

TIM IGLESIAS*

Housing Impact Assessments: Opening New Doors for State Housing Regulation While Localism Persists

TABLE OF CONTENTS

I.	Our Chronic Housing Crisis and the Regulatory Challenge Facing States	439	R
	A. Our Chronic Housing Crisis	440	R
	B. The Dual Role of Local Governments	446	R
	C. The Regulatory Challenge Facing State Governments	451	R
II.	The Prima Facie Case for Applying an Impact Assessment Requirement to Housing	458	R
	A. The Attraction of a Housing Impact Assessment Strategy	461	R
	B. Impact Assessment Requirements: A Deceptively Simple Regulatory Device	466	R
III.	A Sketch of a Housing Impact Assessment Regime	475	R
	A. HIA Regulation of Local Governments to Serve State Housing Goals	475	R
	B. The Preparation of a Preliminary Housing Impact Assessment	478	R

* Associate Professor of Law, University of San Francisco Law School; B.A., Loyola Marymount University; B.A./M.A., Oxford University; J.D., Stanford Law School. I am very grateful to Daniel Mandelker, Mike Rawson, Alice Kaswan, Shelley Saxer, Steven Shatz, and Peter Honigsberg for reviewing previous drafts of this Article. I also received helpful comments from participants in workshops at the Western Law Professors of Color and a Law and Society Conference. I appreciate the excellent research assistance of Abby Cooper and Gina Capua. Any errors are, of course, only my own. I thank Ann, Lucia, and Greg for their faithful support. I dedicate this Article to my grandfather, Santiago Iglesias Pantin, whose life and work deeply inspired me.

C.	Adoption of a Negative Declaration or Preparation of a Full HIA	480	R
D.	The Adoption of a Final HIA	481	R
E.	Judicial Review	481	R
F.	Mitigation.....	482	R
IV.	Two Regulatory Paradigms	484	R
A.	The Interest Group Representation Paradigm	484	R
1.	Fostering Local Housing Movements	485	R
2.	Pressuring Local Governments	489	R
3.	Judicial Enforcement of the HIA Regime and Complementary Housing Laws.....	492	R
B.	The Reflexive Law Paradigm: Changing the Norms of Local Governments and Instigating Self-Regulation	496	R
1.	Reflexive Law	496	R
2.	The Role of Group Norms in Local Government	501	R
3.	The Introduction of the New Norm.....	503	R
4.	The Norm Established	506	R
C.	Two Overlapping Paradigms?	510	R
D.	Evaluating the Benefits, Costs and Risks of the HIA Regime.....	512	R
Conclusion:	Each State Should Adopt a Housing Impact Assessment Regime.....	515	R

Few doubt the important role that a safe, adequate and affordable home plays in individual and community flourishing.¹ Few would contest that most Americans are enthralled in what amounts to an enduring love affair with “home.”² Yet, the

¹ Doubters should see *infra* notes 19-33 and accompanying text.

² This is demonstrated not only by large financial investments in homeownership and home improvement, but by the cultural meanings associated with “home” which are closely entwined with other important American values such as “family,” “security,” and “privacy.” In land use law, the single family house sits atop the hierarchy of uses as the “highest and best use.” In addition, numerous polls indicate broad support even for a wide range of housing, including affordable housing:

Smart Growth America’s October 2000 poll indicates that 66 percent of all respondents favor a requirement that all new housing developments include at least 15 percent housing for moderate- and low-income families. A November 2000 American Planning Association poll indicates that 84 percent of respondents favor providing affordable housing for low- and moderate-income families. An October 2000 poll by the Mortgage Bankers Association and the Conference of Mayors cites 74 percent of respon-

United States has endured a decades-long housing crisis which past and current housing policies have not solved. This Article seeks to open up housing policy to new possibilities through the application of a type of regulatory regime that helped turn around America's environmental policies.

In the late 1960s, a new environmental consciousness was dawning, even while all levels of government made decisions harming the environment without any consideration for their negative effects. In that era, the federal government did not typically consider the potential pollution of our air, water or land as well as likely destruction of animals and plants by federal agencies considering massive construction projects or other major actions. Furthermore, the courts did not generally require the federal government to do so.³ This lack of deliberation about potential environmental effects may seem odd to some readers for whom some level of environmental awareness on behalf of the federal government is taken for granted. Such reaction is an indicator of how deeply environmental concerns have become integrated into our thinking. However, it was not always so.

In 1969, Congress enacted the National Environmental Policy Act (NEPA).⁴ NEPA announced a broad goal: "to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."⁵ This goal was combined with a modest enforcement mechanism: the requirement that when a federal agency was considering a major federal action that would have "significant effect" on the environment, it must prepare, publish and consider an environmental impact statement (EIS) before it made a decision.⁶

dents saying that affordable housing should be made available to public servants—such as teachers, firefighters, and police officers—so that they can live in communities where they work.

DANIELLE ARIGONI, SMART GROWTH NETWORK, AFFORDABLE HOUSING AND SMART GROWTH: MAKING THE CONNECTION 16 n.28 (2001), [hereinafter ARIGONI], available at http://www.smartgrowth.org/pdf/epa_ah-sg.pdf.

³ One significant exception is *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608 (2d Cir. 1965), which created the "hard look" doctrine.

⁴ National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. §§ 4321-4370(f) (2000).

⁵ 42 U.S.C. § 4331(a) (2003).

⁶ 42 U.S.C. § 4332(2)(c). NEPA was followed by many other environmental statutes, including the Clean Air Act, 42 U.S.C. §§ 7401-7671(q) (2000) and the Clean Water Act of 1977, 33 U.S.C. §§ 1251-1387 (2000).

Perceiving value in this new regulatory strategy, twenty-eight jurisdictions adopted various state versions of NEPA in the following thirteen years.⁷ These statutes applied similar EIS requirements to actions by state agencies and, in some states, to local governments in their land use decision making, including zoning and the issuance of permits for proposed developments.⁸ These state statutes are often referred to as State Environmental Protection Acts (SEPA's). While some environmental advocates were (and are) disappointed with NEPA's and SEPA's lack of substantive standards and direct control of outcomes, a considerable group of researchers and scholars have credited NEPA and SEPA's with substantial influence in protecting and improving our environment.⁹

Contemporary housing problems, such as lack of supply of housing and lack of affordability, share several characteristics with environmental issues before the adoption of NEPA.¹⁰ Like the environment, primary housing decisions are made by units of government (especially local governments) exercising broad discretion delegated to them by other governmental entities;¹¹ housing issues are often ignored by local decision-makers, and in

⁷ Nicolas A. Robinson, *SEORA's Siblings: Precedents from Little NEPAs in the Sister States*, 46 ALB. L. REV. 1155, 1157-58 (1982) (listing fifteen jurisdictions which adopted a statewide comprehensive version of NEPA by statute, four jurisdictions which adopted comprehensive regulation by gubernatorial executive order, and nine states which adopted an EIS type procedure for specific limited purposes); DANIEL R. MANDELKER, NEPA LAW AND LITIGATION §§ 12:1-12:2 (2d ed. 2001 & update 2002) [hereinafter MANDELKER, NEPA LAW] (listing sixteen jurisdictions with NEPA-type state statutes and referring to other jurisdictions that adopted some other version of NEPA through alternate means).

⁸ California, Washington and New York apply their state environmental requirements to discretionary permits approved by local governments. MANDELKER, NEPA LAW, *supra* note 7, §§ 12:3-12:5.

⁹ See *infra* notes 130-34 and accompanying text. The American Planning Association endorses this regulatory device when it is integrated into the land use planning and review process. AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK (2002), ch. 12.

¹⁰ There is some irony in the suggestion that NEPA could be the model for a pro-affordable housing regulatory scheme. See Bruce L. Ackerman, *Impact Statements and Low Cost Housing*, 46 S. CAL. L. REV. 754 (1973) (identifying the use of NEPA's requirements to delay or stop the development of affordable housing and proposing solutions).

¹¹ Since the widespread adoption of comprehensive zoning following *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), local governments have introduced more flexibility devices such as planned unit developments, giving themselves more discretionary authority over land use development decisions. Even a proposal which meets all zoning and planning requirements is often subject to a discretionary "site plan review."

some cases, are treated with hostility; the prospective beneficiaries of thoughtful housing policies are often not involved in decisions affecting them; decisions harming housing are often practically irreversible;¹² and, importantly, when government agencies are directed to attend to housing issues, they *can* often adjust their policies to serve *both* housing and other policy goals.

Exercising power delegated to them by state governments, local governments make most of the important housing decisions. They largely decide what housing will be developed, how much of it, what kind, and where. *The fundamental problem underlying our housing crisis is the failure of local governments to consistently integrate housing concerns into the wide range of their land use policies and decisions that actually affect housing.* Framed another way, the problem is state governments' failure to adequately regulate local governments' exercise of delegated discretion in land use decisions that affect housing. To be sure, state governments face a complex regulatory problem and substantial limitations on their capacity to regulate local governments to serve state housing goals, including our deeply entrenched traditions of "localism." For this and other reasons, previous state housing policy has not successfully integrated housing concerns into local government decision making.¹³

This Article proposes a new type of housing regulatory regime for addressing America's housing crisis which combines procedural mandates and a substantive legislative policy requiring mitigation of significant housing impacts whenever feasible.¹⁴ Modeled

¹² For example, when a local government allows commercial development to exhaust the available developable land in its jurisdiction, the costs that would be required to undo this decision so that residential development could replace the commercial development render the previous decisions practically irreversible.

¹³ See *infra* notes 69-80 and accompanying text.

¹⁴ Part III contains a more complete description of a proposed HIA regime. Briefly, the proposed regime would require local governments to consider whether any covered action might create any one or more of three types of housing impacts that would amount to a "significant impact." If the action would create such an impact, the local government must produce a draft housing impact assessment (DHIA) that discusses the housing impacts, alternative actions that would create fewer impacts, and measures that could mitigate the housing impacts. The local government would be required to circulate the DHIA among interested parties for comment and then produce a final housing impact assessment (FHIA) that responds to the comments. The local government would be required to consider the FHIA in making its decision about the contemplated action and to mitigate significant impacts whenever it would be feasible to do so. A local government could go forward with an action that would cause a significant unmitigated impact only if it adopted a statement of overriding concerns (SOC) supported by substantial evidence. The lo-

on the California Environmental Quality Act (CEQA), the “housing impact assessment” (HIA) regime is proposed in this Article for adoption by states and implementation by local governments. A few federal, state, and local policies¹⁵ already incorporate some form of HIA component, and there are signs of additional interest in this strategy.¹⁶

This Article argues that an HIA requirement could be effective in promoting states’ housing policies in two distinct regulatory paradigms—a traditional interest group representation paradigm and a “reflexive law” paradigm. The benefits to housing from either paradigm would accrue by preventing avoidable harms to housing that would have occurred without housing impact consideration, by decisions taking advantage of overlooked possibilities, by housing being more often favored when tradeoffs were required, and by promoting the adoption of local pro-housing policies and practices. Under both paradigms, the HIA regime would treat local governments respectfully and fairly.¹⁷ The HIA also respects the role of the private market as the primary producer of housing.

Part I describes our nation’s chronic housing crises and the dual roles that local governments play in contributing to the problem as well as their capacity to forge solutions. The analysis then focuses on the complex challenge facing state governments regulating local governments’ decisions that affect housing. It finds that previous regulatory attempts have been insufficient and that “our localism” is likely to persist as an enduring limitation to the ability of states to regulate the housing decisions of local governments. Thus, a new regulatory strategy that works within the current limitations is needed.

Part II explains the *prima facie* case for applying an impact assessment requirement to housing. This section then sets impact assessment strategies into a theoretical framework. Impact assessment strategies have been conceptualized in six frameworks

cal government would be subject to a lawsuit for failure to produce an HIA when one was required, for failure to abide by other statutorily-required procedures (e.g., dissemination of the DHIA), for producing an inadequate FHIA, or for adopting an insufficient SOC. An injunction and/or declaratory relief would be the typical remedies for successful plaintiffs.

¹⁵ See *infra* note 97.

¹⁶ See *infra* note 98.

¹⁷ Some previous state housing policies, especially regional “fair share” planning requirements, have been widely criticized as unfair and unrealistic. See *infra* notes 73-82 and accompanying text.

and there are on-going debates about their effectiveness. The section concludes that testing the prima facie case requires the elaboration of a particular regime and the specification of conceptual models.

Part III presents a sketch of an HIA regime primarily based upon CEQA for purposes of discussion and analysis.

Part IV explores how the model presented in Part III could be effective in producing important benefits for housing in two different regulatory paradigms. In the “interest representation regulatory paradigm,” the requirements promote the formation of local housing movements, which employ political and legal means to enforce both the formal rules (the procedural requirements) and the legislative policy to mitigate significant housing impacts when feasible. In the “reflexive law paradigm,”¹⁸ participation in the mandated processes reforms the informal rules (or norms) that often guide discretionary decisions. The housing impact mitigation norm is incorporated into the set of typical norms that local elected officials embrace. The shared norm coordinates the activities and interests of participants into a form of “self-regulation” that produces favorable housing decisions. The norm is enforced primarily by non-judicial means.

Concluding that, on balance, an HIA regime would be beneficial under either regulatory paradigm, this Article recommends that each state adopt an HIA regime tailored to its particular situation.

I

OUR CHRONIC HOUSING CRISIS AND THE REGULATORY CHALLENGE FACING STATES

Section A briefly surveys the enduring housing crisis. Section B analyzes the dual roles of local governments in both causing and solving that crisis and concludes that an integrative regulatory strategy is needed to adequately address the crisis. Section C argues that this need poses a daunting regulatory challenge to state governments and that no current regulatory model is adequate.

¹⁸ The reflexive law regulatory paradigm is explained *infra* notes 204-18 and accompanying text.

A. *Our Chronic Housing Crisis*

Of all the elements that comprise cities, suburbs, and towns, housing is perhaps the most complex. In addition to providing shelter, housing is also a driver of transportation patterns, a consumption good, a prominent feature of the built environment, an investment for building wealth, a determinant of social interaction and achievement, and a symbol of familial connections and personal history.¹⁹

Housing problems such as lack of supply,²⁰ lack of affordability,²¹ overcrowding,²² substandard conditions,²³ discrimi-

¹⁹ ARIGONI, *supra* note 2, at 15.

²⁰ See BIPARTISAN MILLENNIAL HOUSING COMMISSION REPORT, AMERICA'S HOUSING CHALLENGES 18-27 (May 2002) [hereinafter MHC Report], available at <http://www.mhc.gov/MHCReport.pdf>. This Commission was created by an act of Congress, Act of Oct. 20, 1999, Pub. L. No. 106-74, § 206(b), 113 Stat. 1047, 1070. Its members were appointed by Congress.

²¹ MHC Report at 15-17. The standard federal definition of "affordable housing" is that housing is "affordable" if housing costs consume no more than thirty percent of a household's income: "Most federal programs measure affordability by the relationship of income to housing costs. Spending 30 percent to 50 percent of income on housing is the generally accepted definition of a moderate affordability problem; spending more than 50 percent is considered a severe affordability problem." *Id.* at 15. See also JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, STATE OF THE NATION'S HOUSING: 2002, at 3 (2002), available at <http://www.jchs.harvard.edu/publications/markets/Son2002.pdf>. ("Overall, some 8.6 million renters and 6.4 million owners in [the lowest-income households] pay more than 30 percent of their limited incomes for housing and/or live in structurally inadequate or overcrowded homes."); NATIONAL LOW INCOME HOUSING COALITION, RENTAL HOUSING FOR AMERICA'S POOR FAMILIES: FARTHER OUT OF REACH THAN EVER (2002) at <http://www.nlihc.org/oor2002>. (This report measures housing needs by comparing current wages and rent levels for localities in each of the fifty states and uses this information to calculate a "housing wage," the amount of money households in a specific locality would need to earn to afford a typical apartment unit under the traditional standard of paying 30 percent of their income or less. Thirty-seven states have a housing wage more than twice the prevailing minimum wage of \$5.15 per hour). For additional illustrations of this phenomena, see CENTER ON BUDGET AND POLICY PRIORITIES, IN SEARCH OF SHELTER: THE GROWING SHORTAGE OF AFFORDABLE RENTAL HOUSING (1998) and other reports at www.cbpp.org/pubs/housing.htm; NATIONAL ASSOCIATION OF HOME BUILDERS, DECENT, AFFORDABLE HOUSING. IT'S THE AMERICAN DREAM (2001), available at http://www.nahb.org/fileUpload_details.aspx?contentTypeID=7 &contentID=16 (last visited on Oct. 21, 2003). See also publications by the National Housing Conference (NHC), including: Michael A. Stegman et al., *Housing America's Working Families*, NEW CENTURY HOUSING, June 2000; *Paycheck to Paycheck: Working Families and the Cost of Housing in America*, July 2001, available at <http://www.nhc.org/nhcimages/paycheck.pdf>; *Housing America's Working Families: A Further Exploration* (March 2002); *America's Working Families and the Housing Landscape, 1997-2001* (2001) [hereinafter NHC Publications].

²² See, e.g., CALIFORNIA BUDGET PROJECT, LOCKED OUT: CALIFORNIA'S AF-

nation²⁴ and (more recently) sprawl development²⁵ are serious, pervasive and chronic in America. National studies regularly characterize our housing problems as a “crisis.”²⁶ For decades these problems have affected millions of working poor, people of color, the elderly, persons with disabilities and homeless people. Increasingly, larger segments of the workforce with “good jobs,” such as teachers, nurses, firefighters, and police officers are also burdened by housing problems, especially lack of affordability.²⁷ In 1999, just over thirteen million households paid more than half their income for housing and/or lived in substandard units.²⁸ In 2001, just two years later, this number increased by nine percent to 14.5 million households.²⁹ This figure includes a twenty-four percent increase (from 3.9 million to 4.8 million) in the number of low- to moderate-income working households suffering critical housing needs.³⁰ Furthermore, analysis by the U.S. Census Bureau in 2000 found a rise in the poverty rate and a drop in the median annual household income for the first time in a decade which reinforces these concerns.³¹

FORDABLE HOUSING CRISIS (2000), available at <http://www.cpb.org/2000/r0005loc.pdf> (detailing California’s overcrowding problem).

²³ See, e.g., AFFORDABLE HOUSING STUDY COMMISSION, FLORIDA DEP’T OF CMTY. AFFAIRS, 2001 FINAL REPORT, available at http://www.floridacommunitydevelopment.org/ahsc/2000-2001Report/ahsc_2001_report.pdf [hereinafter FLORIDA REPORT] (discussing, *inter alia*, Florida’s substandard housing problems).

²⁴ See, e.g., *U.S. Housing Discrimination Greatly Underreported*, Reuters News Service, Apr. 3, 2002 (while the National Fair Housing Advocacy Alliance compiled 24,000 complaints about housing discrimination in 2001, the U.S. Department of Housing and Urban Development “estimates 2 million people experience some form of [housing] discrimination based on race, disability, national origin or for other reasons. . .”).

²⁵ One way of interpreting the problem addressed by “smart growth” advocates is that housing has been improperly located, i.e., in sprawled low-density developments instead of compact downtowns and neighborhoods. See AMERICAN PLANNING ASSOCIATION, POLICY GUIDE ON HOUSING (1999), available at <http://www.planning.org/policyguides/housing.htm>.

²⁶ See, e.g., CALIFORNIA BUDGET PROJECT, *supra* note 22 and FLORIDA REPORT, *supra* note 23.

²⁷ See NHC Publications, *supra* note 21. For an explanation of why affordability problems did not decline during the high economic growth of the 1990s, see MHC Report, *supra* note 20, at 18-19.

²⁸ *NHC at Work*, Sept. 4, 2002, at 1 (reporting the initial results of a study based on federal data to be released in October, 2002).

²⁹ *Id.*

³⁰ *Id.*

³¹ See CARMEN DENAVAS-WAIT & ROBERT W. CLEVELAND, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, MONEY INCOME IN THE UNITED STATES: 2001, available at <http://www.census.gov/prod/2002pubs/p60-218.pdf>.

Studies demonstrate that the lack of decent affordable housing has negative impacts on the public's health, educational attainment, access to jobs, and job advancement. Long commutes caused by the lack of affordable housing increase traffic and air pollution in our communities and reduce workers' economic productivity.³² Other research documents the costs to family life and community participation caused by housing problems.³³ It is difficult for parents to attend PTA meetings, little league games, and city council meetings if they have to work overtime or multiple jobs to pay rising housing costs or commute long distances to their jobs because they cannot find or afford suitable housing near their work.

The story told by the statistics can be daunting, but also numbingly abstract. Housing is never merely shelter. However inadequate and temporary, one's shelter becomes the ground floor for meeting basic needs, a foundation for job search and education, and a piece of one's identity—a "home" of sorts.³⁴ For those who have always been adequately housed and take it for granted, a full appreciation for the importance of adequate, decent and affordable housing can probably only be gained by experiencing its loss.³⁵

³² See *Why Housing Matters*, in MHC Report, *supra* note 20, at 10-13, and accompanying endnotes (citing sources relied upon by the Millennial Housing Commission); Cheryl P. Derricotte, *Poverty and Property in the United States: A Primer on the Economic Impact of Housing Discrimination and the Importance of a U.S. Right to Housing*, 40 HOW. L. J. 689 (1997); Justin D. Cummins, *Housing Matters: Why Our Communities Must Have Affordable Housing*, 28 WM. MITCHELL L. REV. 197 (2001) (debunking negative myths about affordable housing). For the impact on Minnesota residents, see reports by the Family Housing Fund at <http://www.fhfund.org/Research/Default.htm>.

³³ See, e.g., Stanley S. Herr, *Children Without Homes: Rights to Education and to Family Stability*, 45 U. MIAMI L. REV. 337, 341-46 (1990). See Blaine Harden, *A Place Without Roots That Some Call Home*, N.Y. TIMES, Sept. 30, 2002, at A23 (attributing the rootlessness of residents of Stateline, Nevada—which, according to the 2000 census, has the lowest national percentage of residents living in the state where they were born—largely to the lack of affordable housing).

³⁴ For an interesting exploration of the various meanings of "home" in the law, see Lorna Fox, *The Meaning of Home: A Chimerical Concept or a Legal Challenge?*, 29 J.L. & SOC'Y 580 (2002).

³⁵ Victims rendered homeless from such disasters as flooding or fire often suffer from depression, anxiety, anger, disillusionment, and/or substance abuse problems. See Jenna Hunt, *Counselors Tend to Emotional Needs of Flood Victims*, COX NEWS SERVICE, Sept. 17, 2000, LEXIS, News Library, Wire Service Stores File. One year after Hurricane Floyd, flood victims, living in temporary government mobile home sites, continue to face difficulties finding a home; and it could take two to three years for them to fully recover from their loss. Many become frightened and are in shock

The Housing Act of 1949 established for the first time “a decent home and a suitable living environment for every American family” as a national goal.³⁶ Unfortunately, neither the efforts of the private housing market³⁷ nor the efforts of all levels of government combined³⁸ have been adequate to even come close to meeting the Housing Act’s noble goal.³⁹

Since its first involvement in housing in the 1930s, the federal government has often played a helpful role in facilitating the financing of housing.⁴⁰ These interventions have been reasonably

when forced to abandon their homes in the dead of the night, “uprooted and thrown into a chaotic state.” See Elsa Brenner, *Putting Lives Back Together After a Fire*, N.Y. TIMES, June 6, 1993, § 13WC (Westchester), at 1. In 1993, retired and widowed seventy-five year-old Joseph Rosner lost his home of thirty years to fire. *Id.* After the fire, he lived in a temporary room rented for him by the Red Cross and worried that he would be unable to afford the rent of temporary housing for the same \$228 per month he paid for his old apartment. *Id.* Rosner said the experience put his life “in shambles” and made him “[p]hysically and mentally . . . depressed.” *Id.* When Carl and Sue Wunderlich lost their home to a flood, their biggest concern was “keeping a roof over [their] kids’ heads.” Peter T. Kilborn, *Flood Victims Find Tortuous Path to U.S. Relief Agency Money*, N.Y. TIMES, Aug. 9, 1993, at A10. The couple moved their family to a tent pitched on a mound on a lot where they had previously planned to build a new house. *Id.* A second flood pushed them from this site and, “with no place else to go,” they moved their family into a house overcrowded with four other families, also victims of flooding. The Wunderlich family eventually received a voucher from the Red Cross to rent an apartment. *Id.*

³⁶ The Housing Act of 1949, 42 U.S.C. § 1441 (2002).

³⁷ Most housing units in the United States are produced by private, for-profit developers. Housing produced directly by government and by non-profit developers using government subsidies account for only a small portion of the nation’s total housing supply. For an argument that the non-market housing sector should be substantially expanded, see THE AFFORDABLE CITY: TOWARD A THIRD SECTOR HOUSING POLICY (John Emmeus Davis ed., 1994).

³⁸ Historically, there has been some public/state production. For a brief description of current federal housing programs, see MHC Report, *supra* note 20, at Appendix 3 “Description of Housing Programs.”

³⁹ For the current housing crisis, see *supra* notes 19-33 and accompanying text; for the governmental response, see *supra* notes 36-38 and *infra* notes 40-45, and accompanying text.

⁴⁰ See MHC Report, *supra* note 20, at Appendix 3 “Description of Housing Programs.” For decades, the federal government (and to some degree state governments) has adopted policies and spent relatively generously to support the financial risks of housing developers and buyers, especially single family homeowners. The federal government played a critical role in establishing the thirty-year mortgage. Measured by dollar value, the federal mortgage interest deduction subsidizing homeownership is the largest federal “housing program.” Federal programs under the Federal Housing Administration, the Department of Housing and Urban Development, and the Internal Revenue Service (the Low Income Housing Tax Credit program) have all contributed significantly to meeting housing needs. See generally Charles J. Orlebeke, *The Evolution of Low-income Housing Policy, 1949 to 1999*, 11 HOUSING POL’Y DEBATE 489 (2000). Attempts to expand the federal government’s

successful in expanding and stabilizing housing markets and production. Yet, the federal government has never dedicated sufficient resources to meet identified needs.⁴¹ It is likely that the federal government will continue its traditional focus on housing policy—encouraging and enabling increased private investment in residential development and making limited resources available to subsidize certain housing development and related efforts.⁴²

The role of state governments in housing is a mixed one and intimately intertwined with the critical role of local governments. Since the 1920s, states have delegated extensive land use powers to local governments.⁴³ These land use powers include the authority to zone and otherwise regulate land and to grant or deny discretionary land use permits.⁴⁴ Using the police power delegated to them by state governments, local governments make many of the most important policies and decisions which affect all of our critical housing problems, including increasing or re-

role by establishing a national land use policy have been unsuccessful. See Robert W. Oast, Jr., *Incentives for Economic Development in Underserved Communities and for Affordable Housing: A Selective Look at Legislative Initiatives in the 106th Congress*, 33 URB. LAW. 793 (2001); see, e.g., Shelby D. Green, *The Search for a National Land Use Policy: For the Cities' Sake*, 26 FORDHAM URB. L. J. 69 (1998). But see Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381 (2002) (describing the development of a *de facto* national land use policy).

⁴¹ For example, the recent Bipartisan Millennial Housing Commission (MHC) reported that only one-third of those eligible for federal rental housing assistance actually receive it. See MHC Report, *supra* note 20, at 14. See also the National Housing Conference's frank Proposal in: UNITED STATES MILLENNIAL HOUSING COMMISSION: HOW TO ADDRESS AMERICA'S AFFORDABLE HOUSING CRISIS, 2 (June 15, 2001), at <http://www.nhc.org/nhcimages/mhcrep.pdf> (calling for a "Marshall Plan" for housing).

⁴² See generally, *Principal Recommendations to Congress*, MHC Report, *supra* note 20, at 27-70. The Commission's second principal recommendation is to "[d]evolve decision making to states and local governments, but within a framework of federal standards and performance objectives." *Id.* at 27-28. See also *id.* at 26 ("Decisions about the location and management of affordable housing are best made by state or local governments, rather than the federal government.").

⁴³ After the United States Supreme Court validated the constitutionality of comprehensive zoning by local governments in *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926), and the U.S. Department of Commerce promoted zoning through its publishing of "A Standard State Zoning Enabling Act Under Which Municipalities May Adopt Zoning Regulations" (1926), most states soon passed zoning enabling acts.

⁴⁴ See JULIAN CONRAD JURGENSMEIR & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* §§ 3.5-3.6; §§ 4.1-4.2 (1998); DANIEL R. MANDELKER, *LAND USE LAW* §§ 4.15-4.16 (5th ed. 2003).

ducing housing supply and either including or excluding affordable housing.⁴⁵

Some reasonable policy justifications support this delegation of power. The primary traditional justifications for this delegation of broad discretionary authority are that only local governments have the local knowledge and expertise to make these decisions, that the residents of local government have to live with the consequences of land use decisions, and that decisions on housing issues must be balanced with all the other issues that local governments must decide.⁴⁶

While the causes of the housing crisis are under continual debate, many scholars, developers and a series of national commissions⁴⁷ place substantial responsibility on local governments'

⁴⁵ "[E]ducation and zoning are the principal operations of local governments." Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 2 (1990) [hereinafter Briffault, *Our Localism: Part I*]. Local governments typically set the limits for actual residential development by enacting and applying their planning codes and zoning ordinances to the land within their jurisdiction and to any particular residential proposal. Most proposals for new residential construction require one or more discretionary land use approvals from the local government where they are to be sited. If a local government zones most of its developable land for commercial and retail use, it forces other communities to provide housing for its workers. If a local government adopts planning codes and zoning ordinances favoring large-lot single family housing over more dense residential development, it reduces the housing supply that its land will provide. If a local government rejects proposals for lower-cost housing or multifamily housing because of "not-in-my-backyard opposition," it fails to supply those types of housing to meet these housing needs in its jurisdiction. If a jurisdiction's existing stock of affordable housing is demolished to make way for new development, the local government's failure to preserve that housing increases the demand for affordable housing.

⁴⁶ *Id.* at 5. These reasons are suggestive of what Professor Briffault calls the "decentralization of power" model justifying localism.

⁴⁷ See THE PRESIDENT'S COMM. ON URBAN HOUS., A DECENT HOME (1969) (final report of committee formerly call the Kaiser Committee); NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY (1969). For the Kerner Commission, see John Charles Boger, *The Urban Crisis: The Kerner Commission Report Revisited*, 71 N.C. L. REV. 1289 (1993); PRESIDENT BUSH'S ADVISORY COMMISSION ON REGULATORY BARRIERS TO AFFORDABLE HOUSING (1991) (finding local government regulation is a "major factor"). The current Bush administration has revived the Regulatory Barriers Clearinghouse, a "web-based forum [which] offers builders and developers from around the country the ability to share ideas and solutions for overcoming state and local regulatory barriers to affordable housing," at <http://www.hud.gov/news/release.cfm?content=pr03-069.cfm>. See also THE BROOKINGS INSTITUTE, CENTER ON URBAN AND METROPOLITAN POLICY, *The Link Between Growth Management and Housing Affordability: The Academic Evidence*, 6-8, February 2002, available at <http://www.brookings.edu/es/urban/publications/growthmanage-xsum.htm> [hereinafter Brookings Institute, *Growth Management*] (acknowledging that "traditional zoning and other planning and land use controls limit the supply and accessibility of affordable housing"; examples include: "re-

exercise of land use powers. Commentators do not always agree on *why* local governments are to blame or *how* local governments' policies should be revised, but all agree that local governments bear substantial responsibility for unmet housing needs.

B. *The Dual Role of Local Governments*

In their exercise of land use power, local governments largely determine *what* housing development occurs, *how much*, *when* and *where*.⁴⁸ Most important land use decisions by local governments are discretionary, and are decided by a mix of law and politics.⁴⁹ The housing needs of the jurisdiction's current and future residents are often not a primary consideration in many decisions that impact these needs. Sometimes, housing needs are avoided directly, as in the case of slow and no growth cities, by restricting infrastructure expenditures or engaging in exclusionary zoning.⁵⁰ Many local governments have consistently over zoned land for industrial and/or commercial uses with the effect that the potential supply of housing (especially affordable housing) is severely limited.⁵¹ Often localities deny approval to meri-

quirements for low-density only, minimum housing size, or bans against attached or cluster homes. . . . This 'chain of exclusion' is a powerful reality for limiting the affordability of housing in certain jurisdictions."). *Id.* at Executive Summary.

⁴⁸ See Briffault, *Our Localism: Part I*, *supra* note 45. Certainly, lack of financing is a serious obstacle to meeting our nation's housing needs. Because federal and state governments have more resources than local governments they should play a greater role in financing housing. It also must be stressed that in many cases states themselves arguably cause local governments to ignore housing problems. For example, many state tax policies create incentives for local governments to engage in "fiscal zoning" that pushes local governments to prefer revenue-producing land uses over needed housing. Nevertheless, without appropriately zoned land, available infrastructure and local governments' land use approvals, even a fully-financed housing proposal, goes nowhere. Thus, local governments are a necessary focal point for addressing our housing crisis.

⁴⁹ See generally RICHARD BABCOCK, *THE ZONING GAME: MULTIPLE PRACTICES AND POLICIES* (1966).

⁵⁰ The vast exclusionary zoning literature and the literature on slow and no growth cities attest to this fact. See, e.g., Briffault, *Our Localism: Part I*, *supra* note 45, at 40-43; BROOKINGS INSTITUTE, *Growth Management*, *supra* note 47, ch. 5.

⁵¹ Over-zoning for industrial or commercial uses in order to collect tax revenues—the "fiscalization of land use"—is common. However, sometimes localities over-zone for single-family housing instead of zoning sufficiently for multi-family housing. The 1000 Friends of Oregon successfully attacked the City of Portland's large, minimum-lot-size zoning "based on research showing that half the housing demand in the 1970s in Portland was for multi-family housing while only seven percent of the land was zoned for multi-family housing . . . [T]he same land base that could support only 129,000 housing units in 1978, supported 305,000 units by 1983 because of the reduction in minimum lot sizes to reflect true consumer demand." Terry J. Tondro,

torious but controversial affordable housing developments.⁵² At other times, housing needs are simply ignored and opportunities for meeting housing needs and other objectives are simultaneously overlooked.⁵³ Moreover, planners and local government officials often ignore both the vestiges of past discrimination in land use patterns and are inattentive to discriminatory effects of current decisions affecting housing.⁵⁴

An example of a common missed opportunity to consider and address the potential housing impacts of a land use decision is the approval of a new commercial or retail development.⁵⁵ Most jurisdictions seek to attract such development because it generates tax revenue and creates jobs. A retail development, such as a big box retailer, may also create significant housing impacts in the host jurisdiction because the new employment it generates attracts new residents to live in the host jurisdiction. However, the wages paid to those employees may not enable the new workers to afford the housing available in the host jurisdiction.⁵⁶ If the host jurisdiction does not mitigate some part of these housing

2001 Gallivan Conference: *Sprawl and Its Enemies: An Introductory Discussion of Two Cities' Efforts to Control Sprawl*, 34 CONN. L. REV. 511, 535 (2002).

⁵² A substantial amount of literature documents the "not-in-my-backyard" phenomenon. For a collection of sample treatments, see Tim Iglesias, *Managing Local Opposition to Affordable Housing: A New Approach to NIMBY*, 12 J. OF AFFORDABLE HOUS. & CMTY. DEV. L. 78, note 5 (2002) [hereinafter Iglesias, *Managing Local Opposition*].

⁵³ For example, a recent review of the minutes of twenty-nine local jurisdictions from thirteen states which post their planning commission minutes on the www.municode.org website found that, in each case where proposals for new commercial development were under consideration, potential housing impacts of these developments were not discussed. Data from this analysis is on file with author.

⁵⁴ See Charles Hoch, *Racism and Planning*, 59 J. AM. PLAN. INST. 451 (1993) ("[M]ost planning professionals, like most Americans, do not give racism much thought. Planners rarely study racism or write about it in their professional journals, even though the rare analysis has uncovered evidence of continuing racial discrimination despite civil rights reforms."); see also John O. Calmore, *Race/ism Lost and Found: The Fair Housing Act at Thirty*, 52 U. MIAMI L. REV. 1067 (1998) (critically evaluating the limited success of the fair housing act in reducing discrimination and racial segregation).

⁵⁵ The rapid pace of new office and commercial development in the suburbs highlights the importance of this example. David Brooks, *For Democrats, Time to Meet the Exurban Voter*, N.Y. TIMES, Nov. 10, 2002, § 4 p.3 ("Before 1980, says Robert Lang, a demographer at Virginia Tech, only a quarter of all office space was in the suburbs. But about 70 percent of the office space created in the 1990's [sic] was in suburbia, and now 42 percent of all offices are located there.").

⁵⁶ This kind of housing impact analysis is now common. See Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011 (1991). See also *infra* note 64 and accompanying text.

impacts,⁵⁷ the development creates spillover housing impacts—the employees will have to live in neighboring jurisdictions and will cause additional traffic and pollution by commuting. In such a case, local jurisdictions attending to the potential housing impacts have a variety of means within their delegated land use power to address them. For example, they may seek a contribution from the commercial developer to a housing trust fund that subsidizes housing for workers; they may negotiate with the developer to revise the project to be a mixed use development; they may rezone some land previously zoned commercial to residential use, or increase the density of land already zoned residential, to increase the likelihood of additional housing being developed in the jurisdiction.

There are a variety of explanations for local governments' lack of attention to housing, including conflicting priorities, fiscal reasons, exclusionary desires, or a combination of these and other reasons. Another reason that local governments ignore the housing impacts of their land use and development decisions is that, typically, cities deliberate about these decisions without the participation of those who need the housing that could be produced in that locality.⁵⁸ This lack of participation by the intended regulatory beneficiaries (from the state's point of view) certainly accounts, in part, for the restrictive policies and practices of many local governments.⁵⁹

A corollary of local governments being a significant part of the problem is that, with certain limitations, they can be particularly effective in promoting housing, including affordable housing.⁶⁰

⁵⁷ The assumption is that only some of the new workers will want to live in the host jurisdiction.

⁵⁸ See, e.g., CLAN CRAWFORD, JR., *MICHIGAN ZONING AND PLANNING*, THE INSTITUTE OF CONTINUING LEGAL EDUCATION 4 (3d ed. 1988) ("another problem with the highly political nature of zoning controversies is that in most of them there are rather important interests that are not represented . . . [for example,] the tenants of the proposed apartments or mobile home park.").

⁵⁹ Cities may sometimes include housing developers (the regulated entities from the local government perspective) in the formulation of housing policy, e.g., in mandatory housing planning regimes. However, the policies likely to result through such a process will depend upon the composition of the developers and their interests, policies that may not coincide with the broad range of existing and future housing needs.

⁶⁰ The most obvious limit to local governments' capacity to address housing needs is financial. Typically, housing as land use costs a locality more in services that must be provided than revenues contributed in taxes. A comprehensive solution to our chronic housing crisis demands either a restructuring of local governments' finances to address this imbalance, or a substantial commitment of government resources at

Local governments can work effectively with housing developers, employers, banks, community organizations, adjacent localities and the state to ensure that at least a significant amount of their housing needs are met.⁶¹ Local governments can be particularly effective in promoting housing, including affordable housing, when they are aware of the possibilities and use their best efforts to collect the necessary resources.⁶² Importantly, two of the most recent “progressive” housing policies that have flourished in the last twenty years, e.g., inclusionary zoning⁶³ and housing impact fees,⁶⁴ emerged and have been adopted almost exclusively at the

the federal and state levels. For a broad array of examples of how local governments can promote housing development, see ASSOCIATION OF BAY AREA GOVERNMENTS, BLUEPRINT 2001, HOUSING ELEMENT IDEAS AND SOLUTIONS FOR A SUSTAINABLE AND AFFORDABLE FUTURE, BAY AREA HOUSING (2001) (providing suggestions, model policies, and contacts for local governments to increase affordable housing in their jurisdictions); THE UNITED STATES CONFERENCE OF MAYORS, NATIONAL HOUSING AGENDA: A SPRINGBOARD FOR FAMILIES, FOR COMMUNITIES, FOR OUR NATION, RECOMMENDATIONS FROM THE MAYORS’ NATIONAL HOUSING FORUM (2002) (offering sixty housing policy recommendations addressing a wide array of housing needs). See also, *The Affordable City: Toward a Third Sector Housing Policy* (John Emmeus Davis ed., 1994); GREENBELT ALLIANCE, SMART INFILL: CREATING MORE LIVABLE COMMUNITIES IN THE BAY AREA (2002) (providing advice to civic leaders and citizens on how “infill development” can help the San Francisco Bay Area housing situation, detailing twelve strategies for achieving livable communities and sustainable development through infill housing and mixed-use development, including housing for people at all income levels).

⁶¹ See, e.g., Richard A. Judd & David Paul Rosen, *Inclusionary Housing in California: Creating Affordability Without Public Subsidy*, 2 J. AFFORDABLE HOUS. & CMTY. DEV. L. 4, 6 (1992) (explaining how local governments requiring developers of new residential construction to include a designated percentage of affordable housing in their developments can use a wide variety of measures to mitigate the costs). National Housing Commission, *Inclusionary Zoning: Lessons Learned in Massachusetts*, 2 NAT’L HOUSING COMM’N AFFORDABLE HOUSING POL’Y REV. 1 (2002) offers a hopeful note: researchers found a genuine desire by more than a third of the state’s cities and towns to change their zoning in order to increase the development of affordable housing.

⁶² For example, when the City of Santa Rosa, California, was presented with a proposal for the development of a new Safeway on land designated in part for commercial development and in part for medium-density residential development, the city refused Safeway’s request to redesignate the residential portion as commercial, leading Safeway to build housing as part of its project. Telephone interview with Wayne Goldman, City of Santa Rosa Planning Director (Feb. 19, 2003) (on file with author).

⁶³ Inclusionary zoning programs generally require residential developers to either make some portion of the units they build affordable to specified income levels or require the developers to make some other contribution to housing affordability in the jurisdiction, e.g., by a donation of land or money to a housing subsidy fund.

⁶⁴ Housing impact fee programs generally require commercial developers to contribute money to a housing subsidy fund. The amount of their required contribution is usually based upon the number of jobs they are expected to generate and the

local government level.⁶⁵ This crucial positive role that local governments can play in addressing housing needs is often neglected, but is essential for a solution to our housing crisis.⁶⁶

resulting housing demands the host jurisdiction expects from new residents. These ordinances have been the subject of numerous lawsuits and law review articles. *See, e.g., Commercial Builders of No. Cal. v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991) (holding that Sacramento commercial building impact fee meets Nollan “essential nexus” test). *See also supra* note 56.

⁶⁵ For examples of local inclusionary zoning programs, see Nico Calavita & Kenneth Grimes, *Inclusionary Housing in California: The Experience of Two Decades*, 64 J. OF THE AM. PLANNING ASS'N 150 (1998); Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L. J. 23 (1996); Jennifer M. Morgan, Comment, *Zoning for All: Using Inclusionary Zoning Techniques to Promote Affordable Housing*, 44 EMORY L. J. 359 (1995); Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability*, 23 HOFSTRA L. REV. 539 (1995). Montgomery County, Maryland enacted a regional inclusionary zoning law called “Moderately Priced Housing Law” in 1974. *See Jay Walljasper, A Fair Share in Suburbia; Housing Policy of Montgomery County, Maryland*, THE NATION, Jan. 25, 1999, at 15-21. Inclusionary zoning was endorsed by the New Jersey Supreme Court as a method of fulfilling the “fair share” obligation of New Jersey’s Constitution in *Oakwood at Madison, Inc. v. Township of Madison*, 371 A.2d 1192, 1227 (N.J. 1977), and was subsequently endorsed by the New Jersey Council on Affordable Housing (the state agency charged with implementing New Jersey’s Fair Housing Act, N.J. STAT. ANN. §§ 52:27D-301 to 329 (1985)). A 1993 bill considered by the California legislature (Assembly Bill 1684, Hauser and Farr) would have required local governments to adopt an inclusionary zoning program. *See Barbara Erlich Kautz, Comment, In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing*, 36 U.S.F. L. REV. 971 (2002). *See also* two recent evaluative reports: The Center for Housing Policy, *Inclusionary Zoning: A Viable Solution to the Affordable Housing Crisis?*, 1 NEW CENTURY HOUSING 2 (Oct. 2000); California Coalition for Rural Housing and Non-Profit Housing Association of Northern California, *Inclusionary Housing in California: 30 Years of Innovation* (2003). For a local government perspective on inclusionary zoning ordinances, see Institute for Local Self Government, *California Inclusionary Housing Reader* (2003). Rent control, another local government policy intended to promote housing, is highly controversial in its medium and long term effects on housing supply. Nevertheless, rent control is allowed by some states and survives in some communities.

⁶⁶ The range of performance on housing issues that local governments can present is evidenced in a recent study of local governments in the San Francisco Bay Area that was published in the form of a report card. Non-Profit Housing Association of Northern California and Greenbelt Alliance, *San Francisco Bay Area Housing Crisis Report Card* (June 2002) (copy on file with author). Of the forty most important cities in the region, seven were cited as “honor roll,” four as “good,” six as “needs improvement,” and twelve were given a failing grade. Eleven others were awarded an “incomplete” because they had not provided necessary information for the study. *Id.* at 3. And when state funding for housing is available, many local governments as well as civic and community leaders are eager to access it. John R. Nolon, *Grassroots Regionalism Through Intermunicipal Land Use Compacts*, 73 ST. JOHN'S L. REV. 1011, 1012 (1999) (“[T]hose who argue that the New York State legislature should adopt a strong regional approach to land use planning and regulation do so, in part, because they perceive a need to coordinate the often disconnected and dis-

C. The Regulatory Challenge Facing State Governments

Any attempt to resolve our housing problem must keep the dual role of local governments in view, support local governments' potential for solutions, and simultaneously restrain practices that ignore or exacerbate the problem. This can only occur if housing issues are regularly considered in local governments' policy and decision making. *Fundamentally, housing suffers from not being consistently integrated into the whole range of local governments' policy and decision making: zoning, fiscal policy, infrastructure decisions, and discretionary approvals of proposed developments.* These decisions are often critical in determining whether housing is developed at all, and if so, what kinds, where, how much, and for whom.⁶⁷ What is needed is an *integrative* regulatory strategy. While this integrative focus on the broad range of local governments' land use powers is now widely viewed as important and appropriate,⁶⁸ there is currently no broadly applied regulatory mechanism by which the housing impacts of local governments' decisions are regularly infused into the whole

cordant land use decisions of local governments. The danger in this observation is that it identifies local control as the problem to be cured rather than the base on which to build an inter-municipal process that is responsive to regional needs.”). For a parallel argument in the environmental field, see John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365 (2002) (documenting local governments' adoption of environmentally protective laws).

⁶⁷ Norman Williams, Jr., *The Three Systems of Land Use Control (Or, Exclusionary Zoning and Revision of the Enabling Legislation)*, 25 RUTGERS L. REV. 80 (1970). In a 1970 critique of the Model Code for Land Development, Professor Norman Williams, Jr. wisely noted how in considering the housing crisis a myopic focus on zoning ignores the two other systems of local governments' land use control—local fiscal policy and infrastructure decisions. See also John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 684 (1996) (agreeing with Professor Williams' insight). A recent case exemplifies the issue. *In Fair Share Hous. Ctr., Inc. v. Township of Cherry Hill*, 802 A.2d 512 (N.J. 2002), a developer sought to pay fees to a city's housing fund in lieu of subjecting its land to classification as available for fulfilling the jurisdiction's share of regional housing. The court found that available land itself is key to provision of future affordable housing. From the standpoint of local governments or potential residents, fees are not the functional equivalent of developable land.

⁶⁸ For example, such an integrative perspective is assumed in “smart growth” and sustainable development discussions. See, e.g., AMERICAN PLANNING ASSOCIATION, *GROWING SMART LEGISLATIVE GUIDEBOOK* (2002). See also NATIONAL ASSOC. OF HOME BUILDERS, *STATEMENT OF POLICY ON SMART GROWTH* (endorsing voluntary comprehensive planning including housing, commercial development, infrastructure development and financing) available at <http://www.nahb.org/generic.aspx?sectionID=636&genericContentID=3519> (last visited Jan. 17, 2004).

range of local governments' decisions that actually affect housing.⁶⁹

Because local governments' land use power is regulated by states, state policy has long been a major focal point for the promotion of housing.⁷⁰ Since the Housing Act of 1949 was enacted, legislators, developers and housing advocacy groups have sought state legislative reform to revise local governments' housing policies and practices to achieve their goals.⁷¹ Two state housing regulatory policies that attempt to promote an integrative policy deserve comment.⁷²

⁶⁹ Florida and a few other states impose a special review process for "development of regional impact" (DRIs) which include requirements for consideration of housing impacts. However, these requirements, while valuable, are not widespread and only are applied to a narrow class of decisions regarding specific developments.

⁷⁰ Housing advocates also sought reform through litigation in both federal and state courts. No individual federal constitutional right to housing has been established. See *Lindsey v. Normet*, 405 U.S. 56 (1972). A few state supreme courts (including Pennsylvania and New York) followed the New Jersey Supreme Court's famous *Mt. Laurel* decision, *Southern Burlington County NAACP v. Mount Laurel Township*, 456 A.2d 390 (N.J. 1983), in finding a state constitutional requirement that each local government ensure reasonable opportunities for the provision of its "fair share" of regional housing needs. New Jersey's *Mt. Laurel* approach has had limited success. Neither Pennsylvania (*Nat'l Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 215 A.2d 597 (Pa. 1965)), New York (*Berenson v. Town of New Castle*, 341 N.E.2d, 236 (N.Y. 1975)), nor the other handful of states whose courts have invalidated exclusionary zoning on state constitutional grounds have pursued the doctrine as vigorously as New Jersey. *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127, 1127, 1131-32 (1995). California's Supreme Court made a foray in *Mt. Laurel's* direction in its *Livermore* decision, *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 557 P.2d 473 (Cal. 1976), but rejected *Mt. Laurel's* doctrine, pronounced its own formula for reviewing local governments' decisions to ensure they take into account the "regional welfare." While litigation aimed at establishing new housing rights or restricting local government's exercise of land use authority by close judicial review has borne some fruit, the author of the Note believes that the potential for this approach is limited because of the contemporary tendency of courts to be less "activist" on housing issues. Federal fair housing law and state equivalents have provided some important protection from housing discrimination for members of protected classes in the land use context, and this has been an important remedy. However, most local governments' exercises of discretion that harm housing are not actionable as "discrimination" under fair housing law.

⁷¹ The "Quiet Revolution" raised great hopes for a resurgence of state regulation of local governments' discretion in land use matters. See David L. Callies, *The Quiet Revolution Revisited: A Quarter Century of Progress*, 26 URB. LAW. 197 (1994); Fred Bosselman & David Callies, *The Quiet Revolution in Land Use Control*, Council on Environmental Quality (1971). The "Quiet Revolution" was a term coined to refer to a pattern of states' reassertion of regulatory authority over local governments in a wide variety of contexts. Unfortunately, to date, the "Quiet Revolution" has not delivered substantial benefits to housing.

⁷² As discussed, some local governments have adopted their own self-regulation

Since 1973, Florida's "development of regional impact" (DRI) policy has required additional review of proposed developments that are judged as having regional impacts.⁷³ This review process, encouraged by the American Law Institute's Model Land Development Code,⁷⁴ includes an analysis of potential housing impacts conducted using a state-approved methodology.⁷⁵ The policy imposes upon project applicants a duty to mitigate any significant regional impacts, including housing impacts, as defined by predetermined thresholds. This regulatory program has had some success, and few other states have adopted versions of it.⁷⁶ However, this regulation is only applied to a few specific large development projects rather than the broad range of local governments' development decisions that may have important consequences for housing. For this reason, this regulatory program has been criticized as ineffective and unfair.

Some "comprehensive housing planning requirements" attempt to be integrative. Eight states have adopted some version of a mandatory housing planning regime.⁷⁷ These largely proce-

to consider housing impacts in limited circumstances of reviewing commercial development proposals. *See supra* note 64. However, like the DRI programs, these regulations only require housing impact analysis of some specific development proposals and do not apply to other local governments' policy and decision making.

⁷³ FLA. STAT. Ch. 380.06 (2003); FLA. ADMIN. CODE. ANN. 9J-2 (2003).

⁷⁴ AMERICAN LAW INSTITUTE, *A Model Land Development Code*, Art. VII, § 7-301(1) (1976).

⁷⁵ Two methodologies have been developed. One by the Florida Department of Community Affairs, and another by the East Central Florida Regional Planning Council (ECFRPC) which as been approved for use throughout the state. The latter version can be downloaded from the ECFRPC website at www.ecfrpc.org/Main/Main.asp?CategoryID=4&SubCategoryID=6&ContentID=15& (last visited Oct. 30, 2003).

⁷⁶ For a detailed description of the Florida DRI program, see Marya Morris, *Regulating Regional Impacts: Toward Model Legislation: Part I*, LAND USE LAW 3, 5-7, July 1995. *See also* Mitchell Waldman, *Developments of Regional Impact*, 22 FLA. JUR. 2D ENVIRONMENTAL RIGHTS AND REMEDIES § 28 (1998). *See* Jeffrey Bercow, *Modifying Approved Developments of Regional Impact*, 61 FLA. B. J. 67 (1987). Connecticut, Vermont, Georgia, Massachusetts, Colorado, and Washington have each adopted some version of a DRI program. For an analysis and comparison of various states' versions of DRIs, see Marya Morris, *Regulating Regional Impacts: Toward Model Legislation: Part I*, LAND USE LAW, 3-9 (July 1995); Marya Morris, *Regulating Regional Impacts: Toward Model Legislation: Part II*, LAND USE LAW, 3-8 (August 1995). For a description and evaluation of DRIs, see Briffault, *Our Localism: Part I*, *supra* note 45, at 64-70.

⁷⁷ *See, e.g.*, CAL. GOV'T CODE §§ 65300—65590.1 (West 1983 & Supp. 1993); FLA. STAT. ANN. §§ 163.3161—3215, 186.001—187.201 (West 1987 & Supp. 1993); GA. CODE ANN. §§ 36-70-1—5, 50-8-30—46 (1990); ME. REV. STAT. ANN. tit. 30, §§ 4312—4349 (West 1978 & Supp. 1992); OR. REV. STAT. §§ 197.005—.860 (1991);

dural requirements usually apply to all local governments. Three states, New Jersey, Florida, and California, have adopted comprehensive mandatory planning requirements with highly specific directions for local governments to plan for their “fair share” of regional housing needs. In these regimes, each municipality is required to plan so it is possible for the types and amounts of housing to be built in its jurisdiction that correspond to the jurisdiction’s own local needs plus its share of the regional housing needs. In some states, such as California, the scope of planning extends in principle to the whole range of decisions that could affect housing. Arguably, these comprehensive housing planning requirements force local governments to consider all aspects of land use policy at once during the time they are preparing their housing plans, in California every five years. But this mechanism only actually performs the integration function if the plans are regularly consulted and have some force in actual decision making. Most comprehensive planning regimes rely on “consistency findings” for their effect,⁷⁸ but these have been widely criticized as ineffective.⁷⁹ In practice, plan implementation by requiring a finding of “consistency” with the adopted plan has not successfully integrated housing concerns into local governments’ actual decision making.⁸⁰ In addition, comprehensive mandatory planning requirements that incorporate “fair share” standards are persistently challenged by local governments who argue that the fair share numbers are not an “objective” measure of their cur-

R.I. GEN. LAWS §§ 45-22.2-1—22.2-14 (1991), VT. ST. ANN. tit. 24, §§ 4301-4387 (1992); WASH. REV. CODE ANN. §§ 36.70.010—70.980, 36.70A.010-902 (West 1991 & Supp. 1993). See JOHN M. DEGROVE, *PLANNING & GROWTH MANAGEMENT IN THE STATES* (1992).

⁷⁸ A “consistency requirement” mandates that, when making certain kinds of decisions, a locality must make a finding in the record that the decision is consistent with its housing plan.

⁷⁹ For a review of states’ consistency requirements, see Stuart Meck, *The Legislative Requirement that Zoning and Land Use Controls Be Consistent with an Independently Adopted Local Comprehensive Plan: A Model Statute*, 3 WASH. U. J.L. & POL’Y 295 (2000).

⁸⁰ Unlike an impact assessment regime, the local government may simply make the required finding without any investigation as to the actual potential consequences (viz. potential inconsistencies) that a decision may have with its adopted plan. It is only required to affirm on the record that the action comports with its plan. Nor are interested stakeholders invited to participate in the consideration of whether such consistency exists and what alternatives or mitigations might make an action more consistent with the adopted housing plan. In some states, interested parties do have a right to challenge the jurisdiction’s finding of consistency in court. However, such litigation is rare and rarely successful.

rent and future housing needs but are arbitrary, unrealistic, and unfair.⁸¹ Even undisputed housing advocates such as Mt. Laurel's champion Professor John Payne confess doubt about the accuracy and usefulness of regional housing need numbers.⁸²

In addition to designing an effective regulatory strategy integrating housing concerns into local governments' land use decisions and policy making, states' regulation of local governments' exercise of discretionary land use power in housing confronts a second challenge: pursuing state goals while respecting the special competence and traditional local authority that local governments claim. In a famous pair of articles, Professor Briffault traced the history of local governments' power and tendencies towards parochialism which he termed "localism."⁸³ Local gov-

⁸¹ Cities' opposition to their fair share requirement imposed by Mt. Laurel litigation are regularly mentioned in articles describing that litigation. For a description of how complicated the application of regional fair share housing obligations can become, see *Fair Share Housing Ctr., Inc. v. Township of Cherry Hill*, 802 A.2d 512, 514-19 (N.J. Sup. Ct. 2002) (providing a factual analysis of city's fair share housing obligation).

⁸² John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685, 1709 (1998) reviewing CHARLES HAAR, *SUBURBS UNDER SEIGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996) ("in practice, the fair-share rules are too complicated to be readily understood, too arbitrary and counterintuitive on occasion to be perceived as fair—the sprawl problem—and, despite their superficial objectivity, too subjective to be anchored unambiguously in the vague language of the constitution"). In an earlier article, John M. Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies*, 16 REAL EST. L.J. 20 (1987), Professor Payne proposed a growth share requirement in which local governments would be required to produce housing in some specified proportion to their actual contribution to housing needs as measured by their growth in the previous period. This "growth share" proposal moves toward a solution more likely to be accepted as "fair" by local governments because the standard is, at least to some degree, a function of the state of affairs created by local jurisdictions' own actions. However, Professor Payne's proposal still offers a state-imposed percentage that ultimately substitutes one contestable standard for another. See also John M. Payne, *Remedies for Affordable Housing: From Fair Share to Growth Share*, LAND USE LAW, 3-9 (June 1997); John M. Payne, *Norman Williams, Exclusionary Zoning, and the Mount Laurel Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665 (1996).

⁸³ See Briffault, *Our Localism: Part I*, *supra* note 45; Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) [hereinafter Briffault, *Our Localism: Part II*]. More recently, Professors Briffault and Barron have explored the complexity of localism in practice and its relationships to regionalism and federalism. See Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 1-2 (2000) [hereinafter Briffault, *Localism and Regionalism*] ("[I]n the metropolitan areas that dominate America at the end of the twentieth century, regionalism is not simply the enemy of localism; it is also localism's logical extension."); see also David J. Barron, *Commentary: A Localist Critique of Federalism*, 51 DUKE L.J. 377, 378-79 (2001) ("[L]ocal autonomy is a more complex concept than we often acknowledge. [. . .] The ability of each locality to make effective decisions

ernments cling tenaciously to their land use authority and actively resist any perceived infringement, especially in states with strong “home rule” traditions.⁸⁴ Thus, since the New Jersey Supreme Court’s *Mt. Laurel* decisions,⁸⁵ debates about states controlling the discretion of local governments to serve housing needs have often been framed by the issues of how intrusive state government should be (e.g., override or provide incentives) and by what regulatory mechanism states could force more or less reluctant or recalcitrant local governments to both remove their own regulatory obstacles and to act affirmatively in furthering the development of housing, especially affordable housing.

The recent ascendancy of “smart growth” and “sustainable development” promoters has once again raised the possibility of “regionalism.” Strong regionalism—defined as structural reform reallocating significant land use authority from local governments to regional bodies—is arguably a “first best” solution for controlling the land use discretion of local governments, including in the housing arena.⁸⁶ The shortcomings of traditional local governments’ land use control has been thoroughly criticized.⁸⁷ Strong regionalism would enable a regional entity with broader

on its own is inevitably shaped by its relation to other cities and states, by its relation to broader, private market forces, and, most importantly, by the way the central power structures these relations. . . .” *Id.* at 378-79.). The proposal offered in this Article is consistent with Briffault’s recognition of “the value of a combination of localist and regionalist policies and institutions rather [than] either a totally fragmented localist system or the consolidation of all local government decision making at the regional level.” Briffault, *supra*, *Localism and Regionalism*, at 22.

⁸⁴ See Briffault, *Our Localism: Part I*, *supra* note 45, and Briffault, *Localism and Regionalism*, *supra* note 83, at 15-18 (2000) (reviewing the traditional case for localism as promoting “allocational efficiency in the provision of public services, democratic citizenship, and self-determination by territorial communities.” *Id.* at 15.).

⁸⁵ *S. Burlington County NAACP v. Mount Laurel Township*, 336 A.2d 713 (N.J. Sup. Ct. 1975), *cert. denied*, 423 U.S. 808 (1975) (“Mount Laurel I”); *Southern Burlington County NAACP v. Mount Laurel Township*, 92 N.J. 158 (1983) (“Mount Laurel II”).

⁸⁶ Gerald E. Frug, *Beyond Regional Government*, 115 HARV. L. REV. 1763 (2002); Janice C. Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 GA. ST. U. L. REV. 1019 (2001); Jared Eigerman, *California Counties: Second-Rate Localities or Ready-Made Regional Governments?*, 26 HASTINGS CONST. L.Q. 621 (1999). For a tentative endorsement of Oregon’s land use planning system, see Terry D. Morgan, *Exclusionary Zoning: Remedies Under Oregon’s Land Use Planning Program*, 14 ENVTL. L. 779 (1984).

⁸⁷ See Briffault, *Localism and Regionalism*, *supra* note 83, at 8. (“The existing local governance system contributes to sprawl.” By linking both the tax rate and the funds available for local public services to the local tax base” the local government system adds to the concentration of poverty. *Id.* at 12; “Local government land use decisions, in particular, regularly affect people outside local borders who are unable

attentiveness to housing issues, but appropriately grounded in the exigencies of the local situation, to limit or override local governments' discretion on housing issues to ensure that the general welfare of the region would be served.⁸⁸

Yet if history is any judge, despite numerous and vigorous discussions, only a few states will adopt significant structural land use reforms embracing strong regionalism.⁸⁹ Rather, for many reasons—including traditional policy reasons, local governments' vested interests and citizens' lack of a regional vision⁹⁰—most states for the foreseeable future will continue to delegate substantial land use authority to local governments, including broad discretionary authority over key policies and decisions affecting housing.⁹¹ State government elected bodies tend to be sympathetic to local governments because state legislatures are often dominated by officials representing suburban jurisdictions who wielded land use authority themselves when they served as local elected officials. Continued state attempts to provide financial incentives for voluntary regional collaboration in which local governments continue to exercise their traditional land use powers appear more likely than the adoption of strong regionalism.⁹²

to participate in that decision making process." *Id.* at 21; "The existing localist structure reflects and reinforces economic and social inequalities." *Id.* at 25.)

⁸⁸ The region around Portland, Oregon, is an exception. It has an authoritative regional government, but the effects on housing, especially affordable housing, are widely disputed. No other region has adopted its model.

⁸⁹ Briffault, *Localism and Regionalism*, *supra* note 83, at 2 ("Indeed, the resistance to regionalism is quite widespread in most metropolitan areas."). The current wave of regionalism is not the first. See Robert Fishman, *The Death and Life of American Regional Planning in REFLECTIONS ON REGIONALISM* (Bruce Katz ed., 2000) (reviewing the history of regional planning in the United States and expressing hopeful skepticism of contemporary regionalism).

⁹⁰ Briffault, *Localism and Regionalism*, *supra* note 83, at 29–30 ("[T]he fate of regionalism will turn on whether regionalists will be able to persuade people that their interests are sufficiently tied in with those of the residents or other communities within the region.").

⁹¹ Even the American Planning Association's ambitious "Growing Smart" program only promotes regional planning; the APA shrank from proposing "super-agencies or governmental restructuring." See Stuart Meck, *The American Planning Association's Growing Smart Project: An Overview for Attorneys*, SG021 ALI-ABA 559 (2001). See also AMERICAN PLANNING ASSOCIATION, *GROWING SMART LEGISLATIVE GUIDEBOOK*, ch. 6 (Regional Planning) (2002).

⁹² See, e.g., *Speaker's Commission on Regionalism Final Report*, available at <http://www.regionalism.org/pdf/scorfinalreports/summit02feb02.pdf> (last visited Jan. 14, 2004). Despite the report's strong advocacy for regionalism, it does not recommend any significant structural changes in power allocation between local governments and the state.

Existing laws, with a few exceptions, do not require local governments to consider impacts in their decision making, but rather require other conduct, such as planning. Also, no other constitutional, statutory or common law requires local governments to regularly consider the housing impacts of their actions.⁹³ Moreover, structural solutions, such as the establishment of strong regionalism, appear to be beyond the current horizon. So the obstacles that local governments regularly place in the way of achieving the National Housing Act's goal of "a decent home and suitable living environment for every American family" will remain unless a new regulatory strategy is adopted.⁹⁴ The next Part explores HIA requirements as a potential regulatory strategy to integrate housing concerns in the full range of local governments' land use policy-making and decisions.

II

THE PRIMA FACIE CASE FOR APPLYING AN IMPACT ASSESSMENT REQUIREMENT TO HOUSING

State governments have the authority to regulate local governments' exercise of discretion in land use decisions that affect

⁹³ The state constitutional doctrines of New Jersey, New York, and Pennsylvania may be exceptions. In some cases, a state's environmental quality act may require local governments to study whether housing impacts, usually considered as "socio-economic" impacts, may be severe enough to cause a significant environmental impact, such as traffic congestion and air pollution from commuting workers. *See, e.g., Napa Citizens for Honest Gov't v. Napa County Bd. of Supervisors*, 110 Cal. Rptr. 2d 579 (Cal. Ct. App. 2001) (applying California Environmental Quality Act (CEQA) and holding if even an agency finds such housing impacts, CEQA only requires it to warn the neighboring jurisdictions of potential housing impacts).

⁹⁴ Unfortunately, because state-level "smart growth," growth management, and other growth control efforts are often insensitive to housing concerns—especially affordability—to the degree these reforms are adopted, they may pose serious additional threats to workers and others with unmet housing needs. A recent state-by-state review of the American Planning Association's report on the results of its national "Growing Smart" campaign revealed that very few of the "successes" touted by the APA include any measures that will directly support affordable housing, *see* AMERICAN PLANNING ASSOCIATION, *PLANNING FOR SMART GROWTH: 2002 STATE OF STATES* (2002), *available at* www.planning.org/growingsmart/pdf/states2002.pdf. The only mandatory measure was California's Senate Bill 211 which extended the existence of San Francisco's redevelopment agency on the condition that it spend more money on low-income housing. Copy of review on file with author. *See also* Anthony Downs, *Growth Management, Smart Growth, and Affordable Housing*, keynote speech for Brookings Institution, May 29, 2003, *at* http://www.brookings.edu/views/speeches/downs/20030529_downs.htm (last visited Jan. 14, 2004) (regarding Smart Growth, "[p]romoting more affordable housing can be a goal, but usually is not").

housing. Arguably, states have a duty to ensure that local governments exercise this delegated power for the general welfare, including the promotion of state housing goals.⁹⁵ However, as discussed in Part I, *supra*, states face a formidable challenge in fashioning a regulatory regime that simultaneously constrains local governments' discretion effectively to serve the states' housing goals and fits within the limits of our traditions of localism.

Faced with this regulatory challenge, states should consider new regulatory regimes that might achieve their objective while respecting their limitations. One potentially promising regulatory strategy is the impact assessment requirement. First adopted by NEPA as the environmental impact statement, the regulatory strategy was replicated in many states as SEPA's. It has also been used or proposed to focus attention on other types of impacts, including housing.⁹⁶ A few federal, state, and local policies⁹⁷ already incorporate some form of HIA component.

⁹⁵ Professor Briffault's extensive study of localism led him to urge scholars to seek solutions at the state level. "New legal doctrines and governmental structures are needed to . . . strengthen the states' role in overseeing local power and overriding parochial actions. . . ." Briffault, *Our Localism: Part I*, *supra* note 45, at 6.

⁹⁶ See SERGE TAYLOR, MAKING BUREAUCRACIES THINK: THE ENVIRONMENTAL IMPACT STRATEGY OF ADMINISTRATIVE REFORM 7 (1984) [hereinafter MAKING BUREAUCRACIES THINK] ("Variants of the [environmental impact statement] program have spread to several policy fields, and have been proposed for many others, including, for example, economic impact statements, arms control statements, family statements, urban and community statements, human rights statements, and demographic statements."). *Id.* at 295 and accompanying footnotes. Professor Michael Herz discusses a "human impact statement" that could include consideration of the "allocation of scarce public resources to public housing" as part of a "thought experiment." Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1724 (1993) [hereinafter, Herz, *Parallel Universes*]. See also FRANK VANCLAY & DANIEL BRONSTEIN, ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT (1995), and the website of the International Association for Impact Assessment, an organization promoting the use of impact assessment strategies, at www.iaia.org. (last visited Jan. 14, 2004).

⁹⁷ In addition to Florida's regional impact requirement and housing impact fee ordinances, discussed *supra* notes 72-76 and accompanying text, a few federal and state policies already incorporate a housing impact dimension. (1) The federally-mandated "Consolidated Plan" requires that state and local governments eligible for certain block grant funds (such as Community Development Block Grant, Home Investment Partnership Program, McKinney or Emergency Shelter Grant, and Housing Opportunities for Persons with AIDS) conduct an analysis of "impediments to fair housing choice," which entails consideration of how a jurisdiction's zoning ordinances and land use decisions might impact the housing opportunities of classes protected by the federal Fair Housing Act. See OFFICE OF FAIR HOUS. & EQUAL OPPORTUNITY, U.S. DEP'T OF HOUS. & URBAN DEV'T, FAIR HOUS. PLANNING GUIDE, 1 & 2 (1996). For a description and analysis of two regional housing choice plans that resulted in part from the required "analysis of impediments," see

There are signs of additional interest in this strategy.⁹⁸ Could a state HIA requirement on local governments modeled on a SEPA be a solution to the states' regulatory problems?

Deborah Kenn, *Housing Choice Case Studies: The Twin Cities Region in Minnesota and City of Rochester/Monroe County, New York*, 11 J. OF AFFORDABLE HOUS. & CMTY. DEV. L. 303 (2002). (2) Since 1970, California has required municipalities to prepare five year comprehensive plans concerning the locality's exercise of land use authority delegated to it by the state. One required element of such a comprehensive plan is the "housing element," which must include an identification and analysis of potential and actual governmental and non-governmental constraints on housing. Constraints include restrictive planning and zoning policies. Localities are required to remove such constraints where "feasible and legally possible." CAL. GOVT. CODE §§ 65583(a)(4)–(5) (1999).

⁹⁸ The concept proposed in this Article coincides with a suggestion made almost a decade ago in Timothy Choppin, Note, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L. J. 2039, 2073 (1994) ("In other operations of government, regulations are reviewed for adverse impacts on important governmental objectives, such as environmental impacts and budgeting processes. Development regulations should receive the same scrutiny."). Following are brief references to one federal-level example and two state-level examples of efforts to incorporate a version of an HIA requirement into government decision making. (1) Since 1998, the National Association of Home Builders has been pushing a bill in Congress to require federal agencies to analyze the potential impacts on housing affordability as part of its rule-making process. A bill incorporating this approach has passed the U.S. House of Representatives twice, most recently in H.R. 3899. It has most recently been reintroduced to the first session of the 108 Congress as HR 730. The Millennial Housing Commission's report endorsed this bill as one of its supporting recommendations. See MHC Report, *supra* note 20, at 75. (2) In California, a recent unsuccessful bill, S.B. 439, 2001-02 Reg. Sess. (Cal. 2001), would have added a "human impact" assessment requirement to the CEQA, CAL. PUB. RES. CODE §§ 21000-21178 (West 2001). The "human impact" section of an EIS would contain, among other things, an assessment of impacts that any covered project would have on homeownership in determining whether a proposed project may have a significant effect on the environment. (3) In 2000, at least three lawsuits in California have attempted to get courts to order municipalities to incorporate "housing impact analysis" into EISs required by the CEQA. (Briefs on file with author). One has been decided by an appellate court, one settled after a trial court decision, and one is currently being decided by an appellate court. The only decided appellate case of this group, *Napa Citizens for Honest Gov't v. Napa County Bd. of Supervisors*, 110 Cal. Rptr. 2d 579 (Cal. Ct. App. 2001), both opens and closes a door for "housing impact analysis" lawsuits under CEQA. On the one hand, the call announces standards for agencies to determine when they must prepare housing impact analyses and discusses adequacy standards for such housing impact analyses. On the other hand, it holds that even if an agency is required to perform such an analysis and finds that a project's housing impacts would cause significant environmental impacts, CEQA's duty to mitigate impacts whenever feasibility does not apply. Rather, a city need only "warn" a nearby locality of the likely housing impacts. The court found that an adequate housing impact analysis constitutes a sufficient warning to meet CEQA's requirements.

A. *The Attraction of a Housing Impact Assessment Strategy*

An HIA strategy initially appears attractive for several reasons. First, certain critical contemporary housing problems, specifically increasing the supply and affordability of housing and siting additional housing,⁹⁹ present many of the same regulatory problems as the potential degradation of the environment by government decisions before NEPA was enacted. Like the environment, primary housing decisions are made by units of government (especially local governments) exercising broad discretion delegated to them by other governmental entities. The state needs to control the exercise of broad discretion delegated to agencies (local governments) in a manner that displaces neither the proper scope of local control nor the proper role of the market in housing production, but serves the state's housing policy.¹⁰⁰

Housing issues are often ignored by local decision-makers, and in some cases, are treated with hostility. There is a need for an integrative regulatory regime to promote the overall policy goal (in the case of housing, the Housing Act of 1949, or a state's articulated housing goal). Yet the complexity of the policy area makes comprehensive substantive regulation impossible.¹⁰¹ Often, the prospective beneficiaries of thoughtful housing policies are often not involved in decisions affecting them. Decisions harming housing are often practically irreversible.¹⁰² And, importantly, when local governments attend to housing issues, they *can* often adjust their policies to serve *both* housing and other policy goals.¹⁰³

Second, an impact assessment strategy could be effective be-

⁹⁹ This Article will focus attention on these components of our housing problems both because they have been identified as being critical by numerous authoritative sources (e.g., Bipartisan Millennial Housing Commission) and because they are the specific housing problems over which local governments have substantial control. Other housing problems such as substandard housing, may be more amenable to other regulatory approaches.

¹⁰⁰ See *supra* notes 66–70 and accompanying text.

¹⁰¹ Because of the complexity of housing production, location and financing, states are not competent to enact comprehensive traditional substantive regulation to direct local governments in making policies and decisions affecting housing. Housing problems are too diverse for states to dictate what types and amounts of housing should be produced in what locations and the complexity of housing production processes preclude state governments from dictating how housing should be produced.

¹⁰² See *supra* note 12.

¹⁰³ See *supra* notes 60–66 and accompanying text.

cause housing policy and decisions are amenable to rigorous analysis that can produce valuable information for decision-makers and other participants.¹⁰⁴ If an impact assessment strategy is adopted, different types of projects and housing impacts will require different types of impact analysis, just as environmental impact analyses vary by what type of decision is at issue and what types of environmental impacts are being considered.¹⁰⁵

Many methodologies for generating useful HIAs are already available. For example, analysts regularly offer projections of regional and subregional housing trends correlated to employment, transportation, and other important policy variables.¹⁰⁶ These

¹⁰⁴ Professor Taylor considered this a precondition for the value of an impact assessment strategy. See *MAKING BUREAUCRACIES THINK*, *supra* note 96 at 307–08. Taylor does not require that the field be fully mature and without conflict. Rather, it is enough that the field be developed enough to provide useful information now and be capable of further enhancement. On this criterion, the current art and science of housing policy analysis discussed in the accompanying text meets Taylor’s threshold requirement. See also Dinah Bear, *The National Environmental Policy Act: Its Origins and Evolutions*, 10 *FALL NATURAL RES. & ENV’T* 3 (1995) (noting that a possible pre-requirement for CEQA was the scientific and other work available in 1969 showing the importance of environment, threats posed to it and risks if threats were unaddressed). For a critical analysis of the potential for comprehensive environmental analysis in contemporary NEPA practice, see Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government’s Environmental Performance*, 102 *COLUM. L. REV.* 903 (2002) [hereinafter Karkkainen, *Toward a Smarter NEPA*].

¹⁰⁵ Each of the three types of adverse impacts identified in the model HIA in Part III, *infra*, can be fruitfully investigated using a combination of the analytic models that planners already employ to produce projections.

¹⁰⁶ See, e.g., publications available from the Association of Bay Area Governments at <http://www.abag.ca.gov/abag/overview/datacenter/databod.html> (last visited Jan. 18, 2004). Subregional projections are also at <http://www.abag.ca.gov/planning/subregional/> (last visited Jan. 18, 2004). Examples of this analysis can be found in *Napa Citizens for Honest Gov’t v. Napa County Bd. of Supervisors*, 110 Cal. Rptr. 2d 579 (Cal. Ct. App. 2001) (discussing EIR which analyzed potential housing demand from development of industrial area around county airport and finding that in certain circumstances, an EIR must:

at a minimum, identify the number and type of housing units that persons working within the Project area can be anticipated to require, and identify the probable location of these units. The [EIR] also should consider whether the identified communities have sufficient housing units and sufficient services to accommodate the anticipated increase in population.

It also must explain what action needs to be taken to provide those units or services if they are not likely to be available. *Id.* at 599); *County of Santa Cruz v. City of San Jose*, 2003 WL 1566913 (Cal. App. 6th Dist.) (discussing EIR which “estimated the total demand for housing to serve the project’s employees, assessed existing and planned housing stock in the region in an effort to forecast where employees might reside, and included data on the number of employees expected to commute from each area”). *Id.* at *21.

analytical methods have largely been developed in states with mandatory local planning that includes a housing element, e.g., California, Oregon and Washington. Such information can enrich decision-makers' deliberation about housing policy by increasing their understanding of how a particular city fits into a regional housing, employment and transportation context.¹⁰⁷ Land supply monitoring systems, which aim to ensure an adequate supply of buildable land for future needs, have also been developed.¹⁰⁸ Using these methodologies, local officials can better appreciate the housing impacts of their zoning policies.

The capacity of a given area of land for housing production can be determined objectively by a consideration of the zoning, density, availability of infrastructure and other facts. Similarly, the change in potential yield can be calculated by considering the effect of any change of these factors. In addition, the probable housing impacts of transportation and infrastructure development can be identified and measured. Also the effects and costs of various housing policies on housing demand and supply have been studied.¹⁰⁹ Currently available analyses enable planners to present local leadership with an array of options with relatively concrete predictions of the consequences on housing based upon identified working assumptions. Models for forecasting housing needs generated by non-residential, job-generating developments have been in use in Florida, in other states regulating developments with regional impacts, and by numerous local governments that have adopted and administered "housing impact" or "commercial linkage" fee programs.¹¹⁰ These programs employ a housing impact analysis to set mitigation fees.¹¹¹

¹⁰⁷ For a critical view of forecasting, see Michael Dardia & Laura Mameesh, *Searching for a Crystal Ball: Forecasts and Long-range Planning*, CAL. POL'Y REV., Sept. 2001, available at <http://www.sphereinstitute.org>.

¹⁰⁸ See, AMERICAN PLANNING ASSOCIATION, *GROWING SMART LEGISLATIVE GUIDEBOOK*, ch. 7 (Local Planning) (2002). Many state codes require local governments to monitor the amount of land suitable for development. See CAL. GOVT. CODE § 65583(a)(3) (1999); OR. REV. STAT. § 197.296(3)(a) (2001); WASH. REV. CODE § 36.70A.215(1)(a) (2000). See also ASSOCIATION OF BAY AREA GOVERNMENTS, SAN FRANCISCO BAY AREA LOCAL DEVELOPMENT POLICY SURVEY: A DATA BASE INVENTORY OF DEVELOPMENT POTENTIAL (1994).

¹⁰⁹ See, e.g., the resources available at the American Planning Association website, at www.planning.org.

¹¹⁰ See *supra* notes 64-65; see also William W. Merrill, III & Robert K. Lincoln, *The Missing Link: Legal Issues and Implementation Strategies for Affordable Housing Linkage Fees and Fair Share Regulations*, 22 STETSON L. REV. 469 (1993).

¹¹¹ See Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on*

While some forms of housing impact analysis would be complex and controversial,¹¹² an HIA requirement would be an incentive for new methodologies to be developed or further refined, just as occurred in the environmental field with the advent of the environmental impact statement requirement. Eventually, it is possible that a “level of housing service” analysis could be devised analogous to models currently used for traffic, schools or other infrastructure analysis.¹¹³ Overall, the field of housing policy and analysis is sufficiently developed to provide meaningful analysis of the potential housing impacts of a wide range of local governments’ land use decisions and policy-making.

Third, an impact assessment strategy has the potential for meeting the states’ regulatory goal: integrating housing concerns into local governments’ land use policy and decision making. In principle, if local governments were required to consider the housing impacts of their decisions, this would help ensure that

Housing Costs, 76 IOWA L. REV. 1011, 1014 (1991) (advocating housing linkage as a “principled mechanism for offsetting the housing burden imposed on communities by nonresidential development if local governments apply formulas that carefully calculate the impact nonresidential development projects will have on community housing requirements”).

¹¹² In some cases, a policy, program, or project may cause multiple positive and negative effects, indirect effects, and feedback loops. It is possible that no reliable methodology may be available to analyze the impacts of some proposed developments on certain types of housing. For example, the impacts of a development of a small retail store on housing for persons with disabilities or homeless persons might be indeterminate. Of course, there would be conflicts in various analyses about the effects of a particular supply on housing prices, application of the “filtration hypothesis,” and other issues, just as there are intense methodological conflicts in environmental analysis. Methodological conflicts should not be submerged. Rather, analysts should be required to state their assumptions clearly and distinguish in their findings between what is known and what is uncertain. If analysis of a specific class of projects or type of housing impact were widely deemed regularly indeterminate or speculative, such projects and/or impacts could be specifically exempted from analysis. For example, CEQA regulations provide categorical exclusions for certain types of projects for this reason. See CAL. PUB. RES. CODE § 21084(a) (West 1992).

¹¹³ Such an analysis could consider the housing stock available (type, numbers, condition, affordability and availability/vacancy rates) and potential future housing stock (based upon current zoning, planning codes, etc.). This objective benchmark could then be used for determining the potential significance of a proposal as well as for future planning and, if a jurisdiction were interested, the development of substantive elements of an HIA, such as a mitigation requirement. For example, if a city is proposing to do something that would bring its level of housing service below “x,” then it must mitigate those effects. Such a “level of housing service” analysis could be extended to include a measure of economic and racial stratification and/or limited access due to discrimination.

housing interests would consistently come to their attention.¹¹⁴

Fourth, such impact analysis could benefit housing in several ways. The benefits to housing could accrue by preventing avoidable harms to housing that would have occurred without housing impact consideration, e.g., by preventing the adoption of burdensome regulation.¹¹⁵ Housing could benefit by the possibilities revealed through the HIA, which would have been unknown or overlooked without the analysis, e.g., promoting mixed uses where the housing impacts of a commercial development are recognized.¹¹⁶ HIA could lead to housing development being more often favored when tradeoffs between housing and other local needs are required, e.g., in zoning more land for residential uses compared to commercial uses. When HIAs reveal regular patterns of relationships between local governments' decisions and effects on housing, the requirements could promote the adoption of local pro-housing policies and practices, e.g., higher density zoning, density bonus zoning or policies favoring the construction of secondary units. Ultimately, the requirements could promote broader future changes, such as more cooperation between local jurisdictions that may lead to some form of regionalism.

Finally, such a regulatory strategy could work within the limits of our enduring localism. It would respect local governments' expertise in local matters and balance competing local interests by not taking away or overriding local governments' land use authority. It would not overreach the state's competency in regulating local governments' exercise of discretion in land use matters. Yet it would enlist local governments in the service of state housing policy. These potentials suggest further consideration of an HIA strategy is merited.

¹¹⁴ See *infra*, Part IV for analysis about how effectively a housing impact analysis requirement would perform this integration function in two regulatory paradigms.

¹¹⁵ See, Timothy Choppin, Note, *Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs*, 82 GEO. L.J. 2039 (1994) (supporting revision of state delegation of land use authority to local governments to reduce cost of housing for "moderate income households," recognizing also that lower-income households need subsidies). The NAHB "housing impact statement" federal proposal, *supra*, note 98, may be intended to reduce federal regulations that might increase housing costs.

¹¹⁶ Local governments' land use decision making proceeds serially and interactively with the private sector's initiation of particular land development proposals. While local governments initially zone and plan for certain uses, the likelihood of actual housing or other development depends upon initiatives from the private sector. When private sector projects take shape this can open up opportunities that were not foreseen during local governments' planning and zoning.

B. Impact Assessment Requirements: A Deceptively Simple Regulatory Device

Serious consideration of the application of impact assessment strategy as a solution to state governments' regulatory challenge immediately reveals the complexity of this apparently simple regulatory strategy. There are two related issues. First, scholars do not agree on how to conceptualize impact assessment requirements. Second, the effectiveness of impact assessment requirements is heavily contested.

The complexity of this regulatory strategy can be unpacked in three steps. Impact assessment requirements are typically procedural duties which mandate the production, dissemination and consideration of information but do not require a specific substantive outcome. Yet the production and dissemination of information potentially implicate changes in government decision making and political dynamics.¹¹⁷ The requirements for dissemination of the information, public hearings, and responses to comments received open up the possibility of new levels and kinds of public participation in decision making and public accountability about these decisions. In addition, if judicial review is part of the scheme, courts' interpretation and application of impact assessment requirements add another dimension to how these requirements will modify the exercise of local governments' discretionary authority. The prospect of litigation and actual lawsuits influence both local governments' and private actors' calculations concerning the information produced pursuant to the requirements and the decisions that follow. Thus, an apparently simple and non-demanding procedural mandate that a local government produce and consider certain information relating to its decision making implicates a broad range of actors potentially influencing these decisions and opens up to an uncertain degree

¹¹⁷ See Karkkainen, *Toward a Smarter NEPA*, *supra* note 104, at 904–05 (describing NEPA supporters' views that:

[T]his simple information disclosure mandate forces agency managers to identify and confront the environmental consequences of their actions, about which they otherwise would remain ignorant. It also opens government decisions to an unprecedented level of public scrutiny, with consequent political implications that decisionmakers ignore only at their peril. . . . that this combustible blend of information, transparency, and political accountability creates powerful pressures on agency decisionmakers to avoid the most environmentally damaging courses of action, and to mitigate environmental harms when it is cost effective to do so.

(footnotes omitted).

how much current practices and ways of doing business will be affected by the requirement.

Impact assessment requirements, such as the National Environmental Protection Act's environmental impact statement (EIS) requirement, have been plausibly conceptualized within at least five regulatory models.¹¹⁸ The "comprehensive rational model" views the impact assessment requirement as a means to force bureaucracy to synoptically consider all the potential consequences of a contemplated action before making a decision.¹¹⁹ The "economics of information model" sees the device as a means of internalizing an externality: the regulation mandates the production of information useful for rational decision making by individual actors. This information might not have been otherwise produced because the cost of producing the information would have been greater than the benefits to any particular actor.¹²⁰

The "civic republican" or direct democracy model focuses on the requirement's potential to evoke broad-based citizen partici-

¹¹⁸ The National Environmental Protection Act's EIS was the first example of an impact assessment requirement and has been studied intensively. Karkkainen identifies the comprehensive rational model, a Jeffersonian or "populist" impulse model, and a pluralist or interest group representation model. *Id.* at 912-16. Numerous models are discernable in the collection of NEPA evaluation studies that Professor Daniel R. Mandelker collects in his text. DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION* (Ch. 11, Evaluation: The Effect of NEPA on Federal Agencies) (2002) [hereinafter MANDELKER, NEPA LAW]. See Lorna Jorgensen, Note, *The Move Toward Participatory Democracy in Public Land Management Under NEPA: Is It Being Thwarted by the ESA?*, 20 J. LAND RESOURCES & ENVTL. L. 311 (2000); *Reclaiming NEPA's Potential: Can Collaborative Processes Improve Environmental Decision Making?* (U. of Mont. Center for the Rocky Mt. West & U. of Wyo. Inst. for Env'tl. & Nat. Res., 2000). Others have interpreted NEPA as providing the procedural framework for negotiated rulemaking.

¹¹⁹ Professor Karkkainen adopts the view that the comprehensive rational model is the best way to understand NEPA, and subjects it to intense criticism on this basis. *Toward a Smarter NEPA*, *supra* note 104, at 925-33.

¹²⁰ See, e.g., Cass R. Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. PA. L. REV. 613, 618 (1999). In Professor Sunstein's view, whether informational regulation is superior as a policy instrument to traditional regulatory approaches or unregulated economic markets depends upon the details. Informational strategies can be inferior to conventional regulatory strategies in two important ways: costs may outweigh benefits to be gained from disclosure, and information disclosure is sometimes ineffectual or even counterproductive. The ideal setting is when the problem involves a market failure in the provision of information, useful information can be produced and disseminated cheaply, the information is understandable to the target audiences, and the target audiences can effectively act upon the information.

pation in policy-making.¹²¹ The “interest group representation model” expects the requirement to enable interest groups representing previously inadequately represented interests to advance their cause by playing a stronger role in pluralist interest group politics.¹²² Finally, the “reflexive law model” views the requirement as a mechanism to change the informal rules (or norms) by which decisions are made.¹²³

Each theory includes the idea that the requirement in some way *integrates* a previously ignored policy concern into the decisions and policy that affect the policy goal, and hopes for positive change in the outcomes for those goals via some mechanism(s).¹²⁴ The models disagree as to the normative justification for the requirement, when its application is appropriate, and the mechanism(s) by which it will serve the policy goal.¹²⁵

In addition to being conceptually contested, not surprisingly, the effectiveness of impact assessment requirements is hotly debated. The indirectness of the requirement’s expected effect—its procedural character and lack of a mandated substantive outcome—is one source of conflict.¹²⁶ These disputes make empiri-

¹²¹ See, e.g., Jonathan Poisner, *A Civic Republican Perspective on the National Environmental Policy Act’s Process for Citizen Participation*, 26 ENVTL. L. 53 (1996).

¹²² See, e.g., JOHN FELLEMAN, *DEEP INFORMATION: THE ROLE OF INFORMATION POLICY IN ENVIRONMENTAL SUSTAINABILITY* (1997); Sidney A. Shapiro, *Administrative Law After the Counter-Reformation: Restoring Faith in Pragmatic Government*, 48 U. KAN. L. REV. 689 (2000); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1759 (1975).

¹²³ The works of other jurisprudence scholars such as Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC’Y REV. 239 (1983), scholars Richard Stewart and Cass Sunstein, along with Philippe Nonet and Philip Selzick, locate the EIS process and impact assessment strategy in the context of “reflexive law” strategies. See, e.g., Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227 (1995); Eric Bregman and Arthur Jacobson, *Environmental Performance Review: Self-Regulation in Environmental Law*, 16 CARDOZO L. REV. 465 (1994); Michael Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 COLUM. L. REV. 1668, 1689-93 (1993).

¹²⁴ See, e.g., Lynton K. Caldwell, *Beyond NEPA: Future Significance of the National Environmental Policy Act*, 22 HARV. ENVTL. L. REV. 203, 204 (1998).

¹²⁵ For example, authors analyzing NEPA as an example of reflexive law argue that the policy is justified by the failure of the previous administrative framework to incorporate the value of avoiding damage to the environment, that the imposition of the requirement is justified when substantive or formal regulatory means are not available to promote state policy, and that NEPA will achieve its objective by creating a new form of self-regulation reforming the norms of decision-makers, regulated entities and regulatory beneficiaries. TAYLOR, *MAKING BUREAUCRACIES THINK*, *supra* note 96, at 307–12 (identifying requisites for NEPA’s effectiveness in his model).

¹²⁶ See, e.g., Michael Ferester, *Revitalizing the National Environmental Policy Act*:

cal studies measuring effectiveness difficult to design and inconclusive in their results.

Perhaps the best example of these debates concerns the effectiveness of NEPA's EIS requirement.¹²⁷ NEPA's goal is to protect the environment. In particular, in enacting NEPA, Congress sought to reduce environmental damage caused by its own federal agencies when they made policies and pursued projects with significant negative environmental effects. Instead of imposing substantive regulatory standards,¹²⁸ NEPA requires covered agencies to perform various procedures to identify and consider potential environmental impacts that Congress hoped would influence or guide outcomes toward the regulatory goal of environmental protection.¹²⁹

NEPA proponents claim that the application of EIS has led to numerous decisions by federal agencies, state agencies and local governments to protect environmental resources and to mitigate what would have been worse consequences of the originally proposed development projects.¹³⁰ Others point to the change EIS

Substantive Law Adaptations from NEPA's Progeny, 16 HARV. ENVTL. L. REV. 207, 207-09 (1992).

¹²⁷ Professor Mandelker has collected the most complete set of analyses of NEPA's effectiveness in MANDELKER, NEPA LAW, *supra* note 118, at Chapter 11. For a recent summary of the debates and evaluation, see Karkkainen, *Toward a Smarter NEPA*, *supra* note 104, 904-17.

¹²⁸ National environmental legislation following NEPA, e.g., the Clean Air Act and the Clean Water Act, imposed substantive regulatory standards.

¹²⁹ Specifically, in NEPA Congress imposed numerous procedural requirements and provided for a private right of action to enforce its requirements. An agency planning a "major federal action" must consider if such action would have a "significant effect" on the environment and prepare an "environmental assessment" (EA) stating its conclusion and rationale. If the EA finds a potential significant effect, NEPA requires the agency to prepare an "environmental impact statement" (EIS), an analysis detailing how a contemplated action might harm the environment, alternatives to the proposal with fewer impacts, and measures that could mitigate the potential impacts. If an EA discovers no significant impact, the agency may prepare a finding of no significant impact (FONSI) and terminate the environmental review process. NEPA then requires the agency to disseminate an EA and an EIS (if prepared) to the public and to other interested agencies. If an EIS is produced, it is treated as a draft; NEPA requires the agency to consider and to respond to the comments of the public and other interested agencies formally in a final environmental impact statement (FEIR). Finally, NEPA empowers certain parties to challenge in court the agency's compliance with the statute. See Herz, *Parallel Universes*, *supra* note 96, at 1678-79. For a case comparing a substantive regulatory regime to NEPA's procedural requirements, see *Neighbors of Cuddy Mountain v. Alexander*, 238 F.3d 430 (9th Cir. 2000).

¹³⁰ While none are wholly uncritical, each of the articles and studies cited in MANDELKER, NEPA LAW, *supra* note 118, at Part III ("Positive Evaluations"), finds

wrought in the attitudes, culture and practices of the agencies.¹³¹

positive effects on federal agencies. Professor Mandelker's view is that "NEPA continues to be a major and critical environmental law." *Id.* at xiii. After an initially dour view, Professor Joseph Sax reappraised NEPA in *More Than Just a Passing Fad*, 19 U. MICH. J.L. REFORM 797, 804 & n.28 (1986). He admits he "underestimated the influence of NEPA's 'soft law' elements" and that NEPA's "legitimizing public participation, and demanding openness in planning and decisionmaking, has been indispensable to a permanent and powerful increase in environmental action." *Id.* He further notes: "the presence of citizen-initiated litigation is a major factor that keeps public agencies from slacking in their resolve to see that environmental laws are enforced." *Id.* The value of NEPA to the environmentalist community can also be gauged by its continuing use of the statute and its insistence on NEPA's application in particular circumstances. There are, of course, numerous instances of projects stopped or delayed because of NEPA violations. *See, e.g.,* GEORGE COGGINS, PUBLIC NATURAL RESOURCES LAW, § 12.01 (1990). A NEPA lawsuit forced the Bureau of Land Management into a system-wide series of environmental impact statements that changed the nature of livestock grazing regulation; application of NEPA has indirectly destroyed many property attributes of federal mineral leases; and the Act has contributed to safeguarding tens of millions of acres as potential wilderness areas. *See id.* at § 12.01 and 12-2. *See also* David W. Case, *The Law and Economics of Environmental Information as Regulation*, 31 ENVTL. L. REP. (July, 2001) (reviewing economic and legal literature on the issue, finding that many empirical economic analyses support the notion that mandatory information disclosure strategies can be effective in changing the behavior of regulated entities, including via market mechanisms).

¹³¹ Professor Taylor documents two linked mechanisms he found empirically at work in his research of two federal agencies: the "analyst advocate" or analytical internal mechanism, and the "outside advocate empowerment" or political mechanism. The analyst advocate is a person working within the decision making body who uses her professional influence to ensure that significant environmental impacts are not ignored. The outside advocate is empowered by her participation rights to press decision-makers to avoid significant impacts or to mitigate them. She does this by speaking at public hearings, contacting the media, and in other ways often relying on the procedural requirements to pressure decision-makers. TAYLOR, MAKING BUREAUCRACIES THINK, *supra* note 96. Another researcher traced a four-phase institutional evolution from "early interpretative and formal compliance to an integrated planning and finally a programmatic planning phase" as environmental issues become more and more deeply integrated into an agency's practices. A.F. Wichelman, *Administrative Agency Interpretation of the National Environmental Policy Act of 1969: A Conceptual Framework for Explaining Differential Response*, 16 NAT. RES. J. 263 (1976) (cited in MANDELKER, NEPA LAW, *supra* note 118 at 11-12.) *See also* Jon C. Cooper, *Broad Programmatic, Policy and Planning Assessments Under the National Environmental Policy Act and Similar Devices: A Quiet Revolution in an Approach to Environmental Considerations*, 11 PACE ENVTL. L. REV. 89 (1993); Fairfax & Andrews, *Debate Within and Debate Without: NEPA and the Redefinition of the "Prudent Man" Rule*, 19 NAT. RES. J. 505 (1979) (cited in MANDELKER, NEPA LAW, *supra* note 118, at 11-10 n.3); Richard Andrews, *NEPA in Practice: Environmental Policy or Administrative Reform?*, 6 ENVTL. L. REP. 50001 (1976) (cited in MANDELKER, NEPA LAW, *supra* note 118, at 11-13). Professor Eric Orts considers NEPA only a partially reflexive law mechanism, and a problematic one. Eric Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1275 (1995). Because NEPA is limited to administrative law (i.e., the federal bureaucracies) and is "embedded in a broader substantive legal framework and administrative bureau-

Several credit the ways in which EIS provides environmental advocates, interested agencies and the public specific opportunities to influence decisions.¹³² These and others argue that the decision making process has been improved by the procedurally-required “place” that previously ignored environmental concerns now occupy.¹³³ Finally, some note the enhanced public visibility that EIS provides environmental issues and the support for an “environmental ethic” that this visibility engendered.¹³⁴

While the prevailing view appears to be that NEPA has been and continues to be an important component of environmental protection, there are critics and skeptics.¹³⁵ Professor Michael Herz summarizes some of the major criticisms: “Pure proceduralism is . . . a costly and pointless waste of time because the ultimate decision remains unconstrained” both because of the lack of any substantive standard or other exogenous restric-

cracy,” he doubts its “efficacy in terms of changing the thinking in social systems other than law. . . .” *Id.* at 1275. Yet, while remaining non-committal, even he thinks “[a]lthough NEPA has juridifying tendencies, it may genuinely accomplish its goal of internalizing environmental considerations in agency decisionmaking.” *Id.* at 1340 n.200.

¹³² See 40 C.F.R. § 1503.1 (1993) (NEPA regulations require agencies to disclose draft environmental impact statements, to invite comments from the public, and to “affirmatively solicit . . . comments from those persons or organizations who may be interested or affected.”); Paul J. Culhane, *NEPA’s Impacts on Federal Agencies, Anticipated and Unanticipated*, 20 ENVTL. L. 681 (1990) (cited in MANDELKER, NEPA LAW, *supra* note 118, at 11-9); Stark Ackerman, *The Effects of the National Environmental Policy Act on U.S. Forest Service Decision Making*, 20 ENVTL. L. 703 (1990) (cited in MANDELKER, NEPA LAW, *supra* note 118, at 11-17); Michael Blumm & Steve Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENVTL. L. REV. 277 (1990); Richard A. Lirof, *NEPA—Where Have We Been and Where Are We Going*, 46 J. AM. PLANNING ASS’N 154 (1980) (cited in MANDELKER, NEPA LAW, *supra* note 118, at 11-7). See also Richard Andrews, *NEPA in Practice: Environmental Policy or Administrative Reform?*, 6 ENVTL. L. REP. 50001 (1976) (cited in MANDELKER, NEPA LAW, *supra* note 118, at 11-13).

¹³³ See Lirof, *supra* note 132; Culhane, *supra* note 132; Stanley Millan, *Wanted: NEPA, Dead or Alive, Reward: Our Global Environment [Analysis & Perspective]*, 22 ENVTL. REP. (BNA) 2081, 2081-82 (Dec. 21, 1991).

¹³⁴ See Cahn, *The Impact of NEPA on Public Perception of Environmental Issues*, 6 ENVTL. L. REP. 50010 (1976) (cited in MANDELKER, NEPA LAW, *supra* note 118, at 11-8, n.8).

¹³⁵ After its enactment some environmentalists expressed disappointment with NEPA’s enforcement mechanism, the EIS. While this criticism has strongly influenced many academics, much of the initial criticism was impressionistic and narrowly focused. Later, more comprehensive studies of NEPA’s effects were conducted and found overall positive results. See MANDELKER, NEPA LAW, *supra* note 118, § 11.01 at 11-2 and § 11.04[2]–11.04[3]. See also Professor Karkkainen’s criticisms, *Toward a Smarter NEPA*, *supra* note 104, at 925-33.

tion and because of the lack of judicial enforcement of a substantive standard.¹³⁶ Governments and developers also roundly criticize EIS for being a costly, unwieldy, open-ended burden that provides ample opportunities for what critics say amounts to “extortion” by environmentalist advocates.¹³⁷ Furthermore, many criticize possible unintended consequences of the EIS requirement, including that some developers may not pursue meritorious projects for fear of running the EIS gauntlet.¹³⁸

After thirty years, debate still continues along several dimensions about whether or not the federal and state versions of EIS actually benefit the environment and, if so, how. One respected scholar who published an early influential critique of NEPA, Professor Sax, is now on record as having changed his mind in favor of NEPA’s value and importance.¹³⁹ The actual outcomes of NEPA’s EIS for environmental values have generated voluminous research and commentary.¹⁴⁰ This Article will not attempt to resolve these debates.

In reviewing the debates and analyses of EIS’s effectiveness, it appears that there are six parameters that collectively determine how effective, if at all, an impact assessment requirement will be. They are: (1) the conceptual framework (discussed, *supra*) and any conditions it implies;¹⁴¹ (2) the policy area;¹⁴² (3) the institutional context in which the requirement is added;¹⁴³ (4) the de-

¹³⁶ Herz, *Parallel Universes*, *supra* note 96, at 1693–94.

¹³⁷ Karkkainen, *Toward a Smarter NEPA*, *supra* note 118, at 903 (referring to this dynamic as a “penalty default”); Herz, *Parallel Universes*, *supra* note 96, at 1720 (identifying NEPA’s numerous unintended consequences, including that it “creates opportunities for strategic behavior.”).

¹³⁸ Herz, *Parallel Universes*, *supra* note 96, at 1719.

¹³⁹ As a part of the University of Illinois Law Review’s 2000 Symposium, Innovations in Environmental Policy, Joseph Sax wrote to Professor Rodgers: “NEPA . . . has become the crucial tool for putting [the] environment on everyone’s agenda.” William H. Rodgers, Jr., *The Most Creative Moments in the History of Environmental Law: “The Whats,”* 2000 U. ILL. L. REV. 1, n.19 (2001). See also *supra* note 130.

¹⁴⁰ See also studies cited in ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 449–51 (2000); MANDELKER, *NEPA LAW*, *supra* note 118, at §§ 11-1–11-19.

¹⁴¹ For example, the civic democracy view would imply the need for broad and sustained civic participation to be effective.

¹⁴² Not all policy areas are amenable to impact assessment requirements. For example, Taylor notes that if useful impact analysis is not possible, then the policy area cannot benefit. See *supra* note 104; MAKING BUREAUCRACIES THINK, *supra* note 96.

¹⁴³ Several studies cited by David W. Case, *supra* note 130, counsel critical analysis of situations when information regulation is likely to be effective, including William M. Sage, *Regulating Through Information: Disclosure Laws and American*

sign of the requirement;¹⁴⁴ (5) the legal context in which the requirement is added;¹⁴⁵ and, (6) the judicial review and enforce-

Health Care, 99 COLUM. L. REV. 1701, 1801-25 (1999) (discussing regulatory contexts within which disclosure laws are likely to have the greatest influence and promote meaningful change); Paul R. Kleindorfer & Eric W. Orts, *Informational Regulation of Environmental Risks*, 18 RISK ANALYSIS 155, 156 (1998) (asserting that “more careful systematic thinking about the legal and economic nature of [informational regulation] will yield a better prediction about when this approach is likely to work efficiently and effectively and when it will not.”); Tom Tietenberg, *Disclosure Strategies for Pollution Control*, 11 ENVTL. & RESOURCE ECON. 587, 600 (1998) (listing some of the “determinants of successful disclosure strategies” that research to date has identified). Professor Herz notes that “NEPA was enacted against a background with virtually no substantive environmental regulation. . . . NEPA procedures now apply to highly regulated agency decisions. . . . It is therefore an oversimplification to say that NEPA operates independent of and in place of substantive standards.” Herz, *Parallel Universes*, *supra* note 96, at 1682–83. The use of impact analysis to reform the decision making of large, specialized federal bureaucracies will differ from their effectiveness to change how smaller, general purpose local governments act. The role of an agency specifically charged with assisting the implementation of the requirement (e.g., CEQA for NEPA and the Office of Planning and Research for CEQA) may be important. The role of co-equal agencies may also be important, e.g., other federal agencies in the case of NEPA and adjacent local governments in the case of a housing impact requirement imposed on local governments. See Michael Blumm & Steve Brown, *Pluralism and the Environment: The Role of Comment Agencies in NEPA Litigation*, 14 HARV. ENVTL. L. REV. 277 (1990).

¹⁴⁴ Numerous design issues could be relevant, including the range of decisions subject to the requirement, whether the requirement includes a substantive provision or only procedural duties, and the inclusion of a private right of action. As states which adopted “little NEPAs” have shown, states can create a variety of designs of impact assessment requirements. Indeed, the vast literature criticizing NEPA and the little NEPAs could be a treasure trove of ideas for designing a better impact assessment procedure. See, e.g., David R. Hodas, *The Role of Law in Defining Sustainable Development: NEPA Reconsidered*, 3 WIDENER L. SYMP. J. 1 (1998) (recommending that CEQA amend its regulations to require externality valuation and the posting of security for all NEPA decisions in order to create accountability for accuracy in impact assessments). Karkkainen, *Toward a Smarter NEPA*, *supra* note 104, at 903 (recommending post-decision monitoring, centralized adaptive mitigation, and the adoption of an environmental management systems-oriented approach). See generally MANDELKER, *NEPA LAW*, *supra* note 118, at § 11.02.

¹⁴⁵ This parameter refers to existing legal provisions that might interact with or complement the impact assessment requirement. Impact assessment requirements are not “exclusive” regulatory regimes. Their effectiveness does not depend upon their being the only or dominant regulatory regime in operation. Rather, impact assessment requirements are likely to be more effective when combined with other types of regulation such as formal rights and substantive regulation, provided that the other types of regulation are themselves justifiable and well-designed. For example, in the housing context, the existence of other state housing statutes (e.g., comprehensive planning requirements) or fair housing law might affect the effectiveness of the impact assessment requirement because information produced by the impact assessment requirement might trigger enforcement of these complementary laws. The increased effectiveness results from the fact that investigation required by

ment.¹⁴⁶ Each of these elements will directly partially determine whether or not the requirement will be effective. In addition, each of the six elements will also interact with the other parameters to affect results.

Impact assessment requirements are deceptively simple but conceptually complex in practice. The attraction of impact assessment requirements is a form of regulation that can lead to broad, comprehensive reform with minimal regulatory intrusion. The primary criticism is that they do not work.¹⁴⁷ Given the preceding analysis, there can be no *a priori* conceptual answer for the value of any particular application of an impact assessment

impact assessment mechanisms and improvements of decision making caused by their required procedures can result in the “sunshine” necessary to trigger enforcement of various other formal substantive laws. In the case of environmental law, NEPA complements numerous traditional substantive regulatory programs adopted after NEPA, for example, the Clean Water Act and the Clean Air Act. *See, e.g.,* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) (noting the linkage between enforcement of NEPA and other regulation). Professor Herz discusses how the federal government’s adoption of substantive environmental protection (such as the Clean Water Act) had two opposite effects on NEPA’s independence from substantive standards. On the one hand, despite proof of meeting substantive standards, courts still required the EIS process, i.e., the standards do not “preempt” NEPA. On the other hand, “[i]n practice, the EIS process is tied to the application of those standards Thus, NEPA not only helps implement standards but also supplements them.” *See* Herz, *Parallel Universes*, *supra* note 96, at 1682-83. For example, the information identified in an EIS may reveal a likely violation of the Clean Water Act. It is common for NEPA claims to be closely paired with these and other complementary substantive-type environmental laws. As Professor Stewart has opined: “While reflexive law measures and other information-based approaches can make a contribution, they are no substitute for legal controls on conduct, backed up by effective government enforcement and sanctions.” Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 *CAP. U. L. REV.* 21, 22 (2001).

¹⁴⁶ This parameter refers to the availability of a private right of action, standing requirements, standards of review, burdens of proof, and remedies that will affect how courts interpret and apply the requirement. Professor Mandelker notes the important role of judicial enforcement as “a critical component of NEPA’s implementation.” MANDELKER, *NEPA LAW*, *supra* note 118, at 11-13. Courts regularly enforce the formal procedural rules which ground the information and participation rights of participants in the processes, regulated entities and the regulatory beneficiaries. Participants use their information and participation rights to shape policies and decisions. They use their legal right to enforce the procedural rules to claim and to retain their information and participation rights. At the same time, threats of litigation and filing of lawsuits can be an indirect way of pressing other parties to adopt their preferred decisions and policies.

¹⁴⁷ Regarding NEPA, *see* MENDELKER, *NEPA LAW*, *supra* note 118, at §§ 11.1-11.2; Herz, *Parallel Universes*, *supra* note 96, at 1699 (“Environmentalists have argued that NEPA is doomed to irrelevance because real environmental protection can only come from direct substantive limits.”).

requirement in the abstract. An evaluation of a particular proposal considering the specified parameters may provide a persuasive case for the adoption of an impact assessment requirement. Therefore, to consider the value of possible HIA requirements, Part III will briefly sketch a specific model and then Part IV will analyze it under two promising conceptual models.

III

A SKETCH OF A HOUSING IMPACT ASSESSMENT REGIME

This Part will offer a brief sketch of a basic HIA regime for purposes of discussion and analysis. This HIA regime is designed to maximize the potential for integrating housing concerns into local government policy and decision making while respecting the limits of the current system of state-delegated land use power.¹⁴⁸ Each element of it tracks elements of existing legislation, especially the California Environmental Quality Act (CEQA).¹⁴⁹

A. HIA Regulation of Local Governments to Serve State Housing Goals

This Article's focus is remedying the effects of local governments' failure to take housing impacts into consideration in their land use decisions. Since states delegate land use authority to local governments, they are in the best position to regulate the exercise of that discretion and therefore the best level of government to adopt an HIA requirement. Local governments would

¹⁴⁸ The proposed HIA regime could be designed to be more robust by the adoption of any of the following changes: (1) a standard of judicial review less deferential to local government; (2) broader standing requirements; (3) additional remedies; (4) an administrative enforcement mechanism; (5) additional procedural requirements that would increase participation by stakeholders in the HIA process, e.g., a requirement that a local government consult with adjacent local governments; (6) mandatory regulations implementing the statute requiring, e.g., that local governments employ specified methodologies or particular standards in its housing impact analysis; or, (7) designating judges to develop special expertise on HIA matters. See CAL. PUB. RES. CODE § 21167.1(b) (1996) (requiring counties of populations of more than 200,000 to designate judges to develop special expertise on CEQA and related land use matters).

¹⁴⁹ CAL. PUB. RES. CODE §§ 21000–21177 (2000). In addition to statutory provisions, CEQA Guidelines have been codified at 14 CAL. ADMIN. CODE § 15000 *et seq.* For a complete description of CEQA with references to statutory provisions, see MANDELKER, NEPA LAW, *supra* note 118, at § 12.3.

implement the requirement.¹⁵⁰

Assume a state has adopted a broad state housing goal modeled on the Housing Act of 1949, such as “a decent home and a suitable living environment for every state resident.”¹⁵¹ The HIA requirement would be enacted by state statute to promote this goal.¹⁵² The statute would consist of procedural re-

¹⁵⁰ By local governments, this Article intends municipalities, including counties, cities and towns, rather than special function districts, e.g., school districts.

¹⁵¹ A state’s legislative housing goals need not be much more specific than many are now. The HIA regime is only a means for better achieving those regulatory goals.

¹⁵² NEPA and several SEPA’s already allow for the possibility of considering housing impacts as a species of “socio-economic impacts.” Generally, “socio-economic impacts” are project impacts that do not manifest themselves *directly* as changes in the physical environment (e.g., air and water) but may indirectly cause effects in the physical environment (e.g., creation of jobs may lead to more traffic). Cases decided under two SEPA’s (New York and California) require such consideration in certain circumstances. See *Napa Citizens for Honest Gov’t v. Napa County Bd. of Supervisors*, 110 Cal. Rptr. 2d 579 (Cal. Ct. App. 2001) (holding that California’s environmental statute required consideration of housing impacts under the category of “growth-inducing impacts” that might cause physical impacts in the environment outside of a project’s boundaries and finding the discussion in the EIR under review adequate) (discussed *supra* note 98); *Chinese Staff Workers Ass’n v. City of New York*, 502 N.E.2d 176 (N.Y. 1986) (requiring consideration of the possible impacts a proposed luxury housing development might have on displacement of low-income local residents and businesses in city’s determination of whether an environmental impact statement would be required under city regulations implementing the state environmental statute). Given these decisions, instead of adopting a separate statute for housing impacts as proposed here, the Article’s objective would arguably be met by revising NEPA and SEPA’s to add a requirement that “housing impacts” be considered within the same process. This approach would arguably integrate consideration of all relevant impacts in one report following one process. This approach has been rejected for several reasons. The *Chinese Staff* decision turned on New York’s environmental protection statute’s unusually broad definition of “environment” which explicitly includes “existing patterns of population concentration, distribution, or growth, and existing community or neighborhood character.” *Id.* at 179-80. Such a broad definition of environment invites a slippery slope problem. The results of the *Napa Citizens* case and its progeny demonstrate that CEQA and similar statutes would have to be significantly reworked to add housing as a co-equal concern with the environment. See *Vega v. County of Los Angeles*, 2002 WL 66359, *11 (Cal. App. 5th Dist.) (unpublished case interpreting *Napa Citizens* to require consideration of “the physical changes resulting from housing issues,” such as traffic congestion and air pollution, but not the housing needs themselves.); *County of Santa Cruz v. City of San Jose*, 2003 WL 1566913, *21 (Cal. App. 6th Dist.) (unpublished case finding that CEQA only requires a general discussion of projected growth effects.). Just adding a “housing impact” section to NEPA or a SEPA would not accomplish this Article’s goal. As environmental protection statutes, they predictably subordinate housing issues to environmental concerns. Housing would likely remain in the status of a “poor relation” to environmental protection without a thorough re-writing of the statute, including extending a duty to mitigate *housing impacts* not just the environmental impacts that result from socio-economic impacts.

quirements (described, *infra*) and an explicit legislative policy that local governments “avoid or mitigate significant adverse housing impacts whenever it is feasible to do so.”¹⁵³ Feasibility would be defined as it is in CEQA.¹⁵⁴ Like CEQA, the statute would provide for the possibility that localities might approve a project that would have significant negative effects on housing if it adopted a “statement of overriding considerations” with findings supported by substantial evidence.¹⁵⁵

The statute’s requirements would apply to local government land use decisions and policy-making.¹⁵⁶ Following Professor Williams’s suggestion and the analysis in Part I, the HIA requirement would apply to the whole range of local governments’ decisions that affect housing.¹⁵⁷ Unless exempted by the statute, or regulations if any were authorized, the requirement would apply to the full range of local government discretionary actions that may affect housing: infrastructure planning and financing decisions, planning and zoning decisions such as the adoption and amendment of general (or comprehensive) plans and specific

Second, combining the two types of impacts in one report would defeat one of this Article’s primary purposes—to force local government to be the forum in which these tensions and sometimes necessary tradeoffs are explicitly addressed and, ideally, the subject of serious deliberation. In a consolidated environmental/housing impact report the tensions and tradeoffs would probably come “pre-packaged” and apparently resolved when it was presented to the local legislative body. If this were true, the likelihood of local elected officials facing the hard choices and making thoughtful decisions would be less than if there were two impact reports (environmental and housing) which clearly considered the issues from the two perspectives and left the deliberations to the local decisions-makers. Third, the environmental impact issues and the housing impact issues are sufficiently distinct and the relations between them sufficiently complex that it would make the consolidated impact report too complex to be useful. To the degree that NEPA/SEPA critics are correct in their complaint that current EIRs are already too complex to be useful, a combined report would draw further (and perhaps justified) criticism.

¹⁵³ See CAL. PUB. RES. CODE § 21002 (2000) (legislative policy); Johnston & McCartney, *Local Government Implementation of Mitigation Requirements Under the California Environmental Quality Act*, 11 ENVTL. IMPACT ASSESS. REV. 53 (1991).

¹⁵⁴ “Feasible” is defined as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” CAL. PUB. RES. CODE § 21061.1 (1996).

¹⁵⁵ CAL. PUB. RES. CODE §§ 21001.1; 21081(c) (1996).

¹⁵⁶ An actual statute enacting an HIA regime should apply to state agencies, but this analysis is omitted because this Article focuses on local governments’ impact on housing.

¹⁵⁷ If the HIA applied only to a locality’s review of specific development projects, it would be much less effective because the analysis would miss the critical decisions by the local government to privilege certain land uses by its zoning and infrastructure decisions.

plans,¹⁵⁸ approval of development agreements, zoning and rezoning, subdivision approvals, variance, special use permits, and building permits (when discretionary).¹⁵⁹ For discussion purposes, any of these actions, whether initiated by the local government itself or in response to a private party's application, will be called a "project."

*B. The Preparation of a Preliminary Housing
Impact Assessment*

For any covered local government land use project, the local government must prepare a preliminary housing impact assessment (PHIA) to determine if the project may have a significant adverse impact on the supply, affordability or availability of housing.

There are at least three types of "adverse impacts" to housing that could be investigated and considered for their potential level of "significance." The first type of adverse impact is that the project will decrease the supply, affordability or availability of housing likely to be available in the jurisdiction in the future.¹⁶⁰ The second type is that the project will increase demand for housing, including affordable housing, in the jurisdiction that will not be met by the host jurisdiction under its current zoning and other policies.¹⁶¹ A third type is that a project will have a disparate

¹⁵⁸ The analysis required of a comprehensive plan or a zoning ordinance may be functionally compared to a "program EIS," while the analysis required under an HIA for a specific development project would be like a "project EIS." For an excellent discussion of the benefits and difficulties of such programmatic impact assessments in the environmental context, see Cooper, *supra*, note 131.

¹⁵⁹ Professor Daniel Mandelker, the APA, and others have argued that local governments' specific land use decisions and planning work should be better integrated and have advanced concrete proposals to this end. See, e.g., Daniel Mandelker, *Melding State Environmental Policy Acts with Land Use Planning and Regulations*, 49 LAND USE LAW & ZONING DIGEST 3 (1997); AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK ch. 12 (2002). This Article offers a "second-best" solution to the major reforms envisioned by this ideal. In states with comprehensive planning requirements incorporating a detailed housing element, the integration urged by Mandelker and others could occur if an HIA were adopted that applied to the adoption of comprehensive plans.

¹⁶⁰ This impact would occur, for example, if a jurisdiction rezoned residential land to commercial use or reduced the minimum allowable density of land currently zoned residential. Similarly, this adverse impact might result from a city's decision to forego access to additional sewage or water capacity. This category could include projects such as increasing regulatory requirements or standards.

¹⁶¹ This impact would occur, for example, if a city approved a commercial development that would employ low-wage workers when the city's own housing supply would not likely be increased to provide housing affordable to the workers and,

impact on housing available to members of protected classes under the federal Fair Housing Act and/or increase racial residential segregation in the jurisdiction.¹⁶²

The subject of the HIA is the potential impacts on the housing opportunities of the intended beneficiaries of the regulation, e.g., persons living in substandard housing, overcrowded housing or enduring excessive housing cost burdens within the jurisdiction, and homeless people in the jurisdiction.¹⁶³ The HIA does *not* consider impacts of proposed projects on the currently well-housed within the jurisdiction unless a proposed action would take away or degrade their housing to a significant level.

Under the proposed model, a significance threshold for each of these potential housing impacts would be specified as a percentage of change from a previous state of affairs.¹⁶⁴ Alternatively, “significance” could be defined qualitatively.¹⁶⁵ The HIA would address both harms to housing stock currently available to the regulatory beneficiaries within the jurisdiction and harms to their housing interests or future housing opportunities in the jurisdiction.¹⁶⁶ The HIA would be structured to require local governments to address the potential impacts to a variety of different types of housing and at various household income levels, e.g., multi-family rental, homeownership, senior housing, and special needs.

based upon historical trends, foreseeable housing vacancy rates of the types of housing that the workers need would be low.

¹⁶² Including this impact expands the scope of harms to include “fair housing” concerns, i.e., those that should be considered in the “Analysis of Impediments to Fair Housing Choice” requirement of the federally-mandated Consolidated Plan, *supra* note 97. Including this impact in effect incorporates federal fair housing law into local governments’ land use decisions.

¹⁶³ See Norman Williams, Jr., *The Three Systems of Land Use Control (Or, Exclusionary Zoning and Revision of the Enabling Legislation)*, 25 RUTGERS L. REV. 80, 98 (1970) (“[i]n a new system a critical point would be to give direct legal status to, and recognition of [the third party nonbeneficiaries of the system].”).

¹⁶⁴ An early version of the proposed federal “housing impact analysis” bill, *supra* note 98, specified a five percent change as the trigger of significance. If significance is a function of the threshold size of development or of effect, the measure becomes similar to that used in development of regional impact regimes.

¹⁶⁵ See, e.g., CEQA’s definition of “significant effect on the environment,” CAL. PUB. RES. CODE § 21068 (1976) (“a substantial, or potentially substantial, adverse change in the environment”). Individual actions that may have a significant effect cumulatively are also subject to the impact assessment requirement. CAL. PUB. RES. CODE § 21083(b)(2) (1981).

¹⁶⁶ This could include affordable housing with expiring restrictions, or it could include actions that might cause sharp increases in housing prices that might force current renters out of the jurisdiction such as gentrification.

C. *Adoption of a Negative Declaration or Preparation of a Full HIA*

If the PHIA finds that the project would not cause any significant housing impact, the local government would adopt a “negative declaration,” terminating the HIA process. If the PHIA finds that the project may cause a significant housing impact, but the impact could be mitigated to a level of insignificance and the project proponent modifies the project to incorporate the mitigation measures, the local government could adopt a “mitigated negative declaration” expressing its findings, thereby terminating the HIA process.¹⁶⁷

Otherwise, if the PHIA finds that the project may cause a significant housing impact, a full HIA process would be required. The local government would be required to produce a draft HIA (DHIA).¹⁶⁸ If an HIA is required, the agency may involve regulated entities and regulatory beneficiaries in “scoping” meetings at which issues needing to be addressed are raised, appropriate methodologies and other resources are identified, and initial alternatives to the proposed project and potential mitigations are brainstormed.¹⁶⁹ The DHIA would be required to include a specification of potentially significant housing impacts, alternatives to the proposal that would generate fewer or less significant housing impacts, and measures that could mitigate significant housing impacts. The local government would be required to distribute the DHIA to the public and interested agencies (including adjacent local governments) and hold a public hearing for comment. Once a DHIA is complete and disseminated, interested persons may make responses to the DHIA in the form of comments on the identified housing impacts, suggested alterna-

¹⁶⁷ Environmental advocates dispute the value of “mitigated negative declarations.” On the one hand, the agency is apparently committing itself to some mitigation measures, but many fear that to avoid preparing a complete EIS, these agencies analyses are “based on less rigorous scientific evidence, little or no public participation, and consideration of fewer alternatives.” MANDELKER, *NEPA LAW*, *supra* note 118, at 11-19. Professor Karkkainen proposes a “contingent FONSI,” a revised version of “findings of no significant impact” (the NEPA equivalent of CEQA’s mitigated negative declarations) as a potentially useful reform of NEPA. Karkkainen, *Toward a Smarter NEPA*, *supra* note 104, at 942-46.

¹⁶⁸ Complications that would be caused by allowing delegation of the preparation of the HIA (the principal-agent problem) are beyond the scope of this Article.

¹⁶⁹ A recent law passed in California, codified at CAL. PUB. RES. CODE § 21081.7 (2001), revises CEQA’s procedural duties to require agencies to call at least one “scoping” meeting for a project of statewide, regional, or area-wide significance and to provide notice to any person who has filed a written request to be notified.

tives, and proposed mitigations at the public hearing at which it is released and during the public comment period. The local government would be required to produce a final HIA (FHIA) which would include responses to comments received. The local government would adopt the FHIA at a public hearing before making a decision on the project. Interested persons may again testify at this public hearing.

D. The Adoption of a Final HIA

In making a final decision on the project, the local government would be required to adopt its FHIA with findings supported by substantial evidence in the record. At this time, the government would have three options: (1) it could deny the project because it deems the housing impacts are not able to be sufficiently mitigated; (2) it could approve a revised project which includes mitigation measures believed to reduce significant housing impacts to a level of insignificance; or (3) it could adopt a “Statement of Overriding Considerations” (SOC) expressing its view that, while the project to be approved will have significant housing impacts that may not be mitigated, other specified considerations justify approving the project.

E. Judicial Review

The statute would provide for judicial review of the local government’s compliance with HIA requirements. Persons and organizations with standing could challenge the local government’s decision to issue a negative declaration or a mitigated negative declaration, the adequacy of a FHIA, the sufficiency of a SOC, or any procedural failures. At a minimum, inadequately housed persons living within the jurisdiction, housing developers and organizations operating within the jurisdiction, and adjacent local governments would qualify for standing.¹⁷⁰

The standard of review for all challenges on non-compliance with the statute would be the “prejudicial abuse of discretion”

¹⁷⁰ See Shelley Ross Saxer, *Local Autonomy or Regionalism?: Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 IND. L. REV. 659, 661–663 (1997) (discussing standing issues); *Town of Mesilla v. City of Las Cruces*, 898 P.2d 121 (N.M. Ct. App. 1995) (adjacent city has standing to sue city for rezoning that may cause aesthetic and economic injury; plaintiff town was attempting to protect the quality of life in its boundaries, not exercise its policy power outside of its own boundaries).

standard.¹⁷¹ Challenges to the adequacy of FHIA, the adequacy of mitigation measures, and the sufficiency of a SOC would be reviewed under the same standard and the “rule of reason.” The standard remedy for successful litigation would be injunctive relief forcing the city to either produce an HIA (if it did not and should have), to prepare an adequate HIA (if it initially produced an inadequate one), to prepare a legally sufficient SOC, or to perform any other required but neglected procedural duty. Declaratory relief could be provided when appropriate.

F. Mitigation

Avoiding and mitigating significant housing impacts would be the central focus of the HIA regime. Carrying forward Professor Williams’s insight that all three land use control systems can affect housing, broadly speaking “adverse housing impacts” can have three components: financial, land/zoning, and infrastructure.¹⁷² To be effective, mitigation of housing impacts may need to include the same three components. In part, this means that mitigations in the HIA context would not fall solely on developers. Subject to “takings” and other limitations, local governments could pass on some portion of the financial or land component to developers as is currently done in the cases of housing impact fees and land dedications.¹⁷³ Local governments

¹⁷¹ “An ‘abuse of discretion’ is established [under CEQA] if the agency has not proceeded as required ‘by law’ or if its decision is not supported by ‘substantial evidence.’” CAL. PUB. RES. CODE § 21168.5 (1972).

¹⁷² Except where vacancy rates are consistently high, housing demand must be met by increasing the supply of housing services. In a low vacancy market, housing services can be increased by overcrowding or by adding additional housing units to the housing stock. Overcrowding is not a preferred public policy for many reasons. Additional housing development can be of similar densities to current ones or at higher densities, making more efficient use of scarce land. Assuming that to a large extent the preferred public policy to meet housing demand will be to create additional housing units, there are three dimensions to accommodating the housing demand: available land with appropriate zoning; availability of necessary infrastructure; and, in some cases, filling the financial gap to make construction and maintenance of housing affordable. Thus, when considered from the standpoint of meeting housing needs by producing additional housing, there are three dimensions to “housing impacts.” This analysis assumes the availability and interest of capable private for-profit and/or non-profit housing developers to actually build and operate the new housing where adequate land properly zoned and serviced by infrastructure and sufficient financing exists.

¹⁷³ When local governments require developers seeking discretionary land use approvals to provide possessory interests in land or pay impact fees to the local government as a condition of receiving the approval, the condition may be challenged as a “taking” under the Fifth Amendment “just compensation” clause of the U.S. Con-

would also be required to adopt feasible zoning and infrastructure mitigations to reduce housing impacts to an insignificant level.

Mitigation could include negotiating with a developer of a commercial project to revise the project to include residential uses or assessing a housing linkage fee.¹⁷⁴ A local government anticipating extensive commercial development might adopt a housing linkage fee ordinance to simplify the HIA process on such projects and create predictability for developers. Mitigation could also be achieved by the local government reducing its development standards to reduce the cost of producing housing in the jurisdiction, rezoning commercial land into residential land, increasing the minimum required density of existing residentially-zoned land, or adopting an inclusionary zoning ordinance or other policies generating a relatively predictable amount of units.¹⁷⁵

stitution. In such a case, courts will test the constitutionality of the condition by applying the tests articulated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (there must be an “essential nexus” between a legitimate government interest and the condition), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (condition must be roughly proportional to negative impacts caused by the proposed development). Under a properly administered HIA regime, the *Nollan/Dolan* requirements would be satisfied. *Nollan*’s “essential nexus” test would be met because conditions would not be imposed upon a development until after a housing impact analysis was performed in which it was found that the development would cause a significant housing impact, and the mitigation requirement imposed on the development (e.g., housing impact fees) would have a direct and logical relationship to curing the housing impact identified. The *Dolan* “rough proportionality” test would be satisfied because the nature and extent of the mitigation obligation would be determined by an individualized assessment of the proposed development’s impact on housing contained in the HIA statement. Any mitigation measure not considered under the *Nollan/Dolan* analysis would be subject to the ad hoc balancing test of *Pennsylvania Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). A case decided in 2001, which may be the first case testing an inclusionary zoning ordinance against a facial takings attack, found that it was not a taking. *Home Builders Ass’n of N. Cal. V. City of Napa*, 108 Cal. Rptr. 60 (Cal. Ct. App. 2001).

¹⁷⁴ Like CEQA, the HIA regime would not give additional powers to local governments for mitigation; they would need to use their existing powers which are wholly adequate. See *supra* note 44 and accompanying text.

¹⁷⁵ In some jurisdictions, mitigating the land/zoning and infrastructure components would require local governments to zone sufficient land for residential use at appropriate densities. In jurisdictions with sufficient housing supply but limited affordability, different measures would be appropriate. For each type of negative impact to housing identified through the HIA process, various types of mitigations may be appropriate. If existing housing is to be demolished, mitigation includes replacement requirements of the type found in public housing law and in some states’ redevelopment law, e.g., California. Conversion of existing residential units to hotel uses

IV

TWO REGULATORY PARADIGMS

Part IV considers whether an HIA regime including both formal legal rules (procedural requirements) and a legislative policy (mitigation obligation) could benefit housing through two distinct regulatory paradigms. The first paradigm, the Interest Group Representation (representation paradigm) is analyzed in Section A. In this paradigm, the HIA regime generates information that identifies specific objectives for housing supporters to pursue by traditional political means and through litigation. The state regulates by enabling the formation of local housing movements which pressure and restrain local governments to serve state housing goals.

A second more complex paradigm (reflexive law paradigm) is analyzed in Section B. In this paradigm, the HIA regime revises the norms that guide local government decision making about housing. Decision making under these norms favors housing outcomes more frequently because consideration of housing impacts has become internalized by the key participants and integrated into the decision making system. In this regime, the state regulates by urging local governments to adopt norms that are consistent with localism, yet promote state housing goals.

A. The Interest Group Representation Paradigm

In the representation paradigm, housing interests of persons who are inadequately housed are recognized as being insufficiently represented in current local governments' decision making because of the historical lack of effective participation of these persons or those representing their interests in political and policy making processes. In this paradigm, the HIA regime could be successful by eliciting broad and sustained participation in its processes, in effect, by creating local housing movements wielding significant political and legal power. The interests of the components of the local housing movements are by no means monolithic. Yet their cumulative numbers and sophistication effect a change in the attention and consideration local governments give to housing concerns. The housing movement

could be mitigated by a conversion ordinance. *See, e.g., San Remo Hotel L.P. v. San Francisco*, 117 Cal. Rptr. 2d 269 (Cal. 2002) (upholding San Francisco's Housing Conversion Ordinance against a taking claim).

demands the analysis promised by the HIA regime and uses it to press local governments to adopt measures to avoid and mitigate significant housing impacts as well as to adopt policies favorable to housing. The housing movement makes full use of the HIA regime's procedural mandates, and often litigates to enforce every aspect of the HIA regime. Strong local housing movements are a primary reason why local governments attending to the housing needs of their residents actually do so.¹⁷⁶

1. Fostering Local Housing Movements

The HIA regime creates numerous opportunities for participation and engagement by regulated entities, regulatory beneficiaries, and other members of the public.¹⁷⁷ Each local government regularly makes decisions that would be subject to the HIA requirements. While not all decisions would require a full HIA process, there would likely be at least one such decision at every city council or board of supervisors meeting. In many jurisdictions, such meetings are held every two weeks. These participation opportunities far exceed any provided by previous regulatory frameworks states have used to regulate local governments to promote housing goals. In principle, they are sufficient to foster a significant housing movement. Indeed, one reviewer of a SEPA in a small state fairly gushed at the potential such a regime has for eliciting participation.¹⁷⁸ She opined that the Connecticut Environmental Protection Act expands “the number of potential guardians of the public interest in the environment into the millions, instead of relying exclusively on the

¹⁷⁶ For example, in 2002, a local housing group in Oakland, California, helped pass a “just cause eviction” ordinance. See Measure EE (Just Cause for Eviction Law), available at <http://www.justcauseoakland.org/home/index.php> (last visited Jan. 18, 2004). Moreover, due to the efforts of housing advocates in San Diego, California, that city declared a “housing state of emergency,” passed a fifty-five million dollar bond for affordable housing, and adopted an inclusionary zoning ordinance and an expedited permit process for infill and affordable housing. See Policylink, *San Diego City Council Enacts Inclusionary Housing*, available at <http://www.policylink.org/edupdates/update7.htm#Regional2> (last visited Jan. 18, 2004). *Shelterforce Magazine* regularly publishes stories chronicling the efforts and successes of local housing movements. See also JULIET Z. SALTMAN, *OPEN HOUSING: DYNAMICS OF A SOCIAL MOVEMENT* 39-42 (1978) (providing a historical account linking the open housing movement to the civil rights movement).

¹⁷⁷ See *supra* Part III, describing participation opportunities in the basic HIA model.

¹⁷⁸ Jennifer E. Sills, *The Connecticut Environmental Protection Act (“CEPA”): Enabling Citizens to Speak for the Environment*, 70 *CONN. BAR J.* 353 (1996).

limited resources of a particular agency.”¹⁷⁹

The housing movements will consist primarily of participants drawn from the following groups: regulatory beneficiaries, housing advocates, other community organizations, public interest attorneys, and housing developers (both for-profit and non-profit).¹⁸⁰ These participants will be joined in their work at times by adjacent local governments, smart growth environmentalists interested in social equity, business groups concerned about workforce housing,¹⁸¹ and housing or planning department insiders. In various ways, the HIA regime lures these groups into participation.

The intended regulatory beneficiaries of an HIA requirement are persons who are not currently adequately or affordably housed, e.g., those within the jurisdiction in substandard and overcrowded housing and those shouldering excessive housing costs. Admittedly, getting regulatory beneficiaries involved would be a challenge.¹⁸² The HIA regime does not solve the collective action problem presented by the weak and diffuse interest individual intended beneficiaries have in participating in local governments' land use decisions that may impact their housing interests. The HIA only provides a much-needed focus, frequent opportunity, and incentive for organizing by intended benefi-

¹⁷⁹ *Id.* at 353.

¹⁸⁰ Each of the groups mentioned has a direct interest in promoting or opposing housing development. And, historically, each have been involved in local government housing policy and project decisions.

¹⁸¹ See, e.g., Terry J. Tondro, *Sprawl and Its Enemies: An Introductory Discussion of Two Cities' Efforts to Control Sprawl*, 34 CONN. L. REV. 511, 518 (2002). “The Silicon Valley Manufacturing Group—made up of CEO’s—actively presses local zoning commissions to approve the development of affordable housing near employment centers.” *Id.* at 518. Local chambers of commerce whose members often employ service workers earning relatively low wages have actively engaged in local housing policy-making and decisions. See, e.g., Tim Iglesias, *New Approach to NIMBY*, 12 J. OF AFFORDABLE HOUS. & CMTY. DEV. 78, 88 (2002) (discussing support from “the Napa Valley Wine Train, the Chamber of Commerce, the Hispanic Network, the Conference Visitation Bureau, and others” for a seventeen unit low-income housing development in the City of Napa, California).

¹⁸² See Luke Cole, *Macho Law Brains, Public Citizens, and Grassroots Activists: Three Models of Environmental Advocacy*, 14 VA. ENVTL. L.J. 687 (1995) (analyzing specific opportunities for participation provided by EISs and how to use them). Note that organizing individuals to participate in public discussions about the housing impacts of particular project proposals is likely to be easier than mobilizing them repetitively for longer-term planning processes. Moreover, part of the HIA's effectiveness is that it requires local governments themselves to conduct analysis and consideration of potential housing impacts on the intended beneficiaries whether or not they actually participate.

ciaries to overcome the collective action problem. Usually, intended beneficiaries must first fight and use substantial organizing and political capital to get recognized and to win a place for their voices and interests. However, HIA provides an established “place” for their voices, a structure that waits for and expects their interests to be expressed.¹⁸³ Accommodation by the HIA regime could attract and enable their participation. But the effectiveness of the HIA regime does not depend upon broad participation by the primary regulatory beneficiaries because it is likely to promote substantial participation by groups representing the beneficiaries’ interests.

The establishment of the HIA regime provides housing developers and housing advocates with particularly strong incentives to participate. It generally lowers their costs to participate because they will not have to attract attention to housing impacts or justify their participation in a decision affecting housing. The HIA regime also generally increases the potential benefits to be gained from housing developers’ and advocates’ participation both because the HIA process identifies specific objectives for their advocacy in the project alternatives and proposed mitigations, and because the HIA regime makes it more likely that they can influence local governments to make better housing decisions. Of course, housing developers and advocates will weigh relative costs and benefits of participation in any given decision. They will invest their efforts in seeking to influence decisions with the best ratio of benefits to costs. This might mean focusing on decisions that are likely to be close so that their efforts might provide the necessary pressure to win an important vote.

Non-profit developers would bring a special concern for low-income housing as well as technical skills enabling them to contribute to high-level discussions, e.g., about feasibility of a proposed mitigation. For-profit housing developers, including multi-family rental housing developers, are another potentially important group. Home builder groups are already well-organized and attentive to local housing policy. To be sure, they will often disagree with the other elements of the housing movement. These

¹⁸³ The HIA strategy addresses both the structural elements of subordination (by procedurally creating a place and a hearing specifically for historically-slighted housing interests) and the desire on the part of subordinated groups to experience their individual and collective agency (by creating opportunities for specific individuals and groups to speak, organize, lead and help create housing opportunities for themselves and others in their group).

developers are likely to focus on the negative housing impacts arguably created by local governments' regulatory standards and even point out the potential negative effects on housing of certain policies favored by non-profit affordable housing developers, such as inclusionary zoning or housing impact fees. This conflict would probably foster lively and broad participation in the HIA process.

In cases where significant spillover impacts are feared, nearby local governments would be likely to participate. The participation and enforcement opportunities provided by the HIA regime will change their cost-benefit calculus for paying attention to nearby cities' decisions that may cause housing impact spillovers in their jurisdiction. In other words, the HIA regime provides adjacent local governments with a legal tool specifically designed to enable them to pressure a neighboring government to internalize the housing impacts caused by its decisions. Currently, local governments often consult with each other on environmental issues because of and through the procedures afforded by NEPA and SEPA. They are likely to take the opportunity to do the same on housing issues under an HIA regime.¹⁸⁴

While some environmentalists might attempt to use the HIA process to undermine its regulatory goals, others may actively support housing, especially if it is likely to be infill, higher density housing and located near transit. Environmentalist supporters of housing would often bring substantial direct experience in using NEPA or a SEPA to achieve environmental goals. They could mentor housing advocates in making the most effective use of the regime.

When large or particularly important projects or policies are under consideration, the state housing or community development agency¹⁸⁵ or a regional planning body (if one exists) would be more likely to participate, provide comments, as well as suggest alternatives and mitigations.¹⁸⁶

¹⁸⁴ The active participation by nearby cities before each of the CEQA lawsuits concerning "housing impacts," *supra* note 98, confirms the reasonableness of this assumption. (Author has on file court briefs detailing local governments' participation in CEQA procedures prior to litigation).

¹⁸⁵ Currently in California, the Department of Housing and Community Development receives a copy of any EIS produced by a local government. Typically, the agency has no significant involvement unless it receives a complaint.

¹⁸⁶ For a proposal to increase the level and effectiveness of executive oversight in the NEPA context that might be transferable to the HIA context, see William L.

Historically, other housing laws have not elicited widespread, sustained local housing movements. However, the HIA regime may help overcome many of the obstacles to organization and sustainability of local housing movements. It offers many more opportunities for participation, a more diverse set of possible roles for non-lawyers, and the potential for significant impact on local housing policy. Together, these groups could *cumulatively* sustain strong local housing movements.

In general, the more participation, and the more sophisticated participation, the more effective the HIA would be.¹⁸⁷ Over time, the arguments about housing impacts, analyses of them, and suggested mitigations will become more familiar to local housing movements and local governments. With experimentation, local governments will learn about and share which analyses are more predictive and which mitigation measures are most effective. If their advocacy is strong, local housing movements will successfully create political pressure on local governments to avoid harms to housing and to balance competing needs more in favor of housing.

2. *Pressuring Local Governments*

Pro-housing participants are empowered by the formal rules guaranteeing participation. They are now part of the process. They now have relevant information generated by the formal rules process or can demand it. They now have power to add information and suggestions and to pressure the government for adequate analysis and feasible mitigations.

The HIA would add an important element to the political balancing process that is currently often missing: regular, specific, informed, and accountable consideration of an action's impact on housing in the jurisdiction by a local housing movement. In this way, HIA creates a new balance of power, tilting a bit toward housing interests. The HIA regime makes housing an issue when it often was not, and because so many local governments' land use decisions have significant housing implications, this issue will

Andreen, *In Pursuit of NEPA's Promise: The Role of Executive Oversight in the Implementation of Environmental Policy*, 64 *IND. L.J.* 205 (1989).

¹⁸⁷ William A. Tilleman, *Public Participation in the Environmental Impact Assessment Process: A Comparative Study of Impact Assessment in Canada, the United States and the European Community*, 33 *COLUM. J. TRANSNAT'L L.* 337, 346 (1995) (“[t]he degree of participation affects the quality of the [environmental impact analysis] process, which in turn affects the quality of the decision about a project.”).

keep coming up. Adding housing issues regularly into a broader range of decisions creates opportunities for housing to get something and for tradeoffs that can benefit housing. The challenge facing the pro-housing participants is to leverage the HIA regime's formal procedural rules and its legislative policy (viz. housing impacts should be mitigated when feasible) into informal rules, practices and policies that actually avoid housing harms, mitigate housing impacts, and otherwise further housing interests.

The housing movement's opportunity to influence comes from the fact that the interests of local governments and developers in development decisions are not absolute but relative and subject to complex cost and benefit analysis. Time and money are almost always important to the developer, and thus to the government if it wants to approve a project. The housing movement will use the information generated by the HIA regime, its own ideas and arguments as well as procedural tactics to pressure local governments and the developers for compromises and changes in the project's design, scope, timing or other dimensions. At the government's insistence, proposed developments can be, and often are, revised in a wide variety of ways to serve several objectives while still maintaining profitability. Sometimes, local governments provide a contribution to the development (e.g., land) or give a concession to the developer for a desired change. For example, a government might increase the permissible density on a given area of land so that a developer can build more units in the project. The "density bonus" can either increase the supply of housing a proposal will provide, or can be structured to provide some affordable units at the same rate of return.

Local governments will develop reputations for how strongly they enforce the HIA regime. This information will be communicated among cooperative developers. All else being equal, developers will prefer to develop in cities where the HIA regime is less burdensome than other cities. Apart from changes in current municipal finance, cities which desire to attract commercial development will want to make the HIA regime easier for developers.¹⁸⁸ If cities try to do this by blatantly evading the procedural mandates, they risk enforcement actions by housing

¹⁸⁸ On the public choice model, the addition of the HIA regime will introduce another element to competition among cities for voter-consumer-taxpayers but also

developers, housing advocates and adjacent local governments bringing delays and costs that contradict their goal. For this reason, cities are more likely to soften the requirements in a more sophisticated way. However, faced with a strong and equally sophisticated housing movement, they are more likely to adopt either token measures or decide to accommodate the housing movement by adopting various policies and practices (e.g., pre-meeting with developers to orient them to local requirements and policies that anticipate the need to mitigate housing impacts) that meet the housing movement's demands, but reduce delays and uncertainties facing developers. Moving resistant governments from token measures to substantial ones will be a test of the strength of the housing movement.

When the housing movement is successful, developers will often accommodate the new demands.¹⁸⁹ For example, commercial developers seek to maximize profits and highly value speedy and predictable approvals for their proposals both because time is truly money to them and because the profitability of their proposals is based upon particular market predictions. Given these clear goals and preferences, once the HIA regime is established, it will be in the rational self-interest of commercial developers to consider proposing projects with fewer housing impacts and/or which incorporate some mitigation of inevitable housing impacts. By doing this, they are likely to either avoid an HIA altogether (by getting a negative declaration or mitigated negative declaration), or at least have a quicker process than would occur if they ignore the HIA regime. Local governments' staff and elected of-

for desired development. The argument here is that courts' enforcement of the HIA regime will establish a "floor" for HIA practices.

¹⁸⁹ A popular handbook for developers published by the Urban Land Institute (a non-profit organization serving developers' interests) counsels such an approach:

The interplay of private development activities with public regulation need not be an adversarial one. The benefits of cooperation—and the costs of conflict—far outweigh the benefits of unwilling compromises reached through confrontation and struggle. . . . By using a cooperative approach, private developers and public officials can focus their energies on planning to achieve an appropriate quality of development, rather than on countering each other's tactics. Besides assuring higher quality, cooperation does, after all, lower development costs. Cooperation reduces delays and risks, assures a more orderly process of development, eases the timely provision of needed infrastructure, and avoids litigation, with its diversion of both funds and attention from community development.

URBAN LAND INSTITUTE, *WORKING WITH THE COMMUNITY: A DEVELOPER'S GUIDE* 3-4 (1985).

officials are likely to welcome such enlightened self-interested proposals because it is easier for them to apply and complete their duties under the HIA regime.

As local governments and developers adjust to the HIA regime, local housing movements within a region could coordinate to learn lessons from each other and support each other's campaigns to become more effective. However, political pressure alone will not be enough to win many conflicts.

3. *Judicial Enforcement of the HIA Regime and Complementary Housing Laws*

The challenge facing local housing movements is using their enforcement rights to leverage recognition and application of the housing mitigation policy through judicial enforcement of the HIA regime's formal rules (the procedural requirements). They may also advance their interests by using the HIA regime to increase enforcement of complementary housing laws.

NEPA and especially SEPA jurisprudence provide compelling evidence that courts would be competent to enforce an HIA regime.¹⁹⁰ In a manner parallel to NEPA and SEPAs, potential enforcement problems of the HIA regime itself include: failure of a city to apply an HIA requirement when it should be applied, HIAs with inadequate content, other procedural failures (not publishing a DHIA or not holding a public hearing), and the adoption of an insufficient SOC.¹⁹¹ The federal judiciary and state judiciaries already have vast experience enforcing NEPA.

California's courts have decided many important issues in the CEQA context that would likely arise if states were to adopt an HIA requirement modeled on CEQA and impose it on local governments. For example, state courts have determined that CEQA's impact assessment requirements may be required on a wide range of government projects as well as on private development projects.¹⁹² Furthermore, they have determined in numerous cases when "the discussion of environmental impacts in an impact report was adequate, that environmental impacts were mitigated, or that the agency had properly adopted a statement

¹⁹⁰ See generally, MANDELKER, NEPA LAW, *supra* note 118 (especially Chapter 12, State Environmental Policy Acts).

¹⁹¹ See *id.* at § 12.24, 12-99 and cases collected interpreting CEQA in n.21.

¹⁹² Friends of Mammoth v. Board of Supervisors, 502 P.2d 1049 (Cal. 1972) (applying CEQA to a conditional use permit).

of overriding considerations.”¹⁹³ CEQA case law and some NEPA case law would likely be persuasive authority on parallel issues as they arise in the HIA context.

A common problem that the housing movement is likely to face is that resistant governments may simply abide by the formal procedural requirements, but on every occasion adopt a SOC, refusing to mitigate significant housing impacts even where, in the view of housing advocates, useful mitigation was feasible. The proposed regime requires that findings supporting a SOC must be supported by substantial evidence in the record.¹⁹⁴ Courts can apply this substantial evidence standard of review in a manner more or less deferential to local governments. The typical remedy for a successful plaintiff, viz. remand to the local government for making sufficient findings, merely gives the local government another chance to draft more legally defensible findings.¹⁹⁵ Yet through frequent litigation of this issue, a strong housing movement would force local governments to balance actual competing interests more carefully since they would be aware that their findings supporting SOCs would be regularly challenged in court. In order to make sufficient findings, local governments would need to identify and place in the record facts supporting their balancing of the interests. To the degree that proposed policies do in fact significantly harm local housing interests, more careful balancing will lead to more decisions favoring housing.

Previous attempts to place housing obligations on local gov-

¹⁹³ Similarly, it is unlikely that the imposition of an HIA requirement itself on a private development project would constitute a “temporary regulatory taking.” *First English* recognized the possibility of a temporary taking and provided that damages may be a required constitutional remedy as “compensation” under the Fifth Amendment. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987). Recently, the Court held in *Tahoe-Sierra* that normal delays in the administration of land use authority would not be a per se taking under *Lucas* and should generally be analyzed under the *Pennsylvania Central* ad hoc balancing factors. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 328-42 (2002). The Court also indicated that delays longer than a year may be suspect. *Id.* at 341. It is unlikely that the HIA process would delay projects more than a year.

¹⁹⁴ See *supra* note 149 and accompanying text.

¹⁹⁵ Winning an injunction ordering the local government to perform its legal duties under the HIA may also give advocates negotiation leverage. See Barton H. Thompson, Jr., Note, *Injunction Negotiation: An Economic, Moral and Legal Analysis*, 27 STAN. L. REV. 1563 (1975) (discussing how enjoined parties often attempt to negotiate with successful plaintiffs to resolve litigation).

ernments have faltered in part for lack of enforcement.¹⁹⁶ Notably, in regard to existing enforceable housing obligations, e.g., fair housing law, the enforcement context is usually a local government's consideration of a housing (often affordable housing) proposal where housing advocates' abilities and interests in bringing a lawsuit are conflicted.¹⁹⁷ Because the HIA regime includes within its scope the full range of local governments' decisions that can affect housing, it would provide a much broader set of opportunities for engagement and enforcement of the HIA regime and of complementary housing laws where the interests of housing advocates and those who need housing would not be so conflicted.¹⁹⁸ This fact, combined with broad standing requirements, would increase the number of enforcement actions brought by the housing movement.

The HIA regime could also increase the pressure on local governments to fulfill their obligations under complementary housing laws.¹⁹⁹ Federal fair housing law already applies to all local governments, but the HIA regime would in effect *incorporate* fair housing law into local governments' decision making in a way that it has never been before.²⁰⁰ Under federal fair housing law, a plaintiff may establish a prima facie case of discrimination under a "disparate impact" theory by demonstrating a challenged action causes a disparate impact on members of protected classes.²⁰¹ In some cases, the HIA process may reveal significant po-

¹⁹⁶ See Note, *State-Sponsored Growth Management as a Remedy for Exclusionary Zoning*, 108 HARV. L. REV. 1127 (1995); Paul K. Stockman, Note, *Anti-Snob Zoning in Massachusetts: Assessing One Attempt at Opening the Suburbs to Affordable Housing*, 78 VA. L. REV. 535 (1992). See, e.g., Brian Augusta, *Building Housing from the Ground Up: Strengthening California Law to Ensure Adequate Locations for Affordable Housing*, 39 SANTA CLARA L. REV. 503 (1999); Ben Field, *Why Our Fair Share Housing Laws Fail*, 34 SANTA CLARA L. REV. 35 (1993); Peter W. Saltsich, Jr., *Federal Influence on Local Land Use Regulations: The Fair Housing Act Amendments*, J. OF AFFORDABLE HOUS. & CMTY. DEV. L. (Spring 2000).

¹⁹⁷ On the one hand, housing advocates want to enforce housing obligations on local governments, but practically, bringing a lawsuit to enforce such a duty in the context of a particular housing proposal seeking a permit approval may sacrifice the actual units because by the time the lawsuit is tried and won, the land or funding for the proposal may no longer be available.

¹⁹⁸ For example, housing advocates could bring a challenge to a local government's inadequate HIA regarding a proposed commercial development without facing the tradeoff described at *supra* note 197.

¹⁹⁹ See *supra* note 145 and accompanying text.

²⁰⁰ The federal Fair Housing Act is commonly known as Title VIII of the Civil Rights Act of 1968, codified at 42 U.S.C. § 3601.

²⁰¹ While the statute did not expressly provide for a disparate impact theory, all federal circuits recognize it (although they are not in agreement on the relative bur-

tential housing impacts constituting discriminatory impacts in a disparate impact theory. Because of this possible exposure, local governments will need to identify sufficiently legitimate governmental objectives to justify the impacts, or face possible fair housing litigation. Prior to this, the potential for enforcement of fair housing law was so unlikely that local governments could practically ignore it.

In addition, in jurisdictions with mandatory housing planning requirements enforced by requirements for consistency findings, information produced by the HIA regime identifying significant potential housing impacts may enable advocates to challenge consistency findings more frequently and more successfully, thus holding local governments accountable to implementing their adopted housing plans. This additional enforcement of these planning requirements would result in increasing their importance.

Thus, litigation and threats of litigation are likely to be important in enforcing an HIA's requirements. The likelihood of enforcement must be high enough so that local governments will fulfill their obligations under the HIA regime. While not all of the groups within the housing movement would pursue issues all the way through litigation, at least some would. Some housing advocacy organizations, developers, and adjacent local governments would be the most likely enforcers.

Recent inter-jurisdictional lawsuits brought under CEQA focused on spillover housing impacts.²⁰² These litigations suggest that the HIA regime has the potential to harness the interests of adjacent jurisdictions in mutual, peer-to-peer enforcement of housing obligations. The imposition of the HIA regime will simultaneously make each local government more sensitive to neighboring jurisdictions' housing impact spillovers, provide an appropriate tool to address those concerns, and make each jurisdiction vulnerable to similar enforcement by others. The HIA regime thus incorporates a local-government-to-local-government dimension as a potential enforcement dynamic, engaging the unique capacity of peers to hold each other accountable.²⁰³

dens of proof that plaintiffs and defendants bear in the burden shifting framework). *See, e.g.,* *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2nd Cir. 1988).

²⁰² *See supra* note 98 (describing lawsuits).

²⁰³ Professor Briffault notes that the "balance of power" in local governments often lies in the importance of "interlocal" as opposed to state-local conflicts. This

The success of an HIA regime in the representative model depends upon a combination of political pressure and litigation to win concessions and compromises from local governments and developers. The model would typically be confrontational, placing a premium on the housing movement's ability to rouse and sustain itself.

Of course, many factors assumed in this success story might not occur. The broad participation may not materialize because even the HIA regime does not sufficiently reduce the obstacles to collective action. The housing movement may often be short on resources, including technical expertise and legal resources. Given the diverse complexion of its membership, the conflicts within the movement, e.g., concerning what kinds of housing should be built and for whom, could render it weak. Regular participation by adjacent local governments may be necessary to win significant victories. Still, at least a plausible case can be made that the HIA regime would be successful in the representation paradigm.

B. The Reflexive Law Paradigm: Changing the Norms of Local Governments and Instigating Self-Regulation

This subsection will consider how the enactment of the HIA regime could be successful under the "reflexive law" paradigm in which the primary mechanism for integrating housing concerns into local governments' policy and decision making is changing the informal rules (or norms) affecting local governments' land use decisions. The analysis begins by defining "reflexive law," distinguishing it from other regulatory strategies. This is followed by a description of the role of norms in local government decision making about land use issues and a description of a process by which the housing impact assessment requirement could establish new norms favoring housing.

1. Reflexive Law

"Reflexive law"²⁰⁴ is a relatively newly identified type of regu-

conflict expresses itself in exclusionary zoning where, because of the external effects of these local actions, "local governments are often at war with one another." Briffault, *Our Localism: Part I*, *supra* note 45, at 3.

²⁰⁴ "Reflexive" in this context means an entity's response to itself and awareness of its own actions and their consequences, not in the sense of a knee-jerk "reflex" or unconscious response to a stimulus.

latory regime.²⁰⁵ While there is generally no accepted definition of a reflexive law regime,²⁰⁶ it typically includes the following two characteristics. First, the authority creating a reflexive law regulatory regime (e.g., state government) imposes one or more required components, usually procedural requirements, on the regulated entity (e.g., local government) intended to enable and occasion “reflexive” responses to the regulatory goal by the local government in its role as regulator, by regulated entities (e.g., developers) and by regulatory beneficiaries. Second, regulated entities and regulatory beneficiaries participate with the regulator in the required procedures, and together they develop the content and enforcement of regulatory norms. The process of norm development and enforcement occurs in a manner intertwined with both the carrying out and enforcement of the formal rules.

Reflexive law differs from rule-based systems (such as common law rules of property, tort and contract),²⁰⁷ which regulate

²⁰⁵ See Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 127-35 (2001) (providing a brief and lucid explication of “reflexive law”); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227 (1995):

Reflexive law gets its name from being self-referential in two respects. First, it is a self-critical legal theory. A theory of reflexive law emphasizes the limits of law in the face of complexity. The complexity of society and its problems diminishes the capacity of law to direct social change in a specified or detailed manner. Second, a theory of reflexive law proposes an alternative approach to law reform. It focuses on enhancing self-referential capacities of social systems and institutions outside the legal system, rather than direct intervention of the legal system itself through agencies, highly detailed statutes, or delegation of great power to courts.

Id. at 1232. See also Hugh Baxter, *Autopoiesis and the “Relative Autonomy” of Law*, 19 CARDOZO L. REV. 1987, 1988 (1998) (examining “an attempt in recent German social thought to specify theoretically the relation between law and other social spheres” that forms the theoretical basis for reflexive law).

²⁰⁶ For an alternative framing of similar issues, see Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (labeling this approach to regulation “collaborative governance”); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis For Flexible Regulation*, 41 WM. & MARY L. REV. 411, 421-22 (2000) (“collaborative regulation—a variant of self-regulation in which beneficiaries of regulatory statutes are empowered to participate in regulatory design and enforcement”); IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 4-6 (1992); Robert B. Reich, *Public Administration and Public Deliberation: An Interpretive Essay*, 94 YALE L.J. 1617, 1631-32 (1985).

²⁰⁷ Regulation through common law rules works well when society broadly recognizes the substantive individual rights and their distribution, and individuals can be reasonably expected to enforce their rights through the courts. Where society is unwilling or unable to define or distribute the individual rights, this form of regula-

by granting certain rights and duties to individuals and entities and then empowering courts to resolve ensuing conflicts among these rights.²⁰⁸ Reflexive law also differs from “substantive law,” so-called “command and control” regimes (such as the Clean Air Act or building codes), which regulate through the imposition of specific outcomes or substantive standards on regulated entities.²⁰⁹

Because reflexive law relies on norms to constrain regulators, regulated entities, and regulatory beneficiaries to serve the regulatory goals, a brief introduction to norm theory is necessary.²¹⁰

tion is inapt. Max Weber termed these rule based systems “formal law.” Max Weber’s theory of ideal types is explained in MAX WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* (Edward A. Shils & Henry A. Finch trans. & eds., 1949).

²⁰⁸ Theoretically, we could solve the housing problem using formal law by either legislatures or courts granting (or recognizing) that every individual has a right to decent housing. This approach has certainly been advanced and is not moribund. The problem, of course, has been identifying who or what owes the correlative duty to provide the housing. The closest the United States came was in early visions of public housing, or, in a partial sense, the federal mortgage interest deduction for homeowners. While discussion about potential individual housing rights continues in some quarters (including the United Nations), the prospects for legislative or judicial recognition of a substantive housing right in the United States appear remote. See Janet Ellen Stearns, *The Impact of Habitat II on U.S. Housing Policy*, 16 ST. LOUIS U. PUB. L. REV. 419 (1997).

²⁰⁹ In traditional substantive law regulatory strategies, the regulator interprets and defines the public interest for regulatory beneficiaries and then imposes regulation on the regulated entities usually by employing substantive standards that are intended to determine outcomes. Such regulation works well in contexts where there is a clear “transcendent” public interest, that is “general and sufficiently important compared with any possible limiting private interest to warrant ignoring private interests altogether.” Eric Bregman & Arthur Jacobson, *Environmental Performance Review: Self-Regulation in Environmental Law*, 16 CARDOZO L. REV. 465, 468 (1994). However, it does not work as well in complex policy areas where government or its agencies are unable to adequately specify the public interest. Reflexive law can also be distinguished from various market reforms, such as incentive-based approaches in which government regulates by intervening in markets to adjust price signals or by creating new trading markets (e.g., pollution credits) in order to induce firms to internalize certain externalities.

²¹⁰ While this account highlights changes in norms as the mechanism by which reflexive law regulates, other theorists have articulated different mechanisms for reflexive law. For example, Louise and David Trubek discuss five potential mechanisms by which what is termed “reflexive law” in this Article and “soft law” in their paper can be effective: diffusion, shaming, networks, deliberation, and learning. David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe* 18-21, July 2003, presented at the European University Institute’s “Opening the Open Method of Coordination” workshop, available at <http://eucenter.wisc.edu/Conferences/OMCnetOct03/trubek.Trubek.pdf>. Additional arguments for an HIA regime’s effectiveness could be made using these other mechanisms.

Norm theory contends that compliance with formal rules and economic rationality does not account for all of human behavior.²¹¹ Norms are a third source for explaining human conduct. Under this theory, humans are seen as intelligent, *social* beings, attentive to socially created expectations (viz. norms) in various settings, i.e., their rationality is always socially situated.²¹² In some situations, norms lead people to act in ways that are not required by any formal rule and are even contrary to their “self-interest.”²¹³ There are many kinds of norms²¹⁴ in myriad settings.²¹⁵

²¹¹ Norm theory and traditional rational choice theory are not necessarily at odds. See April Mara Major, *Norm Evolution and Development in Cyberspace: Models of Cybernorm Evolution*, 78 WASH. U. L. Q. 59, 68-70 (2000) [hereinafter, Major, *Norm Evolution*] (explaining how rational choice theory can incorporate aspects of norm theory through the notion of incentive structures and embracing a view that “actors employ a unique combination of rational choice and norms when faced with a decision. The extent to which each is applied depends entirely on the substance of the decision and the actor concerned.”).

²¹² Law and Society scholars have studied the relative roles of formal law (command and control) and norms in affecting human conduct for many years. See, e.g., Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763 (1986). Other scholarly work addressing this subject includes ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1994) and ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2002).

²¹³ The phenomenon of tipping a waiter after a meal is a simple example. There is no formal rule or legal requirement to leave a tip, but many diners feel constrained to leave one and do so. Except in limited circumstances, tipping cannot be explained as an action based on the diner’s rational self-interest. This example is taken from Major, *Norm Evolution*, *supra* note 211, at 59. Norms are distinguished from behavior that can be explained by reciprocity alone. Norms are not individual preferences and are not mere social conventions that have no normative content. Norms may be considered as values embedded in particular social practices.

²¹⁴ There are norms concerning how we treat each other (e.g., deferring to older people), norms about how one gets things done in a particular group (e.g., needing to talk with a particular person before presenting a proposal to a group), and substantive norms (e.g., freedom of contract). General social norms (e.g., saying “excuse me” after bumping into someone) that are broadly recognized throughout a society can be distinguished from group norms (e.g., the degree of acceptable roughness in a basketball game) that are only recognized in certain groups.

²¹⁵ The role of norms has been studied in a wide variety of settings, including cyberlaw, environmental law, alternative dispute resolution, corporate law, legal ethics, family law, and contract law. See, e.g., Arthur J. Cockfield, *Designing Tax Policy for the Digital Biosphere: How the Internet is Changing Tax Laws*, 34 CONN. L. REV. 333 (2002) (Internet norms); Christopher Van Wyk, Book Note, *The Role of Equity in Environmental Protection in the People’s Republic of China: A Review of Environmental Protection in China: Institutions, Enforcement, and Compliance*, 14 GEO. INT’L ENVTL. L. REV. 593 (2002) (environment); Paul G. Mahoney & Chris W. Sanchirico, *Symposium Norms & Corporate Law: Competing Norms and Social Evolution: Is the Fittest Norm Efficient?*, 149 U. PA. L. REV. 2027 (2001) (corporations); Li-Ju Lee, *Law and Social Norms in a Changing Society: A Case Study of Taiwanese Family Law*, 8 S. CAL. REV. L. & WOMEN’S STUD. 413 (1999) (family).

Norms may have their origin in spontaneous cultural practices or in law promulgated by legislatures or decided by courts.

The establishment and development of a norm is not a straightforward, predictable process. Every norm is situated in a particular social context and may have no meaning or application outside of that context. Across a variety of settings, norms may vary along many parameters, e.g., they may be more or less clear and more or less stable (resistant to change).²¹⁶ Often norms can supplement formal rules and “fill in” where formal rules leave gaps.

Norms, by definition, have no formal legal enforcement mechanisms, but they have an obligatory character. Scholars have identified three distinct mechanisms: first party (when a strong norm is internalized by the actor), second party (when the victim of a violated norm challenges the violation by taking some action against the violator), and third party (when non-victim participants in the situation take action against the violator).²¹⁷ Like formal law, norms are not always effective in controlling human behavior, but depending upon the norm, the setting and other factors, they often play an important role. In some situations, informal rules may be more important in affecting choices and behavior than formal rules. Over the long term, there is a cyclical relationship between formal law and norms: law creates norms, and law is, in turn, created by norms.²¹⁸

Regulatory settings include both formal rules and norms. In some decision settings, formal rules will mostly control outcomes. However, in regulatory contexts where decision-makers exercise

²¹⁶ For example, certain social norms regarding gender relations have been changing in the United States (e.g., males opening doors for females or females refraining from inviting males out on a date). See Lior Jacob Strahilevitz, *Social Norms from Close-Knit Groups to Loose-Knit Groups*, 70 U. CHI. L. REV. 359 (2003) (arguing that social cooperation is likely to arise and be enforced in loose-knit groups as much as in close-knit groups albeit by different mechanisms).

²¹⁷ See, e.g., Richard A. Posner & Eric B. Rasmusen, *Creating and Enforcing Norms, With Special Reference to Sanctions*, 19 INT'L REV. L. & ECON. 369, 370-72 (1999) (explaining first party, second party, and third party enforcement mechanisms); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1027-29 (2002) (discussing third-party enforcement).

²¹⁸ Friedman, *supra* note 212, at 771-72. See Alex Geisinger, *A Belief Change Theory of Expressive Law*, 88 IOWA L. REV. 35 (2002) (reviewing debates in the literature, proposing a positive “belief change” theory of law’s effect on social norms and preference, and concluding that according to the model law can often create effective second and third order sanctions to control behavior).

broad discretion—that is, where the formal rules are not determinative—norms sometimes play an important role in controlling outcomes. This situation is especially likely when decisions are polycentric and a variety of competing values are at stake. Reflexive law addresses this type of complex regulatory situation where norms are likely to play an important role. Local land use policy and decision making, especially regarding housing, is an example of the type of policy area and context in which norms are likely to play an important role.

2. *The Role of Group Norms in Local Government*

In the reflexive law view, land use decisions are best explained by a combination of formal rules, norms, and individual preferences of elected officials. The local government setting is characterized by iterated long-term relationships in which decision-makers regularly revisit, discuss, and make decisions about a finite set of issues including land development. In this setting decision-makers are likely to develop “group norms” (mutual expectations that decision-makers have of each other) and to be influenced by them.²¹⁹ Group norms will be partially determined by broader social norms, especially the social norms that decision-makers believe voters share.²²⁰

Local government officials typically share the following four principal group norms:²²¹ (1) We know our own residents’ needs

²¹⁹ On this view, actors are not completely autonomous; their sense of self or role is shaped by professional and group norms.

Group social norms are informal rules of conduct that maintain the consistency of group behavior, whereas societal social norms involve behavior common to a society. The economics and psychology literature describes groups as two or more people who possess reciprocal abilities to influence each other. Groups also require a healthy interchange of group information regarding past and present events. . . . Norms largely dictate group behavior due to members’ expectations and obligations. Norms actually increase the efficacy with which group members interact with other members because of an enhanced ability to anticipate each other’s conduct. Consequently, group norms tend to be stronger than societal norms.

Major, *Norm Evolution*, *supra* note 211, at 76 (footnotes omitted).

²²⁰ This analysis assumes that individual decision-makers have a set of policy preferences, even strong ones, but that they are not “captured” in a strong sense of the term. Decision-makers may have strong views that favor a particular interest, e.g., business or the environment, but their set of preferences are not completely defined in the sense that they do not provide a specific answer to each potential issue raised by a land use decision. Therefore, they are open to new information and are potentially influenced by group norms.

²²¹ This interpretation of typical group norms is impressionistic. However, the

and interests better than anyone else; (2) Our role is to serve our residents' needs and interests; (3) We should be responsible for the consequences of our decisions as should the elected officials of other local governments; and (4) We are proud of our city and should make decisions to support that pride.²²² These norms are at the heart of the principle of local control (or "our localism") justifying the delegation of power to local governments by the state.

These group norms apply to local government decision making and balancing of interests, including housing issues. The primary norm regarding housing is: Each city should take care of its own residents' housing needs. The reigning view is that private markets produce housing in conjunction with local governments, each of which have, at any given time, a set of policies, practices and leadership that is more or less open to housing proposals. As discussed in Part I, housing needs, including those of the jurisdiction, are in fact, often ignored or slighted. In the absence of the HIA regime where the housing impacts of local governments' decisions are identified and considered, local officials can believe they understand the housing needs of their residents, even when they do not. They may make a colorable claim to be serving their jurisdiction's housing needs even when they are not.²²³ They can believe that they are responding to the consequences of their own decisions on housing issues when they actually are not. And they can be proud of their city's accomplishments with each other and enjoy a good reputation among peer elected officials in adjacent jurisdictions even when, if the spillover housing impacts of some of their decisions were known, there would be conflict.

author believes that it could be supported both by scholarly accounts of localism, and first hand accounts, e.g., quotes from city officials and articles from publications that are produced for local elected officials, such as *Governing Magazine*.

²²² Research on group norms supports the view that desire for esteem, especially among peers, may be an end in itself for members of closely associated social groups. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 114 HARV. L. REV. 961, 1028-29 (1995) (arguing that desire for esteem may be an end in itself among members of socially connected groups and, if so, then disapproval by a peer in the forms of gossip, scorn, and ostracism may be sufficient to enforce group norms).

²²³ In principle, "fair share" housing requirements could serve the purpose of informing elected officials of the "true" housing needs in their jurisdiction. However, in "fair share" planning jurisdictions, the housing need numbers are widely rejected as arbitrary and unfair. They have not achieved legitimacy, much less normative status, in informing elected officials about their jurisdiction's needs. See *supra* notes 77-82 and accompanying text.

3. *The Introduction of the New Norm*

After the statute establishing the HIA regime is adopted, local governments will begin to implement its procedural requirements. Most local governments would be likely to at least minimally comply with the procedural requirements.²²⁴

The introduction of the HIA regime disrupts the elected officials' previously established set of mutual understandings. The regime interjects a new policy norm: local governments should avoid or mitigate significant housing impacts caused by its decisions whenever feasible. The HIA regime then causes the generation of information concerning housing impacts, and enables broad participation in discussions about them as well as enforcement of its procedural requirements. This information and aroused interests will challenge elected officials' previously held beliefs. The information combined with public dialogue and debate appealing to the new norm will create tension and conflict.

Faced with the information developed by their own planning department that a proposed action will create significant housing impacts and that certain other alternatives or measures will reduce or mitigate these housing impacts, decision-makers will be faced with a series of new choices.

Neither the formal rules of zoning nor the procedural rules of the HIA regime alone will "force" decision makers to heed the new policy norm's urged direction.²²⁵ However, if the new norm is pressed upon them by participants in the HIA regime's mandated procedures (e.g., housing advocates, residential developers and peer local government officials), decision makers may yield to it in part because the new policy norm "nests" within the four principal group norms articulated above. Mitigating significant housing impacts when it is feasible to do so neatly fits as a sub-norm under each of the four primary norms helping guide their

²²⁴ This analysis presumes that most local governments will comply with most state law most of the time. While it is conceivable that some local governments would resist all compliance with the procedural requirements, e.g., failing to prepare a preliminary HIA for any project at all, these governments would be subjecting themselves to clear liability under the statute. The procedural mandates of the HIA regime are similar in kind to a wide variety of procedural requirements. Courts are competent and willing to enforce them.

²²⁵ In the author's view, the stature and legitimacy of "law" has been severely degraded and compromised in contemporary American society. The effect of this is that the mere enactment of a new law by the state or any legitimate authority (e.g., a court) often carries little moral or educational force.

decision making. The information generated through the HIA regime can support the norm that the officials know their own residents' needs and interests better than anyone else. The awareness of housing impacts in the jurisdiction and options for reducing or mitigating them fit the officials' sense of their role of service to residents' needs and interests. The new norm's thrust for internalizing (some portion of) the potential spillover housing impacts caused by the local governments' action is consistent with the officials' view of themselves as responsible for the consequences of their decisions. Furthermore, the HIA regime's presentation of an opportunity to improve the city by mitigating housing impacts meshes with officials' mutual expectations that they should make decisions supporting their pride in the city.

It is easy to imagine decision makers occasionally acknowledging that a decision will harm their residents' housing interests, and yet they choose not to mitigate those harms, i.e., approving a project with known and unmitigated housing impacts. However, to consistently acknowledge and ignore the identified harms may not be sustainable because of the ongoing tension such a pattern of decision making would create both among the decision makers and between them and the participants in the HIA processes. Continual public rejection of the newly urged norm conflicts with the decision makers' established norms of responding to their residents' needs and interests.

Several processes combine to pressure officials to accommodate or accept the new norm to mitigate significant housing impacts when feasible. First, among the officials themselves, the pressure comes from the fact that, in their resistance to the actions the norms push them toward (namely, recognizing and taking action to mitigate the housing impacts of their decisions), they are acting in ways inconsistent with their own established group norms. Some officials will come to a degree of accommodation or acceptance of the new norm. They may do so for many reasons: because they were already sympathetic to housing needs, because they appreciate its consistency with their established norms, or for some other reason. Sympathetic local officials may develop rhetorical strategies towards their fellow officials that specifically point out, on the one hand, the consistency between the newly urged norm and the officials' established norms, and, on the other hand, the inconsistencies of the officials' continued rejection of the new norm while claiming to

abide by their established norms. Rejectionists will argue that the subnorm is unimportant; all that counts are the procedural rules. They will subsume or equate the norm's reference to "feasible mitigation" as meaning whatever the local officials decide, eschewing any external view.

Second, tension mounts between the officials and their staff as the staff (following the procedures mandated by the statute) regularly deliver to elected officials reports identifying significant impacts and opportunities to mitigate them, and then watch the officials regularly ignore or dismiss the information in their actual decisions.

Third, tensions mount between the officials and the portion of the public engaged in the HIA regime's processes: housing advocates, residential developers (both for-profit and nonprofit), and occasionally a resident who actually needs housing. The public petitions and presses the officials to pay attention to the information and to consider the mitigation options, all the while appealing to the new norm.

Finally, elected officials of adjacent local governments who are upset by the local governments' consistent pattern of ignoring housing impacts may make their displeasure clear to their peers in more or less explicit ways. Elected officials who look to their peers for recognition and respect will be vulnerable to retaliation by gossip, criticism, and complaints others voice against them because of their unwillingness to abide by the urged norm. Some upset neighboring officials may go further and make life difficult for their peers by withholding help or conditioning favors, or even by threatening and initiating litigation.

All of these actions and expressions by elected officials, staff, members of the public, and officials of adjacent jurisdictions toward the group of elected officials are efforts to establish accommodation or acceptance of the new norm among the officials' already established group norms.

It is important to clarify that participants' appeals for adoption of the urged norm are *not* appeals to deductive logic—meaning, because the officials hold these principles they could not or would not act in a manner which logically conflicts with them. It is not argued here that it is psychologically or otherwise *impossible* for officials to act in ways broadly viewed as inconsistent with their social norms, only that to do so creates and maintains tensions in the working relationships with one another, their staff,

the general public and peer officials from nearby cities. The argument is that the enactment of the HIA regime (both its procedural mandates and its newly urged norm) creates an ongoing set of “openings” for staff, advocates, residential developers, peer local government officials or local officials who have accepted the subnorm to engage the other decision makers, to raise the issues, propose solutions, and pressure them to act consistently with the social norms they have internalized in their roles as public servants. This urging occurs in private meetings, small groups, public hearings, and in the media.

Only when the officials accommodate or come to some degree of acceptance of the new norm will the tension be reduced and the decision makers can resume their roles with a sense of normalcy. Of course, normalcy now includes a new subnorm—mitigating housing impacts whenever feasible—integrated into the decision-makers’ previously established group norms.

4. *The Norm Established*

The subnorm may never win complete acceptance or be fully stable, but, at a minimum, eventually the required procedures become part of the routine, part of the way things are done. This keeps the conversation about the subnorm going.

In jurisdictions where the subnorm is accepted and legitimated, it can and will be relied upon or appealed to during decision making processes. Appeals to the subnorm may be made by any of the participants. Sometimes, such appeals will be successful and the officials will choose to take actions which avoid or mitigate significant impacts identified in the HIA process. At other times, other priorities will prevail, e.g., the fiscal consequences of approving large amounts of affordable apartments or political difficulties of restructuring a development proposal will trump the mitigation subnorm.

Regular participants in the HIA processes begin to “internalize” the subnorm into their roles in local governments’ land use decisions. Elected officials internalize the norm as a group norm, but individual officials may go further and develop a personal policy preference supporting housing. Staff members internalize the norm as part of their professional practice in the analysis and reporting they perform for elected officials. Some staff members may develop more sympathy for housing concerns than before the HIA regime was enacted. Members of the public who par-

ticipate in the HIA processes also internalize the subnorm. Housing developers and advocates are, of course, encouraged and empowered by the subnorm which now more widely and publicly validates their personal preferences and commitments. They will press to attach the subnorm tightly to the procedures, elaborate on its meaning and consequences, try to win a place for it as a legitimized, stable subnorm, and then draw out the consequences of it in the governments' decisions. The procedural requirements of the HIA provide the pro-housers with an array of opportunities to keep arguing for their view, and to engage local governments in extended conversations about the relative importance of housing in the community.

Other actors, including commercial developers, who will probably bear some financial costs from the adoption of the subnorm, will be inclined to reject the subnorm, but they will respond to the subnorm as reflected in the reputation and practices of each locality.²²⁶ They will prefer to develop in another city which has not established the subnorm. Or they may accommodate it if a particular development opportunity is located in a jurisdiction which has adopted the subnorm. If a sufficient number of jurisdictions adopt the subnorm, even commercial developers will at least accommodate it. They may internalize the norm to the degree and in a manner that promotes their business interests. Specifically, they may design projects to avoid significant housing impacts where possible, and/or they might consider how to mitigate unavoidable housing impacts in a manner that least disrupts their preferred development. They will do this in order to avoid the HIA process or at least to reduce its potential costs and delays.

In its attempt to establish a form of self-regulation serving the regulator's (i.e., state's) policy, reflexive law intends to rely less on litigation and more on the nonjudicial processes of establishing the new norm described above. However, it is likely that litigation will play some role. Litigation under the HIA regime in the reflexive law view becomes a means of urging the litigant's desired view of the subnorm onto local governments and developers.²²⁷ Litigation still has the practical consequences of delay-

²²⁶ Cooperative housing developers will tell each other: "OK, you're not going to be able to do that development in City A, try City B. The way to get that development approved in City Y is by doing X, Y, and Z." Often the informal rules are critical.

²²⁷ If litigation is used, the courts' treatment of the issues, in particular how they

ing a decision, imposing costs on local government and, if it is a proposed development, on a developer. In some cases, the litigant may win a particular concession on a particular project, but have no influence on the adoption of the urged subnorm. In fact, depending upon how it was pursued, litigation could backfire.

Eventually, decisions and practices guided by the subnorm would generate procedural norms (e.g., mutual understandings about under what conditions “scoping meetings” would be held and who would be invited to attend them) and analytical norms (which methodology would normally be applied to measure the potential significance of a particular type of housing impact). A methodology used and refined over a period of time would, in practice, become the “standard” for a city and develop a normative character. Local governments which mutually consider themselves to be in the same regional housing, labor and transportation market will develop local norms in awareness of each other. The housing impact mitigation subnorm would lead to the adoption of mitigation policies (e.g., a housing impact or “linkage” fee for commercial development) in some localities. Eventually, most governments would at least accommodate the HIA regime to some degree. Others would embrace it more completely. Cumulatively, these changes would serve the state’s housing goals substantially better than the previous regime.

The preceding is a story of the successful establishment of “self-regulation” by norms. The introduction of the new subnorm by the HIA regime has changed the relationships among the participants in the land use development process to coordinate the pursuit of their own goals and interests in a way that better serves the state’s housing goals. While the participants’ roles have been changed, their core interests have not. Elected officials still want to lead the city, balance competing interests and get re-elected. For-profit developers still want to maximize their profits and reduce the delays and costs of the approval process. Housing advocates still want to press for more housing, especially for the most needy, and to prioritize housing over other interests.

In essence, the HIA regime launches a long-term, multileveled, practical “conversation” in each local government

might directly or indirectly enforce the subnorm, might be critical to the success of the HIA regime. This issue is beyond the scope of this Article and is the subject of further research by the author.

about what the subnorm means, whether it will be accepted to any degree, what place it will have among the norms local officials already accept, and how the norm should apply to any given decision in a locality.

Of course, the HIA regime may not operate at all as this story suggests. The point in articulating the success story is to offer a plausible (and persuasive) account of how the HIA regime *might* work according to reflexive law theory's own terms. This story passes over numerous contingencies and uncertainties, any of which could thwart the establishment of the subnorm and its operation to serve the state's policy. Local officials may truly be "captured" and their social norms impermeable. There could be interminable squabbling about methodology, preventing constructive negotiations about feasible mitigations. Bad history, soured personal relationships, professional jealousies or any number of other distortions in relationships among the participants could undermine the possibility of the regime inculcating a new form of coordination among the participants. Instead of acting to urge adoption of the new subnorm, adjacent local governments might conspire to form an exclusive region that revels in its exclusivity. Elected officials may be so unreflective and thick-skinned that their reputation among their peers does not affect them. In response to the urged norm, the typical norms underlying localism may be reformulated to support mutual denial and resistance to the subnorm because of its origin: the state is attempting to force this onto us. The interdependence of cities in a region may be weak because of variable sizes and strengths, so that nonjudicial attempts at enforcing the subnorm against peer officials may be ineffective. Vulnerabilities of this story could easily be multiplied.

Even on the best of assumptions, changing established norms is likely to be difficult.²²⁸ Whether such urging is successful or

²²⁸ Professor Briffault's early work on "our localism" suggests that localism norms may be particularly resistant to change. See Briffault, *Our Localism: Part I*, *supra* note 45. More recently, Professors Briffault and Barron view localism not as a fully defined, closed ideology in a zero sum conflict with regionalism or centralized regulation, but as a more complex and malleable set of positions. Professor Barron's insight that certain centralized commands "may promote local autonomy by altering the background legal structure in a way that protects local governments from the costs that the current, centrally established legal frameworks permits local governments to impose upon their neighbors," suggests that local governments might welcome the HIA regime because it will empower them to defend against the housing impacts that their neighboring governments have traditionally imposed upon them.

not will depend on many variables, some of which may not be identifiable before the adoption of the HIA regime. Established norms are more likely to accommodate revision when the newly urged norm *builds upon* established stable norms, as the HIA's "feasible mitigation" norm attempts to do.²²⁹ In this case, the housing impact mitigation subnorm can be interpreted as adding to the dominant norms of localism instead of challenging them.²³⁰ If successfully adopted, the HIA regime effects not a wholesale change, but only a reformulation of the previously established norms. It would also build upon existing familiar procedural practices. Most local governments are familiar with NEPA and many are familiar with implementing their state's SEPA requirements. This familiarity will tend to focus attention on the substance of the new mandate rather than its procedures.

C. *Two Overlapping Paradigms?*

While much of the overt behavior of participants in the HIA regime would be the same in both paradigms, e.g., attending meetings, providing comments and testimony, and filing lawsuits, the paradigms are not simply different descriptions of the same

David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 378 (2001).

²²⁹ In contrast, the Mt. Laurel litigation, comprehensive "fair share" housing planning requirements, and legislative overrides of local decisions under Massachusetts's "Anti-Snob" law can be understood to urge norms that the state or some regional planning entity knows residents' needs and interests better than the elected officials; that local governments are responsible for housing needs of other jurisdictions; that local officials ought not to feel proud of their city, but perhaps ashamed because of its "selfishness" and exclusivity. These norms conflict directly and substantively with what has been presented as the typical social norms of local governments. Needless to say, versions of strong regionalism (such as in the Portland, Oregon region) completely upend these typical social norms. The procedural and analytical practices and norms of these attempted reforms are also mostly foreign to local governments' typical practices. On this view, it is not surprising that these norms and the regulatory strategies they support have rarely been accepted or accommodated, even with the force of law behind them. Sometimes, this resistance leads to legislative backlash weakening the original law. In the face of dozens of bills to revise Massachusetts's "Anti-Snob" law, the legislature has made several changes weakening the program. See MASS. DEP'T OF HOUSING & CMTY. DEV., SUMMARY OF RECENT 40B REGULATORY CHANGES 1 (2001) at <http://www.state.ma.us/dhcd/Ch40Btf/RegChg.pdf> (last visited Jan. 18, 2004). A state task force has proposed further changes. See CHAPTER 40B TASK FORCE, REPORT ON FINDINGS AND RECOMMENDATIONS, (2003) at <http://www.mhp.net/termsheets/Chapter40Bexec.pdf> (last visited Jan. 18, 2004).

²³⁰ In this sense, the HIA regime is similar to Professor Payne's "growth share proposal." See Payne, *supra* note 82.

phenomenon. Rather, they are distinct regulatory paradigms. It might be suggested that the representation paradigm is a view of regulation in the short term, while the reflexive law paradigm explains how the HIA regime might work in the long term. However, there is no necessary reason to believe that the representative regulatory paradigm would later morph into the reflexive law paradigm.

A primary difference between the paradigms is that in the reflexive law model, the relationships and roles of the participants change as they become coordinated in a form of “self-regulation.” Their participation in the regime under the influence of the subnorm reforms the ways they each pursue their still-conflicting interests. Advocates who were “outsiders,” now become constructively engaged “insiders,” affecting housing policy and decisions with their ideas. They may become more aware of and responsive to other interests’ needs without losing sense of their own core interests. When decision makers, developers, and other participants have internalized the subnorm, the policy goal begins to be served without any visible exertion of power by housing advocates or regulatory beneficiaries.²³¹

In contrast, the representative regulatory model does not foresee or expect any changed roles among the participants, but only a change in the balance of power among them due to the formation of a strong local housing movement. Under this view, the level and type of conflicts and confrontations existing between the competing interests before the enactment of the HIA regime continue and may even deepen. This helps explain why the representative model relies so much more on judicial enforcement to produce its results.²³²

Yet, there remain indications of overlap between the paradigms. For example, in the representative paradigm, commercial developers might accommodate the HIA based upon calculations of rational self-interest. A similar phenomenon occurs in the re-

²³¹ In the British philosopher Steven Lukes’ three dimensional model of power, one important dimension of power is to set the agenda and have your interests taken care of without having to assert them. STEVEN LUKES, *POWER READINGS IN SOCIAL AND POLITICAL THEORY* 4 (1986). To get a sense of this, compare decision-makers thirty years ago to today regarding their sense of how protecting the environment is a part of their “role.”

²³² In contrast, in the reflexive law model, patently manipulative threats of litigation or abusive litigation tactics would discredit the advocate’s standing among the participants in the HIA regime. In this sense, even the resort to litigation under the reflexive law regime is part of the regime’s self-regulation.

flexive law paradigm, but the mechanism is the developer's internalization of the established mitigation of the housing impacts subnorm. The primary mechanisms of each paradigm would be mutually reinforcing: to the degree the HIA regime spawned a local housing movement, decision-makers are likely to accommodate or adopt the new norm, and vice versa.

*D. Evaluating the Benefits, Costs and Risks of the
HIA Regime*

If it was effective, the HIA regime would advance state housing policy by integrating housing concerns into the broad range of local governments' decisions affecting housing.²³³ It would do so in such a manner respecting local governments' traditional expectations for local control. It would also treat local governments fairly because the HIA regime requires local governments to consider and mitigate (when feasible) only the housing impacts created by their own voluntary decisions.

If they were each effective on their own terms,²³⁴ both regimes would generate many similar benefits for housing.²³⁵ Initially,

²³³ An HIA regime would be one part of a set of policies states could use to serve their housing goals.

²³⁴ As discussed, in Part II, *supra*, effectiveness of an impact assessment strategy will in general depend upon: (1) the conceptual framework; (2) the policy area; (3) the institutional context in which the requirement is added; (4) the design of the requirement; (5) the legal context in which the requirement is added; and, (6) the judicial review and enforcement.

²³⁵ Given this proposal's tentative acceptance of localism, two difficult issues require some response. First, will the housing needs encompassed and addressed by an effective HIA regime equal the total "actual" housing needs of a state (however these are measured)? In other words, if the HIA were successful, would the mitigation provision (however enforced) require local governments to meet all the housing needs that exist. At the theoretical level, this is an important and complex issue which requires additional research. On the practical level, this proposal alone cannot promise to meet all housing needs because, among other things, substantial additional subsidy would be necessary to do so. Second, what effect would the HIA regime have on racial and economic segregation, and in particular exclusionary zoning? In a manner similar to Professor Payne's "growth share" proposal, the HIA regime looks forward to potential future effects of current proposals. *See* Payne, *supra* note 82. Yet, the HIA regime could make a contribution to reducing racial and economic segregation. When historically exclusionary governments sought commercial development that would create significant housing impacts affecting their neighbors who have historically provided more housing in the past, the exclusionary regime would become vulnerable to enforcement by adjacent local governments who would otherwise experience the effects of the spillover impacts. (The CEQA housing impact lawsuits suggests that, at least in some cases, such enforcement would be pursued.) Thus, even if the HIA regime would not undo prior effects of segregation, it would condition exclusionary governments' ability to site addi-

the imposition of the HIA regime would “transform the institutional landscape,” as NEPA did when it was first adopted.²³⁶ The benefits to housing from these regulatory paradigms would accrue in the following way: Staff as well as appointed and elected officials would learn more about the actual housing needs in their communities, the housing impacts caused by their decisions, and the policies and practices that promote housing. To some degree, greater awareness and understanding will make them more likely to attend to residents’ housing needs.

The HIA requirement would create a precondition to actions that may have a negative impact on housing. The HIA process would identify avoidable harms to housing that would have occurred without housing impact consideration. The HIA regime would delay, revise, and in some cases block actions that could harm housing. Local governments would begin to take advantage of previously overlooked opportunities to reduce and mitigate housing impacts presented by proposed developments, e.g., by negotiating more mixed-use projects with developers to incorporate a residential component into a retail or commercial project.

More proposed housing developments would be approved. For example, local governments could approve specific housing development in the face of community opposition more often and with less reduction in units/density and increased affordability.²³⁷ Housing would be favored more when tradeoffs are required because the HIA process requires the articulation of both housing impacts and competing needs, instead of housing interests being left out of the balancing altogether.

Finally, local governments would adopt more policies and practices that promote housing. For example, in order to mitigate negative housing impacts, local governments will zone more land for residential use and at higher densities. Other policies that promote housing, e.g., inclusionary zoning, housing impact linkage, and density incentives, would be adopted. Localities

tional commercial and other desired land uses on their responding to their neighbors’ concern about additional impacts.

²³⁶ Karkkainen, *Toward a Smarter NEPA*, *supra* note 104, at 906 (distinguishing NEPA’s initial impact with its “quiescent and unproductive middle age”).

²³⁷ See Iglesias, *Managing Local Opposition*, *supra* note 52, at 94 (explaining how local decision makers sometimes rely on laws that strictly speaking do not compel approval of a housing development to “do the right thing” on housing proposals in the face of community opposition to a meritorious proposal).

would also revise their infrastructure plans and expenditures when cognizant of their housing impacts.

Though calculated to accept the contemporary dominance of “localism,” the HIA regime would support movement towards regionalism by creating a new form of coordination among local governments concerning housing. If a form of strong regionalism were realized, the HIA regime could be incorporated into it.

Like any regulation, the HIA regime brings costs and risks. Like any regulatory regime, the HIA process may, in some instances, be “burdensome, time-consuming, and expensive, and sometimes out of proportion to the ultimate benefits.”²³⁸ Costs of the HIA include direct administrative and staffing costs, due to compliance with the procedural mandates for the production and dissemination of the required analyses. Some of the costs would be paid by the government in staffing; presumably local government would pass these costs on to developers for specific development projects as is the practice in many jurisdictions for environmental analysis. There would be additional costs for time spent in public hearings, and in reading and drafting responses to comments received from interested parties. The HIA process would cause some delays in some specific development proposals leading to financing and other carrying costs. Legal fees could be the most significant cost for local governments challenged by interested parties. These can be expected to be greater in the representation paradigm than the reflexive law paradigm.

Both local governments and developers could incur costs for mitigation measures. Local governments would incur costs for rezoning or the development and application of other policies. If projects are revised to reduce or avoid housing impacts, there would be redesign fees and other “soft development” costs.

The risks of the HIA requirement include economic waste and opportunity costs. Because litigation and threats of litigation may be important in enforcing HIA’s requirements, the possibility of frivolous and even extortionist litigation arises.²³⁹

²³⁸ ERIC BREGMAN & ARTHUR JACOBSON, ENVIRONMENTAL PERFORMANCE REVIEW 497 (1994) (describing NEPA’s EIS requirement).

²³⁹ The statute enacting a HIA requirement could be designed to minimize and deter such lawsuits. For suggestions to curb such abuse in the environmental context, see Mark Vandervelden, *Is the State Environmental Act an Endangered Species?*, 45 CAL. LAW., Apr. 1984; Sean Stuart Varner, *The California Environmental Quality Act (CEQA) After Two Decades: Relevant Problems and Ideas for Necessary Reform*, 19 PEPP. L. REV. 1447 (1992) (highlighting specific instances of abuse

The weighing of costs and benefits is inherently subjective since the valuation of additional housing produced by the HIA regime is not strictly commensurable with the economic costs caused by the regulation. In light of our nation's chronic housing crisis and the profound importance of adequate and affordable housing to families and individuals, on balance, the HIA regime appears likely to successfully promote state housing goals at an acceptable social cost.

CONCLUSION: EACH STATE SHOULD ADOPT A HOUSING
IMPACT ASSESSMENT REGIME

Our chronic housing crisis takes its toll daily in the lives of children and families, more recently among those of moderate income. In principle, the lack of decent, affordable housing—unlike crime, drug abuse, and other social ills—is a *solvable* social problem. We know how to design, build, and maintain decent housing. Local governments ought to be a primary focus of housing policy because they have the capacity to be a major source of the problem, but also to make significant contributions to the solution. Yet, many local governments do not exercise their discretion to promote state housing goals. Housing needs and interests are regularly ignored and slighted in local governments' decision making. What is required to engage local governments in solving our housing problem is no less than a regulatory strategy that would *integrate* consideration of housing concerns into every facet of their land use decision making.

Only states have both the power and legitimacy to impose such comprehensive regulation of local governments' exercise of discretion in land use decisions affecting housing. However, the regulatory challenge facing states considering this task is severe. Several states have tried to force local governments to serve state housing goals with only limited success. No existing state housing policy stands out as a successful and widely replicable model. Moreover, any attempt to impose regulation on discretionary land use decisions—a premier arena of local control—is bound to encounter resistance.

A HIA requirement appears to hold out the promise of a regulatory strategy achieving the objectives while both respecting the

that adversarial groups effect through the environmental impact report procedural process and recommending reforms).

limits of states' competence to comprehensively regulate housing and the exigencies of our enduring localism.

The HIA regime could be effective in either or both of two regulatory paradigms. In one paradigm, the state regulates by enabling the formation of local housing movements pressuring and restraining local governments to serve state housing goals. Alternatively, employing the same HIA regime under reflexive law theory, the state regulates by urging local governments to adopt a new housing impact mitigation norm consistent with localism's typical norms, but which will promote state housing policy.

The costs and risks of the two paradigms are similar, and the potential benefits from either paradigm could be significant. Like the state environmental acts modeled on NEPA, the HIA regime could be easily adapted to the circumstances of particular states. While some local governments' resistance is expected, the underlying premise of the HIA regime accepts localism, so resistance should be limited. In the face of our chronic housing crisis and the states' unique authority to regulate local governments' discretion in land use decision making, each state should adopt a version of the HIA regime modified to fit its circumstances.