982) at 28-19 regarding City of Eugene; LCDC Work Task Order 02-WKTASK-001412 (June 27, 2002) at 4 (faulting planned development overlay zoning for insufficient clarity).

[361] 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.

[362] For citations to the provisions of the PSA mentioned in this paragraph, see *supra* notes 181-184.

> targets), the agency will deem the local government to have "unreasonable constraints" *unless the housing element includes a deemed-approved proviso* limiting project review to (say) 12 months, inclusive of environmental studies and internal appeals.[363]

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 may proceed case by case rather than by general rule if it wishes. The agency may 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.

The ultimate out for an anti-development community is to refuse to adopt a "substantially compliant" housing element. To date, California's courts have resisted the notion that this is a permissible choice for local governments.[364] The courts have ordered cities without a compliant housing element to enact one, and in some instances have suspended the noncompliant local government's authority to issue building permits.[365] Local governments that lack a substantially compliant housing element are also disabled from using their zoning code or general plan to deny projects with a substantial (20%) below-market component.[366]

However, if the state ramps up housing quotas and establishes a functional definition of substantial compliance, continued insistence that *every* local government maintain a compliant housing element might endanger the whole regime. The politically prudent course is probably to let the most diehard NIMBY governments opt out, upon payment of a significant fiscal penalty, lest they fight back with ballot initiatives or other stratagems to constitutionalize local control.[367] The wealthiest of the NIMBYs will probably get what they want, one

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[363] 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 the California Environmental Quality Act (CEQA). But CEQA review is only triggered by discretionary government actions, *see* BARCLAY & GRAY, *supra* note 178, 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 does not apply.

[364] See cases cited in notes 294-297, *supra*.

[365] *Id. See also* Field, *supra* note 128.

[366] *See supra* notes 209-210 and accompanying text.

[367] One way to do this is to eliminate the regulatory (non-fiscal) consequences for noncompliance. Another is to make RHNA quotas tradeable among governments within a region, so that rich NIMBY jurisdictions could pay other local governments to take on the NIMBYs' housing obligations. (New Jersey formerly allowed *Mt. Laurel* affordable-housing obligations to be traded in this way. *See* Harold A. McDougall, *Regional Contribution Agreements: Compensation for Exclusionary Zoning*, 60 TEMP. L.Q. 665

way or another. Better that they not wreck the framework for everyone else in the process.

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 city council would just need to ask the state agency to approve a housing element that conflicts with the problematic local constraints. If homevoters complain, the city council can respond, "The state pushed us to do it; we had to or else we'd lose our funding." And if homevoters gripe to the governor or the housing agency, the state-level actors can respond in kind: "All we did was approve a proposal that *your city council* developed for accommodating a reasonable amount of new housing. If you want it done differently, tell them, but don't complain to us."

To be sure, city councils are not reliably pro-housing actors.[368] Given the choice, some will jealously protect voter-adopted constraints on housing development. Still, survey evidence suggests that many city councilors understand the housing supply problem and would like to do something about it, but feel hemmed in politically.[369] A state-law framework which lets city councils remove voter-adopted constraints while dodging the blame should do some good, perhaps especially with respect to older constraints whose undoing may seem less an affront to today's voters.

My adjustments to the California model would also bolster mayors vis-à-vis city councils in negotiations over the housing element, and as explained above,

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(1987).) Still another possibility would be to borrow from the VRA and enact a "coverage formula" that subjects only a subset of local governments to the most intrusive components of the housing-element framework. *Cf.* text accompanying notes 336-339 (describing selective application of VRA preclearance to Jim Crow jurisdictions).

[368] If elected from territorial districts, they will tend to be responsive to homeowner interests in the neighborhood. *See supra* note 306.

[369] *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 councilors have neutral or pro-growth attitudes toward housing, but are often cowed by grassroots, anti-growth factions).

mayors are likely to be more supportive of liberal housing policies.[370] The key move is to authorize mayors to promulgate interim housing elements, if the state's deadline passes without the local government having enacted 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 strengthening of the California framework would powerfully support bottom-up regional initiatives to plan for more housing. 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.[371] In each case, a regional planning entity convened a consortium of elected officials,[372] and the consortium developed quantitative targets for new housing in the region, as well as guidelines for zoning and development-permitting reforms. 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.[373]

As Hills and Schleicher acknowledge, the central challenge for the grand-bargain approach is "designing an enforcement mechanism."[374] 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 which forge a Greater Boston or Greater Bay Area plan from reneging on their commitments to one another? California's experience since the early 1980s with the 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.

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

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[370] *See supra* text accompanying notes 306-309.

[371] *See* Tim Logan, *Citing 'Housing Emergency,' 15 Mayors Pledge to Boost Construction*, BOSTON GLOBE, Oct. 2, 2018 (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.

[372] The CASA consortium includes business, labor, and interest group leaders, as well as elected officials. *See* CASA Membership Roster, https://mtc.ca.gov/our-work/plans-projects/casa-committee-house-bay-area/casa-membership-roster.

[373] *See* Hills & Schleicher, *Planning*, *supra* note 308; Hills & Schleicher, Balancing, *supra* note 311.

[374] Hills & Schleicher, *Planning*, *supra* note 308, at 125.

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.[375]

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.[376] Moreover, commitments made in housing elements to remove these constraints would be credible, both because state law would automatically suspend constraints that are not reformed on schedule, and because a local government which adopts a state-certified housing element in the first place signals that it prefers the concessions made in its housing element to the alternative of forgone revenue.[377]

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. And—importantly—the interest groups which stand to benefit from a big increase in the regional housing supply (*e.g.*, chambers of commerce and municipal unions) would have reason to invest *a lot* of resources in lobbying the collaborative.[378]

To be sure, a strong RHNA / housing-element framework is not the only way to make interlocal housing bargains enforceable. Region-specific legislation is another possibility. But getting legislation passed is likely to be more difficult than getting a mission-driven agency to reinforce, through an extant review process, an interlocal understanding that advances the agency's mission.

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[375] 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* Part III.A.1.

[376] 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.

[377] Of course, it is *possible* that this signal is insincere with respect to concessions that will take effect at some time in the future (e.g., under the local program to remove constraints). But if the local governments in the region doubt one another's sincerity in this regard, they can agree through the consortium to make the constraint-removal provisions of their housing elements immediately effective.

[378] 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.

3. Caveats

The model I have sketched holds considerable promise, and to operationalize it in the West Coast 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 and preferences to bamboozle the state agency into certifying dysfunctional housing elements, *e.g.*, housing elements which assign the quota to sites that are infeasible or very costly to develop.[379] Other NIMBY localities may be able to get the agency to approve transparently awful housing elements, by arguing that the element's dysfunctional features are necessary to forestall a local insurrection. It is certainly worth considering additional measures to strengthen the voice of nonresidents in local politics,[380] to reduce the return to homeowners from restricting housing supply,[381] or otherwise to better align the interests of current residents with the interests of potential future residents.[382]

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.[383] A state housing agency captured by homevoters might push *every* local government to impose onerous affordability requirements on new development, thereby stanching the supply of housing even in localities that would otherwise have had developer-friendly policies. 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.

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[379] This risk is exacerbated by resource shortages at the California housing agency. *See* LAO, *supra* note 219, at 7 (noting that as of 2017, HCD had only a $1M budget line and seven staff persons for housing element review). The main advantage of state-mandated upzoning (e.g., requiring local governments to allow 4-5 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 bad sites.

[380] For example, allowing commuters to vote in local elections both where they work and where they live.

[381] *See, e.g.*, FISCHEL, *supra* note 5, at 365 (calling for reduction in federal tax benefits for homeownership); EDWARD L. GLAESER & JOSEPH E. GYOURKO, RETHINKING FEDERAL HOUSING POLICY: HOW TO MAKE HOUSING PLENTIFUL AND AFFORDABLE 126-32 (2008) (calling for mortgage-interest tax deduction to be tied to the county-level elasticity of housing supply).

[382] *See, e.g.*, CHRISTOPHER S. ELMENDORF & DARIEN SHANSKE, AUCTIONING THE UPZONE: A NEW STRATEGY TO INDUCE LOCAL GOVERNMENT COMPLIANCE WITH STATE HOUSING POLICIES (Cal. Envtl. Law & Pol'y Center, UC Davis, Dec. 2018) (proposing state-law framework authorizing local governments to auction, and thus profit from, the new development rights created by upzoning pursuant to state policy).

[383] *See supra* text accompanying notes 191-193.

V. 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 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.

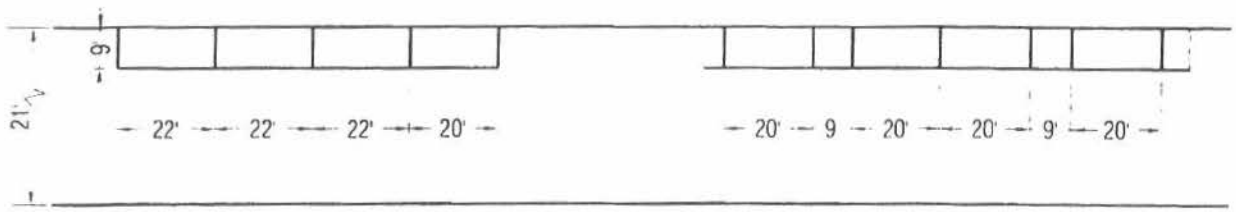
The model is one of preemption by intergovernmental compact. The state periodically establishes regional housing-production targets, with the goal of increasing supply until housing costs in then-expensive regions become comparable to housing costs in regions with "healthy housing markets" elsewhere in the nation. Regional quotas are then divvied 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 housing element itself. Local governments seeking to amend their housing element must provide notice and a written justification to the state's housing agency. The agency may respond by decertifying the housing element, exposing the local government to pecuniary and possibly regulatory sanctions, but the agency may not impose on the local government a housing element of the agency's own design.

Parking Standards
Exhibit A

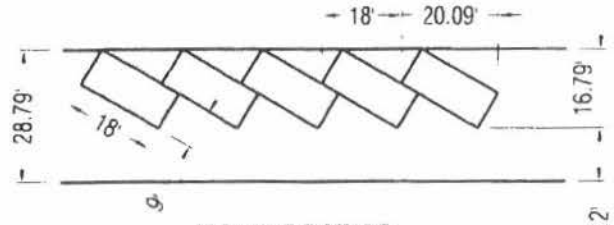
CITY OF LOS ALTOS

COMMUNITY DEVELOPMENT DEPARTMENT

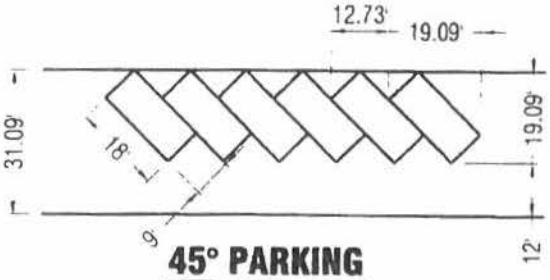
March 2001



PARALLEL PARKING ALTERNATES



30° PARKING



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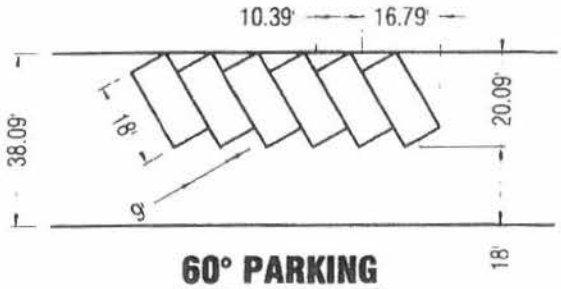

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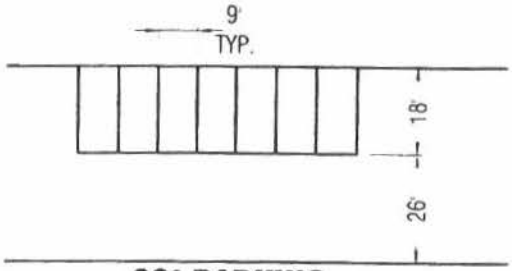
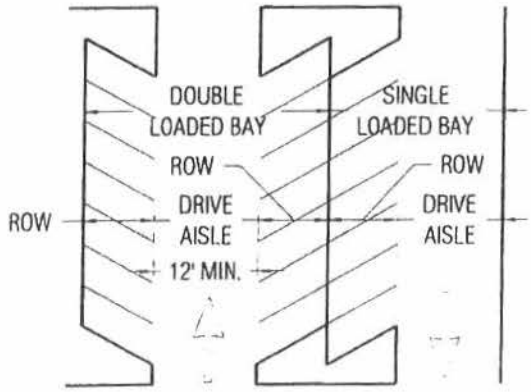


90° PARKING



ONE WAY

Approved: _____ _____
City Engineer Date

CITY OF LOS ALTOS · CALIFORNIA · INCORPORATED DECEMBER 1, 1952

REVISION	
Description	Date

DEPARTMENT OF PUBLIC WORKS

STANDARD PARKING STALL DETAILS

SU-17

STANDARD PLANS 2007

CITY OF LOS ALTOS

Landscaping Guidelines

The Architectural and Site Control Committee of the Planning Commission will use the following guidelines with respect to interior and perimeter landscaping:

1. Interior Landscaping

   a. In parking areas with 10 or more spaces, at least 5 percent of the interior of the parking area shall be landscaped. Hedges or other landscaping installed to meet the screening requirements are not to be included in computing the portion of interior lot area devoted to landscaping.

   b. Individual planting areas shall preferably be a minimum of 6 feet wide and 50 square feet in area.

   c. There shall be a minimum of one 15-gallon tree per 100 square feet of landscaped area, with a balance in shrub and ground cover.

2. Perimeter and Buffer Strips

   a. Unless otherwise specified by the Zoning Ordinance, a 4-foot planted strip shall be maintained when adjacent to streets. This shall be increased to 6 feet if car bumpers overhang.

   b. Unless otherwise specified by the Zoning Ordinance, there shall be a 4-foot planted strip at abutting property lines (6-foot if bumper overhangs.)

   c. Unless otherwise specified by the Zoning Ordinance, there shall be a 10-foot strip with dense screen planting when abutting property is residential.

   d. Unless otherwise specified by the Zoning Ordinance, an alternate to (c) is a minimum 5-foot-high fence with 4-foot planted strip.

3. Maintenance

   a. Protection for planted areas shall be provided by a 6-inch minimum height concrete curb.

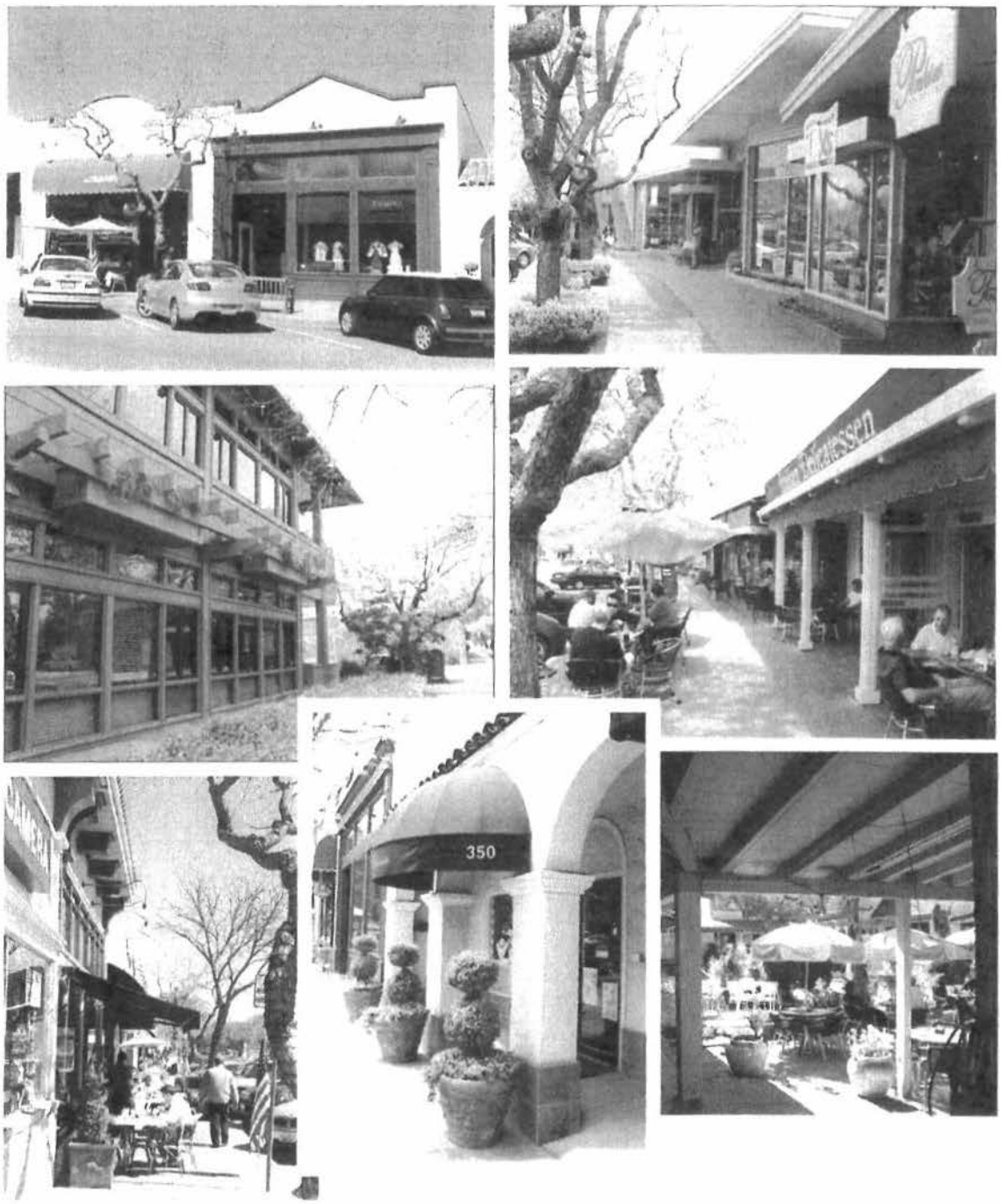
   b. Permanent automatic sprinklers are required.

4. Exceptions

   These requirements for landscaping may be waived or modified at the discretion of the Architectural and Site Control Committee when in their judgment the environment or particular locations would prove hostile to plants, trees, or shrubs.

Downtown Design Guidelines

City of Los Altos



Adopted
December 8, 2009

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CITY COUNCIL

Megan Satterlee	Mayor
David Casas	Mayor Pro Tem
Val Carpenter	
Ron Packard	
Lou Becker	

PLANNING COMMISSION

Jonathan C. Baer	Chair
Michael M. Abrams	Vice Chair
Bill Bocook	
Phoebe Bressack	
W. Randall Hull	
Kenneth Lorell	
Kathryn (Kitty) L. Uhlir	

DOWNTOWN DEVELOPMENT COMMITTEE

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Lou Becker	Vice Chair
Abigail Ahrens	
Bart Nelson	
Bill Maston	
Dan Brunello	
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James Walgren	

CITY STAFF

Douglas J. Schmitz	City Manager
James Walgren, AICP	Community Development Director
David Kornfield, AICP	Planning Services Manager
Anne Stedler	Economic Development Coordinator

CONSULTANT

Larry L. Cannon	Cannon Design Group *Sausalito, California*

INTRODUCTION

1

INTRODUCTION

Los Altos is blessed with a downtown of unique personality and vitality with a wide variety of shops, restaurants, offices, and services focused primarily on serving the local community. Constructed over a period of many decades, the development patterns are supportive of a strong pedestrian environment, and its structures offer a rich palette of the community's history.

Residents and visitors alike appreciate the special *Village Character* of Downtown Los Altos, but the identification of those features that are most responsible for the establishment of that highly prized character has often been elusive, and difficult to convey to property owners wishing to make changes to existing structures or build new ones. The intent of these design guidelines is to better describe the nature and elements of that *Village Character* by pointing out special features of existing downtown development and by examples from other communities with a similar village scale and character.

The design guidelines that follow provide practical and time-tested methods for preserving and enhancing the special qualities of the Downtown Los Altos village scale and character while offering ample opportunity for increased economic vitality. They supplement and reinforce the *Los Altos Downtown Design Plan*, and are intended to assist applicants in visualizing appropriate designs and in understanding community expectations, while providing fairness and consistency in the City's downtown development review and approval process.

COMMUNITY EXPECTATIONS

The community wishes to support and enhance the unique character of Downtown Los Altos. Property owners and developers will be expected to fit their projects into that existing fabric with sensitivity to their surroundings, and a recognition that the sum of the whole is more important than any single building or use. Buildings should be seen as unique, identifiable, and distinct from other buildings, but this distinction should be subtle, not dramatic.

A high quality of traditional architectural and landscape design is expected with abundant detail carried out in a manner that is authentic to the architectural style selected by the applicant.

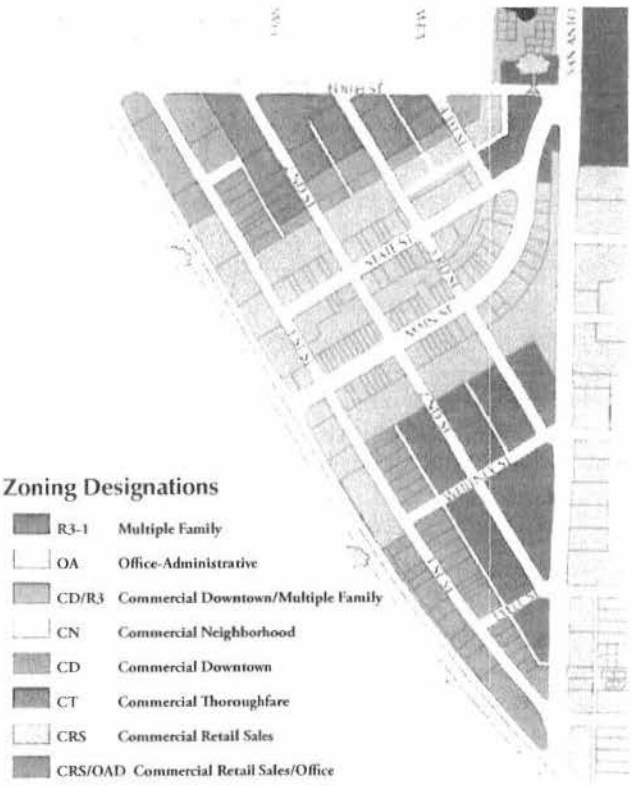
Applicants are not required to meet all guidelines, but should be in substantial conformance with the design guidelines and the Required Findings set forth in the sidebar on page 11.

INTENT

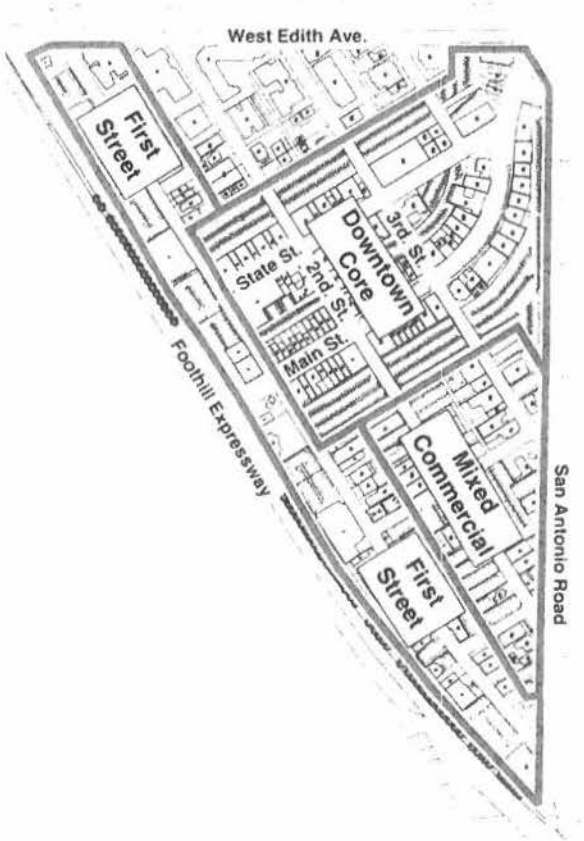
These guidelines are intended to accomplish the following:

- **Support and enhance the unique Los Altos Downtown Village Character.**
- **Maintain and enhance an attractive Downtown pedestrian environment.**
- **Provide a mix of uses to meet the needs of community residents and visitors.**
- **Encourage increased Downtown vitality with additional retail shops, restaurants, offices and residents.**
- **Encourage creative design and architectural diversity.**
- **Encourage appropriate historic preservation.**
- **Encourage sustainable design and development.**
- **Establish a strong sense of entry at Downtown gateways.**
- **Provide adequate, attractive and convenient public parking.**
- **Encourage the maintenance and upgrading of uses, properties and signage.**
- **Encourage signage appropriate to the Downtown Village scale and Character.**
- **Implement the Los Altos Downtown Design Plan.**
  The city will consider development incentives for projects that implement or preserve elements of the Downtown Design Plan (e.g., paseos and courtyards) on a case-by-case basis.

For City staff assistance in the development review process, please contact the City's Planning Department at (650) 947-2750



Downtown Zoning



Downtown Design Guidelines Districts

APPLICABILITY

These design guidelines apply to all design review applications for new construction, additions, exterior facade changes, landscaping and signage.

The guidelines are in addition to and subordinate to the zoning regulations. The five downtown zoning districts covered by these design guidelines are shown on the map to the left. Full Zoning Code information for the downtown area can be found on the City's web site at:

www.losaltos.ca.gov

GUIDELINES ORGANIZATION

These guidelines are focused on the commercial areas contained within the triangle bounded by Foothill Expressway, San Antonio Road, and West Edith Avenue.

The guidelines are divided into three sections to reflect the major use areas of Downtown Los Altos. Note that some districts may contain more than one zoning category.

The guidelines set forth in the Downtown Core District establish the level of community expectations relative to architectural form, village character elements, and design quality and details for the whole of the downtown area. They should be reviewed by applicants for projects in all zones.

Downtown Core District

This district is the primary pedestrian retail area of downtown focused on Main Street and State Street. Its structures are closely related one to the next with a great deal of retail continuity, and a small scale village character. Most of the Downtown Core District is within the Downtown Parking District.

Mixed Commercial District

Located adjacent to San Antonio Road, this district, while still heavily pedestrian oriented, has a looser physical texture, somewhat larger scale buildings, and more stand alone structures. Supplemental design guidelines are provided to recognize the district's different physical conditions and uses. The intent is to accommodate larger uses while maintaining a scale and character that is supportive of downtown's village character.

First Street District

This area fronting on First Street contains a wide variety of uses, and is more strongly vehicle-oriented than the retail core area. The intent is to accommodate a wide mix of uses in a manner sensitive to the village character of downtown.

DOWNTOWN VILLAGE CHARACTER

2

DOWNTOWN VILLAGE CHARACTER

Downtown Los Altos has grown and changed over a span of decades through incremental changes and the efforts of many property and business owners. The area serves as the heart of the community through a mix of retail, office, residential, institutional, civic and service uses as well as social gathering spaces. Today, it is a closely knit series of subdistricts with slightly differing use emphases and design characteristics, held together by an overall village scale and character. That unique scale and character has been nurtured over the years, and has become even more of a community asset as many other downtowns in the Bay Area have grown ever larger and lost much of their earlier charm.

Village Character is often hard to define, and harder to preserve as retailing and office development trends in downtown areas have tended to favor national retail chains and prototypical designs. Yet, there are communities determined to preserve the uniqueness of their village scale and character downtowns. In the development of these design guidelines, existing features of Downtown Los Altos have been used as models, and lessons learned from other downtowns have been integrated as examples of effective ways to preserve and enhance village scale and character.

Some of the major features of village character are listed in the sidebar to the right, and illustrated by the annotated photographs of Downtown Los Altos below and on the following pages.

Individual tenant identities with wide diversity in parapet shapes, building heights and awnings

VILLAGE CHARACTER FEATURES

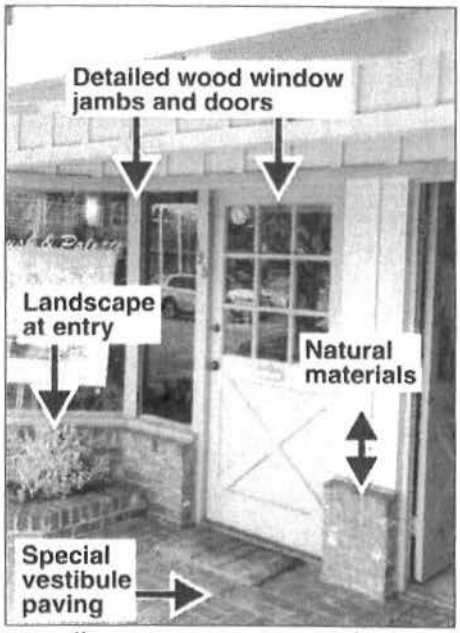
- **Traditional Village and Main Street architectural styles.**
- **Wide diversity of building forms.**
- **Larger buildings broken up into smaller segments.**
- **Courtyards and paseos with secondary uses.**
- **Mixture of continuous storefronts and stand alone buildings.**
- **Varied building top profiles and details.**
- **Wide variety of interesting architectural and storefront detail.**
- **Diverse mix of pedestrian scaled storefronts and signage.**
- **Individual store personalities.**
- **Variety of storefront profiles with entry vestibules, facade recesses and landscaping.**
- **Landscaping integrated with the storefronts**
- **Limited blank walls.**
- **Wide variety of natural building materials.**
- **Abundant landscaping and pedestrian amenities.**
- **Wide variety of pedestrian paving.**
- **Preserved historic resources.**
- **Pleasant and interesting parking-to-shopping paths.**
- **Second floors strongly related to the street front.**
- **Attractive parking areas.**
- **Residential units included in the downtown mix of uses.**
- **Public social gathering places.**
- **Integrated art and whimsical details.**
- **Use of natural materials.**
- **Subtle lighting.**

Landscaping and amenity buffers between pedestrians and parked cars

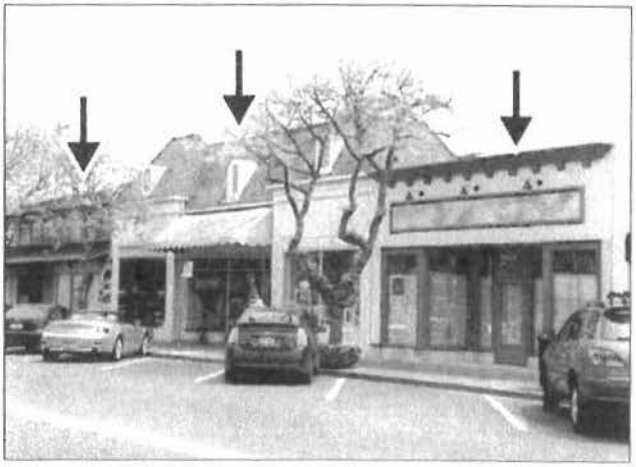
VILLAGE CHARACTER FEATURES

Great diversity in awnings, signage and sign lighting

Facade setbacks and outside seating

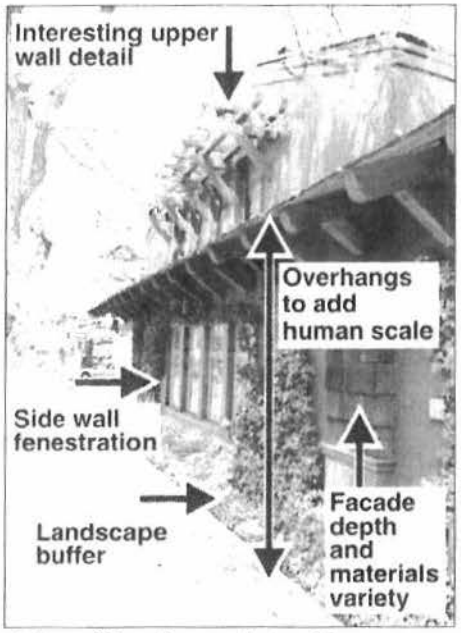


Visually interesting entries with natural materials

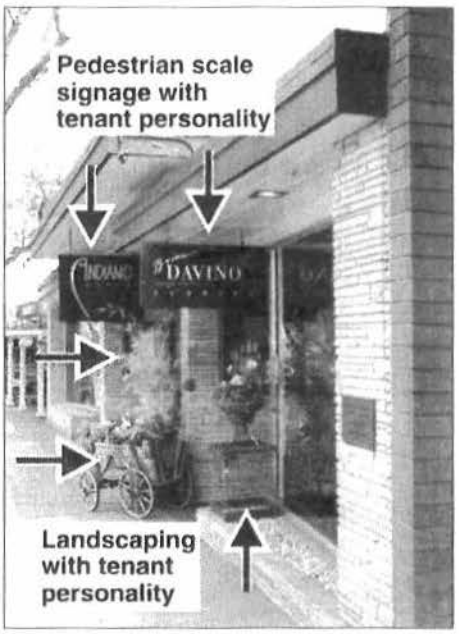


Variety of building forms

VILLAGE CHARACTER FEATURES



Side wall breakup and visual interest



Pedestrian scale signage and landscaping with personality

Public social spaces

Strong presence of second floor uses on the street

Intimate courtyards and paseos

Residential units included in the downtown mix of uses

VILLAGE CHARACTER FEATURES

Small offices with personality and human scale

Larger offices with interesting human scale details and sensitive materials selection

Entry vestibules and friendly entry doors

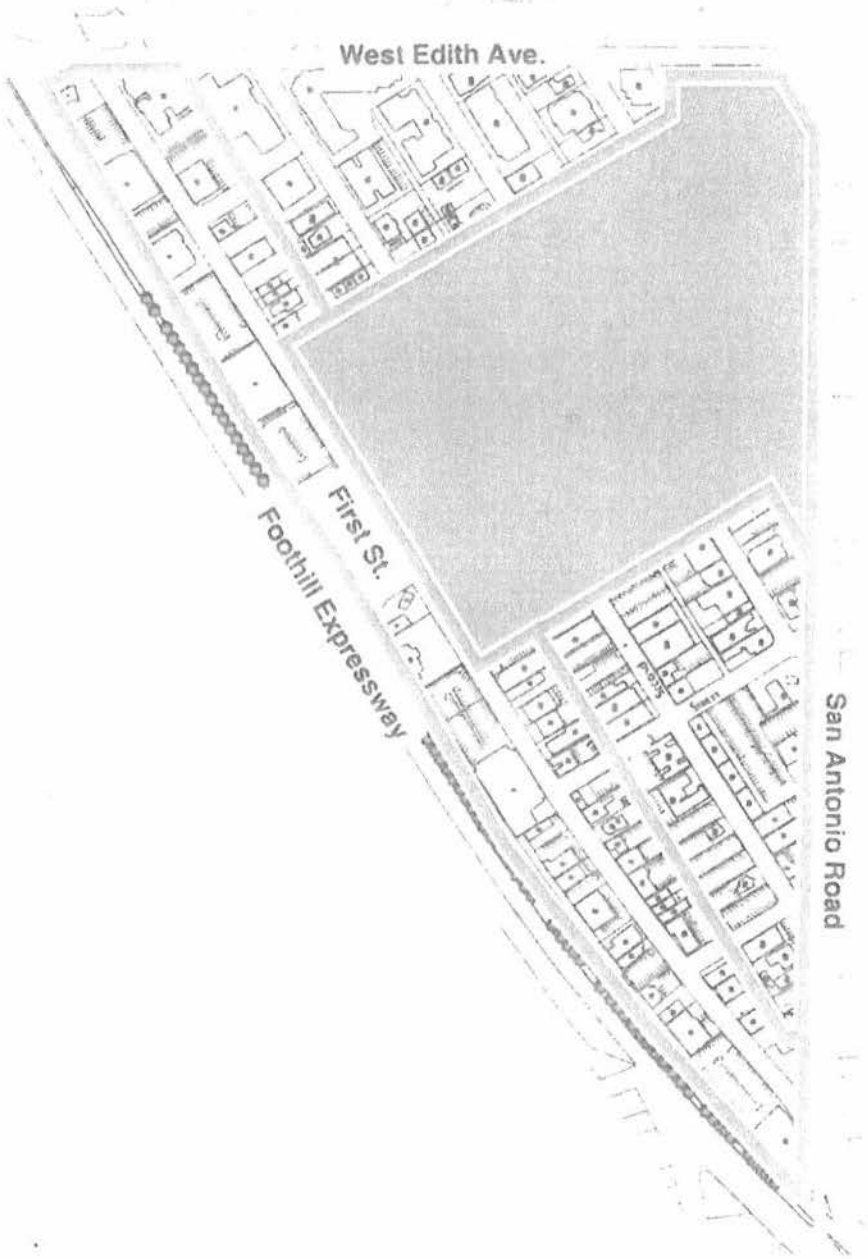
Reminders of the downtown's architectural history

Large offices broken up into village scale buildings

Pedestrian scaled storefronts

DOWNTOWN CORE DISTRICT

3



DOWNTOWN CORE DISTRICT

The Downtown Core District is the very heart of the downtown. It contains a wide diversity of retail and other uses, all contained within a strongly pedestrian-oriented environment. The size of the area makes parking once and visiting multiple stores relatively easy. And, street frontages are visually interesting. Individual buildings and shops have unique personalities, and a great deal of attention has been given to landscaping within both the public and private realms.

The goal of these design guidelines is to retain and enhance the uniqueness of the district, and to integrate changes to individual parcels into the fabric of the area – including parcels and buildings, which by historic standards, may be somewhat larger than the current pattern.

3.1 PEDESTRIAN ENVIRONMENT

The compactness of the Downtown Core is such that it lends itself well to parking once, and walking to multiple destinations. For that to be successful, the pedestrian experience at every point from getting out of one's car to moving throughout the downtown must be a pleasant one with clarity of organization and delight to the eye and senses.

The creation of a successful pedestrian environment is a joint public-private effort. The guidelines below address the major contributors to the creation of a village scale and character.

3.1.1 Provide uses and activities to enhance and complement the Downtown environment

Uses and activities do not normally fall within the purview of design guidelines. However, they are often critical to the success of individual projects and the downtown as a whole. The following are guidelines for the early planning stages of projects within the Downtown Core District.

a) Explore opportunities for office and residential uses on the second floor.

Second floor office and residential uses provide valuable support for downtown ground floor uses as well as a greater sense of place for the downtown. In addition, they have the potential for extending the hours of downtown utilization beyond normal retailing hours.

Carmel

REQUIRED FINDINGS

For any commercial project in the city to receive design review approval, the Planning Commission must be able to make the following findings:

1. The proposal meets the goals, policies and objectives of the General Plan and any specific plan, design guidelines, and ordinance design criteria adopted for the specific district or area.

2. The proposal has architectural integrity, and has an appropriate relationship with other structures in the immediate area in terms of height, bulk and design.

3. Building mass is articulated to relate to the human scale, both horizontally and vertically. Building elevations have variation and depth, and avoid large blank wall surfaces. Residential or mixed-use residential projects incorporate elements that signal habitation, such as identifiable entrances, stairs, porches, bays and balconies.

4. Exterior materials and finishes convey quality, integrity, permanence and durability, and materials are used effectively to define building elements such as base, body, parapets, bays, arcades and structural elements.

5. Landscaping is generous and inviting, and landscape and hardscape features are designed to complement the building and parking areas and to be integrated with the building architecture and the surrounding streetscape. Landscaping includes substantial street canopy, either in the public right-of-way or within the project frontage.

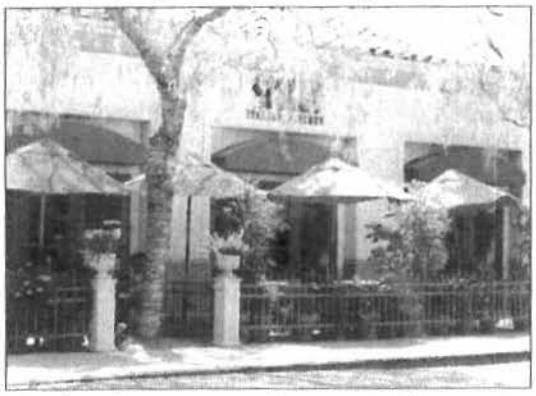
6. Signage is designed to complement the building architecture in terms of style, materials, colors and proportions.

7. Mechanical equipment is screened from public view, and the screening is designed to be consistent with the building architecture in form, material, and detailing.

8. Service, trash and utility areas are screened from public view, or are enclosed in structures that are consistent with the building architecture in materials and detailing.

Courtyards and paseos can increase downtown vitality and economic success through development intensity and tenant variety.

Clusters of varied dining opportunities can create a distinctive sense of place and an enhanced street environment after normal working hours.



Outdoor dining is strongly encouraged.

b) Explore opportunities for additional tenants through the use of courtyards and paseos.

Current uses are largely contained within one-story structures, often containing only a single tenant. Opportunities for additional retail, service commercial and office tenants, in courtyards or along paseos, abound. They can be especially useful for deep parcels where primary tenants do not need the full depth of the lot. Their use could enhance individual property utilization while supplying additional foot traffic to support other downtown uses. Existing paseos and courtyards should be preserved. Arbors and trellises are encouraged in paseos and courtyards (see example below).

Guidelines for Courtyards:

- Enclose on at least two sides by buildings.
- Remain open to the sky. (Arbors and trellises are allowed.)
- Minimum width: 20 feet.
- Minimum area: 400 square feet.

Guidelines for Paseos:

- Minimum width: 10 feet for through-block paseos. 4 feet for entries to courtyards or individual single businesses.
- Courtyards along the paseo are encouraged.

c) Explore opportunities for active evening uses.

Consider nearby uses when planning for property design changes. There may be opportunities for adding to an existing cluster of after-hours uses with outdoor dining or complementary uses (e.g., bookstore for browsing near restaurants or coffee houses).

3.1.2 Design landscaping and open space to enhance the Downtown Village Character

Downtown open spaces and landscaping are as much responsible for the area's uniqueness as are the buildings. They provide the framework to unify an otherwise potentially chaotic collection of eclectic building designs into a strong sense of place. Some of the main features of Downtown's open space and landscape system include:

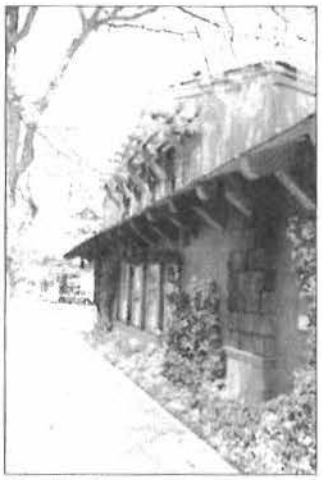
- Continuous pedestrian links between uses and between parking and storefront clusters

- Separations between pedestrians and automobiles
- Quiet and intimate open spaces off of main walkway areas
- Varied paving colors and textures
- Multiple and varied pedestrian amenities
- Sheltering Chinese Pistache trees along pedestrian paths
- Individualized landscaping at storefronts and shop entries
- Landscaping with seasonal blooms
- An overall sense of informality and variety

a) Design storefronts and building walls along pedestrian frontages to accommodate special paving and landscaping.

Carmel

Use abundant landscaping to emphasize storefront entries.



Los Altos

Use landscaping to soften side walls along pedestrian walks.

b) Utilize textured paving in all paving areas adjacent to the public sidewalks.

Brick pavers and other modular units are ideal in providing a color and scale change to open space areas that are linked to or adjacent to sidewalk areas. They complement the smaller scale size of the areas, and assist in reinforcing the village scale of the downtown. One example is shown in the photograph to the upper right. Exposed aggregate concrete with brick or wood dividers, or permeable paving, are other acceptable alternatives. Avoid plain or colored concrete paving with scored joints. While less expensive than hand-placed pavers, it lacks the necessary visual quality to enhance the village character.

c) Enhance tree wells with landscaping.

Planting strips and pockets are effective in adding visual interest to sidewalks and open spaces, and serve well in separating pedestrians from adjacent traffic and parked cars. They also provide infiltration areas for stormwater runoff. Flowering plants or ones with distinctive forms and colors, as shown in the examples to the right, are especially appropriate.

Carmel

Use special textured paving in open space areas to separate them from high traffic sidewalks and to provide a human scale.

Carmel

Los Altos

Landscaped tree wells and planter strips are the desired approach to separating pedestrians and cars.

Carmel

Courtyard and paseo treatment should be equal in quality and detail to the primary street frontages.

Santa Barbara

Santa Barbara

Incorporate fountains and other forms of public art into courtyards, paseos and other open spaces.

d) Design courtyards and paseos to invite pedestrian use and enhance adjacent uses.

Landscaping, pedestrian amenities, storefront treatments and signage in courtyards and paseos should be equal in quality and detail to the primary street frontages. One example is shown to the left.

e) Seek opportunities to incorporate fountains and public art into open spaces.

Fountains and other forms of public art add uniqueness to the downtown pedestrian environment, increase the attractiveness of the area to a wide range of tenants, and encourage longer shopping stays.

f) Provide abundant pedestrian amenities.

Benches and other places to sit, shade from the sun, and other amenities also encourage shoppers to linger and extend their time downtown. These amenities should be supportive of the desired village character and scale. Selection of natural materials, like wood, and high quality metal of a traditional design, rather than concrete, are most likely to be successful. Planter edges can also serve to provide convenient seating near shop fronts.

Carmel

g) Integrate pedestrian scale lighting into the landscape of open spaces.

Pasadena

3.1.3 Design pedestrian and vehicle crossing points with attention to pedestrian safety

Ingress and egress points for parking lots and parking structures as well as pedestrian crosswalks are potential areas of pedestrian and vehicular movement conflicts.

a) Provide visual clues to alert drivers that pedestrians have the right of way.

- Provide special paving textures and/or colors for pedestrian crossings at intersections and parking areas.
- Provide special signage where driver visibility of crossing pedestrians might be limited.

b) Avoid landscaping and other obstructions that could limit views of traffic and pedestrians at crossing points.

- Keep landscaping below driver eye height.
- Avoid trees and signs that might block drivers' views of pedestrians about to cross their path.

3.1.4 Locate and design trash enclosures and private parking areas to be inconspicuous and enhance the visual environment

Adequate parking and trash disposal areas are essential to the success of the downtown. However, accommodating them must be accomplished in a manner that is inconspicuous and enhances the area's village scale and character.

a) Improve existing private parking lots when conversion to usable commercial space is not possible.

- Provide low walls and landscaping for parking spaces adjacent to streets and pedestrian ways.
- Soften walls with vine and/or tree landscaping. Two examples are shown below.

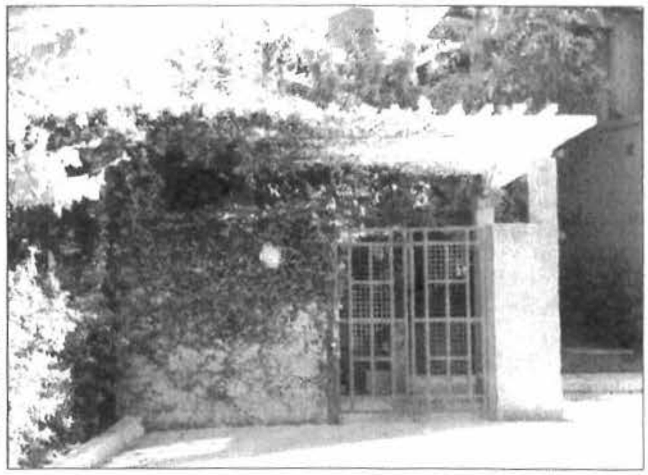
Use low walls to screen the view of cars from adjacent sidewalks and landscaping to soften blank walls.

Use trees and architectural features to buffer walls at parking and service areas.

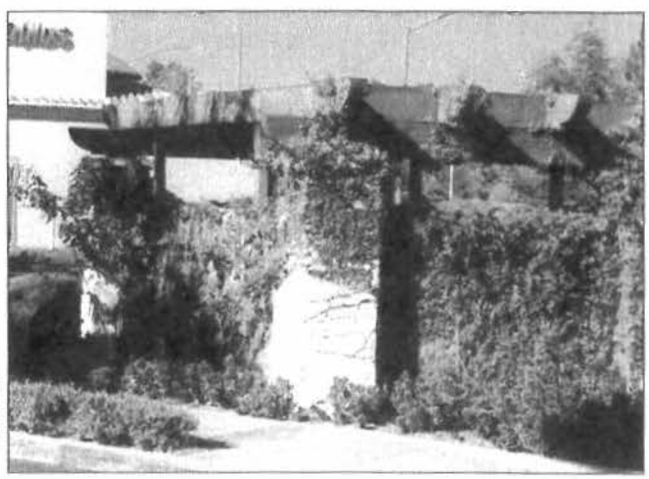
Pleasanton

b) Integrate trash enclosures into the building.

- Provide interior trash rooms whenever possible.
- Where trash enclosures are adjacent to buildings, match the trash enclosure building materials, details and colors to those of the building (See examples on page 36).
- Where integration into the building is not possible, provide upgraded trash enclosures with finished and durable materials as well as buffering landscaping. Avoid exposed concrete block unless enhanced split face block textures and colors are utilized, block joints are visually minimized with colored mortar, and extensive vine landscaping is provided to soften the walls' appearance. Three examples are shown below and to the left.



Mountain View



Valencia

3.2 ARCHITECTURE

Downtown Los Altos contains an eclectic mix of architectural styles and forms, indicative of its growth over many decades. While there are individual buildings of architectural merit, the character of downtown owes more to the wide stylistic variety, small scale, and visual richness of its structures than to their architectural distinction. In the future, the emphasis will be on combining individual architectural excellence with building forms and details that reinforce the small scale village character of the Downtown Core District. A diversity of design styles will be encouraged and expected.

Over time, the downtown retail core has evolved as an area with substantial pedestrian/retail continuity and an emphasis upon an expression of the unique personalities of its individual businesses. The following design guidelines are intended to reinforce that existing framework, scale and character.

3.2.1 Continue the pattern and scale established by existing buildings

a) Maintain and reinforce the underlying downtown 25-foot module along all street frontages. Some techniques for this emphasis include the following:

Changing roof parapet height and/or shape.

Utilizing different building heights, architectural styles, and forms.

ARCHITECTURAL STYLE

These guidelines are not intended to establish or dictate a specific style beyond the desire to maintain Downtown Los Altos' small town character and attention to human scale and detail. In general, diverse and traditional architectural styles that have stood the test of time are preferred.

Designs merely repeated from other cities or without thought to the special qualities of Los Altos are strongly discouraged, and unlikely to be accepted.

CORPORATE ARCHITECTURE

The City will work with applicants to adapt critical functional features of prototype plans to their Los Altos sites, but will not accept standard plans, building forms, elevations, materials, or colors that do not relate to the site, adjacent development, or Los Altos' community character.

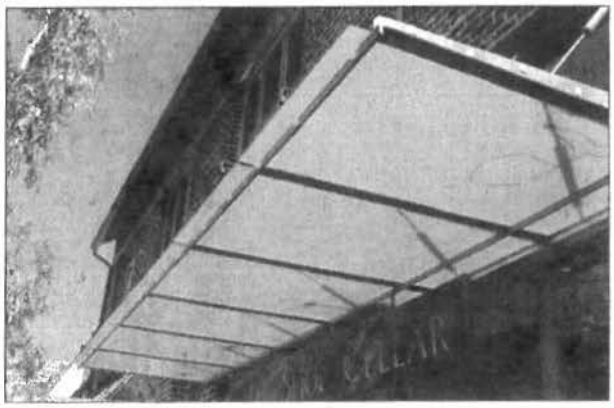
Applicants are encouraged to meet early in the process with the City's Planning Services Department staff to discuss their plans and building prototypes.

SUSTAINABLE DESIGN

The City of Los Altos supports sustainable design in the construction of new facilities and the remodeling of existing buildings. Applicants are expected to utilize creativity in adapting sustainable design elements to the unique qualities of Downtown Los Altos' visual environment. City staff will work closely with applicants to achieve this goal.

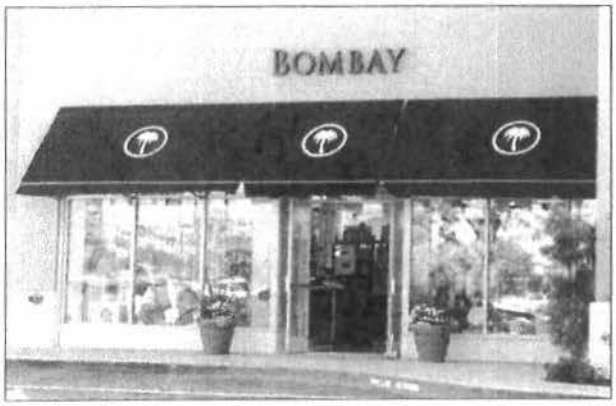
Special attention will be expected of all applicants in the following areas:

- Use of energy efficient HVAC systems
- Use of solar energy
- Reduction of energy demands through simple techniques such as operable windows and sun control methods
- Minimization of storm water runoff
- Use of recycled materials
- Maximization of insulation and energy efficient lighting



Laguna Beach

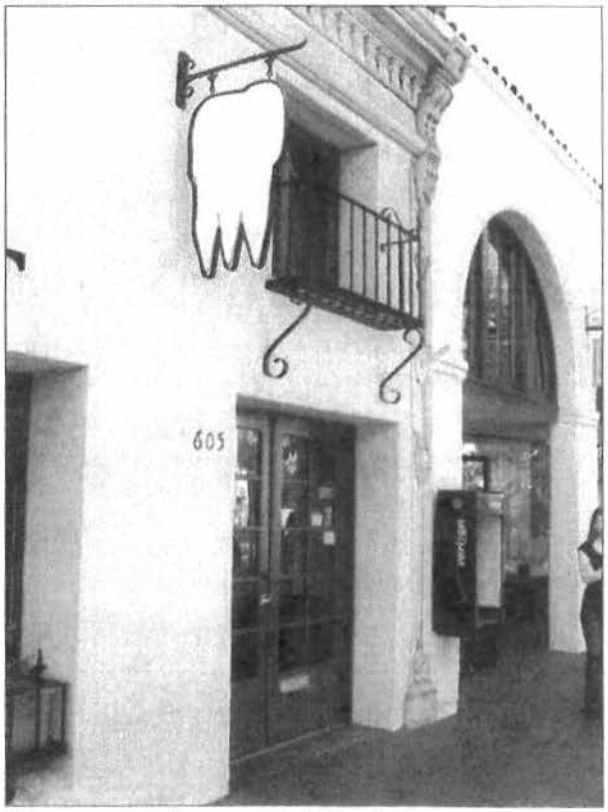
Utilizing different awning forms and/or materials, as shown above and below, matching the predominant building module.



Coast Misiones

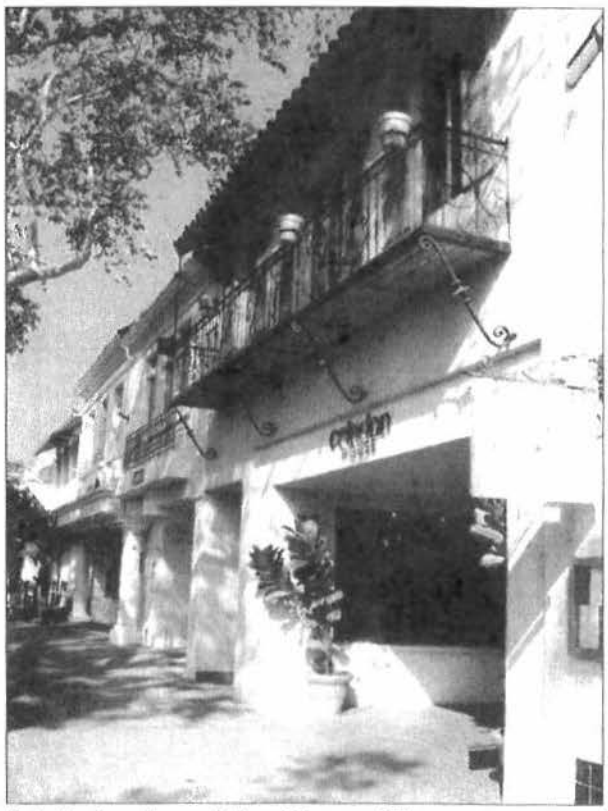
Santa Barbara

Defining storefronts with projecting piers and emphasizing tenants' unique store personalities.



Santa Barbara

Changing storefront type and details.



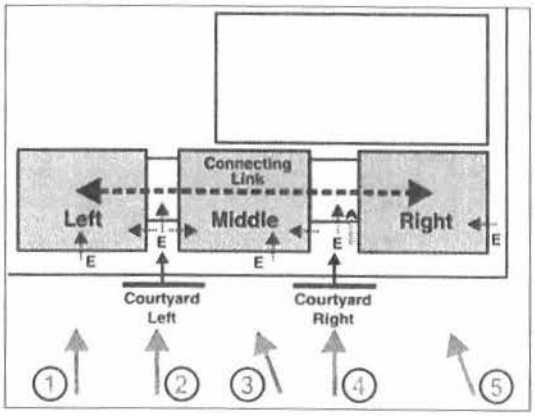
Santa Barbara

Reinforcing the module with second floor projections and details.

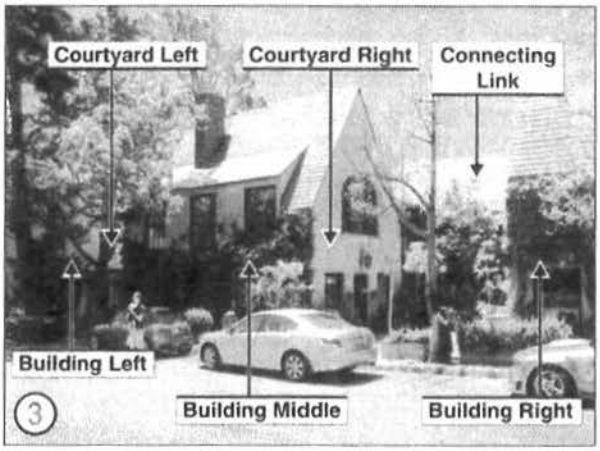
b) Break larger buildings up into smaller components.

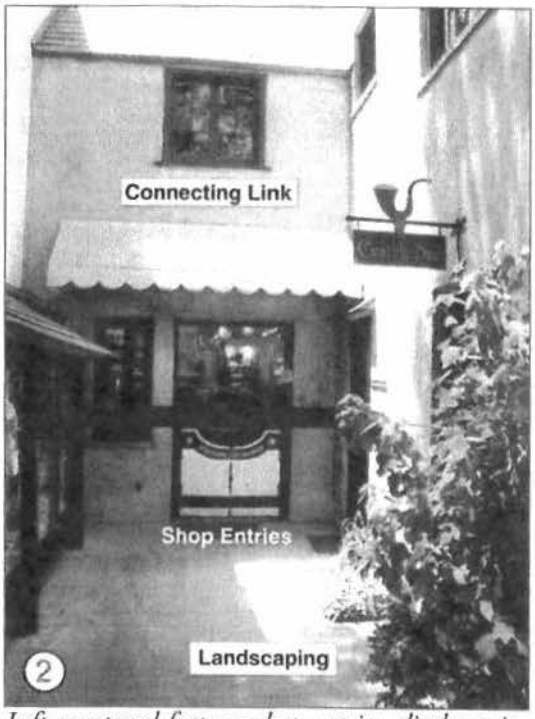
- Divide longer facades into individual smaller segments with individual design forms and architectural styles. One option is shown on this page. Development incentives may be available.

- Provide recessed courtyard entries between individualized building segments. These courtyards should be at least 20 feet wide and 20 feet deep with substantial landscaping and pedestrian amenities. These are excellent locations for entries to shops and/or to second floor uses. The example of a larger structure in Carmel which utilized these techniques is shown in the diagram and photos on this page. See also the photo example from Los Gatos at the bottom of page 31.



Carmel (Images 1-5)





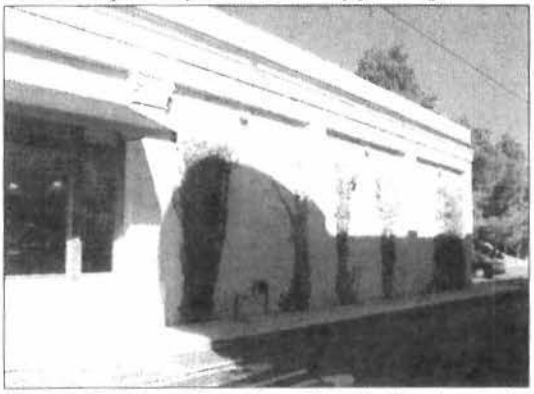
Left courtyard features shop entries, display windows. special paving and landscaping.

Right courtyard features shop entries, stairs to second floor uses, special paving and landscaping.

Differing architectural forms and styles separated by courtyards assist in fitting this large building complex into a village scale.

Front facades are predominantly display windows and entries.

Sidewall display window provides a transition between the primary and secondary frontages.



Sidewall piers relate the sidewall facade to the shop fronts, and landscaping softens the wall.

These contemporary facades fit into this streetscape due to their small scale, and the use of high quality materials and crisp detailing.

c) Create continuous building frontages.

- Avoid blank walls along sidewalks and paseos. Display windows and entries should occupy at least 60% of the wall areas on primary frontages. Walls along side streets and paseos may have a lesser amount of glazing, but should have display windows – especially near the primary facade. Other non-glazed wall areas should be enhanced with wall plane changes, landscaping (e.g., landscaped trellises and lattices), and/or special architectural detailing (see example to the left).
- Minimize pedestrian/vehicle conflicts by locating any driveway or loading areas away from main pedestrian routes.

3.2.2 Design for diversity with sensitivity to adjacent development

a) Select traditional architectural styles.

- Traditional architectural styles have been developed over an extended period of time, and generally fit comfortably with other traditional styles in a downtown commercial environment. Within the traditional styles of building form and facade organization, however, design creativity is encouraged to adapt the style to current needs and a fresh look. Examples of traditional commercial styles may be found in the resources identified in the sidebar on page 27. Adaptations of traditional residential styles may also be appropriate to the village character of Downtown Los Altos.
- The depth and authenticity of detailing found in traditional architectural styles will best harmonize well with current buildings in Downtown Los Altos. However, well designed modern facade designs may be acceptable, depending on location, materials, and the quality of the details. They will be considered on a case-by-case basis. Examples are shown below and to the bottom left.

The warmth of the materials and the variety of smaller scale detailing help this modern facade to fit into a streetscape of diverse architecture.

b) **Relate the facade designs to adjacent structures.**

- Respect the scale of adjacent buildings.
- Relate the placement of defining elements and details to those on adjacent structures. One example from Downtown Los Altos is shown below.

Los Altos

Matching parapet and window heights help relate these adjacent buildings.

c) **Design with architectural integrity and continuity.**

- Exterior details should be authentic to the style. Sources of assistance in understanding traditional architectural design principles and details may be found in the reference sources noted in the sidebar to the right.
- Design buildings as whole units. The design of upper floors and ground level walls, piers and other supporting elements should be designed as a unified whole.
- Preserve historically significant structures, whenever possible. Refer to Appendix B for a list of downtown historic resources.
- Preserve worthy elements of the existing buildings. Recycle and reuse distinctive design elements.

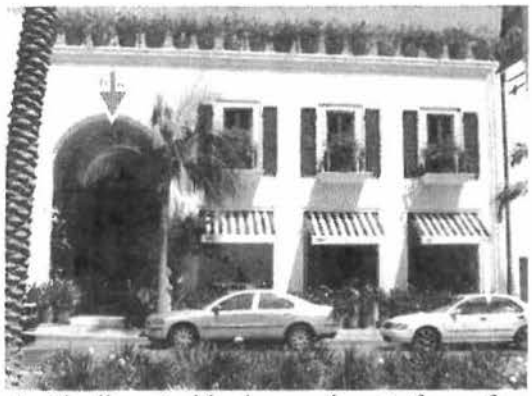
Santa Barbara

The upper and lower facades of this building work as one unified structure.

- Where buildings were once architecturally distinctive but have been altered over time, restore the lost integrity of form and details, if possible.

ARCHITECTURAL STYLES AND DETAILS RESOURCES

- **The Buildings of Main Street: A Guide to American Commercial Architecture**
  Richard Longstreth
  Rowman Atimira 2000
- **Traditional Construction Patterns: Design & Detail Rules of Thumb**
  Stephen A. Mouzon
  McGraw-Hill 2004



Avoid tall entries like the one above in favor of pedestrian scaled entries like the one shown below.

Operable windows are encouraged for restaurants, cafes and coffee shops.

3.2.3 Design to enhance Downtown's Village Character and pedestrian scale

a) Vary storefront treatments.

A strong feature of Downtown Los Altos' village character is the variety and individuality of the storefronts.

- Provide significant variations between adjacent storefronts occupied by different businesses, including those within the same building structure. These variations should include display windows, entry doors, awnings and signage. For frontages over twenty-five feet in width with the same tenant, variations should also be provided to avoid long facades of the same storefront design.
- Size store entries to the human figure and normal entry door heights. Avoid over scaled, tall entries such as the one to the above left.
- A wide variety of storefront treatments is desirable. Some may have bulkheads below display windows while others may have larger areas of glass extending to the floor.
- Outdoor dining and operable windows are strongly encouraged for restaurants and cafes. Two examples of operable windows are shown below to the left.

b) Design storefronts to allow landscaping and special paving.

- Landscaping may occur in a variety of forms as shown in the examples below and on the following page. Flowers are strongly encouraged to add color and interest.
- See also Guidelines 3.1.2 a) on page 19.

Permanent brick planters.

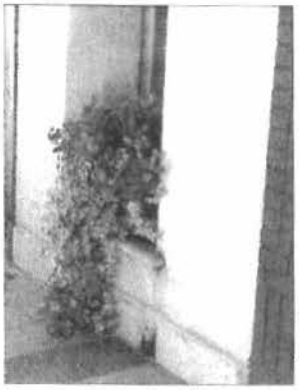
Planters and climbing vines.

Victoria, BC

Built-in planters and hanging pots.

Pasadena

Trellises and lattices with climbing vines.



Los Gatos

Recessed window boxes.

Los Gatos

Mixed treatment in larger setbacks.

Carmel

Window box planters, paving pockets and climbing vines.

Pasadena

Landscaped set-backs and potted plants.

Los Gatos

Planter pots.

Carmel

Wall-mounted pots.

Carmel

Vestibules need not be rectangular in shape.

Santa Barbara

Vestibules with more facets can be used to increase the exposure of goods in storefront windows.

Carmel

A simple, narrow vestibule with a well detailed door may work best for narrow store frontages.

c) **Provide entry vestibules.**

Vestibules emphasize shop entries, and allow ingress and egress to businesses without impeding pedestrian movement on adjacent sidewalks. They also allow for increasing display window exposure.

- Vestibules may have a wide variety of shapes, from simple rectangular indentations to larger and more complex shapes. Some examples are shown in photos to the left.
- Use special paving materials and colors to clearly define the vestibule areas and separate them from the adjacent public sidewalk.
- The use of wood doors with glazing and raised panel details, rather than metal and glass doors, is strongly encouraged to add warmth to the shop entries.
- Dutch doors and doors with divided light windows are encouraged to link the shop interior to passing pedestrian traffic and add visual interest to the entry.

Los Altos

A wood door and brick paving contribute to this inviting shop entry.

Oakland

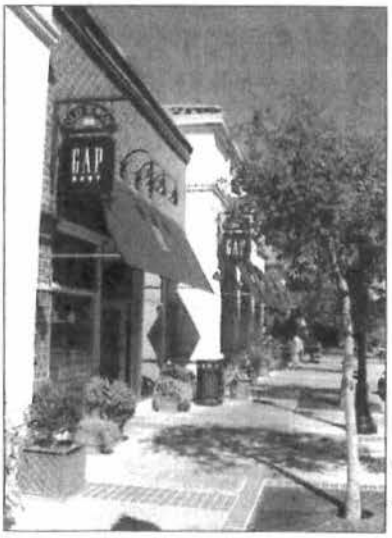
Dutch doors offer an inviting, friendly entry to passing shoppers.

d) Utilize awnings and canopies at windows and entries.

- A variety of awning types is encouraged. They may be traditional, as shown to the right, or unique (see the wood shutter awnings below). They should also be distinct to the store's tenant. For multiple tenant buildings, avoid making all of the awnings the same.
- Keep the mounting height at a human scale - with the valence height not more than 8 feet above the sidewalk level.

Beverly Hills

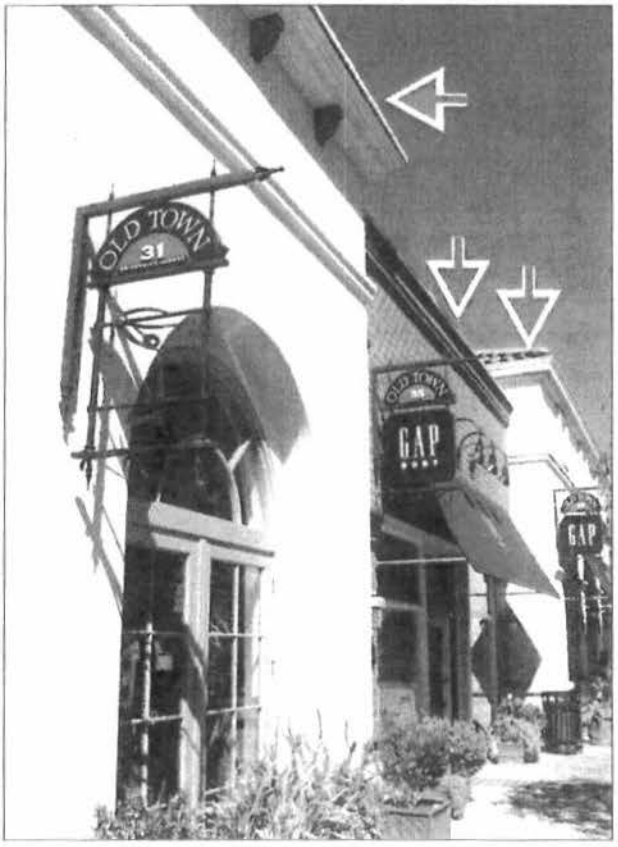
San Jose



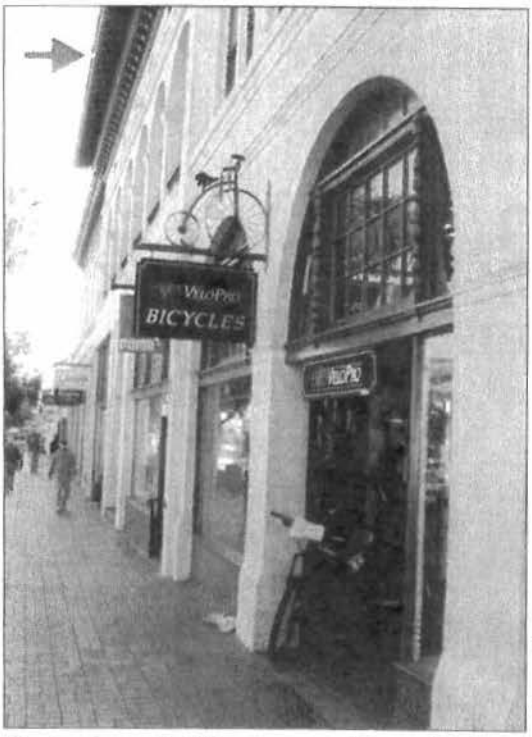
Los Gatos

e) Provide cornices and building tops consistent with the architectural style.

- Avoid unfinished wall tops in favor of projecting cornice features or roof overhangs. Examples are shown below and to the right.



Los Gatos



Saint Rashani

Designing larger buildings to resemble a collection of smaller individual buildings, as shown to the left, is preferred in the Downtown Core. Larger structures with varied store fronts, as shown above, may be considered on a case-by-case basis.

Carmel

Architectural features and shop entries are encouraged on corner parcels.

Carmel

f) Provide special features for buildings located at street corners (See examples to the left).

g) Emphasize entries and display windows.

- Make shop entries as open and inviting as possible.
- Consider landscaping and special paving to add visual interest.
- Keep all window glazing transparent. Avoid tinted glass in favor of awnings and other shading devices for sun control.

h) Utilize natural materials.

Wood, stone, and brick can provide warmth at storefronts, and enhance the feeling of village scale and character.

- Wood doors and window frames are strongly encouraged.
- Avoid synthetic stone.
- Tile is discouraged except for bulkheads below display windows and for decorative accents. One good example is shown below.

Ojai

Santa Barbara

Landscaping and open doors can add great appeal to both individual shops and the street as a whole

Carmel

Providing large display windows and inviting entries enliven the street frontage, and encourage shoppers to enter the store.

i) Enhance the pedestrian experience with interesting architectural details.

- Consider bay window displays where walls might otherwise be blank, as shown in the example below.

Carmel

- Architectural details should be high quality and appropriate to the architectural style.
- Individual trim elements should be scaled to be or resemble proportions that could be handled and installed by hand. Elements on any portion of the structure should not be inflated in size to respond strictly to building scale, but should also have a relationship with human scale.

j) Provide special storefront and facade lighting.

Nighttime lighting of the building and display windows can add greatly to the downtown's sense of vitality and safety, and can encourage window shopping by those who may be dining in downtown restaurants.

- Lighting should be subtle.
- The use of decorative lighting, concealed fixtures, or pin lights are all possibilities.
- Decorative lighting fixtures should be appropriate to the architectural style of the building and storefront.

Santa Barbara

Pleasanton

Small details like these pots on shelves at the restaurant entry can add greatly to the village scale and character.

Pasadena

True or simulated divided light windows, decorative lights, and landscaping can add special visual interest to a storefront.

Carmel

These small decorative wall-mounted fixtures and the concealed lighting of the display window provide subtle lighting for the building, merchandise and signage.

Carmel

Tile stairs and business directory sign

Pasadena

Awnings and window boxes at the second level help relate those uses to the street level

Carmel

Second floor overhang and wrought iron gate at second floor entry

3.2.4 Design second floor facades to complement the streetscape and Village Character

a) Provide second floor entries that are equal in quality and detail to storefront entries.

Some techniques to accomplish this emphasis include: See example to the left and below.

- Special awning or roof element.
- Wrought iron gate.
- Decorative tile stair treads and risers.
- Special lights.
- Decorative street address numbers or tiles.
- Plaque signs for upper floor business tenants.

Carmel

Second floor entry awning

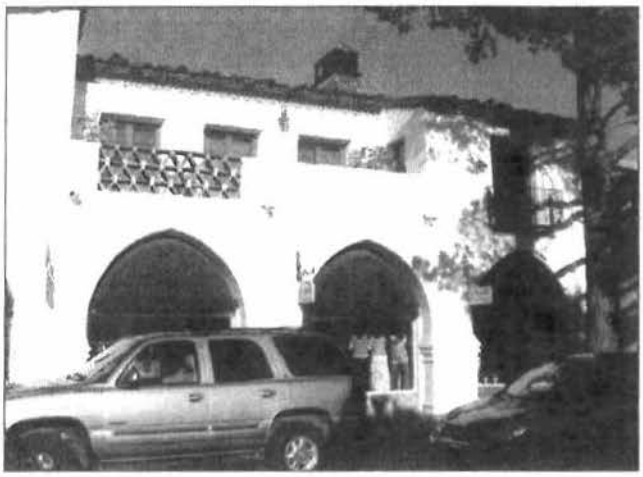
b) Relate second floor uses to the pedestrian environment on the street level.

Some methods of achieving this include the following: See examples on this and the following page.

- Second floor overhangs
- Bay windows
- Decks
- Balconies
- Planters.

Carmel

Projecting bay windows



Carmel

Upper floor deck

St. Helena

Small balcony with landscaping

Monrovia

Wide balcony

Carmel

Colorful flower pots

c) **Utilize operable windows in traditional styles.**

- Recess windows at least 3 inches from the face of the wall.
- Use vertical proportions for individual windows.
- Separate individual or groups of windows by solid wall masses, and treat windows as punched openings.
- Avoid ribbon windows and curtain wall treatments.

Los Altos

Building facades facing parking lots may be treated the same as street-facing facades, as above, or may be treated in a more simple manner, as below.

Los Altos

3.2.5 Design compatible parking plaza oriented entries and facades

Facades facing parking lots may be treated similarly to street-facing facades if they serve as a second entry, or they may be treated more simply, but will be expected to receive consistent design attention and landscaping. Two current examples in the Downtown Core District are shown below.

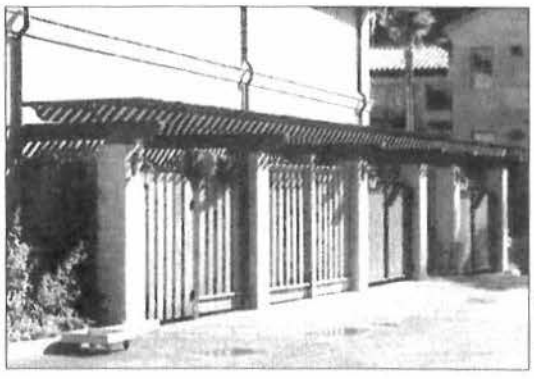
3.2.6 Integrate utilities and building services into the overall building design

a) Integrate mechanical and trash rooms into the building whenever possible.

- Where not feasible, use screen walls to match the design, materials and finish of those of the main building (See examples below).

b) Add trellises, lattices, and landscaping to screen and soften exterior mechanical equipment and trash enclosures.
Two examples are shown below.

Ojai



Los Gatos

c) Rooftop mechanical equipment shall be concealed from public view (street or adjacent buildings).

- Existing rooftop mechanical equipment shall be concealed or relocated out of view whenever a roof is replaced and when equipment is upgraded or replaced to any extent that requires a building permit.

- Locate on a portion of the rooftop that is not visible to the public or locate behind roof forms, parapets or screens that are compatible with the architectural character of the structure.

3.2.7 Design larger structures to be sensitive to the unique scale and character of Downtown Los Altos

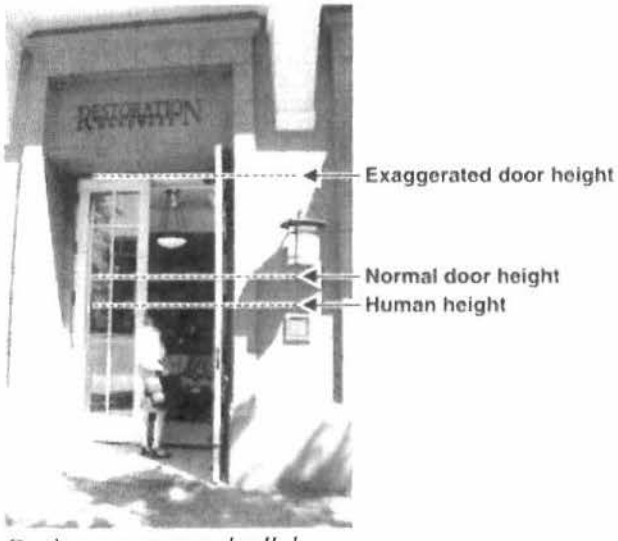
a) Adapt corporate prototype designs to relate both in form and scale to the adjacent downtown fabric.

- An Apple store prototype example in Walnut Creek and its modification for Downtown Los Gatos, shown to the right, illustrates one way in which a corporate prototype design can be modified to fit into a small scale downtown environment.
- The GAP store in Los Gatos, shown below, has been designed to appear as two structures to better fit into the existing downtown fabric.

Los Gatos

b) Avoid architectural styles and monumental building elements that do not relate to the small human scale of Downtown Los Altos.

- The structures shown below and to the right are well designed, but would be out of place in Downtown Los Altos. These are all examples of what should not be done.

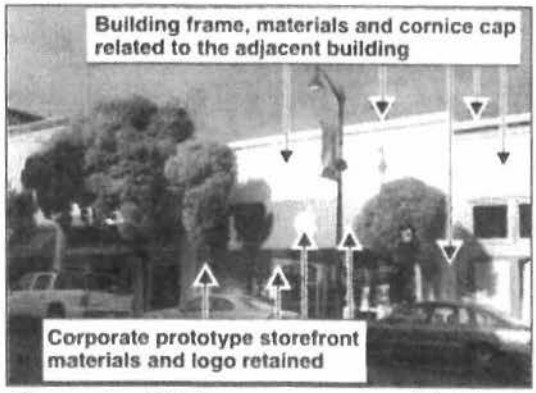


Walnut Creek

Don't use exaggerated tall doors

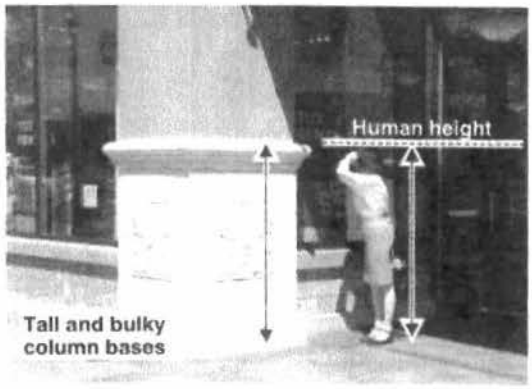
Walnut Creek

This store in Walnut Creek illustrates the standard Apple prototype.



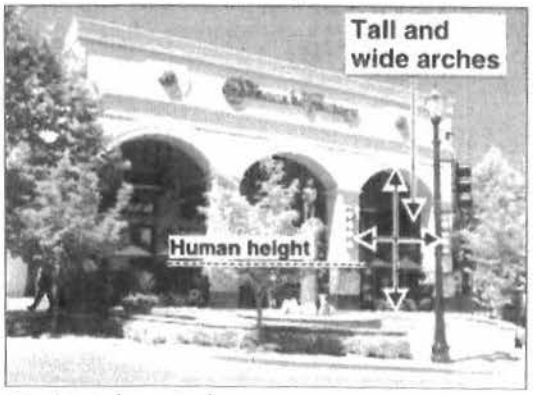
Los Gatos

The standard Apple prototype was modified in the Town of Los Gatos to better fit with the existing downtown scale and character.



Walnut Creek

Don't use over-size building elements



Walnut Creek

Don't use large arches

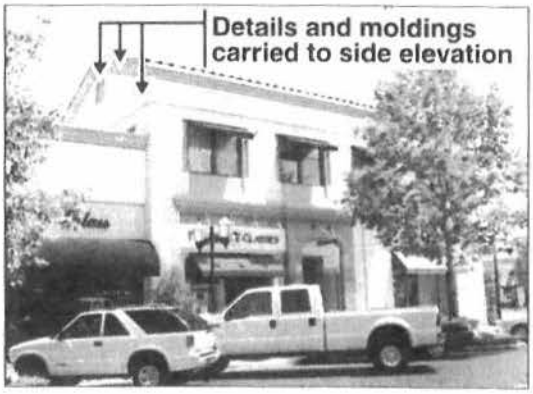
Carmel

Telluride

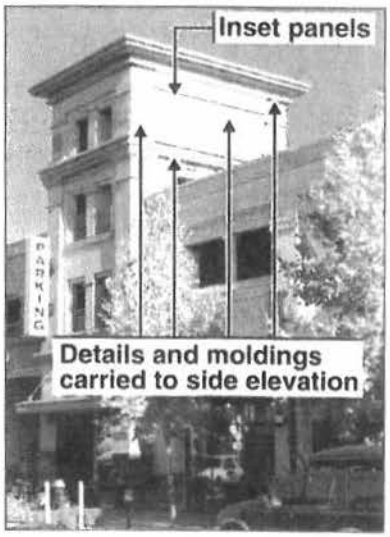
Telluride

c) Provide special design treatment for visible sidewalls of structures that are taller than their immediate neighbors.

- Sidewall windows are encouraged where codes allow and adequate fire protection can be provided.
- Employ design techniques to relate the visible sidewalls to front facades. Some common techniques include the following:
  - Repeating front facade finished materials, decorative details and mouldings.
  - Carrying front facade cornices and wall top projections around all sides of the upper floor.
  - Providing varied parapet heights to avoid a box-like appearance.
  - Utilizing gable and hip roofs to vary the height and appearance of side walls.
  - Treating side walls with inset panels.
  - Integrating interesting architectural details.
  - Stepping back the front facade of upper floors to vary the side wall profile.



Valencia



Walnut Creek

3.2.8 Design and detail parking structures to complement Downtown's Village Scale and Character

a) Locate vehicular entries to allow ingress and egress from streets other than Main Street and State Street.

b) Place as much of the parking below grade as possible.

c) Provide commercial uses on ground floors facing pedestrian-oriented streets and walkways.

d) Provide a minimum 5-foot wide landscape strip to accommodate low shrubs, flowering plants, and vertical trees along all edges that do not have active commercial frontages.

e) Integrate extensive landscaping into the parking structure edges and entries.

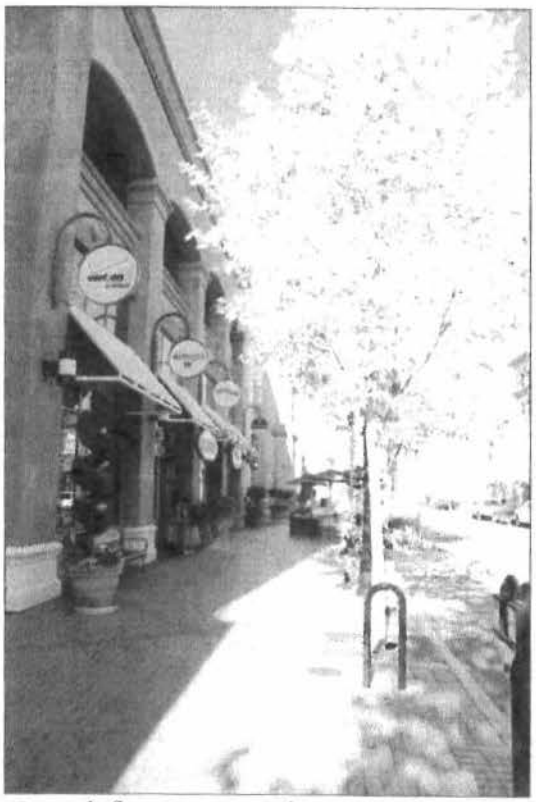
f) Integrate pedestrian entries with adjacent commercial uses.

g) Provide secondary ground floor pedestrian entries when the structure is adjacent to commercial core service alleys containing rear shop entries or paseo entries.

h) Design parking structures to be visually compatible with other Downtown Core District commercial buildings.

Some techniques include:

- Breaking up the building mass and height to match the predominant 25-foot wide module of the core area.
- Designing the structure as a downtown building, rather than as a parking structure.



Walnut Creek

Ground floor commercial uses in the parking structure example shown above assist in maintaining retail and pedestrian continuity.

Walnut Creek

This parking structure has been designed with pilasters, and with varied facade depths, and details to relate to the module and style of nearby retail shops.

Walnut Creek

Minimize parking garage entries, and integrate parking structures with adjacent commercial uses, as shown above.

Sacramento

Facade materials and opening proportions help relate this parking structure to its surrounding neighbors.

San Mateo

Ground level commercial uses and upper floor setbacks are techniques that relate parking structures to adjacent smaller scale development.

- Utilizing finished exterior wall materials (e.g., brick and/or stucco), and decorative trim elements.
- Providing natural light and ventilation with openings that are similar to the proportions of commercial building windows.
- Screening cars from street view.
- Visually screening interior light fixtures from street and adjacent buildings view.
- Incorporating medallions and/or decorative lighting fixtures into exterior ground floor facades.

i) Step back street-facing facades, if feasible, where they are adjacent to lower buildings (See example to the left).

j) Design facades facing the service drives for Downtown Core District commercial buildings as visually attractive neighbors that will be compatible with those adjacent secondary entries and outdoor use spaces. Two multi-use service alley examples are shown below.

k) Special attention should be given to landscaping, window fenestration, lighting, variations in alley paving materials and textures, and other elements that add human scale and visual interest.

Pasadena

Pasadena

3.2.9 Reinforce a sense of entry at Downtown Gateways

a) Provide special design treatments on sites that mark entries to the Downtown Core District.

- Sites for special treatment are identified on the adjacent map.
- Relate the improvements to any special public entry improvements at these entry intersections. Broader concepts for these intersections are outlined in the *Los Altos Downtown Design Plan.*

b) Select design treatments that are appropriate for the site, the architectural style of the structure, and the uses accommodated. Some elements that may be considered include:

- Tower elements
- Sloped roof structures
- Special uses with outdoor plazas
- Fountains
- Special landscape features
- Special lighting
- Increased architectural details
- City identity signing

Downtown Gateways

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3.3 SIGNAGE

Signage is critical to the economic viability of individual businesses as well as to the downtown as a whole. This importance must be balanced with the goals of providing a strong sense of community, and using the design of signage to reinforce the village character and ambiance of Downtown Los Altos.

Applicants should refer to Chapter 11.04 Signs of the Los Altos Zoning Ordinance which contains relevant definitions and the basic standards which will be applied to commercial signage. The guidelines in this chapter supplement the Sign Ordinance, and are intended to provide more detail in regard to good signage design principles and community expectations that signage will be consistent with downtown's village scale and character.

The sign examples shown may not be appropriate for all locations. Each sign will be reviewed in the context of the proposed project architecture and site.

3.3.1 Select signs appropriate to the pedestrian scale environment of the Downtown Core District

a) Select and scale signs that are oriented to pedestrians rather than to passing motorists. Sign types that are most likely to be successful and approved are the following:

- Wall Signs
- Awning Signs
- Window Signs
- Projecting Signs
- Hanging Signs
- Plaque Signs

GOOD SIGN DESIGN PRINCIPLES

Design easily readable signs.

• Avoid excessive wording and advertising messages. Signs are most effective when their messages can be grasped quickly. Too many words or images compete for attention and reduce the readability of the sign.

• Use no more than two letter font types per sign. The primary purpose of a sign is to quickly convey information to passing pedestrians and motorists. More than two letter styles make readability more difficult. A simple logo with an additional type style may be considered.

• Keep the size of letters and graphics in proportion to overall sign area. Text and graphics are difficult to read if they crowd the borders of the sign. Smaller letters with space around them will have more impact than larger letters with limited space around them. Generally limit the width and height of lettering and graphics to 85% of the overall sign width and height. A good rule of thumb is to limit the amount of sign information to no more than 50 to 55% of the overall sign area.

Use high quality materials

• Appropriate materials include finished wood, metal and, for projecting banner signs, woven fabric. Plastic sign materials and signs painted directly onto building surfaces are strongly discouraged..

• The sign materials and design should be related to those of the building on which it is mounted, and all sign edges should be cleanly finished.

Use simple sign shapes

• Geometrical shapes such as rectangles, squares, circles, ovals and triangles are visually stable shapes which help focus attention on the sign message. These should be used in almost all cases. Combinations of geometric shapes will also generally produce a good sign shape.

Pleasant Hill

Piedmont

Los Gatos

Manteca

3.3.2 WALL SIGNS

Wall signs are panels or individual letters mounted on and parallel to a building wall or a roof fascia.

a) Limit sign information.

- Generally, limit sign information to the business name. Graphic logos, date of building construction, address, and other elements may be allowed at the discretion of the City.

b) Place signs within a clean *Signable Area.*

- The *Signable Area* should:
  1) Be relatively flat.
  2) Not contain doors or windows.
  3) Not include projecting molding or trim.
  4) Be in reasonable proportion to the overall facade.
  5) Generally not exceed 15% of the building facade.
- If a building does not have a good location for a wall sign, use other allowed types such as awning, window, or projecting signs.

c) Use sign materials which project slightly from the face of the building.

- Signs painted directly onto wall surfaces are strongly discouraged since a change in tenant could require a major facade repainting.
- Use either individually applied letters to the face of the wall, or apply sign letters to a board or panel mounted on the wall face. Sign copy and graphics applied to a board or panel may consist of any of the following:
  - Individual letters and graphics of wood, metal or similar materials
  - Individual letters and graphics carved into the surface of a wood panel
  - Letters and graphics painted directly onto the surface of the panel

d) Night lighting is encouraged.

- Direct exterior illumination with well designed and shielded spotlights is the preferred lighting method.
- Interior illuminated individual letters are strongly discouraged.
- Interior illuminated *can signs* which include multiple letters on a translucent background within a single sign enclosure are not allowed.
- Neon signs are discouraged, but may be allowed and evaluated on a case-by-case basis.

e) Conceal all sign and sign lighting raceways and other connections.

f) **Maximum letter height.**
Sign height and width should be appropriate to the building on which it is placed and the distance of the sign from fronting streets. Generally, wall sign letter heights should not exceed 12 inches in height except along San Antonio Road where 18 inch high letters may be considered.

Santa Rosa

g) **Relate sign colors to building colors.**
- Select wall sign colors to complement the building and storefront colors. For colors other than black, select from color ranges which are analogous and complementary to storefront and/or building colors.
- Corporate branding colors will be considered, but will not be automatically approved if they are considered out of place with the building or the surrounding environment. A change of color or the use of toned down colors in the same hue family may be required in place of brighter standard corporate colors.

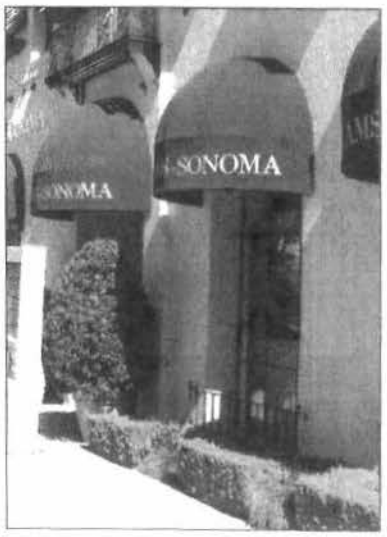
3.3.3 AWNING SIGNS

Awning signs consist of letters and graphics applied directly to the face or valence of awnings. Awning signs are often used effectively in combination with window signs.

a) **Place signs for easy visibility.**
- Apply signs to awning front valences (i.e., the flat vertical surface of awnings) or to sloped awning faces with a slope of at least 2 to 1.


Healdsburg

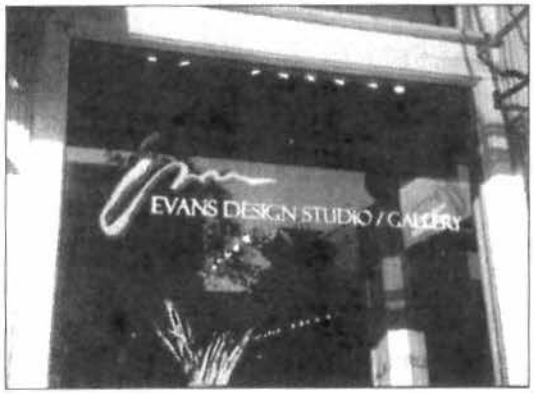
b) **Limit the signage information on awnings.**
- Since awning signs will often be viewed from passing vehicles, the amount of information which can be effectively conveyed is limited. Keeping sign text short will allow viewers to better comprehend and remember the message.
- Generally, limit awning signs to the business name, business logo, services or type of business (e.g., French Cuisine), and/or the business address number.
- Limit the size of logos or text placed on awning sloped faces to a maximum of 15% of the sloped surface areas.
- Limit sign width on awning valences to a maximum of 85% of the awning width. Limit the letter height to a maximum of 85% of the valence height.



Petaluma

c) **Avoid interior illuminated awnings.**
Backlit awnings that make the entire awning a large sign are not allowed. Signage on the awning's sloped face may be illuminated by shielded and attractive directional spot lights.

Burlingame



Los Gatos

3.3.4 WINDOW SIGNS

Window signs are primarily oriented to passing pedestrians, and are generally applied to the inside of display windows.

a) **Limit the amount of signage used.**
Window signs should be limited to a maximum of 25% of any individual window, and an aggregate area of no more than 10% of all ground floor windows on any building face.

b) **Limit the size of lettering.**
The maximum height of letters should be 10 inches.

c) **Consider the use of logos and creative sign type.**
Graphic logos and images along with special text formats can add personality and interest to window signs.

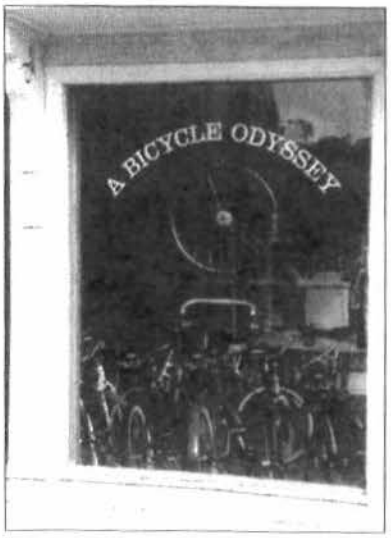
d) **Use high quality materials and application methods.**
Limit window sign materials to the following:

- Paint or vinyl film applied directly to the face of the window.
- Wood or metal panels with applied lettering.

Oakland

Los Gatos

Mill Valley



San Francisco

3.3.5 PROJECTING SIGNS

Projecting signs are relatively flat, two-sided solid panels attached to brackets which are mounted on and perpendicular to the face of buildings and storefronts. In addition to text, they may include graphic images that express the unique personality of an individual business.

a) **Use high quality materials.**
Use wood, metal or non-glossy fabrics. Avoid plastics.

b) **Limit the number and size of projecting signs.**
- Use no more than one projecting sign per business frontage.
- Limit the size of any projecting sign to five square feet.
- Project signs no more than 36 inches from the building face, and provide at least 6 inches between the inside edge of the sign and the building.

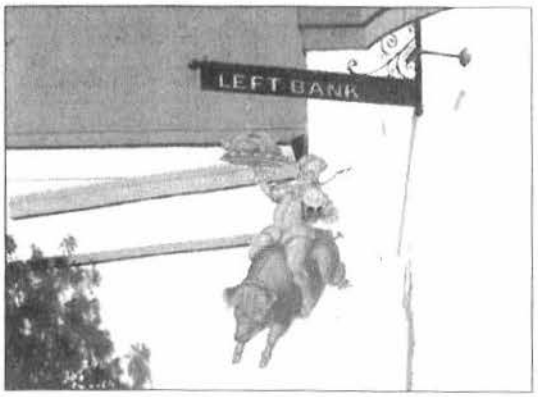
c) **Relate the design of projecting signs and supports to the character of the building.**
- Simple round or square horizontal supports with capped ends, painted black or white, are generally acceptable.
- More decorative approaches may be desirable when appropriate to the sign and/or architectural character of the building.

d) **Position projecting signs to complement the building's architectural details.**
Locate solid panel signs below the first floor ceiling line, or no more than 14 feet above the sidewalk, whichever is less. Provide at least 8 feet from the bottom of projecting signs to the ground in pedestrian areas.

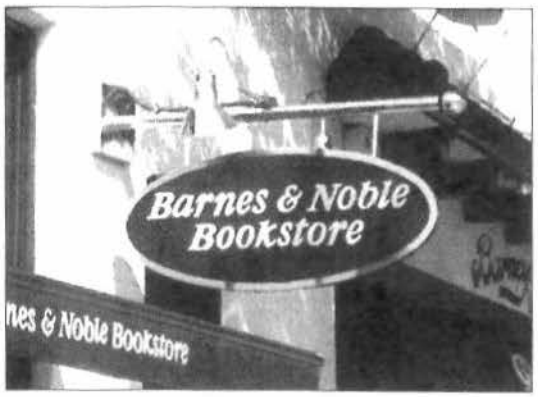
e) **Provide sign lighting only with shielded spotlights.**
- Utilize high quality fixtures such as cylinder spots or decorative fixtures. Avoid exposed standard spot and flood light bulbs.
- Design light supports to complement the design of the sign and building facade.

San Francisco

Blade signs are a smaller form of projecting sign.



Pleasant Hill



Oakland


Santa Barbara

Los Gatos

Laguna Beach

Laguna Beach

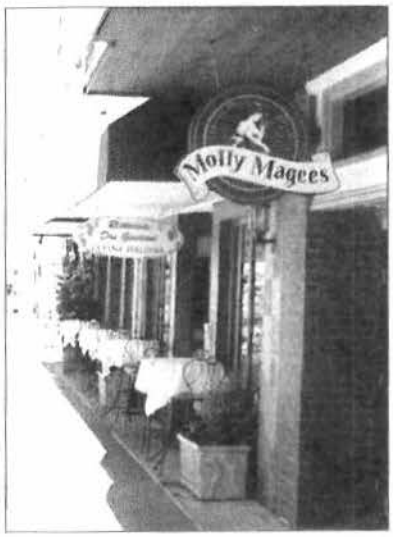
3.3.6 HANGING SIGNS

Hanging signs are relatively flat panels, generally two-sided, which are similar to projecting signs, but are smaller and suspended below awnings, bay windows, balconies, and similar projections. They are intended primarily for business identification to pedestrians passing on the sidewalk.

a) **Use high quality materials.**
Use wood or metal and avoid shiny plastic or fabric. Finish all exposed edges. Suspend signs with metal rods, small scale chain, cable, or hooks.

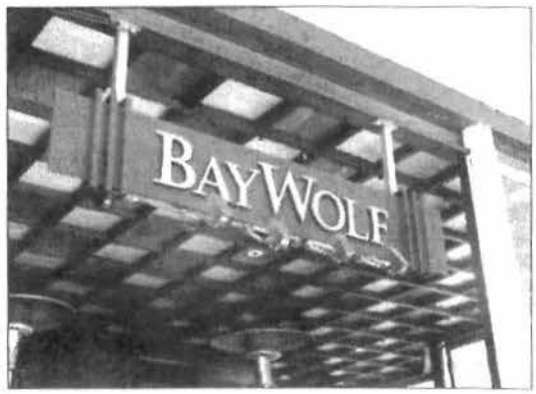
b) **Limit the number and size of hanging signs.**
Use no more than one hanging sign per business. Limit the maximum sign size to 3 square feet. Mount signs to provide a minimum of 8 feet clearance between the sign and the sidewalk.

c) **Orient hanging signs to pedestrian traffic.**
Mount signs under awnings, bay windows or other projections with their orientation perpendicular to the building face so that they will be visible to pedestrians passing on the sidewalk. If hanging signs for multiple businesses are placed along a building frontage, they should all be mounted with their bottom edge the same distance above the sidewalk.



Mountain View

Carmel



Oakland

3.3.7 PLAQUE SIGNS

Plaque signs are pedestrian-oriented flat panels mounted to wall surfaces near business entries, upper floor entries, and courtyards. They include signs that identify a specific business, directory signs for multiple businesses, and menu display boxes for restaurants.

a) **Limit the location and size of plaque signs.**
Locate signs only on wall surfaces adjacent to tenant entries or entry passageways to off-street courtyards. Plaque signs may identify a single business or multiple businesses occupying an upper floor or courtyard.

Santa Barbara

Santa Barbara

Los Gatos

Santa Fe

b) **Use plaque signs for the display of restaurant menus.**
A restaurant district is enhanced when a variety of restaurants share the area and customers are able to walk from one to the next to compare menus and prices. Attractive menu boxes with lighting assist in this process. Menu signs or boxes should have internal indirect lighting (e.g., bulbs located in the frame to cast direct light over the menu surface) or direct lighting using decorative fixtures.

Sausalito


San Francisco

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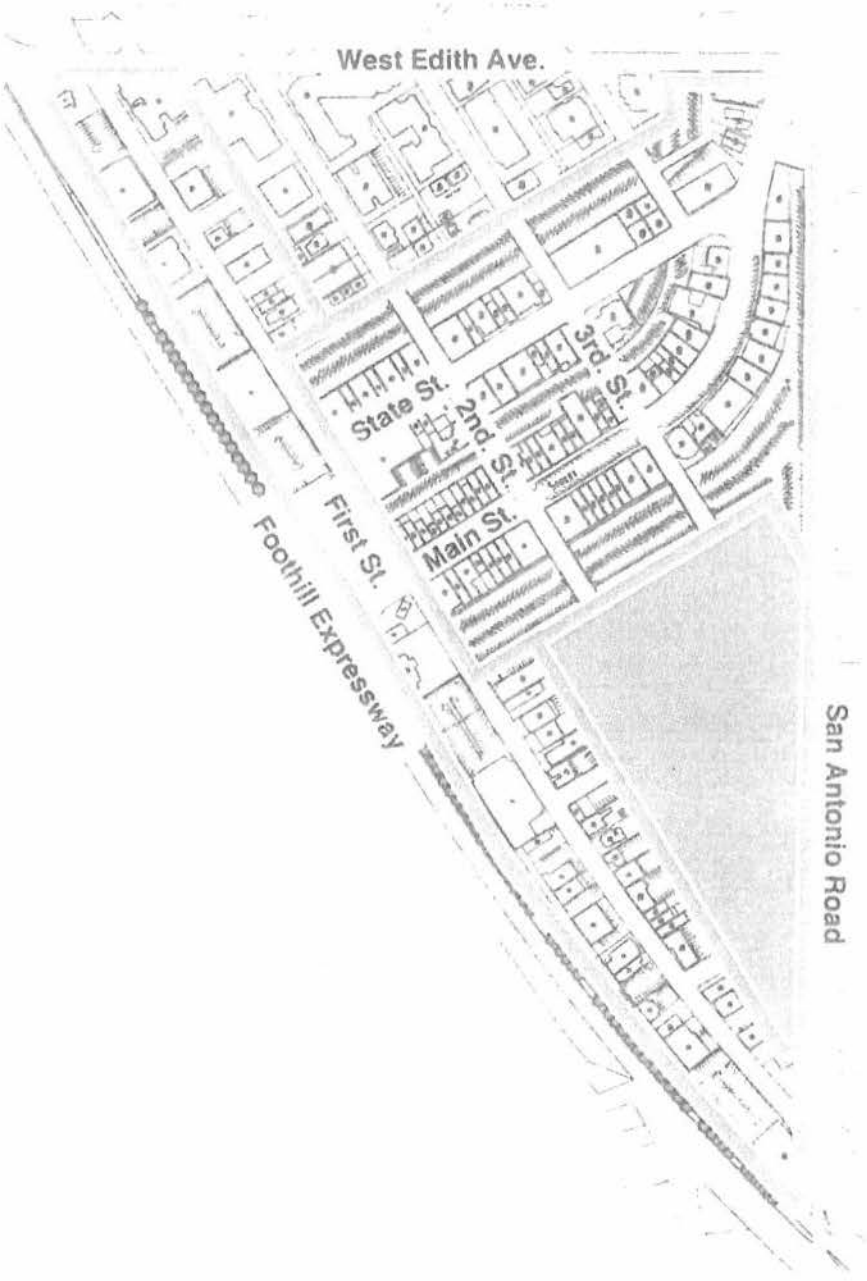
MIXED COMMERCIAL DISTRICT

4



MIXED COMMERCIAL DISTRICT

Owners of properties and businesses in this district should review the guidelines for the Downtown Core District. While projects in this district may be somewhat larger and less retail-oriented than those in the downtown core, they are still very much a part of the downtown village, and the village character and scale emphasis underlying those guidelines will be expected of new buildings and changes to existing properties in this district. The intent of these guidelines and the zoning standards established for this district are summarized in the sidebar to the right.

The primary differences between development in this district and the downtown core include:

- A wider range of uses is allowed.
- Required parking must be provided on-site rather than in common parking district lots or structures.
- Setbacks are required along all street fronts, and in many cases at the rear of parcels.
- A 50-foot building module applies, rather than the 25-foot module in the downtown core.
- Three-story buildings are allowed up to forty-five feet in height.*

  ** Pending a Zoning Code change approval by the City Council to increase the height limit in this zone from its current maximum of forty feet.*

INTENT

A. Promote the implementation of the Los Altos Downtown Design Plan.

B. Support and enhance the downtown Los Altos village atmosphere.

C. Allow latitude for creative design and architectural variety.

D. Respect the scale and character of the area immediately surrounding the existing downtown pedestrian district.

E. Provide pedestrian amenities such as paseos, outdoor public spaces and outdoor seating.

F. Establish a sense of entry into the downtown.

G. Encourage historic preservation for those buildings listed on the city's historic resources inventory.

H. Encourage the upgrading of building exteriors, signs, passageways and rear entries.

I. Provide for a full range of retail, office, and service uses appropriate to downtown.

J. Improve the visual appeal and pedestrian orientation of the downtown.

K. Encourage the use of solar, photo voltaic, and other energy conserving devices.

Los Altos

This low wall separates the parking lot from the sidewalk/driveway at this Los Altos office building.

Palo Alto

A low box hedge is used here to buffer the pedestrian from the adjacent parking lot.

Palo Alto

Special paving and landscaping give this parking lot a village character.

4.1 PEDESTRIAN ENVIRONMENT

A strong pedestrian orientation is expected. In addition to the guidelines below, the Downtown Core District Pedestrian Environment guidelines on pages 17-22 will also apply to this district.

4.1.1 Minimize the impact of parking on pedestrian circulation and the pedestrian environment

a) Underground parking is strongly encouraged.

b) Locate parking at the rear of parcels.

c) Limit the exposure of surface parking lots along street frontages as much as possible.

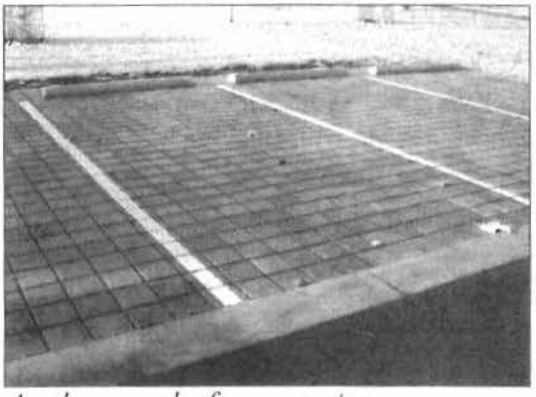
d) Provide access to parking from passages and less traveled pedestrian routes whenever possible.

e) Limit the width of parking access drives as much as possible.

f) Limit access and parking lot paving to those areas that are functionally required, and provide landscaping in all other areas.

g) Where parking lots must abut a public street or a pedestrian walkway, provide a minimum landscaped setback of 5 feet, and provide low walls or box hedges to screen parked cars from direct view. Two examples of screening are shown to the left.

h) Special textured paving that is porous and minimizes water run-off in surface parking lots is strongly encouraged. Examples are shown to the left and below.



Palo Alto

Another example of porous paving

4.2 ARCHITECTURE

The Mixed Commercial District includes office and service uses as well as retail uses. And, since many of the parcels are larger than those in the Downtown Core District, buildings are also often larger. The architecture guidelines below are intended to recognize these differences while maintaining a scale and character that is compatible with that of the downtown core.

4.2.1 Mixed use buildings are encouraged

a) Buildings not planning for a mixed use at the current time still must allow for future mixed use by:

- Providing a minimum ground floor ceiling height of 12 feet.
- Locating the ground floor no more than 12 inches above the sidewalk level.
- Designing the ground floor facade with a minimum of 60 percent transparent glazing.

b) Ground floor retail uses should generally follow the relevant storefront design guidelines for the Downtown Core District. If in doubt, applicant should consult with city planning staff.

4.2.2 Break long facades into smaller modules

a) Buildings that are longer than 75 feet in length must be broken up into segments that are no longer than 50 feet.

b) The development of smaller building segments may be accomplished in several different ways. They include combinations of the following techniques:

- Separate structures surrounding a courtyard.
- Indented courtyards (See Guideline 3.2.1.b).
- A change in horizontal or vertical plane.
- A projection or recess.
- Varying cornice or roof lines.
- Distinctive entries.

4.2.3 Provide primary building entries on the street frontage

a) Building entries may also be provided from the parking lot, but this should not be designed as the only or the major entry.

The photos above show two examples of breaking larger buildings into smaller segments that are compatible with the Los Altos downtown village scale and character.

BUILDING HEIGHT VARIATION EXAMPLES

Los Gatos

Santa Monica

Exterior stairs to upper floor uses are one way to provide variation in building height.

4.2.4 A variation in building heights is encouraged

a) Variations may be provided by different heights for major building elements or by lowering segments of the facade such as exterior stairs (See photos to the left).

4.2.5 Sloped roof forms are encouraged

a) Flat roofs may be considered on First Street parcels where they would be more compatible to adjacent development.

b) Upper floors embedded in the sloped roof form may be needed to conform to the height limits for the district. *One example is shown below.*

Pasadena

Cupertino

Projecting ground floor arcades are another way to provide variation in building height.

4.2.6 Design buildings to screen surface parking lots whenever possible

a) Provide as much building frontage along the streets as possible.

b) Second floor space is encouraged along street frontages with parking lot entries. See the example below.

Santa Monica

4.2.7 Provide design consistency

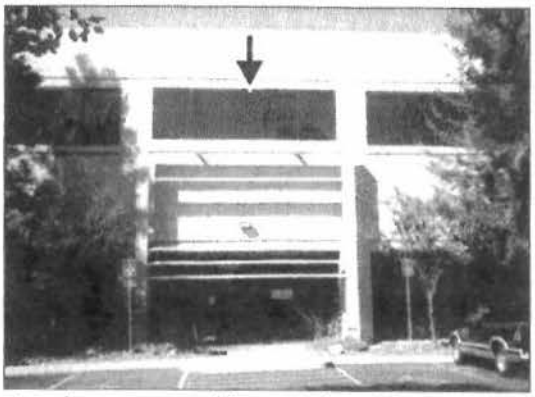
a) The architectural style and details should continue around all sides of the structure.

4.2.8 Emphasize individual windows or small window groups on upper levels

a) Use vertical window proportions.

b) Avoid horizontal ribbon windows.

c) Recess window a minimum of 3 inches from the face of all exterior walls.



Sunnyvale

Avoid continuous ribbon windows like those above in favor of individual windows with substantial jambs separating them, as shown below.

Los Altos

4.2.9 Upper floor balconies and decks are encouraged

Los Gatos

Another example of second floor balcony and deck space providing facade depth and visual interest.

See the guidelines and examples on pages 34-35.

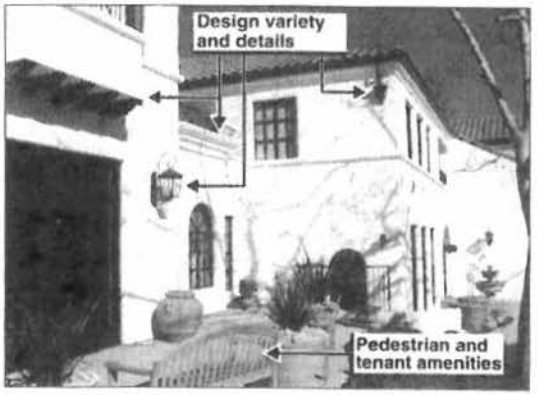
4.2.10 Include substantial architectural detail

a) Detail elements should be consistent with the architectural style of the building.

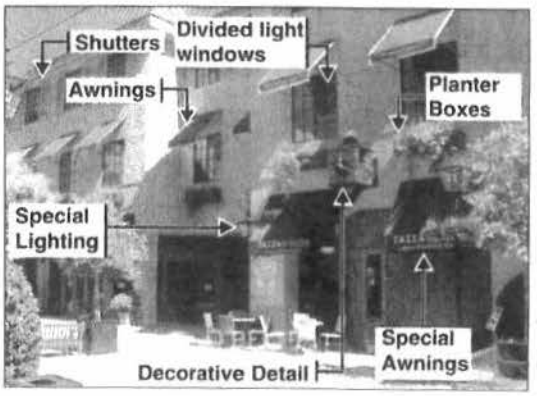
b) Detail elements, similar to those in the Downtown Core, may include:

- Roof cornices and overhangs
- Wall mouldings
- Trellises and lattices with landscaping
- Decorative lights
- Awnings
- Balconies

See examples to the right.

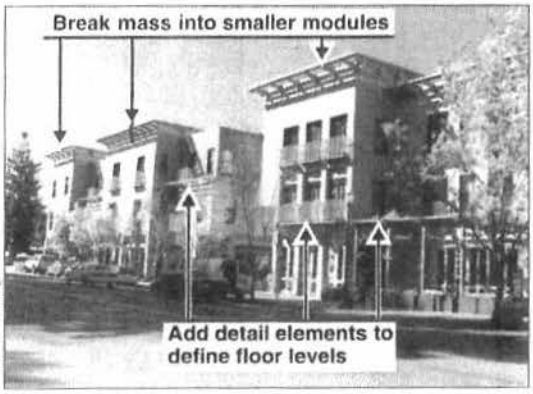


Los Gatos



Pittsburg

Danville

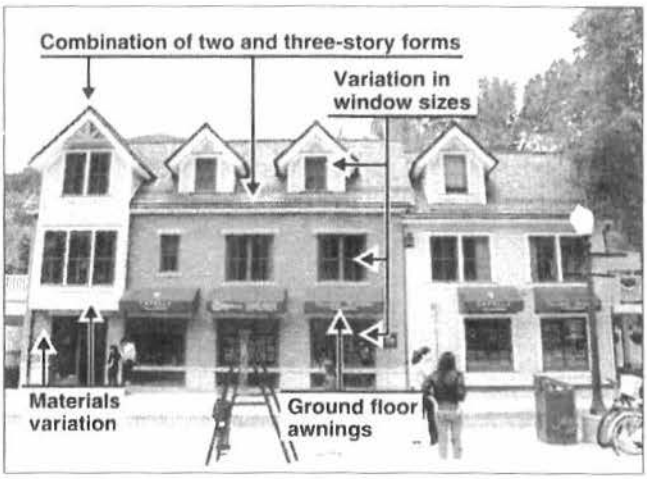


Healdsburg

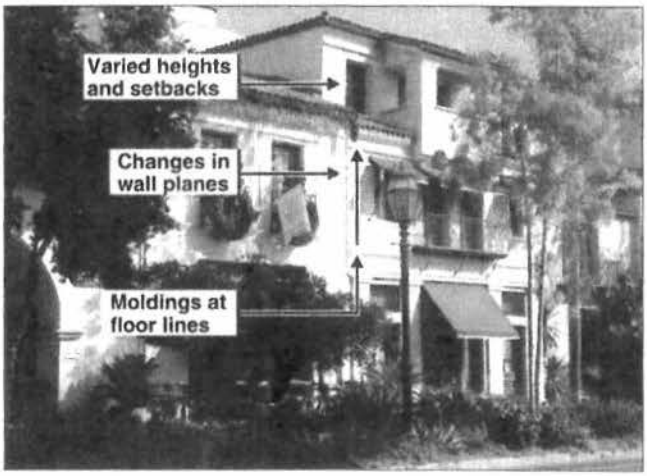
Brisdale Village

4.2.11 Design taller buildings to relate to smaller nearby buildings in the downtown

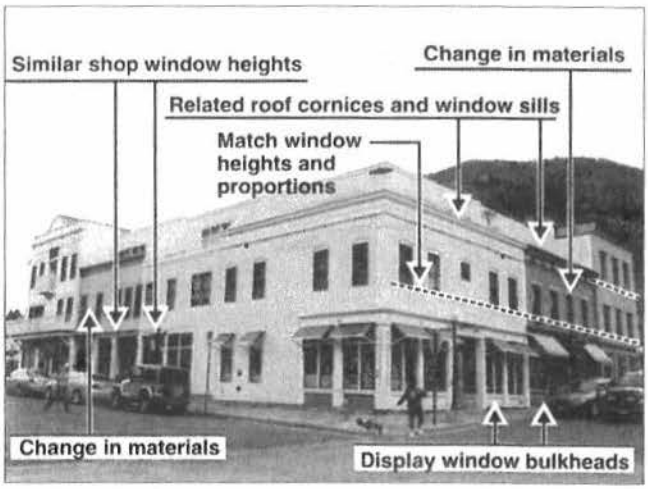
Some techniques are shown in the examples on this page.



Telluride



Santa Barbara



Telluride

4.3 LANDSCAPE

Extensive landscaping is expected in the Mixed Commercial District because of the increased setback requirements, substantial surface parking, and the increased size of the buildings.

4.3.1 Provide a landscaping buffer between parking lots and building facades

a) Include shrub and tree landscaping to give tenants a sense of separation between themselves and the parking lot.

b) When parking is tucked under the building, landscaped planters, with trees, should be provided to break up the parking lot paving at the building. One example is shown below to the right.

Danville

Landscaping to separate buildings from parking lots is expected. The type and height of landscaping will be dependant on the size, height, and form of the building.

4.3.2 Provide special landscaping and paving at building entries

See pages 28 and 29.

4.3.3 Provide on-site amenities for tenants and pedestrians

a) Locate amenities adjacent to sidewalks, building entries, paseos, and courtyards. Amenities may include:

- Benches
- Fountains
- Planted areas
- Rain gardens and other rainwater infiltration features
- Special decorative paving
- Potted flowers and plants
- Public art
- Waste receptacles

Laguna Beach

Example of landscaped planters at tuck-under parking.

Los Altos

Los Altos example of landscaping used to enhance an office building's setting.

GROUND SIGN EXAMPLES

Los Altos

Sonoma

Sonoma

4.4 SIGNAGE

The Downtown Core District signage guidelines apply to all signs in the Mixed Commercial District. Ground signs and free-standing signs may also be allowed at the discretion of the city.

4.4.1 GROUND SIGNS

a) Location limitations.

Ground signs may be considered on a case-by-case basis mainly along San Antonio Road in recognition of its greater vehicle orientation, width, and traffic speeds. They may also be considered along other streets where wide landscaped setbacks are provided, as in the downtown Los Altos example to the upper left.

b) Limit the information on each sign.

- Ground signs should generally be limited to the following information:
  1) Project or primary business identification name and/or logo
  2) Address number
- Multi-tenant ground signs are strongly discouraged. However, the display of multiple tenants may be considered for small ground signs so long as the sign and background color is common throughout, and the type style and logo colors of each tenant are the same.
- The inclusion of services and products offered should not be included on ground signs.

c) Locate signs for easy visibility from passing vehicles.

- Locate signs within 10 feet of the front property line.
- Avoid blocking any vehicular or pedestrian sight lines which might result in safety problems.

d) Signs including bases should fit within a rectangle no larger than 5 feet high and 5 feet wide.

e) Lighting.

- Lighting for ground signs must be by direct spotlight illumination from fixtures mounted either at the top of the sign or on the ground below the sign. Fixtures must be shielded to avoid direct view of the bulbs. Interior illuminated ground signs are not allowed.

f) Materials.

- All ground signs, including price signs for service stations, shall be constructed of matte finish nonreflective materials.

4.4.2 FREESTANDING SIGNS

a) Limit freestanding signs to single tenants.

b) Signs including bases, vertical supports, and crossbars should fit within a rectangle no larger than 6 feet high and 3 feet wide.

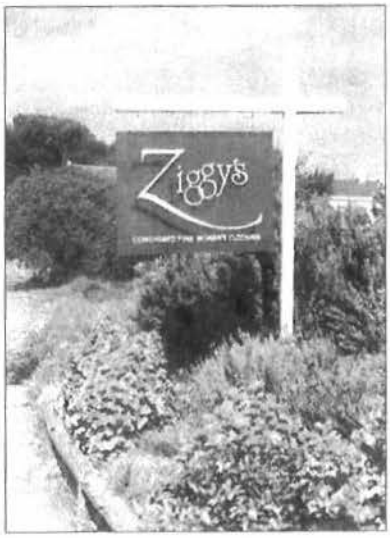
c) All sign materials should be matte finish.

d) Letters and logos may be applied or painted onto the sign.

e) Signs may be externally lit with shielded spot lights.

FREESTANDING SIGN EXAMPLES

Laguna Beach



Seattle

Seattle

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FIRST STREET DISTRICT

5

FIRST STREET DISTRICT

Owners of properties and businesses in this district should review the guidelines for the Downtown Core District. While projects in this district may be somewhat larger and less retail-oriented than those in the downtown core, they are still very much a part of the downtown village, and the village character and scale emphasis underlying those guidelines will be expected of new buildings and changes to existing properties in this district. The intent of these guidelines and the zoning standards established for this district are summarized in the sidebar to the right.

The primary differences between development in this district and the downtown core include:

- A wider range of uses is allowed.
- Required parking must be provided on-site rather than in common parking district lots or structures.
- Setbacks are required along all street fronts, and in many cases at the rear of parcels.
- A 50-foot building module applies, rather than the 25-foot module in the downtown core, except for lots located within the CRS Zoning District.*

  * *Pending a Zoning Code change approval by the City Council to extend the CRS zoning into the First Street District..*

INTENT

A. Promote the implementation of the Los Altos Downtown Design Plan.

B. Support and enhance the downtown Los Altos village atmosphere.

C. Allow latitude for creative design and architectural variety.

D. Respect the scale and character of the area immediately surrounding the existing downtown pedestrian district.

E. Establish a sense of entry into the downtown.

F. Encourage historic preservation for those buildings listed on the city's historic resources inventory.

G. Encourage the upgrading of building exteriors, signs, and parking lots.

H. Provide for a full range of retail, office, and service uses appropriate to downtown.

I. Develop a landscaped strip along the back of properties that abut Foothill Expressway between West Edith Avenue and San Antonio Road.

J. Improve the visual appeal and pedestrian orientation of the downtown.

K. Encourage the use of solar, photo voltaic, and other energy conserving devices.

Applicants should carefully review the Los Altos Zoning Ordinance provisions appropriate to their properties. Parcels covered by the design guidelines for the First Street District are located within three zoning districts with slightly different limitations and requirements.

Sunset Road

A visual and physical separation between street front sidewalks and adjacent parking lots is expected.

5.1 PEDESTRIAN ENVIRONMENT

The First Street District is spread along First Street which is more vehicle-oriented than the remainder of Downtown Los Altos, and has more surface parking with limited landscaping than most other areas. Nevertheless, this district is very much a part of the downtown village. These guidelines are intended to allow larger buildings and on-site parking while doing so in a manner that reinforces Downtown Los Altos' village scale and character.

5.1.1 Minimize the visual impact of parking

a) Underground or screened roof parking is encouraged on larger parcels.

b) Provide a landscape buffer between street front sidewalks and any adjacent parking lot. Per the zoning code, the minimum width of this buffer must be 5 feet, unless less is allowed by a variance. When lesser widths are allowed for existing parking lot improvements, some buffering is still required. One approach to adding visual buffering by a low wall is shown below.

Berkeley

Danville

Separate parking lots from pedestrian areas at buildings by landscaping (above) or by pedestrian arcades (below).

Los Gatos

5.1.2 Provide pedestrian linkages between street front sidewalks and building entries

a) Building entries facing First Street are strongly encouraged. For larger buildings where entries are set back on a facade facing a parking lot, provide a strong sidewalk connection with landscaping on both sides from the street front to the entry.

5.1.3 Provide landscape buffers between parking lots and pedestrian areas at buildings

a) Building fronts are expected to be as active and attractive as those in the Downtown Core District, and to be buffered from parked cars. Landscaping and, where appropriate, trees should be used to buffer pedestrian areas. Alternatively, arcades and planters at the building may be used for this purpose. Examples of these two approaches are shown to the left.

5.1.4 Provide special paving for parking lots immediately accessible from the street

a) Parking areas which are adjacent to street front sidewalks and with perpendicular parking spaces directly accessible from the street drive lane are strongly discouraged. For existing parking areas like this that are being upgraded, provide a distinction on the paving color and texture between the parking surface and the adjacent sidewalk and street paving.

5.1.5 Provide pedestrian walkways through large parking lots

a) Dedicated walks through parking lots will improve pedestrian safety and enhance the shopping and business patronage experience. Walkways should be reinforced with edge landscaping and with textured and/or permeable paving where they cross parking drive aisles. One example is shown in the upper right of this page.

5.1.6 Provide pedestrian amenities.

Amenities may include:

- Benches
- Fountains
- Planted areas
- Rain gardens and other rainwater infiltration features
- Special decorative paving
- Potted flowers and plants
- Public art
- Waste receptacles

5.1.7 Integrate ground floor residential uses with the streetscape

a) Set structures back a minimum of 10 feet from the street property line. Stairs and entry porches may encroach into this setback up to the property line.

B) Soft landscaping is required for a minimum of 60% of the front setback area.

See examples below and to the right.

Example of a well designed pedestrian walkway through a parking lot. Note: The building entry in the background would be out of scale for downtown Los Altos.

Provide pedestrian amenities.

Provide ground floor residential setback landscaping.

Tustin

This shopping complex has a village scale and character by virtue of treating adjacent uses as individual buildings.

Los Gatos

The scale, details and natural materials used for this tower create an attractive focal point for the building without losing human scale.

5.2 ARCHITECTURE

Building uses and sizes will vary more in the First Street District than elsewhere in the downtown. The goal of these guidelines is to accommodate this wide diversity of size and use while maintaining a village scale and character that is complementary to the downtown core. The photographs shown on this and the following page are examples of more vehicle-oriented buildings that include forms and details that are sensitive to village scale and character.

5.2.1 Design to a village scale and character

a) Avoid large box-like structures.

b) Break larger buildings into smaller scale elements.

c) Provide special design articulation and detail for building facades located adjacent to street frontages.

d) Keep focal point elements small in scale.

e) Utilize materials that are common in the downtown core.

f) Avoid designs that appear to seek to be prominently seen from Foothill Expressway and/or San Antonio Road in favor of designs that focus on First Street, and are a part of the village environment.

g) Provide substantial small scale details.

h) Integrate landscaping into building facades in a manner similar to the Downtown Core District (See pages 28-29).

Examples of larger parcel buildings that are designed to be consistent with a village character are shown on this and the adjacent page.

Mid Valley

Traditional building forms, architectural details, and integrated landscaping assist in relating the parking lot frontage to an overall village scale and character.

5.2.2 Design structures to be compatible with adjacent existing buildings

a) Buildings adjacent to the Downtown Core District should be designed in form, material, and details similar to those nearby along Main and State Streets.

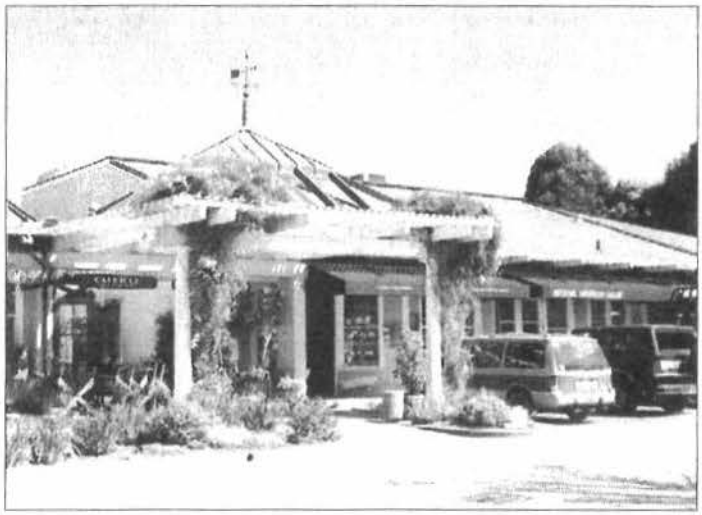
b) Projects adjacent to existing residential neighborhoods should draw upon residential forms and details to create a smaller grain design fabric that is compatible with the residential buildings.

Examples are shown below and to the right.

Ojai

Danville

Danville



Mill Valley

Landscaping between facing parking rows is desirable to break up large expanses of paving.

5.3 LANDSCAPE

Substantial landscaping is expected in the First Street District to ensure that the area becomes a visual part of the larger downtown village.

5.3.1 Provide substantial landscaping adjacent to residential neighborhoods

5.3.2 Landscape Foothill Expressway edges with shrubbery and trees

5.3.3 Add substantial landscaping in all parking lots

a) Provide landscaping equal to or greater than the requirements set forth in the Los Altos Zoning Code.

b) Tree landscaping should be provided to create an orchard canopy effect in surface parking lots with more than one drive aisle. Utilize landscape fingers placed parallel to the parking spaces to break up expanses of parking lot paving. Space the islands with intervals not exceeding 6 parking spaces in length.

c) Utilize hedges, trees, and other landscaping between facing parking spaces as shown in the example to the left.

5.3.4 Add street trees along all parcel street frontages

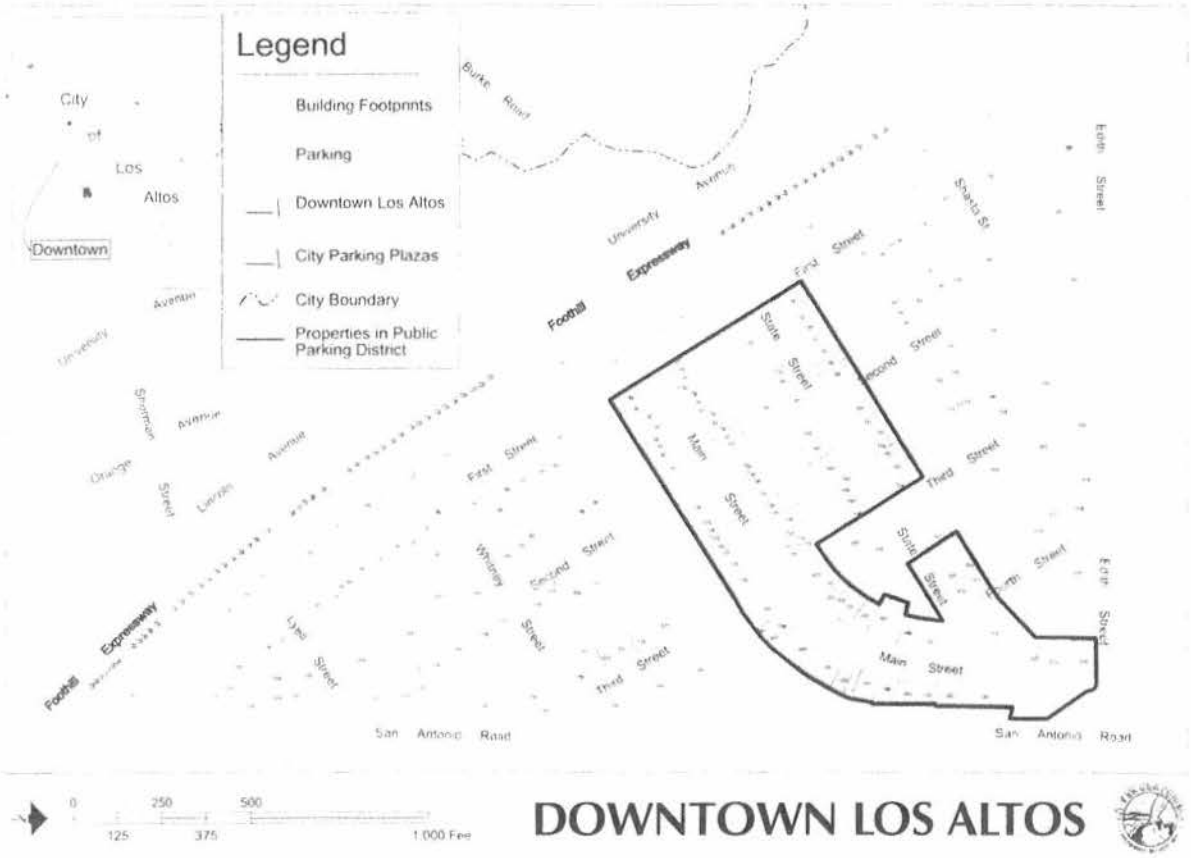
5.4 SIGNAGE

The Downtown Core District signage guidelines apply to all signs in the First Street District. Ground signs and freestanding signs may also be allowed at the discretion of the city (See the guidelines on pages 60-61 for these two sign types).

DOWNTOWN PARKING DISTRICT

In conjunction with downtown property owners in 1956 the City of Los Altos formed a public parking assessment district. As a result this district formed the 10 public parking plazas in the downtown core area. A majority of the properties in the downtown core are within the public parking district as shown on the map below. These properties in the public parking district are subject to unique parking regulations that exempt the properties from providing on-site parking for gross square footage that does not exceed 100 percent of their lot area.

Properties in Public Parking District



DOWNTOWN LOS ALTOS

DOWNTOWN HISTORIC RESOURCES

Downtown Los Altos has nine properties listed in the City's Historic Resources Inventory, including five buildings that are designated as landmarks. The most prominent historic building downtown is the old Southern Pacific Railroad Station at 288 First Street, which was designated as a landmark in 1984 and may be eligible for listing on the State and National Historic Registers. All nine properties and their historic ranking is listed below. More detailed historic evaluations for each property are available in the City's Historic Resources Inventory.

Address	**Historic Ranking**
288 First Street	Landmark
300 Main Street	Landmark
301 Main Street	Historically Significant
316 Main Street	Landmark
350 Main Street	Historically Important
368 Main Street	Historically Significant
388-398 Main Street	Landmark
395-399 Main Street	Landmark
188 Second Street	Historically Significant